



**Fourth Court of Appeals
San Antonio, Texas**

MEMORANDUM OPINION

No. 04-20-00532-CV

IN THE INTEREST OF W.J.M., a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-CI-15709
Honorable Karen H. Pozza, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: March 30, 2022

AFFIRMED

Appellant Father appeals the trial court's order modifying the parent-child relationship.¹ In his first two issues, Father argues the trial court abused its discretion when it modified possession and access, the geographic restriction, and child support because there is insufficient evidence of a material and substantial change in circumstances.² In his third issue, Father argues the modification was not in the child's best interest. We affirm.

¹ To protect the identity of the minor child, we refer to appellant as "Father," to appellee as "Mother," and to the child as "the child." See TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8.

² Father argues the trial court abused its discretion when it modified conservatorship. However, we note Mother and Father were joint managing conservators before the modification and remained joint managing conservators after the modification.

BACKGROUND

On August 20, 2018, Mother filed a petition for divorce. On December 7, 2018, Father and Mother entered into a mediated settlement agreement that was merged into a final divorce decree on April 30, 2019. Among other things, the divorce decree established the parents' respective rights and duties to the child.

Relevant to this appeal, the divorce decree geographically restricted the primary residence of the child to within the Medina Valley Independent School District. The divorce decree provided for a visitation schedule whereby the parents would share equal possession of the child. The divorce decree stated neither party shall pay child support or medical support. Instead, "each parent shall support the child when he is in their possession." However, Mother was required to maintain healthcare and dental care insurance coverage for the child and to pay all the unreimbursed healthcare expenses not covered by insurance. Mother was also ordered to pay all educational expenses indefinitely, as well as all childcare expenses until May 2021.

On May 11, 2020, Mother filed a motion to modify terms of the divorce decree relating to possession and access, the geographic restriction, and child support. On September 19, 2020 and September 23, 2020, the trial court held a bench trial on Mother's motion for modification.³ Mother, Father, maternal grandmother, maternal grandfather, and paternal grandfather each testified at the trial.

Having found several material and substantial changes in circumstances since the mediated settlement agreement was signed and that modification was in the child's best interest, the trial court partially granted Mother's motion. In its modification order, the trial court: (1) changed the geographic restriction from within Medina Valley Independent School District to Bexar County

³ Although the trial court's order states the trial court heard the case on "September 15, 2020 and September 23, 2020," the trial transcript shows the case was heard on September 19, 2020 and September 23, 2020.

and other contiguous counties; (2) changed the parties' possession and access to a standard possession order; (3) removed Mother's requirement to pay childcare expenses while the child is in Father's possession; (4) removed Mother's requirement to pay all the child's educational expenses; and (5) ordered Father to pay child support under the child support guidelines in the Texas Family Code. Father appealed.

STANDARD OF REVIEW

"We review a modification order under an abuse of discretion." *In re E.C.*, 216 S.W.3d 424, 426 (Tex. App.—San Antonio 2006, no pet.). A trial court abuses its discretion if its decision is arbitrary, unreasonable, or without reference to guiding rules or principles. *Quixtar, Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31 (Tex. 2010). We will not disturb the trial court's decision absent a clear abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

"Under the abuse of discretion standard, legal and factual sufficiency of the evidence are not independent grounds for asserting error[] but are relevant in assessing whether the trial court abused its discretion." *In re J.D.D.*, 242 S.W.3d 916, 920 (Tex. App.—Dallas 2008, pet. denied). "[W]e may not interfere with the trial court's decision so long as some evidence of a substantive and probative character supports it and the ruling comports with the law." *In re A.B.R.*, No. 04-17-00220-CV, 2018 WL 3998684, at *3 (Tex. App.—San Antonio Aug. 22, 2018, no pet.) (mem. op.) (quotation marks omitted). In a suit for modification, a trial court's findings must be based on a preponderance of the evidence. TEX. FAM. CODE ANN. § 105.005.

SUBSTANTIAL AND MATERIAL CHANGE

In his first issue, Father argues there is insufficient evidence of a material and substantial change to modify possession and access and the geographic restriction. In his second issue, Father argues there is insufficient evidence of a material and substantial change to modify child support.

A. Possession and Access and Geographic Restriction

A trial court “may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child 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 earlier of: (A) the date of the rendition of the order; or (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based” TEX. FAM. CODE ANN. § 156.101(a)(1).

“Whether a material and substantial change occurred is a question of fact.” *Nellis v. Haynie*, 596 S.W.3d 920, 925–26 (Tex. App.—Houston [1st Dist.] 2020, no pet.). “This fact specific determination is not controlled by a set of rigid guidelines, but instead, is made according to the circumstances as they arise.” *Id.* at 926 (quotation marks omitted). A material and substantial change in circumstances occurs when the party seeking modification demonstrates the conditions that existed at the time of entry of the prior order have changed as compared to the circumstances existing at the time of the hearing on the motion to modify. *Zeifman v. Michels*, 212 S.W.3d 582, 589 (Tex. App.—Austin 2006, pet. denied).

In its findings of fact and conclusions of law, the trial court found that Father did not exercise all his periods of possession under the equal possession order. This finding is significant under the facts of this case because—rather than ordering child support—the divorce decree here contemplates each parent would provide support for the child while the child was in that parent’s possession. The divorce decree, thus, contemplates an equal share in the cost and effort to rear the child based on an equal share of possession of the child.

Under the divorce decree, Father had the duty to support the child, including providing him with clothing, food, and shelter while the child is in his possession. The decree also states Father

is to pick up the child right after school on the weekdays Father has possession of the child. However, Father testified he is unable to pick up the child right after school during weekdays because some days he does not leave work until 5:30 PM. Father also admitted he has not exercised his extended summer possession because he can't "take the time off of work to have him exclusively for the extended periods."

Father's testimony is some evidence of a substantive and probative character that supports the trial court's findings. The trial court could have reasonably determined Father's failure to fully exercise his possession is tantamount to a failure to share in his portion of the expenses and responsibilities to rear the child. The trial court could have further determined that this results in an increased burden on Mother to compensate for Father's failure to incur his equal share of child rearing expenses and to assume his equal share of child rearing responsibilities. This increased burden on Mother was not contemplated at the time the mediated settlement agreement was signed. Based on the preponderance of the evidence supporting the modification, the trial court acted within its discretion and in accord with the law.

Next, the trial court found the geographic restriction should be modified from within the Medina Valley school district to Bexar County and other contiguous counties. In its findings of fact and conclusions of law, the trial court found that Mother "could no longer afford to maintain a home in Medina Valley ISD, and [Father] moved out of Medina Valley ISD and cannot afford to reside in Medina Valley ISD."

Although the divorce decree did not state which parent had the exclusive right to designate the child's primary residence, it ordered "that the primary residence of the child shall be within the Medina Valley Independent School District, and the parties shall not remove the child from the Medina Valley Independent School District for the purpose of changing the primary residence of the child until this geographic restriction is modified by further order of the court" At trial,

Father agreed that—because he is no longer able to reside within the Medina Valley school district—“the only reason [the child] can stay in Medina ISD is if [Mother] can continue to reside there.”

Mother testified she and Father were unable to sell their home during the divorce because their mortgage was significantly “under water.” Father was unable to take over the mortgage, so Mother was left with the financial burden of the home. This burden was further exacerbated by the increasing property values in the Medina Valley school district. Mother testified the cost of living in the Medina Valley school district “is quite high” and it would continue to be a financial burden to relocate to a smaller home within the school district due to increased property values.

Moreover, Father testified he no longer lives in the Medina Valley school district because he “could not find affordable housing within the school district.” Father’s testimony supports Mother’s contention that she can no longer afford to live in the school district either.

Given the fact that Mother was already burdened with substantial debt from the divorce—and incurred additional expenses from Father’s failure to fully exercise his visitation—the trial court did not abuse its discretion in finding the increased cost of living and rising property values caused Mother to no longer afford to live in the Medina Valley school district. This substantive and probative evidence supports the trial court’s finding that Mother’s inability to maintain a residence within the geographic restriction was a material and substantial change in circumstances. *See Brejon v. Johnson*, 314 S.W.3d 26, 32 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding an increased cost of living was a material and substantial change supporting the trial court’s modification order).

Accordingly, we overrule Father’s first issue.

B. Child Support

“If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order’s rendition.” TEX. FAM. CODE ANN. § 156.401(a-1). “A change in the obligor-parent’s income can constitute a material and substantial change in circumstances.” *Reagins v. Walker*, 524 S.W.3d 757, 761 (Tex. App.—Houston [14th Dist.] 2017, no pet.). “If the amount of support contained in the order does not substantially conform with the [child support] guidelines . . . , the court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child.” TEX. FAM. CODE ANN. § 156.402(b); *see also Kendall v. Kendall*, 340 S.W.3d 483, 512 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding the trial court did not abuse its discretion when it ordered modification of child support to conform with the child support guidelines).

In addition to the evidence of a material and substantial change cited above, Father testified he received a promotion and a \$5,000 increase in his annual salary—from \$48,000 to \$53,000—since the rendition of the divorce decree. *See In re K.A.M.S.*, 583 S.W.3d 335, 346 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding the reasons justifying modification of conservatorship simultaneously operate to justify modification of child support). Father’s own testimony supports the trial court’s finding that there was a material and substantial change in Father’s circumstances. The trial court acted within its discretion when it ordered Father to begin paying child support in conformity with the child support guidelines.

Accordingly, Father’s second issue is overruled.

BEST INTEREST

In his third issue, Father argues the modification of possession and access is not in the child's best interest. Father also argues briefly that modifying the geographic restriction is not in the child's best interest.

A. Possession and Access

In its findings of fact and conclusions of law, the trial court “found that it is in the best interest of the child to modify possession and access of the child because [Father] consistently failed to meet his obligations under an equal possession schedule.” Father argues there is insufficient evidence to support this finding.

A child's best interest is always the primary consideration of the court in determining issues of possession and access to the child. TEX. FAM. CODE ANN. § 153.002. “The trial court retains broad discretion in crafting the rights and duties of each conservator to promote the [child's] best interest[.]” *Coburn v. Moreland*, 433 S.W.3d 809, 828 (Tex. App.—Austin 2014, no pet.).

Here, Father's failure to incur his equal share of child rearing expenses and assume his equal share of child rearing responsibilities under the equal possession order has imposed an inequitable burden on Mother. In addition to carrying the debt on the marital home, incurring expenses to refinance the mortgage, and paying for all the child's educational and medical expenses, the trial court heard testimony that Mother also paid for child-care expenses for days that Father is unable to timely pick up the child from school. Consequently, Mother testified her financial situation is “not great” and she would ask Father for assistance in raising the child. Father declined to do so.

The trial court could have inferred that Father's inability to timely pick up the child from school under the equal possession order caused an inconsistent schedule for the child because he would have to go to after-school childcare on Father's days of possession. *See In re Guardianship*

of C.E.M.-K., 341 S.W.3d 68, 81 (Tex. App.—San Antonio 2011, pet. denied) (noting “the plans for the child by those seeking primary possession” and “the stability of the home or proposed placement” are relevant factors in a best-interest determination). Further, the trial court could have inferred that Father’s refusal to financially assist Mother with the expense of childcare contributed to Mother’s dire financial situation, which could have a negative impact on the child. *Cf. In re M.V.*, 583 S.W.3d 354, 363–64 (Tex. App.—El Paso 2019, no pet.) (holding a custodial parent’s improved financial circumstances has a positive effect on the child). The trial court’s modification to a standard possession order and guideline child support not only realigns the burden between the parents—which will have a positive effect on the child—but will also foster stability and a more consistent schedule for the child.

Both the record and the Texas Family Code support the trial court’s findings that modification from the equal possession order to a standard possession order is in the child’s best interest. *See In re H.D.C.*, 474 S.W.3d 758, 763 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (“There is no abuse of discretion as long as some evidence of a substantive and probative character exists to support the trial court’s exercise of its discretion.”); TEX. FAM. CODE ANN. § 153.252 (“[T]here is a rebuttable presumption that the standard possession order . . . is in the best interest of the child.”). Accordingly, under the highly deferential standard of review applied in modification cases, we conclude there was no clear abuse of discretion when the trial court found modification of possession and access was in the child’s best interest.

B. Geographic Restriction

“[T]he Texas Supreme Court [has] provided a variety of factors relevant to the determination of whether a geographic restriction is in the best interest of the child, including: (1) the reasons for and against the move, including the parents’ good faith motives in requesting or opposing it; (2) health, education, and leisure opportunities; (3) the degree of economic,

emotional, and educational enhancement for the custodial parent and child; (4) the effect on extended family relationships; (5) accommodation of the child's special needs or talents; (6) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; (7) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the non-custodial parent and child; and (8) the ability of the non-custodial parent to relocate.” *In re C.M.*, No. 04-12-00395-CV, 2014 WL 2002843, at *3 (Tex. App.—San Antonio May 14, 2014, no pet.) (mem. op.) (citing *Lenz v. Lenz*, 79 S.W.3d 10, 14–16 (Tex. 2002)). The trial court's decision regarding a geographic restriction is fact driven. *Lenz*, 79 S.W.3d at 18–19.

Here, the divorce decree restricted the child's primary residence to within the Medina Valley school district. The trial court's modification order modified the geographic restriction to include Bexar County and contiguous counties. Thus, any opportunity or accommodation the child enjoyed under the geographic restriction in the divorce decree would likely remain available to the child under the modification.

The modification of the geographic restriction will have essentially no effect on the child's extended familial relationships because the potential for increased distance between the child's new residence and his extended family is insignificant. The child's paternal grandparents—with whom the child also spends time—reside in Wilson County, a county contiguous to Bexar County. Moreover, the modification of the geographic restriction will have a minimal effect, if any at all, on Father's ability to maintain a full and continuous relationship with the child because Father also lives in Bexar County. Thus, Mother's relocation to Bexar County or a contiguous county would allow Father and paternal grandparents to continue a meaningful relationship with the child.

The evidence reflects that living within the Medina Valley school district was unaffordable to both parents, and supports a reasonable inference that modification would lead to an economic

and emotional enhancement to both Mother and the child. *See M.V.*, 583 S.W.3d at 363–64. In contrast, a refusal to lift the geographic restriction would likely have caused Mother to remain under financial stress and have a negative impact on Mother’s emotional state, which in turn could have a detrimental effect on the child. *See id.*

Based on the record before us, we cannot say the trial court abused its discretion in determining the *Lenz* factors weighed in favor of modifying the geographic restriction. *See Lenz*, 79 S.W.3d at 14–16; *M.V.*, 583 S.W.3d at 363–65; *C.M.*, 2014 WL 2002843, at *4.

Accordingly, Father’s third issue is overruled.

CONCLUSION

The trial court’s judgment is affirmed.

Irene Rios, Justice