NUMBER 13-19-00028-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF M.M., A CHILD

On appeal from the 438th District Court of Bexar County, Texas.[1]

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Benavides

By three issues, appellant Brenda Maldonado appeals the trial court's grant of the right to determine primary residence of their child M.M.[2] to her former husband Miguel Martinez. Maldonado challenges the judgment on three grounds arguing that the trial court: (1) ignored guiding principles in determining the best interests of the child; (2)

[1] This case was transferred to us from the Fourth Court of Appeals in San Antonio pursuant to an order by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001. Because this is a transfer case, we apply the precedent of the San Antonio Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

[2] We use initials to protect the minor's identity. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8.

decision was against the great weight and preponderance of the evidence; and (3) abused its discretion by excluding evidence of Martinez's illegal conduct. We affirm.

I. BACKGROUND

Maldonado and Martinez separated in 2012 and were divorced in December 2014 when M.M. was four-years old. The divorce decree did not specify visitation, but the parties agreed in the decree that Martinez had the right to designate M.M.'s primary residence. Maldonado filed the present proceeding seeking the right to designate M.M.'s primary residence in December 2016. The trial court signed temporary orders expanding visitation for Maldonado in June 2017.

In May 2015, Maldonado enlisted in the Army. According to Maldonado, M.M. lived with her until she enlisted and then M.M. lived with her grandmothers going back and forth between them with Maldonado visiting every weekend she could get leave. In March 2016, Maldonado remarried and moved to Fort Hood, near Killeen, with her current husband, who is also in the Army. Maldonado continued to visit M.M. nearly every weekend. Sometime in 2016, Maldonado was transferred to Poland for nine months and returned at the end of 2016. The couple now live in Fort Carson, Colorado.

Martinez testified that when the couple separated, Maldonado left M.M. with him and she has remained with him since. They agreed that he had the right to establish her primary residence when they divorced in 2014. He lived with his girlfriend beginning in 2016 and they married in 2018. During that time, she assisted in taking care of M.M. She has teenage daughters of her own who live with them.

Martinez works for an excavation company and has worked for them off and on for three years. One of his jobs for the company was in College Station in 2016, for approximately six months. During that time, M.M. stayed with his mother during the week and he came home on weekends.

Since M.M. started pre-K, she has changed school six times. She attended Kindred for first grade and was enrolled there for second grade. Her first-grade teacher testified that M.M. was smart, well-behaved, did well in school, had no health or behavioral issues, and she was comfortable speaking with adults.

Martinez acknowledged that he had moved several times. He and his wife are currently renting a two-bedroom apartment and saving to buy a house. The girls' bedroom has a large mattress for the two teen girls and a smaller mattress for M.M. He testified that they have more furniture, but they are not using it because it does not fit into the apartment.

Maldonado testified that she and her husband are unlikely to be transferred anytime soon. She will not be deployed because her husband is subject to deployment. She criticized Martinez for his lack of involvement with M.M.'s healthcare; however, she provides health insurance through the Army Tri-Care system and has arranged doctor, dentist, and eye doctor appointments for M.M. She mentioned that Martinez did not take M.M. for eyeglasses even after the school suggested she needed them, but Maldonado makes all the appointments. She further criticized Martinez's lack of involvement with the schools M.M. attended.

The social worker recommended that Maldonado be granted the right to determine primary residence. She thought that Maldonado might be better attuned to her daughter's emotional needs; could better meet her medical needs; would provide greater stability, and more recreational opportunities. She also thought that Maldonado was more willing to co-parent than Martinez. The social worker testified that M.M. was bonded with both parents and both could raise M.M. M.M. was bonded with her stepmother, both her grandmothers, and her stepsiblings, all of whom lived in San Antonio.

The trial court declined to change the right to determine primary residence, ordered counseling, and made other orders not challenged here. Maldonado filed a motion for new trial that the trial court denied. The trial court declined to file findings of fact and conclusions of law. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

By her first and second issues, Maldonado challenges the sufficiency of the evidence in support of the trial court's decision to maintain the status quo and allow Martinez to determine M.M.'s residence.

A. Standard of Review

A trial court has 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). This is, in part, because the trial court is in a better position having faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent. *Coleman v. Coleman*, 109 S.W.3d 108, 111 (Tex. App.—Austin 2003, no pet.); *In re H.S.N.*, 69 S.W.3d 829, 831 (Tex. App.—Corpus

Christi–Edinburg 2002, no pet.); *see also In re T.A.M.*, No. 13-16-00005-CV, 2017 WL 711636, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 23, 2017, no pet.) (mem. op.). Under this standard, we review the "evidence in a light most favorable to the court's decision and indulge every legal presumption in favor of its judgment." *In re J.I.Z.*, 170 S.W.3d 881, 883 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.).

We review a trial court's order modifying conservatorship under an abuse of discretion standard. *See Gillespie*, 644 S.W.2d at 451; *see also In re T.A.M.*, 2017 WL 711636, at *3. A trial court abuses its discretion when it acts arbitrarily or unreasonably, when it clearly fails to correctly analyze or apply the law; or acts without reference to any guiding rules or principles. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re D.S.*, 76 S.W.3d 512, 516 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Challenges to the legal or factual sufficiency of the evidence are not separate grounds of error, but instead are relevant factors to consider in assessing whether the trial court abused its discretion. *In re R.T.K.*, 324 S.W.3d 896, 899 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *In re D.S.*, 76 S.W.3d at 516. To determine whether the trial court abused its discretion because the evidence was legally or factually insufficient, we consider whether the trial court had sufficient information upon which to exercise its discretion and whether it erred in its application of that discretion. *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex. App.—Fort Worth 2010, no pet.); *Gonzalez v. Villarreal*, 251 S.W.3d 763, 774 n.16 (Tex. App.—Corpus Christi–Edinburg 2008, pet. dism'd). Traditional sufficiency review comes into play regarding the first question, and as to the second question, we determine whether the trial court made a reasonable decision. *In re M.M.M.*, 307 S.W.3d at 849. A trial court

does not abuse its discretion if there is some evidence of a substantive and probative character to support its decision. *R.T.K.*, 324 S.W.3d at 900.

When the testimony of witnesses is conflicting, we will not disturb the credibility determinations made by the fact finder, and we will presume that it resolved any conflict in favor of the verdict. *See Syed v. Masihuddin*, 521 S.W.3d 840, 848 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Coleman*, 109 S.W.3d at 111; *Minjarez v. Minjarez*, 495 S.W.2d 630, 632 (Tex. App.—Amarillo 1973, no writ).

B. Best Interest of the Child

To prevail on her petition to modify the parent-child relationship, Maldonado had to establish that (1) modification would be in the child's best interest and (2) "the circumstances of the child, a conservator, or other party affected by the order has materially and substantially changed" since the date of the rendition of the divorce decree.[3] *See* TEX. FAM. CODE ANN. § 156.101(a)(1)(A). In a custody modification proceeding, the trial court is not confined "by rigid rules," but conducts a broad, "fact-specific" inquiry which may encompass any major changes that affect the child's emotional and physical well-being or the parent's ability to support that well-being. *See In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.). As a result, the burden was on Maldonado to establish that a change was in M.M.'s best interests. *See* TEX. FAM. CODE ANN. § 156.101(a)(1)(A).

When the trial court appoints joint managing conservators, the court must

[3] The parties do not contest that circumstances have changed. Both parents have remarried; Maldonado moved out of state and is gainfully employed. Because this issue is not challenged, we need not address it. *See* TEX. R. APP. P. 47.1.

designate the conservator who has the exclusive right to determine the primary residence of the child. *Id.* § 153.134(b)(1). In this case, the trial court granted Martinez the right to designate M.M.'s primary residence. *See id*. By her first issue, Maldonado complains that the trial court did not follow guiding principles in deciding best interest.

"The best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child." *Id.* § 153.002. Cases such as this are "intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors." *Lenz v. Lenz*, 79 S.W.3d 10, 18–19 (Tex.2002) (discussing factors often relevant in a best-interest analysis); *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex.1976) (same regarding termination cases); *see In re K.L.W.*, 301 S.W.3d 423, 425 (Tex. App.—Dallas 2009, no pet.). It is the public policy of the state to (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage. *See* TEX. FAM. CODE ANN. § 153.001.

The trial court heard evidence that M.M. bonded with her father, stepmother, her teenaged stepsisters, and with her maternal and paternal grandmothers who saw her regularly. Although the family had moved several times within San Antonio over the past four years, she has remained in San Antonio near her extended family. Despite M.M. changing schools multiple times before first grade, she did well in school and has had no discipline problems. Martinez is not usually available during school hours due to his work

schedule and he has had limited contacted with the school. However, Martinez arranged for M.M.'s paternal grandmother to pick her up from school most days and drive her home. Her maternal grandmother eats lunch with her once a week at school and M.M. spends one weekend a month with her. Maldonado and her mother arrange M.M.'s doctor's appointments and M.M.'s maternal grandmother usually takes her when she needs to go.

The social worker who evaluated Martinez and Maldonado and met with family members recommended that Maldonado be awarded the right to determine primary residence. Although she sided with Maldonado, at one point she testified the decision was not close, but in her report, she stated the decision was a close one.

Maldonado and her spouse are more affluent. According to Maldonado and her mother, M.M. needs counseling, has expressed that she "want[s] to die," and wants to live with her mother. According to Martinez, M.M. is a happy, healthy, well-adjusted child who does not need counseling. Although he acknowledges that M.M. loves her mother and enjoys being with her, Martinez testified that M.M. has expressed a fear of living in Colorado full-time. The paternal grandmother and Martinez's wife also testified that M.M. is well-adjusted and happy.

Maldonado argues that because Martinez is not involved in his daughter's medical care and does not know the name of her pediatrician or dentist, that M.M. should live with her. Martinez testified that he, his wife, and his mother work together to take care of everything M.M. needs. He attested that Maldonado wanted to handle the medical care arrangements and he saw no reason to interfere especially since the child's health insurance is through the military and only she has access to medical insurance

information.

The trial court heard testimony supporting many factors, identified above, that can bear on the determination of a child's best interest. Based on this evidence, we conclude that the trial court had sufficient competent evidence to support the trial court's determination that granting Martinez the right to determine M.M.'s primary residence was in the child's best interest. *See Gillespie*, 644 S.W.2d at 451; *Syed*, 521 S.W.3d at 851.

We overrule Maldonado's first issue.

C. Primary Residence

By her second issue, Maldonado argues that appointing Martinez the right to determine primary residence was against the weight and preponderance of the evidence.

M.M. has lived in San Antonio her entire life. Her father and both grandmothers live there. According to Martinez, since before her parents divorced, M.M. has lived with him, other than a period where he was working out of town. During that time, M.M. lived with her paternal grandmother during the week and with her father on the weekends. That testimony was contested by Maldonado, but credibility determinations are for the fact finder. *See Syed*, 521 S.W.3d at 848; *In re H.S.N.*, 69 S.W.3d at 831.

Maldonado testified that she saw M.M. nearly every weekend when she was stationed at Fort Hood and has seen her often since she was transferred from Poland to Colorado. Martinez testified differently. According to him, for the first few years after they separated, Maldonado did not see M.M. often and it was not until after she filed this action in 2016 that Maldonado began to exercise visitation. M.M. is now eight-years old. They separated when she was approximately two. *See In re H.S.N.*, 69 S.W.3d at 831

(providing that the trial court has the duty to assess credibility).

Based on this conflicting evidence, we conclude that the trial court did not abuse its discretion by maintaining Martinez's right to designate M.M.'s primary residence. *Id.*

We overrule Maldonado's second issue.

III. ADMISSION OF EVIDENCE

By her third issue, Maldonado complains that the trial court erroneously excluded evidence that she alleged established that Martinez was in the United States illegally and was working under forged documents. Martinez testified he had recently hired an immigration attorney, that he had a tax identification number and a social security number and that he filed income tax returns. Although Maldonado sought to question Martinez further about his immigration status, the trial court sustained a relevance objection. Counsel did not make an offer of proof. TEX. R. EVID. 103(a)(2).[4]

We review a trial court's decision to exclude evidence for an abuse of discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam); *see also St. Germain v. St. Germain*, No. 14-14-00341-CV, 2015 WL 4930588, at *4 (Tex. App.—Houston [14th Dist.] Aug. 18, 2015, no pet.) (mem. op.).

In general, immigration status is not relevant in a civil case. *See TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 241–42, 244 (Tex. 2010) (holding evidence of immigration status unrelated to merits of claims was not admissible, and noting that the "only context

[4] To preserve an objection to the exclusion of evidence, the party whose evidence is excluded must provide the trial court with the excluded evidence or a statement regarding what the excluded evidence would have shown. *In re Estate of Miller*, 243 S.W.3d 831, 837 (Tex. App.—Dallas 2008, no pet.). The offer of proof allows a trial court to reconsider its ruling considering the actual evidence. *Id.*; *Smith v. Smith*, 143 S.W.3d 206, 211 (Tex. App.—Waco 2004, no pet.). However, when the substance of the evidence is apparent from the record, a formal offer of proof may not be necessary. *Smith*, 143 S.W.3d at 211; TEX. R. EVID. 103(a).

in which courts have widely accepted using [immigration status] evidence for impeachment is in criminal trials, where a government witness's immigration status may indicate bias, particularly where the witness traded testimony for sanctuary from deportation"). Immigration status is also not probative of a parent's fitness. *See Turrubiartes v. Olvera*, 539 S.W.3d 524, 529 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (reversing the trial court's decision on conservatorship due to its impermissible focus on mother's immigration status); *see also St. Germain*, 2015 WL 4930588, at *4 (affirming the trial court's exclusion of immigration status of wife).

The trial court did not abuse its discretion in excluding evidence of Martinez's immigration status. *See Turrubiartes*, 539 S.W.3d at 529. We overrule Maldonado's third issue.

IV. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
11th day of June, 2020.