NUMBER 13-16-00005-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF T.A.M., A CHILD

On appeal from the 94th District Court
of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Rodriguez

We issued a memorandum opinion in this case on January 26, 2017, affirming the trial court's judgment in all respects. Appellant subsequently filed an amended motion for rehearing. Without changing our previous disposition, we deny the motion for rehearing but withdraw our prior memorandum opinion and judgment and substitute the following memorandum opinion and accompanying judgment in their place.

The parties in this case are appellee A.M. and appellant J.F.L., the parents of T.A.M. J.F.L. brings three issues on appeal. By her first two issues, J.F.L. argues that

the trial court erred in granting A.M.'s petition to modify child support and denying J.F.L.'s petition to modify custody. By her third issue, J.F.L. argues that the judge erred by denying her motion to recuse. We affirm.

I. BACKGROUND

This suit began in 2012, when both J.F.L. and A.M. filed competing petitions to modify the parent-child relationship. Both petitions were ultimately tried to the bench in March 2015. An order of modification was entered October 2015, by which time T.A.M. was eleven years old.

This was the second time J.F.L. and A.M. sought modification of their respective parent-child relationships. The first modification case was tried in 2011, and it resulted in both parents retaining joint managing conservator status and many of the same rights they had been entitled to under the original decree of divorce. But the 2011 order granted A.M. two exclusive rights which had previously been held by J.F.L.: "the exclusive right to designate the primary residence of the child within Nueces County, Texas" and "the exclusive right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child." However, the trial court ordered that J.F.L. would pay no child support "at this time" in consideration of the "agreement of the parties and the circumstances of J.F.L. . . . ." According to A.M.'s testimony, he had agreed that J.F.L. should pay no child support until she was able to support herself.

On August 20, 2012, J.F.L. filed a petition to modify A.M.'s exclusive residence-designation rights under the 2011 order. J.F.L. had moved from Rockport to Austin,

obtained a job, and proposed a modification of custody to allow T.A.M. to live with her. Throughout the litigation, J.F.L. cited this new job and other positive developments in her financial affairs as a basis for modification of custody. According to J.F.L., these changes qualified as a "material and substantial change in circumstances" under the Texas Family Code, and she further argued that a modification of custody was in the best interest of T.A.M. J.F.L. also requested child support.

A.M. filed a counter-petition seeking to modify child support from the agreed amount of $0 per month to an amount within the child support guidelines.

The case was transferred from the Aransas County Court to the 94th District Court in Nueces County, the Honorable Bobby Galvan presiding. J.F.L. filed a motion to recuse Judge Galvan, which he denied. The allegations and evidence related to this motion are set forth separately in Section IV, *infra*.

During the bench trial, A.M. acknowledged J.F.L.'s new job and prosperity but argued that there was no material and substantial change of circumstances to warrant a modification of custody. However, he urged that in light of J.F.L.'s improved financial condition, there was a material and substantial change in *financial* circumstances and that J.F.L. should be ordered to pay child support consistent with the state guidelines.

After the trial, Judge Galvan entered a finding that J.F.L. had failed to prove a material and substantial change in circumstances since the 2011 order "that would support a change in the conservator designated as having the exclusive right to establish the primary residence of the child." However, Judge Galvan also entered a finding that A.M. "proved that the *financial* circumstances . . . have materially and substantially

changed since the date of rendition of the order to be modified . . . sufficient to support an increase in the amount of child support" which J.F.L. was required to pay. (Emphasis added). Ultimately, Judge Galvan denied J.F.L.'s motion to modify custody but granted A.M.'s motion to modify child support, ordering J.F.L. to pay $499 per month. This appeal followed.

II. MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES

By her first issue, J.F.L. focuses on whether there was a material and substantial change in circumstances of the child, a conservator, or one affected by the order—which is a precondition for modification of child custody or child support. As a general proposition, J.F.L. argues that a change in circumstances related to child support is necessarily a change in circumstances for custody as well. She frames this proposition in two ways. Her first argument is that when A.M. pleaded there was a change in circumstances for one purpose, he judicially admitted a change of circumstances for all other purposes, including custody. J.F.L.'s second argument is that because the trial court found a material change as to child support but not as to custody, this shows an arbitrary, internal inconsistency that qualifies as an abuse of discretion.

A. Applicable Law

When the parties have agreed to a child support order that is different from the amount required by the child support guidelines, the trial court has discretion to modify the support 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) (West, Westlaw through 2015 R.S.); *In re P.C.S.*, 320

S.W.3d 525, 530 (Tex. App.—Dallas 2010, pet. denied). The party seeking a modification of child support has the burden to show the requisite change in circumstances. *In re C.C.J.*, 244 S.W.3d 911, 918 (Tex. App.—Dallas 2008, no pet.). An order modifying child support will not be overturned unless the trial court clearly abused its discretion. *See Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011).

The court may modify an order 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 (West, Westlaw through 2015 R.S.). "Thus, any person who seeks to modify an existing custody order must show (1) changed circumstances and (2) that modification would be a positive improvement for the child." *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000). We reverse a trial court's order on custody modification only when it appears from the record as a whole that the trial court abused its discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *see In re C.R.O.*, 96 S.W.3d 442, 446 (Tex. App.—Amarillo 2002, pet. denied).

The test for abuse of discretion is whether the trial court ruled arbitrarily, unreasonably, without regard to guiding legal principles, or without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). As to ruling without supporting evidence, the trial court does not abuse its discretion if some evidence in the record

reasonably supports the trial court's decision. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002). We apply an abuse of discretion standard because the trial court is in the best position to observe the character of the evidence, the demeanor of the witnesses, and those influences which cannot be discerned from the record. *In re H.S.N.*, 69 S.W.3d 829, 831 (Tex. App.—Corpus Christi 2002, no pet.). Under this standard, we review the "evidence in a light most favorable to the court's decision and indulge every legal presumption in favor of its judgment." *In re J.I.Z.*, 170 S.W.3d 881, 883 (Tex. App.—Corpus Christi 2005, no pet.).

Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact. *Id.* Generally, one party's "allegation of changed circumstances of the parties constitutes a judicial admission of the common element of changed circumstances of the parties in the other party's similar pleading." *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.); *In re L.C.L.,* 396 S.W.3d 712, 718 (Tex. App.—Dallas 2013, no pet.); *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ); *Thompson v. Thompson*, 827 S.W.2d 563, 566 (Tex. App.—Corpus Christi 1992, writ denied).

B. Discussion

In her first argument, J.F.L. contends that A.M. judicially admitted a material change in circumstances in his pleadings by stating that "[t]he circumstances of the child

or a person affected by the order have materially and substantially changed since the date of the rendition of the order to be modified . . . ." In her brief, J.F.L. effectively argues that we should disregard those portions of A.M.'s petition wherein he qualifies his claim by pleading a material change in circumstances as to "support." J.F.L. relies on *In re A.E.A.* and the cases cited therein as support for her argument that this constituted a judicial admission. *See* 406 S.W.3d at 410–411.

We find these cases to be distinguishable. As a group, these cases address a very different situation: one wherein a party seeks to modify a particular aspect of the parent-child relationship, and the other party files a counter-petition seeking to modify the very same aspect of the relationship. *See id.* When, in such situations, one party clearly and unequivocally alleges a material change of circumstances as to that aspect of the relationship, this Court has naturally held that a judicial admission has occurred and barred the admitting party from later disputing a change as to that aspect. *See Thompson*, 827 S.W.2d at 566.

However, this Court has recognized a distinction from the general rule in cases where parties seek modification of wholly *different* aspects of the parent-child relationship which are governed by different requirements and "circumstances." *See Snider v. Grey*, 688 S.W.2d 602, 606 n.3 (Tex. App.—Corpus Christi 1985, writ dism'd). In *Snider*, the mother claimed that the father had judicially admitted changed circumstances for all purposes. *Id.* We disagreed. *Id.* The father had pleaded that there was a material change of circumstances which authorized a modification of the mother's visitation privileges, while keeping the custody arrangements the same. *Id.* The mother had

sought to prove a change in circumstances which warranted changing custody entirely. *Id.* We recognized that the "prerequisite proof to justify modification of visitation is not the same required for a change of custody." *Id.* We therefore did "not agree that the parties' respective pleadings stipulated to the effect that the movant (mother) need not prove up this key element to warrant a change of custody . . . ." *Id.* Though the statutory phrase "material change in circumstances" applied to each party's motion, visitation was governed by different circumstances and requirements than those which governed an outright change in custody. *See id.* Thus, pleading one did not result in judicial admission of the other. *See id.* Or, put into the terms used by the Fort Worth court, the parties were not truly discussing a "common element" in "similar pleading[s]." *See In re A.E.A.*, 406 S.W.3d at 410.

As in *Snider*, we observe here that child support is governed by different circumstances and requirements than those which govern custody. *See* 688 S.W.2d at 606 n.3. The circumstances related to child support deal mostly with finances. "Without evidence setting out the *financial circumstances* of the parties at the time the original decree of divorce was entered, or the *financial circumstances* of the parties at the time of the hearing on the motion to modify," the court cannot determine whether there has been a material and substantial change as to child support. *Melton v. Toomey*, 350 S.W.3d 235, 238 (Tex. App.—San Antonio 2011, no pet.) (quoting *Cole v. Cole*, 882 S.W.2d 90, 92 (Tex. App.—Houston [14th Dist.] 1994, writ denied)) (emphasis added); *see In re C.C.J.,* 244 S.W.3d at 917 (same); *see also In re A.J.K.P.*, No. 13-13-00414-CV, 2014 WL 3731743, at *2 (Tex. App.—Corpus Christi July 24, 2014, no pet.) (mem. op.) (same).

The family code itself provides that the trial court may consider the financial considerations which are set out in the child support guidelines to determine whether there has been a material or substantial change of circumstances that warrants a modification of an existing child support order. *See* TEX. FAM. CODE ANN. § 156.402 (West, Westlaw through 2015 R.S.); *see also id.* § 154.123 (West, Westlaw through 2015 R.S.) (specifying the considerations which may warrant a departure from the guidelines, which include expenses for the child's education and health care; the obligee's net resources, income, and investments; and the relevant expenses and liabilities of either party, including day care, alimony, and garnishment; etc.).

By comparison, the custody inquiry is not oriented towards one particular class of considerations such as finances. *See In re C.C.J.*, 244 S.W.3d at 919; *In re T.W.E.*, 217 S.W.3d 557, 559 (Tex. App.—San Antonio 2006, no pet.); *see*, *e.g.*, *In re K.L.R.*, 162 S.W.3d 291, 307–08 (Tex. App.—Tyler 2005, no pet.) (upholding a finding of changed circumstances regarding custody because mother had debilitating health problems, had remarried and divorced, she had been incarcerated for felonies, had failed to appear at custody hearings, had been forced to move from her previous residence, and had refused father's offer of visitation, and child thrived during father's temporary custodianship). In a custody modification proceeding, the trial court is not confined "by rigid rules," but conducts a broad, "fact-specific" inquiry which may encompass any major changes that affect the child's emotional and physical well-being or the parent's ability to support that well-being. *See In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *In re C.C.J.*, 244 S.W.3d at 919; *In re T.W.E.*, 217 S.W.3d at 559; *Zeifman*

v. Michels, 212 S.W.3d 582, 593 (Tex. App.—Austin 2006, pet. denied). For instance, in cases dealing with modification of the custodial right to determine the child's residence, it has been held that material changes may include categories as diverse as:

> (1) the marriage of one of the parties, (2) poisoning of a child's mind by one of the parties, (3) change in the home surroundings, (4) mistreatment of a child by a parent or step-parent, or (5) a parent's becoming an improper person to exercise custody.

See Arredondo v. Betancourt, 383 S.W.3d 730, 734–35 (Tex. App.—Houston [14th Dist.] 2012, no pet.). This list is non-exhaustive. *Id.* In a somewhat related relocation case, the Texas Supreme Court has acknowledged the potential relevance of many different factors as part of a "fluid balancing test":

- reasons for and against the move; education, health, and leisure opportunities; accommodation of special needs or talents of the children; effect on extended family relationships; effect on visitation and communication with the noncustodial parent; the noncustodial parent's ability to relocate;

- parent's good faith in requesting the move; continuation of a meaningful relationship with the noncustodial parent; economic, emotional, and education enhancement for the children and the custodial parent; effect on extended family relationships; and

- employment and education opportunities of the parents; the ages of the children; community ties; health and educational needs of the children.

In re C.R.O., 96 S.W.3d 442, 449 (Tex. App.—Amarillo 2002, pet. denied) (summarizing *Lenz v. Lenz*, 79 S.W.3d 10, 14–17 (Tex. 2002)) (internal citations omitted).

Applying these principles to the matter at hand, we note that A.M.'s claim of changed circumstances was somewhat qualified: at the same time A.M. pleaded that a material change had occurred as to "support," he filed an answer which denied that a material change had otherwise occurred for custodial purposes. In light of the different

circumstances and requirements which apply to custody and child support, we cannot agree with J.F.L.'s first argument that A.M. judicially admitted a material change for all purposes. *See Snider*, 688 S.W.2d at 606 n.3; *cf. Thompson*, 827 S.W.2d at 566.

The same principles guide our evaluation of J.F.L.'s second argument: that the trial court abused its discretion by entering an internally inconsistent order. Given that child support is governed by different circumstances and requirements than those which govern custody, we cannot say that the trial court acted in an arbitrary fashion by finding changed circumstances as to child support but not as to custody. *See Bocquet*, 972 S.W.2d at 21. Instead, the evidence in the record reasonably supports the trial court's finding of changed circumstances as to one but not the other.

The evidence in the record supports the trial court's findings of fact that A.M. carried his burden to prove "that the financial circumstances of . . . a conservator . . . have materially and substantially changed" since the original order of February 2, 2011, warranting a change in child support payments. *See In re C.C.J.*, 244 S.W.3d at 918. The trial court cited one changed circumstance in particular as a basis for modifying child support: that J.F.L. was unemployed in 2011 but had a job as of the 2015 modification trial. Based on the change in income, the trial court found that ordering J.F.L. to pay $499.39 per month was within the child support guidelines. *See* TEX. FAM. CODE ANN. § 154.122 (West, Westlaw through 2015 R.S.) ("The amount of a periodic child support payment established by the child support guidelines in effect in this state at the time of the hearing is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child.").

Furthermore, J.F.L. herself points to other evidence of a change in the parties' financial circumstances: J.F.L. "had public housing before and now has her own home"; A.M. "agreed to waive child support before but not now"; and A.M. "was the financially responsible parent at the first trial" but there was evidence that, after providing for T.A.M. without any child support for almost five years, A.M.'s financial situation was in jeopardy by the time of the second trial. There is evidence in the record reasonably supporting the trial court's decision as to child support. *See Butnaru*, 84 S.W.3d at 211.

The evidence in the record also supports the trial court's finding that J.F.L. had not carried her burden to prove a material change in custody-related circumstances. *See In re V.L.K.*, 24 S.W.3d at 342. In addition to the changed financial circumstances listed above, J.F.L. also presented the trial court with evidence of changes in non-financial circumstances, including and especially the newly presented evidence of T.A.M.'s wishes. At the first trial, no evidence was allowed on T.A.M.'s wishes. At the second trial, J.F.L. presented the testimony of a child psychologist who had visited with T.A.M. multiple times. J.F.L. and the child psychologist both testified that T.A.M. now wished to live with J.F.L. in Austin. They also testified that T.A.M. felt free to be himself with J.F.L. but not with A.M., that T.A.M. felt J.F.L. was sensitive and supportive whereas A.M. could be angry and gruff, and that J.F.L. had worked very hard to be as involved in T.A.M.'s life as possible whereas A.M. had not done so.

However, the child psychologist also stated her belief that it was inappropriate to give a child "the choice of who they stay with." The psychologist instead believed "that the parent should look at their personal strengths or situations and decide what the best

possession schedule is for a child."[1] The trial court also heard contrary testimony regarding many circumstances which had not changed and which favored T.A.M.'s continued residence in Nueces County. This included testimony that Nueces County remained the home of his father, all of his friends, and nearly all of his extended family, including a favorite aunt, with whom he also felt "free to be himself." Nueces County was the location of his school, his church, and where he had lived virtually all of his life—in the same home where he was raised. Amid this conflicting evidence, the trial court rendered a decision which was reasonably supported by some substantive proof in the record. *See Butnaru*, 84 S.W.3d at 211.

The evidence in the record supports the trial court's finding that A.M. demonstrated a change in the narrower realm of "financial circumstances," *see In re C.C.J.*, 244 S.W.3d at 918, but that J.F.L. had not carried her burden to prove a material change in the broader realm of custody-related circumstances. *See In re V.L.K.*, 24 S.W.3d at 342. Viewing the evidence in a light most favorable to the court's decision and indulging every legal presumption in favor of its judgment, we cannot say that the trial court clearly abused its discretion. *In re J.I.Z.*, 170 S.W.3d at 883.

We overrule J.F.L.'s first issue.

III. ALTERNATE GROUNDS FOR MODIFICATION OF CHILD SUPPORT

In her second issue, J.F.L. challenges the trial court's reliance, in the alternative,

[1] We further note that T.A.M. was then only ten years old and that this evidence did not come to the trial court through T.A.M. himself, but instead came by way of an intermediary who was impeached by A.M. *Cf.* TEX. FAM. CODE ANN. § 156.101(a)(2) (West, Westlaw through 2015 R.S.) (providing that the trial court "may" modify custody where it is in the best interest of the child and "the child is at least 12 years of age and has expressed to the court in chambers . . . the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child").

on a statutory provision which could also support a modification of child support even if there was no material change in circumstances. *See* TEX. FAM. CODE ANN. § 156.401(a)(2) (allowing modification where it has been three years since the entry of the prior support order and the current payment differs by either $100 or 20% from the child support guidelines). However, because we have already determined that the trial court did not abuse its discretion in finding a material change in financial circumstances, it is unnecessary to address the alternate grounds for modification discussed in J.F.L.'s second issue. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *see also* TEX. R. APP. P. 47.1.

IV. RECUSAL

By her third issue on appeal, J.F.L. argues that Judge Galvan of the 94th District Court in Nueces County erred in denying her motion to recuse. J.F.L. alleges that Judge Galvan colluded with A.M., A.M.'s attorney, and three other figures to encourage T.A.M. to lie under oath.

A. Background

In 2010, Judge Galvan presided over an earlier action seeking to modify the parent-child relationship. The proceedings were then transferred from Nueces County to Aransas County. While in Aransas County Court, J.F.L. and her attorney made allegations that Judge Galvan was involved in a conspiracy to encourage T.A.M. to lie under oath. According to J.F.L., in September 2010, T.A.M. told her that this conspiracy had developed at a local Chinese restaurant, where T.A.M. met with A.M., A.M.'s attorney, a local police officer, Judge Galvan, and two other local attorneys.

J.F.L.'s allegations were developed before two different judges in the Aransas County Court. Following a hearing on October 11, 2010, a first judge entered a finding that J.F.L.'s claim had no basis in fact. Another county court judge then interviewed T.A.M. *in camera* and, after hearing T.A.M.'s report directly, denied J.F.L.'s motion for temporary orders. The same judge then presided over a trial in the county court, wherein J.F.L.'s allegations were again developed. The jury rendered a verdict in favor of A.M.

In 2012, J.F.L. filed this separate modification suit, and the action was transferred back to Nueces County and assigned to Judge Galvan. J.F.L. filed a motion asking Judge Galvan to recuse himself. The motion suggested that the very fact that these allegations had been made would make it difficult for Judge Galvan to be impartial. Judge Galvan declined to recuse himself and referred the motion to the presiding judge for hearing pursuant to rule 18a. *See* TEX. R. CIV. P. 18a(f)–(g). The motion was heard and denied by the 148th District Court. Judge Galvan ultimately conducted a bench trial and entered a judgment on the merits. This appeal followed.

B. Applicable Law

We review the denial of a motion to recuse under an abuse of discretion standard on appeal from the final judgment. *Lueg v. Lueg*, 976 S.W.2d 308, 310 (Tex. App.—Corpus Christi 1998, pet. denied); *see* TEX. R. CIV. P. 18a(j)(1)(A). Generally, a judge in Texas may be removed from a case because he or she is constitutionally disqualified, disqualified under a statute, or recused under rules promulgated by the supreme court. *In re Union Pac. Res. Co.,* 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding). Texas Rule of Civil Procedure 18b provides multiple grounds for recusal. *See* TEX. R. CIV. P.

18b(b). Potentially relevant to this case, rule 18b provides that a judge must recuse himself in any proceeding in which: (1) the judge's impartiality might reasonably be questioned; (2) the judge has a personal bias or prejudice concerning the subject matter or a party; or (3) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. *Id.* The Texas constitution provides that no judge shall sit in a case "wherein the judge may be interested"; "where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law"; or "when the judge shall have been counsel in the case." *Horn v. Gibson*, 352 S.W.3d 511, 514 (Tex. App.—Fort Worth 2011, pet. denied) (quoting TEX. CONST. art. 5, § 11).

Disqualification on constitutional grounds cannot be waived, *Horn*, 352 S.W.3d at 514 (citing *Esquivel v. El Paso Healthcare Sys., Ltd.,* 225 S.W.3d 83, 87 (Tex. App.—El Paso 2005, no pet.)), but other grounds for recusal can be waived if not raised by proper motion. *See In re Union Pac.*, 969 S.W.2d at 428; *In re R.A.*, 417 S.W.3d 569, 582 (Tex. App.—El Paso 2013, no pet.); *see also Fox v. Alberto*, 455 S.W.3d 659, 664 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (finding recusal arguments to be waived in a child-custody case wherein judgment granted one parent the right to designate the children's primary residence). "In order to preserve error for appellate review, a party's argument on appeal must comport with its argument in the trial court." *In Interest of E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied) (citing *In re D.E.H.*, 301 S.W.3d 825, 829 (Tex. App.—Fort Worth 2009, pet. denied)).

C. Discussion

J.F.L.'s argument on appeal to this Court differs from her argument at the recusal hearing. At the hearing, J.F.L.'s attorney argued that, regardless of the truth of the allegations, it would be difficult for Judge Galvan to be impartial because of the seriousness of the allegations.[2]

On appeal, J.F.L.'s argument is that her allegations are true. In support, she recounts the evidence she presented in 2010 in great detail, and challenges the Aransas County Court's finding that her allegations had no basis in fact.[3] Unlike the motion and hearing in the trial court, J.F.L. makes no argument regarding whether the allegations themselves could create bias that would serve as a ground for recusal.

J.F.L. has not advanced any grounds for recusal which could be construed as constitutional in character. *See Horn*, 352 S.W.3d at 514; *Esquivel*, 225 S.W.3d at 87. Rather, J.F.L.'s recusal arguments could only relate to those grounds for recusal which are set forth in the "rules promulgated by the supreme court." *See In re Union Pac.,* 969 S.W.2d at 428. As such, J.F.L.'s recusal arguments are waived, given that her argument on appeal does not comport with her argument in the trial court. *See In Interest of E.M.*, 494 S.W.3d at 229; *In re D.E.H.*, 301 S.W.3d at 829.

We overrule J.F.L.'s third issue.

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[2] For instance, the attorney stated in his opening argument: "Now, Your Honor, we're not here today to determine whether or not that actually took place, and I think that's actually irrelevant. What's relevant is due to the nature of these allegations I just don't see how the Judge can be impartial given he had knowledge—he had to have knowledge of these allegations." *But see Soderman v. State*, 915 S.W.2d 605, 608 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd, untimely filed) (citing *Chamberlain v. State*, 453 S.W.2d 490, 492 (Tex. Crim. App. 1970)) (rejecting a claim for disqualification of a judge on the basis that the petitioner had sued the judge for civil rights violations, reasoning that if the filing of complaints against a judge resulted in automatic disqualification on grounds of supposed partiality, then any judge would be subject to disqualification "at the whim" of a party).

[3] These evidentiary arguments are misplaced in this case, which is an appeal from a separate proceeding which occurred nearly five years after the 2010 hearing which J.F.L. relies upon.

V. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
23rd day of February, 2017.