

Not Reported in S.W.3d, 2008 WL 5671873 (Tex.App.-Beaumont)  
(Cite as: 2008 WL 5671873 (Tex.App.-Beaumont))

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## MEMORANDUM OPINION

Court of Appeals of Texas,  
Beaumont.  
In the Interest of K.E.L.

No. 09-08-00014-CV.  
Submitted on Dec. 11, 2008.  
Delivered Feb. 26, 2009.

West KeySummaryChild Custody 76D  576

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk576 k. Joint Custody. Most Cited

Cases

Sufficient evidence established a material and substantial change in circumstances justifying a trial court's decision to modify a child custody order, under which parties were joint managing conservators with father as the parent with the right to select the child's residence, to grant the mother the right to designate the child's primary residence. Testimony tended to show changes in the child's behavior, sleeping patterns, child's language, and child's attitude, all following the date of the trial court's original decision to grant the father the right to designate the child's primary residence. There was also evidence that the child's leg had been fractured while in father's care and the child suffered ant bites while in father's care. Moreover, the father had a webpage which referenced sexually suggestive content. *V.T.C.A., Family Code § 153.312*.

On Appeal from the 317th District Court, Jefferson County, Texas, Trial Cause No. F-190,182, *Larry Thorne*, J.  
*Todd W. Leblanc*, Beaumont, TX, for appellant.

*Jack Lawrence*, Beaumont, TX, for appellee.

Before *McKEITHEN*, C.J., *GAULTNEY* and *HORTON*, JJ.

## MEMORANDUM OPINION

*HOLLIS HORTON*, Justice.

\*1 This is an appeal from a modification order that granted the child's mother the right to designate the child's primary residence. We affirm.

### Procedural Background

J.L.,<sup>FN1</sup> the child's father, brings this appeal. H.M., the child's mother, and J.L. are the parents of K.E.L., who was born in February 2004. Shortly after the child's birth, H.M.'s mother filed an original petition affecting the parent-child relationship in which she requested that the court name her and H.M. joint managing conservators and designate H.M.'s mother as the person with the exclusive right to designate the child's primary residence. J.L. filed a counter-petition asking that he be named as the child's sole managing conservator and be given the exclusive right to establish the child's primary residence. At the conclusion of a trial in July 2005, the trial court orally pronounced its decision to make the parents joint managing conservators and named J.L. as the parent with the right to select the child's residence. The trial court later signed a written order consistent with its oral pronouncement of its intent to give J.L. the right to designate the child's primary residence. Instead of the terms contained in a standard possession order, however, the order further provided that K.E.L.'s parents were to alternate possession of her on a weekly basis. See *TEX. FAM.CODE ANN. § 153.312 (Vernon 2008)*.<sup>FN2</sup>

<sup>FN1</sup>. To protect the privacy of the parties involved in this appeal, we identify the parents and child by their respective initials. See *TEX. FAM.CODE ANN. § 109.002(d) (Vernon 2008)*.

FN2. Although the Legislature amended certain aspects of the statute that provides the terms for standard possession orders after the possession order at issue here, the changes are not pertinent to this appeal. Therefore, we cite the current version. Compare TEX. FAM.CODE ANN. § 153.312 (Vernon 2008) with Act of May 27, 2007, 80th Leg., R.S., ch. 1041, § 2, sec. 153.312(a), 2007 Tex. Gen. Laws 3594, 3595 (current version at TEX. FAM.CODE ANN. § 153.312(a) (Vernon 2008)), and Act of May 29, 2005, 79th Leg., R.S., ch. 916, § 12, sec. 153.312(b), 2005 Tex. Gen. Laws 3148, 3151-52 (current version at TEX. FAM.CODE ANN. § 153.312(b) (Vernon 2008)).

In January 2007, H.M. filed a motion to modify the terms of the original possession order. H.M. requested that the trial court designate her as the person having the exclusive right to determine the child's primary residence. In November 2007, the trial court conducted an evidentiary hearing on H.M.'s motion. At the conclusion of the hearing, the trial judge modified its prior order and gave H.M. the right to designate the child's primary residence.

In a single issue, J.L. contends the trial court abused its discretion in modifying its prior order because the evidence was legally and factually insufficient to support the modification.

#### Standard of Review

We review the trial court's modification of an order creating a joint managing conservatorship under an abuse of discretion standard. See *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex.1982); *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex.App.-Fort Worth 2002, pet. denied). The appellate court gives "wide latitude" to the trial court's modification decisions and will reverse only if the record as a whole shows the trial court abused its discretion. *In re J.R.D.*, 169 S.W.3d 740, 743 (Tex.App.-Austin 2005, pet. denied). "A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to

guiding principles." *In re T.D.C.*, 91 S.W.3d at 872 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985)).

Under an abuse of discretion standard as applied to the modification of a child custody order, sufficiency issues are considered on appeal as follows:

\*2 [L]egal and factual sufficiency are not independent grounds of error, but are relevant factors in deciding whether the trial court abused its discretion. In determining whether there has been an abuse of discretion because the evidence is legally or factually insufficient to support the trial court's decision, 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? The traditional sufficiency review comes into play with regard to the first question. We then proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision.

*Id.* (citations omitted). An abuse of discretion, however, does not occur as long as some evidence of a substantive and probative character exists to support the trial court's decision. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex.App.-Houston [1st Dist.] 1993, writ denied).

#### Testimony at the Modification Hearing

Three witnesses testified during the November 2007 modification hearing: H.M., J.L., and J.L.'s mother. H.M., age 20 at the time of the hearing, testified that she lived with her parents and attended college. She testified that as of January 2008, she would be a junior. H.M. explained that she and J.L. had followed the trial court's possession order and exchanged possession of the child on a weekly basis since the prior hearing in July 2005. According to H.M., however, J.L. had not fully complied with the order because he had not paid the child support required under the order. At the time of the hearing, J.L. owed H.M. past child support of ap-

proximately \$4200.

H.M. also explained that on several occasions, when J.L. returned K.E.L. to her, K.E.L. had suffered ant bites on her leg, shoulder, or neck. K.E.L. also appeared on occasion to have suffered from flea bites. On another occasion, K.E.L. suffered a knee injury when jumping on a trampoline while in J.L.'s care. When H.M. took K.E.L. to the doctor on the following day, the injury was diagnosed as a fractured leg.

H.M. explained that she attended college classes three to four hours daily and was free to care for K.E.L. when not attending class. During week-ends when she had K.E.L., H.M. stated that she stayed with the child and did not go out. In contrast, H.M. explained that when J.L. had the child on week-ends, she had seen him out. H.M. also testified that when J.L. had K.E.L., she called J.L.'s house every day to check on her, but that more times than not J.L. was not there when she called. H.M. described difficulty with the child's wanting to stay up until 11:30 or 12:00 on evenings immediately after J.L. returned K.E.L. to her. H.M. also complained of certain language the child used that H.M. attributed to the child's being around J.L.

According to H.M., a week-to-week schedule was not in the child's best interest. She felt that K.E.L. needed more stability and would benefit from being in one place all the time. According to H.M., she had matured since graduating from high school and had plans to get a good job upon graduation to support her daughter. H.M. also testified that she did not think K.E.L. was safe when she was with J.L. At the time of the hearing, H.M. testified that she was not employed or married, and she explained that she depended upon her parents for her support.

\*3 J.L. also testified at the hearing. At the time of the hearing, J.L. stated that he lived with his parents and worked for a corporation as a field service technician performing waste water analysis. He also testified about his rate of pay, work-schedule, and

job duties with his current employer, as well as with two prior employers for positions that he had held during 2005 and 2006. J.L. explained that his mother cared for K.E.L. during the workday.

J.L.'s testimony included information about his social life and his limited contact with H.M. after the court gave him the right to designate the child's primary residence. The trial court admitted a copy of J.L.'s "MySpace"<sup>FN3</sup> page that contained sexually-oriented statements that he agreed he had made on the page. According to J.L., there was nothing on the page that would indicate he was a bad parent. J.L. also admitted that he had a message on his answering machine that stated "[i]f you don't want to leave a message, stick it up your b\* \* \*." J.L. contradicted H.M.'s testimony that implied he was usually not home when H.M. called to check on K.E.L., and J.L. also stated that he never allowed K.E.L. to stay up past 9:30 p.m. Regarding K.E.L.'s importance to him, J.L. testified that K.E.L. is "the only thing right now that I believe fully matters to me. My job, that's one thing; but my daughter is my life. She's all I care about." J.L. denied that he had used bad language in front of K.E.L. With respect to the child's safety, J.L. testified that when H.M. returned K.E.L. to him, there were occasions when K.E.L. had a black eye or bumps on her head, but he attributed this to usual childhood experiences and did not take pictures. J.L. also addressed whether he had complied with the prior court orders. He admitted that he had never paid child support, and asserted that he had never seen a copy of the court's order requiring the payment.

FN3. "MySpace is a social networking website with an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music, and videos for teenagers and adults internationally." Wikipedia, the Free Encyclopedia, MySpace, at <http://en.wikipedia.org/wiki/MySpace> (last visited Feb. 3, 2009).

J.L.'s mother also testified at the hearing. Ac-

According to her, J.L. was seventeen when K.E.L. was born, but since that time “has grown up so much. He went from a kid that didn't know anything about kids to being a dad, and he takes responsibility for her. He bathes her. He feeds her. He—you know, he is just there for her.” J.L.'s mother also testified that she loves K.E.L., and that if she did not believe that J.L. was a good father she would say so.

At the conclusion of the hearing, the trial court advised the parties of its decision to make the parents joint managing conservators and to alter the times of the parent's possession to conform them generally to the standard possession order. The court further gave H.M. the exclusive right to designate the child's residence. The court informed the parties that it had decided to give H.M. this right and take it from J.L. based on “material and substantial change [in the] child's behavior, sleeping, the child's language, father's language, the child's attitude, [and] the child's injuries.” The trial judge further stated that “I would never have done a week to week on a 2 year old.... And I think that is injurious to the child. So, those are some of the reasons [for the modifications].”

#### Analysis

\*4 A trial court may modify an order appointing a conservator of a child if the modification is in the child's best interest, and, among other grounds, the circumstances of the child or a conservator have materially and substantially changed since rendition of the earlier order. See [TEX. FAM.CODE ANN. § 156.101\(1\)](#) (Vernon 2008). In determining issues of conservatorship and possession, the legislature has provided that “[t]he best interest of the child shall always be the primary consideration....” [TEX. FAM.CODE ANN. § 153.002](#) (Vernon 2008). When, as here, no findings of fact or conclusions of law are requested or filed, an appellate court implies all necessary findings in support of the trial court's judgment. See *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex.1990); *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex.App.-Dallas 2008, no pet.)

(applying the implied finding rule to an appeal of a child custody modification proceeding).

J.L. challenges whether sufficient evidence established a material and substantial change in circumstances to justify the trial court's decision to modify the original conservatorship order, contends the trial court abused its discretion in modifying the terms of the original order, and asserts the evidence does not show that the modification is in the child's best interest. See [TEX. FAM.CODE ANN. § 156.101](#) (Vernon 2008). The record of the hearing on H.M.'s request to modify the prior order contains testimony tending to show changes in the child's behavior, sleeping patterns, the child's language, the father's language, and in the child's attitude, all following the date of the trial court's original decision to grant J.L. the right to designate the child's primary residence. After the date of the prior order, there was also evidence that K.E.L.'s leg had been fractured while she was in J.L.'s care, testimony about the ant bites she suffered while in his care, and evidence concerning sexually suggestive content on his “MySpace” page. There is no testimony that when the trial court decided to enter the prior order that it had considered similar instances of injury, similar evidence tending to reveal J.L.'s personality, or similar evidence regarding the development of K.E.L.'s personality.

While trial courts conducting conservatorship hearings may face conflicting testimony about each of the parent's abilities that must be weighed in reaching a decision about what is in the child's best interest, the trial court is in the better position to evaluate the evidence “since it faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent.” *In re J.R.D.*, 169 S.W.3d at 743. “In a non-jury trial ‘every reasonable inference and intent supported by the record will be drawn in favor of the trial court's judgment.’” *Burns v. Burns*, 116 S.W.3d 916, 920 (Tex.App.-Dallas 2003, no pet.) (quoting *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 (Tex.1992)).

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\*5 Here, the trial court's modification of its prior order was not limited to changing the parent with the right to designate the child's primary residence. The trial court's concern that the prior court's possession schedule was interfering with K.E.L.'s development of a sense of a "home base" led it to alter the prior terms of the possession order, making them more like those in a standard possession order, with the apparent goal of reducing further problems beginning to develop in K.E.L.'s personality. Given the decision to alter the prior schedule, and the current schedules of the parents, the trial court may have concluded that H.M.'s schedule would best meet the child's needs. Finally, the evidence concerning the content contained on J.L.'s "MySpace" page may have led the trial court to believe that H.M. would be more responsible in serving as the person with the right to designate the child's primary residence.

Based on the testimony before it, we cannot say the trial court abused its discretion in finding the changes sufficiently substantial to justify its decision to change the prior order by granting H.M. the right to designate the child's primary residence. We further find that the trial court had sufficient information upon which to exercise its discretion, and the evidence does not demonstrate that the trial court abused its discretion. Finally, we conclude that the record contains sufficient evidence to show the trial court's decision to modify its prior order was reasonable and in the child's best interest.

We overrule J.L.'s sole issue and affirm the trial court's order of December 10, 2007.

AFFIRMED.

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In re K.E.L.

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**Court Documents**

**Dockets (U.S.A.)**

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[2](#) IN THE INTEREST OF K.E.L., NO. 09-08-00014-CV (Docket) (Tex.App.-Beaumont Jan. 9, 2008)

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- 2** In re A.C., 2010 WL 1730790, \*1 (Tex.App.-Fort Worth Apr 29, 2010) (NO. 2-09-278-CV) (**KS**)

**★ Mentioned**

- C** **3** In re S.J.O.B.G., 292 S.W.3d 764, 776 (Tex.App.-Beaumont Jul 16, 2009) (NO. 09-08-00160-CV) (**KS**)

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**Court Documents****Appellate Court Documents (U.S.A.)****Appellate Briefs**

- 6** Kevin Scott GILLIN, Appellant, v. Lori Ann GILLIN, Appellee., 2009 WL 3025029, \*3025029 (Appellate Brief) (Tex.App.-San Antonio Aug 18, 2009) **Brief of Appellee** (NO. 04-09-00119-CV) ★ (**KS**)