NO. 12-10-00243-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF	***§***	***APPEAL FROM THE***
JOHN THOMAS TYSON, JR.,	***§***	***COUNTY COURT AT LAW***
A CHILD	***§***	***RUSK COUNTY, TEXAS***

MEMORANDUM OPINION

Appellant Amber McFarland (formerly Rogers) appeals the trial court's order in a suit to modify the parent-child relationship. Amber presents four issues. We affirm.

BACKGROUND

Amber and John Thomas Tyson were divorced on March 29, 2005, and are the parents of John Thomas Tyson, Jr. (hereinafter "J.T."), born April 18, 2001. In the divorce decree, the trial court appointed Amber and John joint managing conservators of J.T. Amber was granted the exclusive right to designate the child's primary residence within the State of Texas. The trial court ordered that John have possession of J.T. pursuant to a standard possession order, and that he pay child support to Amber. On November 3, 2009, John filed a petition to modify the parent-child relationship. He requested that he be appointed the person with the right to designate the primary residence of the child, and that the child's residence be restricted to Rusk County, Texas. In the petition, John stated that the order to be modified was the final decree of divorce rendered on March 29, 2005, the circumstances of the child, a conservator, or other party affected by the order to be modified had materially and substantially changed since the final decree of divorce, and modification was in the child's best interest.

During a temporary hearing, John testified that Amber informed him that she and J.T. were moving from Henderson, Texas, to Waco, Texas, so she could work with her father and

return to school. After the hearing, the trial court entered temporary orders, appointing Amber and John as temporary joint managing conservators of J.T. The trial court also ordered, pursuant to the parties' agreement, that the primary residence of the child be Rusk County, and that the parties should not remove the child from Rusk County for the purpose of changing the child's primary residence until modification by further order of the court. The trial court ordered that Amber have possession of J.T. pursuant to a standard possession order, and that no child support be paid by either party.

After a final hearing, the trial court entered an order appointing Amber and John joint managing conservators of the child. However, the trial court granted John the exclusive right to designate the child's primary residence within Rusk County, and ordered that Amber have possession of the child pursuant to a standard possession order. The trial court did not order child support or medical support.

Amber filed a request for findings of fact and conclusions of law. The trial court did not comply, but Amber did not file a notice of past due findings and conclusions. Amber also filed a motion for new trial and a motion to suspend the trial court's order, which the trial court overruled. This appeal followed.

TEMPORARY HEARING AND ORDER

In her third and fourth issues, Amber argues that the trial court abused its discretion by restricting the child's primary residence to Rusk County in the temporary orders since the final decree of divorce did not do so. Further, she contends, the trial court abused its discretion during the temporary hearing by "making [a] ruling in chambers off the record" without her being present, and without her waiving the right to a record.

We note that, on August 4, 2010, the trial court ordered modification of the parent-child relationship. This judgment disposed of all parties and issues in the proceeding, and is, therefore, a final judgment. *See* ***Lehmann v. Har–Con Corp.***, 39 S.W.3d 191, 200 (Tex. 2001). Complaints about temporary orders are moot where a final order has been entered. ***In re P.R.***, 994 S.W.2d 411, 417 (Tex. App.—Fort Worth 1999, pet. dism'd w.o.j.), *disapproved on other grounds*, ***In re J.F.C.***, 96 S.W.3d 256, 267 & n. 39 (Tex. 2002); ***Wright v. Wentzel***, 749 S.W.2d 228, 234 (Tex. App.—Houston [1st Dist.] 1988, no writ); ***Garner v. Garner***, 673 S.W.2d 413, 418 (Tex. App.—Fort Worth 1984, writ dism'd). Because the order complained about is a

temporary order, the hearing was a temporary hearing, and a final order has been entered in the proceeding, Amber's arguments regarding the temporary order and hearing are moot. Amber's third and fourth issues are overruled.

MODIFICATION

In her first and second issues, Amber contends that the trial court abused its discretion in modifying the conservator with the right to designate the primary residence of the child. Specifically, she argues that the evidence is legally and factually insufficient to support John's allegations that the circumstances of the child, a conservator, or other party affected by the order to be modified have materially and substantially changed since the final decree of divorce, and that modification is in the child's best interest.

Standard of Review

A trial court's modification of conservatorship is reviewed for abuse of discretion. ***In re P.M.B.***, 2 S.W.3d 618, 621 (Tex. App.–Houston [14th Dist.] 1999, no pet.). It is an abuse of discretion for a trial court to rule without supporting evidence. ***Id.*** Under an abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent issues, but are relevant facts in assessing whether the trial court abused its discretion. ***In re Ferguson***, 927 S.W.2d 766, 769 (Tex. App.–Texarkana 1996, no writ). To determine whether the trial court abused its discretion because the evidence is legally or factually insufficient, we engage in a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? ***In re T.D.C.***, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g). The traditional sufficiency review comes into play with regard to the first question. ***Lindsey v. Lindsey***, 965 S.W.2d 589, 592 (Tex. App.—El Paso 1998, no pet.). We then determine whether, based on the elicited evidence, the trial court made a reasonable decision—one that was neither arbitrary nor unreasonable. ***Id.*** In the absence of such a clear abuse of discretion, an appellate court should not substitute its judgment for that of the trial court. ***In re Ferguson***, 927 S.W.2d at 769. In the absence of express findings, we imply all necessary findings in support of the trial court's judgment. ***In re B.N.B.***, 246 S.W.3d 403, 406 (Tex. App.—Dallas 2008, no pet.) (citing ***Holt Atherton Indus., Inc. v. Heine***, 835 S.W.2d 80, 83 (Tex. 1992)). When, as here, a reporter's

record is included in the record on appeal, the implied findings may be challenged for legal and factual sufficiency. ***Id.***

Applicable Law

The best interest of the child is the primary consideration in determining conservatorship or residency of a minor child. ***Villasenor v. Villasenor***, 911 S.W.2d 411, 419 (Tex. App.–San Antonio 1995, no writ). As pertinent here, the trial court may modify an order that provides for the appointment of a conservator of a child or the terms and conditions of conservatorship if modification would be in the best interest of the child and the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the rendition of the order. TEX. FAM. CODE ANN. § 156.101(a) (West Supp. 2011).

Whether there has been a material and substantial change of circumstances affecting the child is normally to be determined by an examination of the evidence of changed circumstances occurring between the date of the order or judgment sought to be modified and the date of the filing of the motion to modify. ***Gibbs v. Greenwood***, 651 S.W.2d 377, 379 (Tex. App.–Austin 1983, no writ). The moving party must show what material changes have occurred in the intervening period, and the record must contain both historical and current evidence of the relevant circumstances. ***Zeifman v. Michels***, 212 S.W.3d 582, 589, 594 n.1 (Tex. App.—Austin 2006, pet. denied). Without both sets of data, the court has nothing to compare and cannot determine whether a change has occurred. ***Id.*** at 594 n.1.

A court's determination as to whether a material and substantial change of circumstances has occurred is not guided by rigid rules and is fact specific. ***Id.*** at 593. Further, the policy behind the requirement of a material and substantial change is to prevent constant relitigation with respect to children and to attempt to create stability in the conservatorship. ***Id.*** at 595. Courts have consistently required that a change be proved and that it be shown to be substantial and material. *See e.g.*, ***id.*** at 593. Generally, unless the custodial parent moves "a significant distance," relocation will not suffice to establish a material and substantial change in circumstances. ***In re A.C.S.***, 157 S.W.3d 9, 22 (Tex. App.–Waco 2004, no pet.) (quoting ***Bates v. Tesar***, 81 S.W.3d 411, 430 (Tex. App.—El Paso 2002, no pet.)). However, if the custodial parent moves a significant distance, a finding of changed circumstances may be appropriate. ***Bates***, 81 S.W.3d at 430.

When addressing the best interest of the child in the context of a relocation case, we should consider certain factors, including (1) the child's relationship with extended family, (2) the presence of friends, (3) the presence of a stable and supportive environment for the child, (4) the custodial parent's improved financial situation, (5) the positive impact on the custodial parent's emotional and mental state and its beneficial impact, if any, on the child, (6) the noncustodial parent's right to have regular and meaningful contact with the child, (7) the ability of the noncustodial parent to relocate, (8) the adaptability of the noncustodial parent's work schedule to the child, and (9) the health, education, and leisure opportunities available to the child. ***In re C.M.G.***, 339 S.W.3d 317, 320 (Tex. App.—Amarillo 2011, no pet.) (citing ***Lenz v. Lenz***, 79 S.W.3d 10, 15–16 (Tex. 2002); ***In re Z.N.H.***, 280 S.W.3d 481, 486–87 (Tex. App.—Eastland 2009, no pet.)).

The Evidence

In order to obtain modification of the geographic restriction in the divorce decree, John was required to produce evidence that demonstrated a material and substantial change of circumstances which made the geographic restriction of the State of Texas in the divorce decree unsuitable at the time he filed the motion to modify as opposed to the more limited geographic restriction of Rusk County, Texas. *See* TEX. FAM. CODE ANN. § 156.101(a); ***Gibbs***, 651 S.W.2d at 379.

At the hearing, John stated that the material and substantial change of circumstances was that Amber planned to relocate to Waco. He testified that at the time of the divorce, he and Amber agreed that she could not move outside the State of Texas, but denied that Amber planned to move after the divorce. However, Amber stated that she had grown up in Waco, all her family lived there, and that she planned to move back after the divorce, but could not afford to do so. She testified the only reason for the geographic restriction was that she planned to move to Waco. According to Amber, John told her that he did not care where she lived as long as she did not leave the state. Although Amber and John disagreed about whether Amber's move was contemplated at the time of the divorce, Amber's move within the State of Texas complied with, and was authorized by, the geographic provision in the original divorce decree. Therefore, her relocation, without more, cannot be evidence to establish a material and substantial change in

this case.[1] *See* ***Bates***, 81 S.W.3d at 430. Thus, John must rely on other evidence of a material and substantial change that warranted modifying the geographic provision to prevent J.T. from moving with Amber to Waco.

John testified that the custody and geographic restriction should remain the same as determined in the temporary hearing because J.T. has had a stable home life with him and his extended family. He stated that custody of J.T. "needs to stay just like it is," and that if J.T. moved with Amber to Waco, it could create serious problems. He stated that since the divorce, J.T. has developed a close bond with John's extended family, including his mother, his father, and his grandmother. He testified that J.T. is happier and has a good attitude. John admitted, however, that J.T. had developed a very close bond with Amber and that he had lived with her until the temporary hearing. According to John, it would be nothing more than an experiment if the geographic and custody provisions allowed J.T. to move with Amber to Waco.

John stated that between the divorce and the motion to modify, he and J.T. fished and camped, and played putt-putt golf and video games together. He stated that J.T. participated in baseball, soccer, and Boy Scouts. He testified that he went to all of J.T.'s games, but Amber only went to a few. John stated that before Amber moved, John's mother or grandmother picked up J.T. from school and admitted that this had been J.T.'s routine since first grade. He also testified that his mother has taken J.T. to church since the divorce.

John stated that since November, he has had to go to work at 6:00 a.m. John's mother, who lives approximately two hundred yards from his house, prepares breakfast for J.T., gets him ready for school, and takes him to school. Either John's mother or grandmother picks J.T. up from school. He testified that J.T. is at his house with John's grandmother when he gets off work. Then, John and J.T. finish J.T.'s homework and eat dinner. He testified that J.T. is involved in the children's choir and children's bell choir. Although John admitted that his house had only one bedroom, he has added a bed for J.T. in the bedroom and is planning to add another bedroom to the house. He also stated that in the summer, J.T. stays with John's grandmother.

Betty Tyson, John's mother, testified that she is an administrator at the church that she and J.T. attend. She stated that J.T. should remain in the same routine, i.e., living with John, because the child is comfortable in that routine. She believed that J.T. considers his home to be

[1] John does not argue that Amber's move was a "significant distance" from him, thereby failing to raise the possibility that the move itself could support a finding of changed circumstances. *See* ***Bates***, 81 S.W.3d at 430; ***In re A.N.O.***, 332 S.W.3d 673, 676 (Tex. App.—Eastland 2010, no pet.).

with John. According to Betty, she and her mother have picked up J.T. from school since kindergarten or first grade. Further, she stated that this has been J.T.'s routine since before the temporary hearing. She testified that since November, she has also taken J.T. to school every morning. Betty stated that on Wednesdays, the church bus picks him up to go to choir. According to Betty, J.T. is active in the children's choir, children's bell choir, Sunday school, and Wednesday night children's bible study. Betty also testified that she takes J.T. to church, to Boy Scouts, to the doctor, and to the dentist. She stated that she attended J.T.'s doctor's visits when he was a baby. According to Betty, J.T. stays with her mother in the summer.

Further, John produced evidence from J.T.'s third grade teacher and the former children's director at the church J.T. attends. J.T's third grade teacher, Alicia Bishop, stated that since J.T. began living with his father, he seemed calmer and more relaxed. Bishop testified that he was also keeping up with his homework better and doing better in his reading. According to Bishop, J.T.'s home life seemed more consistent because his father and grandmother ate lunch with him, went on field trips with him, and attended his programs. According to Bishop, J.T. received a commended performance on his reading and math TAKS scores, and was her top boy reader. She also testified that although J.T. would be attending a new school next year, he would be with the same students as before. Bishop stated that when J.T. lived with Amber, he was frequently tardy, resulting in his being frustrated and irritated. She also stated that it would be an experiment to see how J.T. would react to a new environment.

The children's director, Cindy Parker, testified that J.T. was involved in the church's musical group and choir, and went to Sunday school. Parker testified that J.T. came to church with his grandmother, Betty, and that Betty picked him up after choir. According to Parker, Betty, and sometimes Betty's mother, were the main people disciplining J.T. and teaching him respect. She stated that J.T. was in a positive, supportive, and secure environment with his father, grandmother, grandfather, and step-grandmother. From comments that J.T. has made around her, she believes that he feels very secure living with his father. However, she did not know what type of environment J.T. would be in if he moved.

Stacey Strong, a friend of Amber's, testified that she and Amber were neighbors for four years before Amber moved. She testified that Amber's family is very close with a good support system, particularly her siblings and their children. She did not believe moving would be a difficult transition for J.T. because he visited Amber's family every other weekend before she

moved. However, Strong admitted that she had never seen Amber's present home in Waco and does not know Amber's work and school schedule. Brandon McFarland, Amber's brother, testified that he believes his family in the Waco area has a good support system. He did not believe that J.T. would have a difficult time transitioning to living in Gholson because he has spent time there in the summer.

Amber testified that she has one sister and three brothers besides Brandon who live close to her new home in Gholson, near Waco, and all but her youngest brother are married with children. Her new home is her grandmother's house. Amber testified that she could take J.T. to school and pick him up in Gholson. She also stated that J.T. is very close to her extended family in Gholson. Amber testified that J.T. wanted to go to the high school in Waco, be in the agriculture program, and show goats and rabbits. According to Amber, she moved to Gholson to go back to school and help her father take care of her mother and run the family businesses. At the time of trial, Amber was working on the website for her father's archery store from home, and going to school full time. Although she does not pay rent for her grandmother's house, she pays taxes and utilities.

Amber testified that before she moved, J.T. would go to children's choir on the church bus on Wednesdays. Further, she stated that on Thursdays and Fridays, Betty or J.T.'s great-grandmother usually picked J.T. up from school. She stated that when John had possession of J.T., she understood that he stayed with Betty. Amber testified that during the past summer, J.T. stated that he stayed with Betty or his great-grandmother, and "spends the night" with John once or twice a week. Amber also admitted that J.T. visited John's father and stepmother often.

Amber complained that she has had little telephone contact with J.T. since she moved, stating that she is either unable to reach anyone by telephone or no one responds to her text messages. Further, she believes that John has not worked with her regarding visitation with J.T., testifying that she "can't even get an extra hour." John disagreed, stating that he has never refused telephone calls from Amber or refused to allow J.T. to call Amber. However, Amber also testified that since November, she has not been informed of the dates of any of J.T.'s school functions, including his Christmas program and field day.

Analysis

From the above described evidence and the record as a whole, the trial court could have reasonably concluded that Amber's relocation to Waco constituted a material and substantial

change of circumstances since the 2005 final decree of divorce. *See* ***In re P.M.B.***, 2 S.W.3d at 621. The trial court could have determined that John's extended family, specifically John's mother and grandmother, were extremely involved in J.T.'s care and life, even before Amber moved. Moreover, the trial court could have determined that John's extended family offered a secure, positive environment for J.T, and removing him from that extended family would have had been an experiment. The trial court could have also concluded that Amber's new home did not offer the stability and support that J.T. would have with John. Therefore, the trial court did not abuse its discretion in finding that the material allegations regarding a material and substantial change in John's petition to modify were true.

Regarding J.T.'s best interest, the trial court could have concluded that J.T.'s home environment, extended family relationships, school, and church were very secure and positive. The trial court could have found that J.T.'s daily schedule with John's mother and grandmother was longstanding and ongoing. Further, the trial court could have recognized that removing J.T. from John would require changes in J.T.'s life, and that it would be an experiment. Moreover, the trial court could have considered Amber's changed circumstances noted above as factors when determining J.T.'s best interest. All this evidence supports a finding that modification was in the child's best interest. Although there was some evidence in the record that was favorable to Amber, we conclude that the trial court did not abuse its discretion in finding that modification was in J.T.'s best interest. *See* ***Villasenor***, 911 S.W.2d at 419. Accordingly, Amber's first and second issues are overruled.

DISPOSITION

Having overruled Amber's issues, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 9, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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