TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00588-CV

Farrah Ann Beckham Brown, Appellant

v.

Matthew Paul Brown, Appellee

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-FM-15-005550, THE HONORABLE GARY HARGER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Farrah Ann Beckham Brown appeals the final order in a suit affecting the parent-child relationship (SAPCR). After a trial on Matthew Paul Brown's petition to modify the conservatorship, possession, and support of the parties' two children, the trial court entered an order granting Matthew the exclusive right to designate the children's residence. We affirm.

BACKGROUND

Farrah and Matthew were divorced in 2016 and have two minor children from their marriage: C.B., who is eleven years old, and A.B., who is nine years old.[1] Their agreed final divorce decree appointed them as joint managing conservators with equal possession of the children, with Farrah having the exclusive right to establish the children's primary residence within

[1] Because the parties share the same surname, for clarity we refer to them by their first names.

Travis, Harris, or Dallas Counties. In late 2020, Farrah informed Matthew of her intent to relocate to Harris County. Pursuant to the geographical restriction in the divorce decree, this move was permitted, assuming (1) Farrah provided Matthew six months' notice, and (2) Matthew could find comparable employment in the new county. Matthew opposed this move, and in February 2021 he filed a petition to modify the parent-child relationship, seeking to limit the children's geographic restriction to Travis County and contiguous counties.

At the modification hearing, the trial court heard evidence concerning the parties' co-parenting relationship. Since their divorce, the parties have had minimal problems abiding by the terms set forth in the divorce decree. The parties both agree that they have a good co-parenting relationship. C.M. is eleven years old, is outgoing, has many friends, and has been involved in soccer for the last four years. A.M. is nine years old and has enjoyed dance lessons in the past. Both parents live in Travis County, approximately fifteen minutes from each other. Matthew and the children visit his family in Wimberly on most holidays and birthdays. Matthew testified that Farrah is welcome to attend these gatherings and that she often does. The trial court heard undisputed evidence that the children have a loving relationship with each of their parents.

In late 2020, per the terms of their divorce decree, Farrah emailed Matthew informing him she intended to relocate outside of Travis County for financial- and employment-related reasons. At the time of the hearing, Farrah testified she sought to relocate to Harris County for her newly acquired job at a Houston-based company as an account executive. She testified that after she lost her job in March 2020 due to the pandemic, she struggled to find work in Austin. For approximately one year, she was unemployed and depended upon unemployment checks and periodic child support payments from Matthew to pay her bills. She testified that her mortgage payments were in forbearance and that she was struggling financially.

After applying for multiple jobs with no success, in early 2021 she began working for MacroFab. While MacroFab is a Houston-based company, Farrah's supervisors testified that they allowed her to work remotely from Austin until this modification suit was resolved. Her supervisors also testified that Farrah was one of their best employees and that her sales commissions were substantial. They testified that if she did not move to Houston it would be difficult to retain her as an employee, and that she may not be compensated for her commissions.

Farrah testified that the job at MacroFab was her main reason for wanting to relocate, as neither she nor the children had family or friends in Harris County. At the time the divorce decree was finalized in 2016, Matthew worked at Camp Construction Services, which has offices in both Harris and Dallas Counties. Six months after the divorce decree was finalized, Matthew began a new role at Capital Construction Services in Austin. He testified that they do not do business in Harris County and that therefore he could not secure employment there with his same company if he were to move. He testified that he did not apply for any jobs in Harris County. Matthew did not want the children to move to Harris County without him. He expressed concerns that the children "would be sad to not be able to spend [] time with [both] their mother and their father." He also testified he would be concerned about the children transferring into new schools and leaving their current friends and extracurricular activities. He testified that he was generally "worried about them" and that he would be "greatly affect[ed]" if they were to move. Farrah also admitted her children did not want to move.

The children did not testify at the hearing. Rather, the court heard testimony from Dr. Allison Wilcox, a therapist who had met with each of the children in several therapy sessions. Dr. Wilcox expressed her concerns that the children are stressed from the ongoing litigation and

do not want to "lose favor with either parent." She testified that C.B. had become "crankier" over the last few sessions, but otherwise noted no substantial behavioral changes in either child.

After the hearing, the trial court issued an order giving Matthew the exclusive right to designate the primary residence of the children "subject to the terms of the [geographic restriction provision of the divorce decree]." The trial court otherwise made no other modification to the original geographic restriction. The practical effect of the modification meant that Farrah was permitted to relocate to Harris County, but that she could not establish the children's primary residence there. Farrah appeals the trial court's order.

DISCUSSION

In her sole issue on appeal, Farrah contends the trial court abused its discretion in granting a modification to the custody arrangement that was neither pled for nor tried by consent of the parties. Specifically, she claims the trial court erroneously awarded Matthew the unconditional, exclusive right to designate the primary residence of the children even though Farrah eventually decided not to relocate to Harris County. Farrah asks this Court to reverse the judgment and remand to the trial court for a judgment that comports with the pleadings. After reviewing the record, we conclude that the trial court's order granting Matthew the exclusive right to designate the children's primary residence was not arbitrary or unreasonable in light of the evidence presented.

Trial courts have broad discretion to decide the best interest of a child in family law matters such as custody, visitation, and possession. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). A trial court may modify a conservatorship order if the circumstances of a child, a conservator, or another party affected by the order have materially and substantially changed since

the original order, and if the modification would be in the child's best interest. *See* Tex. Fam. Code § 156.101(a). The party seeking modification must establish these elements by a preponderance of the evidence. *Spence v. Davis*, No. 03-22-00179-CV, 2023 WL 427063, at *4 (Tex. App. Austin—Jan. 27, 2023, no pet.) (mem op.). We review a decision to modify conservatorship for an abuse of discretion. *Gillespie*, 644 S.W.2d at 451. A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or without reference to guiding principles. *Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). We consider only the evidence most favorable to the trial court's ruling and will uphold its judgment on any legal theory supported by the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam). Under this standard, if "some evidence of a substantive and probative character exists to support the trial court's decision," the trial court did not abuse its discretion. *Echols*, 85 S.W.3d at 477.

The parties' original divorce decree provided that Farrah maintain the exclusive right to designate the primary residence of the children within Travis and contiguous counties. The decree also provided that she may move with the children to either Dallas or Harris Counties, but only if certain conditions were met. The geographic restriction states:

> The parties acknowledge, however, that the parties may desire to relocate the [children's] residence to Dallas or Harris Counties. Further, the parties acknowledge it may be possible for Matthew [] to transfer and continue his employment in either Dallas County or Harris County, Texas. While such is not guaranteed, with sufficient advance time Matthew [] may be able to make such arrangements to transfer his employment to either Dallas or Harris County. Accordingly, it is ordered that upon Farrah [] providing at least six (6) months' advance notice to Matthew [] of [her] desire to change the [children's] residence to either Dallas County, Texas or Harris County, Texas and [Matthew's] successful arrangement to secure a transfer in employment to the county to which Farrah [] noticed of her intent to relocate . . . Farrah [] may elect to relocate the [children's] residence to Dallas or Harris County, Texas.

After Farrah informed Matthew that she intended to move, Matthew filed suit seeking the following modification:

> In the event that Farrah [] elects to relocate to Harris County, Texas, or a location outside of Travis County, Texas[,] order that Matthew [] has the exclusive right to designate the primary residence of the children within Travis County and its contiguous counties.

Farrah contends that the trial court abused its discretion in giving Matthew the exclusive right to designate the children's primary residence because Matthew only sought this relief on a conditional basis. She claims he could only receive this relief if she were to move, and because she ultimately did not move, the trial court had no authority to enter an order providing him this relief. Accordingly, she contends, the trial court's modification order did not comport with Matthew's pleadings and thus constituted an abuse of discretion. *See* Tex. R. Civ. P. 301; *see also Flowers v. Flowers,* 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We agree that this language is conditional; Matthew's pleadings sought the exclusive right to determine the children's primary residence *in the event* that Farrah chose to relocate outside Travis County; in the event she chose not to relocate, Matthew requested the geographic restriction be limited to Travis County.

Farrah is correct in that Matthew's pleadings did not seek the exclusive right to designate the children's primary residence in the event she chose not to relocate. But at all relevant times during the modification suit, Farrah intended to relocate to Harris County. At the hearing, the trial court heard evidence that Farrah was planning to move to Harris County: her current employer expected her to relocate there, and she had put her house on the market and informed Matthew and the children of her intent to move. Her testimony was unequivocal in her desire to relocate. Farrah decided not to move only *after* the trial court gave Matthew the exclusive right to

designate the children's primary residence, which was based on the evidence before the trial court—and premised entirely—on the condition that she was going to relocate. The trial court only learned of her changed decision when Farrah submitted her motion for reconsideration more than a month after the court issued the modification order. And importantly, as the trial court noted in denying Farrah's motion for reconsideration, the key word in Matthew's pleadings is "elect"; at the time of the hearing the evidence was undisputed that Farrah had expressed her desire—or her election—to move to Harris County. *See In re Thetford*, 574 S.W.3d 362, 365 n.7 (Tex. 2019) (orig. proceeding) ("In determining whether a trial court abused its discretion, a reviewing court is generally bound by the record before the trial court at the time its decision was made."). Accordingly, viewing the evidence and testimony provided at the hearing under the applicable standard of review, we conclude the trial court did not abuse its discretion in granting Matthew his requested relief. *See Echols*, 85 S.W.3d at 477.

Farrah attempts to analogize this case to *Gomez v. Rangel*, where the appellate court overturned a trial court's imposition of a geographic restriction because the father did not specifically request it in his pleadings. No. 07-13-00070-CV, 2014 WL 4441379 at *4 (Tex. App.—Amarillo Sept. 8, 2014, no pet.) (mem op.). In *Gomez*, the parties' original order provided that the mother have sole custody of the child and that the father have no visitation rights. *Id.* at *1. The mother also had the exclusive right to designate the child's primary residence, without any geographic restrictions. *Id.* The father filed a modification suit, seeking increased visitation and access to the child. *Id.* The trial court ordered that he be allowed supervised visitation with the child and that he pay monthly child support. *Id.* The court also modified mother's exclusive right to designate the child's primary residence by imposing a geographic restriction to one county. *Id.* The court of appeals reversed, holding that the geographic restriction imposed by the trial court

was an abuse of discretion because father had not specifically sought modification other than visitation and access to the child; nowhere in father's pleadings did he seek to modify the designation of the person with the exclusive right to designate the child's primary residence. *Id.* at *6.

Here, by contrast, Matthew's modification suit sought "the exclusive right to designate the primary residence of the children within Travis County and its contiguous counties" in the event Farrah elected to move. This was a specific request to modify the parties' geographic restriction provided in the original divorce decree which allowed Farrah, under certain conditions, to designate the primary residence of the children to Harris, Dallas, or Travis Counties. The modifications sought by the father in *Gomez* and in Matthew's pleadings are distinctly dissimilar; *Gomez*, therefore, is not analogous to this case.

Accordingly, Matthew's pleadings gave reasonable notice of his intent and claims asserted under Rule 301, and thus the trial court's order granting him the exclusive right to designate the children's primary residence conformed with the pleadings. *See* Tex. R. Civ. P. 301; *see also Flowers*, 407 S.W.3d at 458 (noting appellate court may liberally construe pleadings to contain any claims that could reasonably be inferred from specific language in petition); *see In re P.M.G.*, 405 S.W.3d 406, 417 (Tex. App.—Texarkana, 2013, no pet.) (finding no abuse of discretion where trial court's order imposed permanent geographic restriction on child's residence despite absence of such request in father's modification petition). For these reasons, we overrule Farrah's sole issue.

CONCLUSION

Having overruled Farrah's sole issue, we affirm the judgment of the trial court.

Edward Smith, Justice

Before Chief Justice Byrne, Justices Kelly and Smith

Affirmed

Filed: November 17, 2023