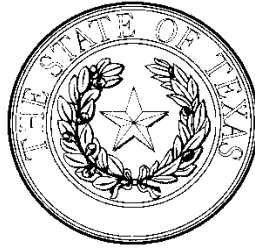


Opinion issued June 30, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00100-CV

DALE CLAUDER DUNN, Appellant

V.

COURTNEY BROOKE GARCIA, Appellee

**On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Case No. 18-FD-2521**

MEMORANDUM OPINION

Appellant, Dale Clauder Dunn (“Father”), challenges the trial court’s order, entered after a bench trial, in favor of appellee, Courtney Brooke Garcia (“Mother”), in Mother’s suit to modify the parent-child relationship. In three issues, Father

contends that the evidence is legally and factually insufficient to support the trial court's finding of a material and substantial change of circumstances and that the trial court's modification is not connected to, or limited to, its findings.

We reverse and remand.

Background

On July 19, 2017, a Scurry County trial court signed an Agreed Order in Suit Affecting the Parent-Child Relationship ("Agreed Order"), in which it appointed Father and Mother as joint managing conservators of their three minor children, M.B.D., D.B.D., and E.B.D. In the Agreed Order, the trial court granted Father the "exclusive right to designate the primary residence of the children within the State of Texas for one year" and, "thereafter, with no geographic restriction," and granted him the exclusive right to make certain decisions about the children's healthcare, welfare, and rearing. Mother was granted possession of the children pursuant to a Modified Standard Possession Order, under which she had possession one weekend per month and on certain holidays and periods during the summers. The trial court ordered that Mother pay child support in the amount of \$500.00 per month.

The record shows that, at the time of the Agreed Order, Mother and Father lived in Snyder, Scurry County, Texas. M.B.D. was age five, D.B.D. was four, and E.B.D. was three. In November 2017, Father moved with the children to live near his family in Friendswood, Galveston County, Texas.

On June 15, 2018, Mother filed a petition to modify the parent-child relationship in the Scurry County trial court. She asserted that, since the date of the Agreed Order, the “circumstances of the children, a conservator, or other party affected by the [Agreed Order] ha[d] materially and substantially changed.” In her Second Amended Petition to Modify the Parent-Child Relationship, Mother asked that she and Father remain as “joint managing conservators of the children.” She asserted, however, that “[p]receding the filing of this suit, [Father] ha[d] engaged in a history or pattern of child abuse and neglect,” and she asked the trial court to “consider this conduct in appointing [her] as sole managing conservator or the parties as joint managing conservators.” Mother requested the exclusive right to designate the children’s primary residence, to be geographically restricted to Scurry County or contiguous counties. She requested that Father have access to the children in accordance with a Standard Possession Order and that she and Father have “independent rights” to make decisions about the children’s medical care and education.

On September 26, 2018, the Scurry County trial court issued a Temporary Order. It continued Mother and Father as joint managing conservators, but granted Mother the exclusive right to designate the children’s primary residence and to make decisions about the children’s education. It also granted each parent independent rights to consent to medical treatment and psychiatric care for the children and

granted each parent possession pursuant to a Standard Possession Order. It terminated Mother's obligation to pay child support and instead ordered that Father pay monthly child support in the amount of \$2,565.00.

Subsequently, the Scurry County trial court granted Father's motion to transfer the case to Galveston County.

The Galveston County trial court conducted a bench trial over the course of seven days, beginning on January 28, 2020. At trial, Mother testified that, at the time of the July 2017 Agreed Order, the children were living with Father in Snyder. Father worked as an emergency-room physician, and his job required him to travel to hospitals located in different Texas cities, including Nacogdoches. He was frequently not at home and utilized hired childcare. Mother noted that, at the time of trial, Father was still working at hospitals located in different Texas cities, including Nacogdoches, and he was still employing a nanny to care for the children when he worked during periods of possession.

Also at the time of the Agreed Order, Mother was living in Snyder with her boyfriend, Tanner Garcia. They were married days after the Agreed Order was rendered. Mother testified: "Tanner and I lived together until [the Agreed Order] was written and then we got married." She explained that "before we did live in the same home and the children when they came would stay with us both there; but when the Judge ordered us to be married—said that we couldn't do that, then we married

so that we wouldn't violate" the terms of the Agreed Order prohibiting cohabitation. Mother was working as a nurse and SANE (Sexual Assault Nurse Examiner) coordinator. Tanner was an officer at Snyder Police Department ("SPD").

Mother testified that, shortly after the rendition of the Agreed Order, Father began sending emails and text messages to her containing photographs and cell phone video of one or more of the children crying and asking for Mother. Mother testified that she believed that Father was prompting the children to cry and using them to retaliate against her for leaving. Mother testified that, on August 23, 2017, she filed a complaint with DFPS, alleging that Father had been "emotionally abusive" toward the children. She submitted copies of Father's emails and text messages to the investigator. The trial court admitted into evidence a DFPS Notice of Finding, in which DFPS stated that it had investigated Mother's complaint, made a "Finding" of "Ruled Out," and "closed" the investigation.

Mother testified that, in August 2017, Father enrolled M.B.D. in kindergarten in Snyder Independent School District ("ISD"), and the other two children were not yet school-age. In October 2017, Lacey Wall, a counselor at M.B.D.'s school, called and told Mother about information that a teacher had heard from M.B.D. Mother testified that she asked Lacey whether the school had reported the information to DFPS. On October 27, 2017, Snyder ISD made a report to DFPS about an

inappropriate-touching incident involving M.B.D. On October 30, 2017, M.B.D. was interviewed at The Children's Assessment Center ("CAC"), but made no outcry.

Mother testified that, in November 2017, M.B.D. "made an outcry of inappropriate touching" to Mother. Specifically, M.B.D., who was five years old, told her that A.W., who was seven years old, had inappropriately touched her. Mother noted that A.W. was a classmate at M.B.D.'s school and the son of Father's friend. Mother testified that M.B.D. "said that he touched her on top of her clothes. And when I questioned—I said, And then what happened? She said, that he touched her underneath her clothes as well." Mother took M.B.D. to the police station and filed a complaint against A.W.

The trial court admitted into evidence an SPD Incident Report, dated November 22, 2017. In the report, the investigator noted that Mother had stated that M.B.D., who was five years old, told her on November 18, 2017 that A.W., who was seven or eight years old, had touched her "private parts" while M.B.D. was at Father's house. Mother told the investigator that M.B.D. had initially stated that the touching had occurred under her clothes, and had later stated that it was on top of her clothes. Mother stated that she had "contacted the emergency room at Cogdell Memorial Hospital and was told that they would not perform a SANE [sexual assault] exam" on M.B.D. Mother stated that she contacted Father on November 21, 2017 to express concern about M.B.D. being around A.W. The report reflects that

SPD notified DFPS of the incident and that DFPS later reported that it had spoken with the children several times and that they had “never made an outcry.” The SPD report states that the incident was “exceptionally cleared.”

Mother further testified that she believed that M.B.D. had previously told Father about the touching by A.W. and that Father, as a medical doctor, had failed to report the incident. She asserted that such failure constituted a significant change in circumstances warranting a modification. Mother admitted, however, that she had not asked Father what M.B.D. had told him, she did not know whether M.B.D. had told Father that the touching had occurred under her clothes, and she did not know whether what was said “rose to the level of reporting.”

Mother also testified that Father withdrew M.B.D. from kindergarten over the school’s handling of the matter. He felt that the school was not protecting his daughter, and he intended to homeschool her. Father and the children then moved to Friendswood.

Mother testified that, in June 2018, she reported to DFPS that she had previously found blood in three-year-old E.B.D.’s underwear and lacerations and redness on her vagina. She also testified that E.B.D. had had eczema since she was born, that it became “really bad” when she was three years old, that a rash was on her “entire body” and “everywhere,” that eczema is “itchy,” and that the redness could have been from the eczema. The trial court admitted into evidence a video of

a June 5, 2018 CAC interview of the children. Throughout the interview, E.B.D. is shown incessantly scratching at her legs and thighs under her skirt. Mother testified that it was possible that E.B.D. had scratched her vagina. And, she took E.B.D. to a doctor, but the doctor did not find any bleeding or lacerations. Mother admitted that she had included in her June 2018 report to DFPS a complaint against Father for the content of a February 4, 2018 email that she knew was a joke and was not true. The trial court admitted into evidence an August 9, 2018 Notice of Findings on [DFPS] Investigation, stating it had investigated Mother's complaints and made a "Finding" of "Ruled Out." The Notice states that a finding of "Ruled Out" means that it "was reasonable to conclude that the alleged abuse or neglect did not occur."

Mother testified unequivocally throughout trial that she had not accused, and was not accusing, Father of any inappropriate touching or physical or sexual abuse of anyone. Rather, her sole accusation was that Father had been emotionally abusive to the children, based on the videos that she had complained about in August 2017.

Father testified that, at the time of the rendition of the Agreed Order in July 2017, he was traveling to work as an emergency-room physician and that he had been doing so since 2015. After July 2017, he continued to travel and work as an emergency-room physician. In November 2017, he moved with the children from Snyder to Friendswood. He still owned a house in Snyder and had a house in Friendswood. He worked in Nacogdoches, Big Spring, and Victoria, Texas. His

work schedule varied from month-to-month, and he typically worked 12- to 24-hour shifts at a time. He noted that he owned an airplane, typically traveled to work by air and automobile, and that the air commute between Friendswood and Nacogdoches was 45 minutes. He had employed certified childcare workers and a Pasadena ISD substitute school teacher to supervise the children while he was at work.

Father testified that the photographs and video forming the basis of Mother's August 2017 complaint to DFPS were taken prior to the rendition of the Agreed Order. He testified that he was not antagonizing the children or using them to hurt Mother. Rather, Mother rarely saw the children, and they were having a difficult time. In one video, M.B.D. was recovering from pneumomediastinum.¹ In another video, D.B.D. was being treated at a hospital for a cut on his head. The children were upset and missed Mother, and at other times they acted out. Father testified that he simply sent Mother videos of what was occurring in the children's lives.

Father testified that, sometime between October 31, 2017 and November 4, 2017, M.B.D. told him that "she was touched over her clothes on the groin and by a boy." She identified A.W. and stated that it had happened "only once." Father testified that, based on when the children were accessible to one another, he surmised

¹ Pneumomediastinum is a condition in which air is present in the space between the lungs. See *Pneumomediastinum*, 7 J. THORACIC DISEASE, Supp. 1, S44–S49 (Feb. 2015). It can involve shortness of breath and severe central chest pain. See *id.*

that the incident might have occurred on October 14, 2017, while he was at work, the nanny was off, and A.W.'s mother was supervising the children at Father's house in Snyder. Father stated that he discussed the matter with M.B.D. and told her that she would not be around A.W. again. And, he did not allow M.B.D. to be around A.W. thereafter. Father testified that he did not report the incident because a five-year-old stating that a seven-year-old touched her over her clothes one time was "not reportable" and "did not rise to the level of statutory reporting." He had no cause to believe that M.B.D. was harmed. When he learned that the school had previously known about the allegation and had conducted interviews of M.B.D. without notifying him, as the custodial parent, however, he withdrew her from the school.

After trial, on December 4, 2020, the trial court signed an Order in Suit to Modify Parent-Child Relationship. It ordered that the parties "remain joint managing conservators." It granted Mother "the exclusive right to designate the primary residence of the children within Scurry County, Texas or Galveston County, Texas," subject to certain geographic restrictions. It also granted Mother the exclusive right, after meaningful consultation with Father, to make decisions involving invasive medical or dental care, psychological treatment, and the children's education.

The trial court granted Father possession of the children pursuant to a Modified Possession Order, giving him possession every other week, but requiring

that, during the school term, the children “shall spend the night within Scurry County, Texas or a county contiguous.” The trial court ordered that Father pay monthly child support in the amount of \$2,565.00.

The trial court issued findings of fact and conclusions of law, in which it found that Mother had established that a material and substantial change of circumstances had occurred after the rendition of the Agreed Order in 2017, as follows:

- b. . . . [Father] has relocated from Scurry County, Texas to Friendswood, Texas, and that [Father] intended, at the time he relocated to Friendswood, Texas, to establish his primary residence in Galveston County, Texas.
- c. Further, [Mother] has married Tanner Garcia since July 19, 2017, the date of the original Order, and [Mother] has given birth to two (2) children with her spouse, Tanner Garcia, since July 19, 2017, the date of the original Order, which children are the half-siblings of the children the subject of this suit.
- d. [M.B.D.] was enrolled by [Father] for Kindergarten in Snyder [ISD] for the 2017–18 school year. On or about October 30, 2017, [Father] checked the child out of school early and notified the school that the child, [M.B.D.], would not be returning to school at Snyder [ISD]. Thereafter, [Father] “homeschooled” the children, and [M.B.D.] was enrolled in the Texas Tech University school for children for a period of time.

. . . .

- g. [Father] was notified of inappropriate touching of the child, [M.B.D.], and that [Father] did not notify authorities or comply with the mandated reporting of such an incident, despite his position as a licensed M.D. which mandates the reporting of such incidents.
- h. [Father’s] relocation and change of residence to Friendswood, Texas, has caused [Mother] to incur increased costs when [Mother] is required to transport the children to the residence of [Father] before and/or after a period of possession.

- i. [Father's] profession as a Medical Doctor, and his current employment, require[s] him to travel to different cities across the State of Texas to render his employment services. As such, [Father's] schedule is inconsistent and he commonly works 24-hour shifts, not allowing himself to be available during those shifts to care for the children.

The trial court concluded that it was in the best interest of the children that the parties remain joint managing conservators, but that Mother be granted the exclusive right to designate the primary residence of the children, to be within Scurry or Galveston County, and that she be granted the exclusive right, after meaningful consultation with Father, to make decisions involving invasive medical or dental care, psychological treatment, and education. After finding that Father had a history of traveling between Scurry County and Friendswood during his periods of possession of the children, the trial court concluded that it was in the best interest of the children that Father's periods of possession during the regular school term be exercised within Scurry County, or those contiguous, on nights immediately preceding school days. The trial court concluded that Father pay reasonable child support in the amount of \$2,565.00 monthly.

Modification

In his first and second issues, Father argues that the trial court erred in modifying the Agreed Order because the evidence is legally and factually insufficient to support the trial court's finding of a material and substantial change of circumstances. He asserts that the trial court erred in finding changes that were

anticipated at the time of the Agreed Order. In his third issue, Father asserts that the trial court's modifications are not connected to, or limited to, the change of circumstances it found.

Standard of Review

Trial courts have wide discretion in determining issues of custody, control, possession, support, and visitation matters involving children. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *In re K.R.P.*, 80 S.W.3d 669, 674 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Most of the appealable issues in a family-law case are reviewed for an abuse of discretion. *Reddick v. Reddick*, 450 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2014, no pet.). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). A trial court also abuses its discretion if it fails to analyze or apply the law correctly. *Id.*

Under an abuse-of-discretion standard, legal and factual sufficiency challenges are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion. *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). We consider (1) whether the trial court had sufficient information upon which to exercise its discretion and (2) whether it erred in applying its discretion. *Id.* Under the first prong, we consider the traditional sufficiency review. *Echols v. Olivarez*, 85 S.W.3d 475, 478 (Tex.

App.—Austin 2002, no pet.). Under the second, we consider, based on the evidence, whether the trial court’s decision was arbitrary or unreasonable. *Id.*

A party challenging the legal sufficiency of the evidence supporting a finding on which he did not have the burden of proof must show that no evidence supports the adverse finding. *Guimaraes v. Brann*, 562 S.W.3d 521, 549 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). A “no evidence” challenge may be sustained if: (1) the record shows a complete absence of evidence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). We consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Id.* at 821–22.

When an appellant challenges the factual sufficiency of an adverse finding on an issue on which he did not have the burden of proof, he must demonstrate that the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). In a bench trial, the trial court is the sole judge of the witnesses’ credibility and of the weight to be given their testimony. *Townsend v. Vasquez*, 569 S.W.3d 796, 807–08 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

A trial court’s findings of fact have the same force and dignity as a jury’s answers, and we review the sufficiency of the evidence supporting those findings using the same standards that we apply to jury findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When the appellate record contains a reporter’s record, as here, findings of fact on disputed issues are not conclusive and may be challenged for evidentiary sufficiency. *Hertz Equip. Rental Corp. v. Barousse*, 365 S.W.3d 46, 53 (Tex. App.—Houston [1s Dist.] 2011, pet. denied). We review the trial court’s legal conclusions de novo. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Smith v. Karanja*, 546 S.W.3d 734, 738 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Legal Principles

It is well-established that, as a matter of public policy, “there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of re-litigation [of conservatorship matters] should be discouraged.” *Knowles v. Grimes*, 437 S.W.2d 816, 817 (Tex. 1969); see TEX. FAM. CODE § 153.001(a)(2) (declaring that public policy of this state is to provide stable environment for children). 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 (1) the “circumstances of the child, a

conservator, or other party affected by the order have materially and substantially changed” since, as applicable here, the date of the rendition of the order at issue and (2) modification would be in the best interest of the child. TEX. FAM. CODE § 156.101(a)(1). “The change-in-circumstances requirement is a threshold issue for the trial court and is based on a policy of preventing constant re-litigation with respect to children.” *Smith*, 546 S.W.3d at 738.

For the party seeking modification to prove that a material and substantial change in circumstances has occurred since the original order, “the evidence must show the conditions that existed at the time of the prior order as compared to the conditions that existed at the time of the hearing on the motion to modify.” *In re K.D.B.*, No. 01-18-00840-CV, 2019 WL 4065276, at *7 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, no pet.) (mem. op.). Once provided with evidence of both sets of circumstances, the trial court must compare the two to determine whether a substantial and material change has occurred. *In re T.M.P.*, 417 S.W.3d 557, 563 (Tex. App.—El Paso 2013, no pet.). Without evidence of both the historical and the current relevant circumstances, “the court has nothing to compare and cannot determine whether a change has occurred.” *Zeifman v. Michels*, 212 S.W.3d 582, 594 n.1 (Tex. App.—Austin 2006, pet. denied).

Determining whether changed circumstances are material and substantial is fact-specific and “not guided by rigid rules.” *Id.* at 593. Courts have found

substantial and material changes with respect to: (1) a change in the home surroundings; (2) a party's remarriage, (3) a party's poisoning of a child's mind, (4) a parent or step-parent's mistreatment of a child, and (5) a parent's becoming an improper person to exercise custody. *Smith*, 546 S.W.3d at 741.

Further, the relief that the trial court grants must be somehow connected to the changed circumstances. *Id.* at 741–42 (noting that remarriage “may require some changes but does not mean that the trial court may now modify other provisions in the original divorce decree unrelated to the remarriage”).

A trial court's best-interest determination is also fact-specific and may be guided by such nonexclusive factors as:

- (1) the desires of the child;
- (2) the emotional and physical needs of the child now and in the future;
- (3) the emotional and physical danger to the child now and in the future;
- (4) the parental abilities of the individual seeking custody;
- (5) the programs available to assist the individual to promote the best interest of the child;
- (6) the plans for the child by the individual or by the agency seeking custody;
- (7) the stability of the home or proposed placement;
- (8) the acts or omissions of the parent, or potential conservator, that may indicate that the existing relationship is not a proper one; and
- (9) any excuse for the acts or omissions of the parent or potential conservator.

Mauldin v. Clements, 428 S.W.3d 247, 269 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976)).

Material and Substantial Change

In his first and second issues, Father argues that the trial court erred in modifying the Agreed Order because the evidence is legally and factually insufficient to support the trial court’s finding of a material and substantial change of circumstances. He asserts that the trial court’s findings include changes of circumstances that were anticipated at the time of the Agreed Order.

The trial court found that the circumstances of the children, Father, or Mother had “material and substantially changed” since the July 19, 2017 Agreed Order, based on: (1) Mother’s remarriage; (2) Father’s relocation; (3) Father’s work schedule; (4) M.B.D.’s education; and (5) a failure to report abuse.

1. *Mother’s Remarriage*

The trial court found:

- c. . . . [Mother] has married Tanner Garcia since July 19, 2017, the date of the original Order, and [Mother] has given birth to two (2) children with her spouse, Tanner Garcia, since July 19, 2017, the date of the original Order, which children are the half-siblings of the children the subject of this suit.

A parent’s remarriage can constitute a pertinent factor in determining whether a material and substantial change has occurred. *In re E.M.*, No. 02-18-00351-CV, 2019 WL 2635565, at *7 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem.

op.). However, the mere fact of remarriage is not sufficient, standing alone, to justify the modification of a prior custody order. *Id.* “[I]t is not the fact of change that drives a modification but whether these changes are material and substantial changes in the parenting arrangement.” *Id.* at *6. Thus, “[n]ew marriages may qualify if they are shown to affect the parent-child relationship.” *In re A.T.E.*, No. 01-19-00481-CV, 2020 WL 5790417, at *5 (Tex. App.—Houston [1st Dist.] Sept. 29, 2020, no pet.) (mem. op.).

The record shows that, at the time of the Agreed Order, Mother was living with Tanner in Snyder. Mother testified: “Tanner and I lived together until [the Agreed Order] was written and then we got married.” She explained that “before we did live in the same home and the children when they came would stay with us both there; but when the Judge ordered us to be married—said that we couldn’t do that, then we married so that we wouldn’t violate” the terms of the Agreed Order prohibiting cohabitation. At the time of trial, Mother and Tanner were living together as a married couple in Snyder.

Mother’s marriage to Tanner, without more, is not evidence of a material and substantial change. *See In re E.M.*, 2019 WL 2635565, at *7. “Although courts have allowed changes to be prove[n] in a variety of ways, they have consistently required that a change be prove[n] and that it be shown to be substantial and material.” *Zeifman*, 212 S.W.3d at 593. The evidence shows that, at the time of the

rendition of the Agreed Order, Mother and Tanner had already been living together and that the children were already staying with both of them when they visited. There was no evidence presented of a materially and substantially changed circumstance. See TEX. FAM. CODE § 156.101(a)(1); *In re A.T.E.*, 2020 WL 5790417, at *5; *In re E.M.*, 2019 WL 2635565, at *7 (“Dad does not explain how Mom remarrying constitutes a material and substantial change.”).

2. *Father’s Relocation*

The trial court found:

- b. . . . [Father] has relocated from Scurry County, Texas to Friendswood, Texas, and that [Father] intended, at the time he relocated to Friendswood, Texas, to establish his primary residence in Galveston County, Texas.

. . . .

- h. [Father’s] relocation and change of residence to Friendswood, Texas, has caused [Mother] to incur increased costs when [Mother] is required to transport the children to the residence of [Father] before and/or after a period of possession.

The record shows that, at the time of the July 2017 Agreed Order, Father and Mother lived in Scurry County. The terms of the Agreed Order granted Father the “exclusive right to designate the primary residence of the children within the State of Texas for one year” and, “thereafter, with no geographic restriction.” In November 2017, Father and the children moved to Galveston County. At trial, Mother testified:

Q. So, in July of 2017, not only did you agree that [the children] should live with [Father], you agreed that there would be a domicile restriction to the entire state of Texas for one year, correct?

A. Yes.

Q. *And so it was contemplated in June of 2017 that [Father] may move outside of Snyder, right?*

A. Yes.

Q. *And, in fact, it was contemplated in 2017 that after one year [Father] may move to anywhere in the United States, right?*

A. Yes.

Q. *And you agreed to that, correct?*

A. Yes.

....

Q. You said in October [Father] contacted you and said he was moving to Friendswood, right?

A. Yes.

....

Q. So, he moved to Friendswood, right?

A. Yes.

Q. *And a move that you knew about and you knew it was contemplated in July when you agreed to it, right?*

A. Yes.

(Emphasis added.)

Whether a change in residency constitutes a material and substantial change of circumstances depends on the facts of the case. *In re T.M.P.*, 417 S.W.3d at 564. However, “[i]f a circumstance was sufficiently contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but instead an

anticipated circumstance that cannot be evidence of a material or substantial change of circumstances.” *Smith*, 546 S.W.3d at 740; see *Wiese v. AlBakry*, No. 03-14-00799-CV, 2016 WL 3136874, at *4 (Tex. App.—Austin June 1, 2016, no pet.) (mem. op.) (“[A] change in circumstance may be so anticipated and factored into the original decree that the eventuality of the change does not constitute a material or substantial change of circumstances.”)).

Because the evidence shows that Father’s move out of Scurry County was authorized in the Agreed Order and anticipated at the time of its rendition, his relocation to Galveston County four months later does not constitute evidence of materially and substantially changed circumstances. See *Smith*, 546 S.W.3d at 740; *Hoffman v. Hoffman*, No. 03-03-00062-CV, 2003 WL 22669032, at *6 (Tex. App.—Austin Nov. 13, 2003, no pet.) (mem. op.) (holding that because parties anticipated mother’s move at time of rendition of decree, such did not constitute evidence of material and substantial change of circumstances).

3. *Father’s Work Schedule*

The trial court found:

- i. [Father’s] profession as a Medical Doctor, and his current employment, require[s] him to travel to different cities across the State of Texas to render his employment services. As such, [Father’s] schedule is inconsistent and he commonly works 24-hour shifts, not allowing himself to be available during those shifts to care for the children.

The record shows that Mother testified that, at the time of the July 2017 Agreed Order, Father was traveling to hospitals located in different Texas cities, including Nacogdoches, for work. And, at the time of trial, Father was still traveling to Nacogdoches for work. She testified that, when Father traveled for work in July 2017, he had employed a nanny to care for the children. And, at the time of trial, Father was still employing a nanny to care for the children while he worked.

Father testified that, at the time of the Agreed Order, he was traveling to work as an emergency-room physician and that he had been doing so since 2015. After July 2017, he continued to travel and work as an emergency-room physician. His work schedule varied from month-to-month, and he typically worked 12- to 24-hour shifts at a time. He noted that he owned an airplane, typically traveled to work by air and automobile, and that the air commute between Friendswood and Nacogdoches was 45 minutes. He had employed certified childcare workers and a substitute school teacher to supervise the children while he was at work.

Thus, there was no evidence presented of a change in Father's work schedule. See TEX. FAM. CODE § 156.101(a)(1); *In re K.D.B.*, 2019 WL 4065276, at *7.

4. *M.B.D.'s Education*

The trial court found:

- d. [M.B.D.] was enrolled by [Father] for Kindergarten in Snyder [ISD] for the 2017–18 school year. On or about October 30, 2017, [Father] checked the child out of school early and notified the school that the child, [M.B.D.], would not be returning to

school at Snyder [ISD]. Thereafter, [Father] “homeschooled” the children, and [M.B.D.] was enrolled in the Texas Tech University school for children for a period of time.

The terms of the July 2017 Agreed Order included that Father had the “exclusive right to make decisions concerning the children’s education,” with notice to Mother. At the time of the Agreed Order, M.B.D. was at home and had not yet started school. Rather, M.B.D. turned five years old in May 2017, and Father enrolled her in kindergarten for the 2017–18 school year in August 2017. Father testified that, when he learned that the school had conducted interviews with M.B.D. in October 2017 without notifying him, as the custodial parent, he withdrew M.B.D. from the school to homeschool her. In November 2017, Father moved with the children to Friendswood. Father testified that, also beginning in November 2017, he employed a substitute teacher from Pasadena ISD to care for the children.

It was clearly anticipated in July 2017 that M.B.D. would begin kindergarten in August 2017, and such fact cannot serve as evidence of a material and substantial change of circumstances. *See Wiese*, 2016 WL 3136874, at *4 (“[T]he change in the children’s ages and the fact that they have now begun school are circumstances clearly anticipated by the parties at the time of the original decree and cannot serve as the basis for the trial court’s material-and-substantial-change determination.”). A change in educational *needs* can constitute a material and substantial change. *Zeifman*, 212 S.W.3d at 593 (“Increase in age alone is not a changed circumstance

to justify modification unless changed needs are shown.”); *see, e.g., In re M.C.K.*, No. 14-17-00289-CV, 2018 WL 1955065, at *7 (Tex. App.—Houston [14th Dist.] Apr. 26, 2018, no pet.) (mem. op.) (noting that father presented evidence that child’s educational and social needs were not being met in homeschooling environment, child would not, or could not, discuss what she was learning, and mother was not adhering to established curriculum).

Here, however, Mother did not present any evidence of a material and substantial change. *See* TEX. FAM. CODE § 156.101(a)(1); *Zeifman*, 212 S.W.3d at 593. Mother did not present any evidence that M.B.D.’s educational and social needs were not being met in the homeschooling environment or that Father was not adhering to an established curriculum. *Cf. In re M.C.K.*, 2018 WL 1955065, at *7.

5. *Failure to Report*

The trial court found:

- g. [Father] was notified of inappropriate touching of the child, [M.B.D.], and that [Father] did not *notify authorities or comply with the mandated reporting* of such an incident, despite his position *as a licensed M.D.* which mandates the reporting of such incidents.

(Emphasis added.)

Mother asserted that, after M.B.D. told Father that A.W. had touched her, Father failed in his mandatory duty as a medical doctor to report the incident.

Mother asserted that such failure constituted a significant change in circumstances warranting a modification of the Agreed Order.

Father testified that, sometime between October 31, 2017 and November 4, 2017, M.B.D. told him that “she was touched over her clothes on the groin and by a boy” and she identified A.W. Father discussed the matter with M.B.D. and told her that she would not be around A.W. again. And, he did not allow M.B.D. to be around A.W. thereafter. Father testified that he did not report the incident because a five-year-old stating that a seven-year-old touched her over her clothes one time was “not reportable.” Further, “it did not rise to the level of statutory reporting.” He had no cause to believe that M.B.D. was harmed.

Family Code section 261.101, “Persons Required to Report; Time to Report,” provides, in pertinent part, that:

- (a) A person having *reasonable cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse* or neglect by any person shall immediately make a report as provided by this subchapter.
- (b) If a professional has *reasonable cause to believe that a child has been abused* or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has reasonable cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. . . .

TEX. FAM. CODE § 261.101 (emphasis added); *see id.* § 261.001 (defining “abuse”). Generally, a report must be made to a local or state law enforcement agency or to DFPS. *Id.* § 261.103.

The Family Code provides that a person or professional who fails in a duty to report abuse under section 261.101 is subject to penalties under criminal law. *See id.* § 261.109. Thus, enforcement of section 261.101 is the responsibility of the appropriate prosecuting attorney. *See Colt v. Hamner*, No. 05-04-00294-CV, 2005 WL 834098, at *2 (Tex. App.—Dallas Apr. 12, 2005, no pet.) (mem. op.). There is no evidence in this case that Father has been found guilty of such a failure to report.

An alleged failure to report under section 261.101 will not support a private individual’s civil cause of action. *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (declining to adopt section 261.101 as “establishing a duty and standard in tort” and holding that plaintiff-parents could not maintain claim in negligence per se based on allegation that defendant failed to report child abuse); *Colt*, 2005 WL 834098, at *2 (holding plaintiff could not prevail in her defamation suit “on the ground that [defendant] ‘broke’ section 261.101”); *see also de la Torre v. de la Torre*, 613 S.W.3d 307, 312–13 (Tex. App.—Austin 2020, no pet.) (noting that section 261.101 does not “create private causes of action”); *Doe v. S&S Consol. I.S.D.*, 149 F.Supp.2d 274, 299 (E.D. Tex. 2001) (noting that section 261.101 “does not on its face create a statutory civil cause of action” and holding that plaintiff could not

maintain civil action against defendant for failure to report child abuse). Thus, Mother's *allegation* that Father violated section 261.101 is not evidence of a material and substantial change in circumstances. *See* TEX. FAM. CODE § 156.101(a)(1).

We conclude that the evidence is legally insufficient to support the trial court's findings of a material and substantial change of circumstances. Because Mother did not make her threshold showing of a material and substantial change, we hold that the trial court abused its discretion in modifying the Agreed Order.

We sustain the portion of Father's first and second issues, in which he challenges the legal sufficiency of the evidence supporting the modification. Accordingly, we do not reach his remaining issues.

Conclusion

We reverse the trial court's December 4, 2020 Order in Suit to Modify Parent-Child Relationship and remand for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.