AFFIRM as MODIFIED in part and REVERSE and REMAND in part; Opinion Filed December 19, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00053-CV

IN THE INTEREST OF J.D.A., A MINOR CHILD

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-09-15331

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Brown

In this suit affecting the parent-child relationship, Mother appeals orders modifying child support and enjoining Maternal Grandfather from unsupervised access to her child, J.D.A. For the following reasons, we modify the trial court's final order in part, reverse it in part, and remand the case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

Mother and Father, parents of J.D.A., divorced in August 2011. Before the divorce, Father reported an outcry by J.D.A. of sexual misconduct by Maternal Grandfather. Child Protective Services (CPS) investigated the matter, which it resolved as "unable to determine." In the divorce proceeding, Father requested that Maternal Grandfather's access to J.D.A. be supervised. Following trial, the trial court signed a divorce decree appointing Mother and Father as joint managing conservators, giving Mother the exclusive right to designate the primary residence, and

ordering Father to pay $1500 monthly for child support. The decree further denied Father's request that Maternal Grandfather's access to J.D.A. be supervised.

Pursuant to a mediated settlement agreement, the trial court signed an Agreed Final Order Relating to Suit to Modify Parent/Child Relationship (Agreed Order) in November 2015. Mother and Father remained joint managing conservators, and Father continued to pay child support of $1500 per month. The Agreed Order, however, gave Mother the exclusive right to designate the primary residence, but only within the geographic boundaries feeding into J.D.A.'s elementary school in Coppell, Texas until Father resided within those boundaries. Once Father moved within those boundaries, the Agreed Order provided for a more equitable access and possession schedule. And, following entry of the Agreed Order, Father moved into the same Coppell apartment complex where Mother and J.D.A. lived, triggering the new schedule.

Just three months later, Mother notified Father that she planned to move to her parents' home in Arlington, Texas. In response, Father filed a petition to modify parent-child relationship and request for sanctions. Among other things, Father requested that, should Mother move outside the geographic boundaries described in the Agreed Order, he be named sole managing conservator, J.D.A.'s residence and all periods of possession remain within the Agreed Order's geographical boundaries, Mother be ordered to pay child support, and Maternal Grandfather be allowed only supervised access to J.D.A.

The trial court held a bench trial on Father's motion to modify. Mother represented herself pro se. She testified that she moved to her parents' house due to her financial situation. She had worked as a self-employed certified public accountant (CPA) on and off since 2003. She thought she may have reported income of $15,000 on her 2015 tax return, but could not remember. She was earning an average of about $1000 per month at the time of trial. Her income depended on how many hours she could work and varied each month. She had suffered from Multiple Sclerosis

(MS) since 2000. Her MS caused fatigue, which impacted the hours she could work. Her rent expense in Coppell was $1800 per month, and she had to pay for J.D.A.'s expenses when he was living with her. She also had extensive litigation costs, which required her to lower her expenses. She had borrowed $30,000 on a credit card and was trying to pay $500 per month on that debt. Mother conceded that she was aware of her expenses, including the high litigation bills, during the settlement negotiations prior to entry of the Agreed Order.

Father acknowledged Mother suffered from fatigue and questioned her physical capacity to raise J.D.A. He nevertheless believed she was "making more than what she told the Court" and "either lying to the court or underemploying herself." Maternal Grandfather testified that Mother did not have a regular income, and he had helped her financially since her move at the end of March 2016. She moved so she could pay her litigation costs and work with her doctor to regain her health.

The trial court asked Mother why she was underemployed; Mother responded that it was due to her health and the ongoing litigation. The trial court then stated on the record, "I'll look up what a public accountant makes, and I'll determine what your child support is on that amount."

The trial court issued a memorandum ruling the day of trial. Under the ruling, both parents remained joint managing conservators, but Father would determine the primary residence. Mother would pay child support of $652 per month based on the trial court's findings that Mother was intentionally underemployed and the median salary for a CPA in Tarrant County was $50,000. The ruling also included a permanent injunction precluding Maternal Grandfather from unsupervised access to J.D.A. The trial court subsequently entered a Final Order in Suit to Modify Parent-Child Relationship consistent with the memorandum ruling. Mother filed a timely request for findings of fact and conclusions of law under Texas Rule of Civil Procedure 296. Thereafter,

she also filed a notice and a supplemental notice of past due findings and conclusions. The trial court never entered the requested findings and conclusions, and Mother appealed to this Court.

CHILD SUPPORT ORDER

In her second issue, Mother contends the trial court abused its discretion in ordering her to pay monthly child support of $652. We review a trial court's child support order for abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *In re J. G. L.*, 295 S.W.3d 424, 426 (Tex. App.—Dallas 2009, no pet.). A trial court abuses its discretion if its decision is arbitrary, unreasonable, or without reference to any guiding rules or principles. *In re J. G. L.*, 295 S.W.3d at 426; *see Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). In family law cases, the abuse of discretion standard overlaps the traditional sufficiency standard of review; legal and factual sufficiency of the evidence are not independent grounds of error but are relevant factors as to whether a trial court abused its discretion. *In re P.C.S.*, 320 S.W.3d 525, 530-31 (Tex. App.—Dallas 2010, pet. denied). If evidence of a "substantive and probative character" supports a trial court's judgment, it cannot be arbitrary or unreasonable. *In re J. G. L.*, 295 S.W.3d at 426-27. We give the trial court, which observes the witnesses and their demeanor, great latitude to determine the best interest of the child. *See Iliff v. Iliff*, 339 S.W.3d 74, 82 (Tex. 2011).

A trial court has discretion to set child support within the parameters provided by the family code. *Id.* at 78. Twenty percent of an obligor's monthly net resources is the standard child support guideline for one child. TEX. FAM. CODE ANN. §§ 154.125(b), 154.121 (West 2014). The family code, however, provides that "[i]f the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor" instead of net resources. *Id.* §

154.066(a) (West 2014). The "paramount guiding principle" in a child support decision is the best interest of the child. *Iliff*, 339 S.W.3d at 81.

Once an obligor offers proof of her current wages, the obligee must demonstrate the obligor is intentionally unemployed or underemployed in order to receive child support computed on earning potential. *Id*. at 82. The obligee must show that the obligor's actual earnings are "significantly less" than her earning potential. *Id.* at 82; *see* TEX. FAM. CODE ANN. § 154.066(a). That an obligor is failing to maximize her potential is not enough to support a finding of intentional underemployment. *Trumbull v. Trumbull*, 397 S.W.3d 317, 321 (Tex. App.—Houston [14th Dist.] 2013, no pet.). An obligor also may proffer evidence in rebuttal. *Iliff*, 339 S.W.3d at 82. Among other factors, a court may consider a parent's efforts to address health needs or whether economic conditions have precluded full employment. *See id*. at 81-82. A court "should be cautious of setting child support based on earning potential in every case where an obligor makes less money than he or she has in the past." *Id*. at 82.

At the close of evidence, the trial court entered findings into the record, including that Mother is a CPA, Mother is intentionally underemployed, and the median annual salary for a CPA in Tarrant Count is $50,000. The Final Order incorporated those findings and assessed monthly child support of $652, which the trial court derived by applying the statutory percentage guideline to a monthly net resource amount based on an annual income of $50,000.

The evidence of Mother's current wages was $1000 per month. Although Father had the burden to show intentional underemployment, *see id.* at 82, he neither alleged in his petition to modify that Mother was intentionally underemployed nor produced any evidence on the issue beyond his wholly speculative testimony that he believed she was making more and was "either lying to the court or underemploying herself." Father produced no evidence to show what Mother previously earned. Without some evidence of Mother's past income, the trial court had no basis

for finding that she was intentionally making "significantly less." *See Turnbull*, 397 S.W.3d at 321.

Further, the record is void of any evidence of Mother's earning potential. Although the trial court planned to "look up what a public accountant makes" and subsequently entered a finding that the median salary of a CPA in Tarrant County was $50,000, there was no evidence admitted in the record at trial to support that finding or any finding that Mother actually had the capacity to earn $50,000 annually or any level of annual earning other than $12,000 to $15,000. *See Reddick v. Reddick*, 450 S.W.3d 182, 190-91 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (wife failed to carry burden of showing intentional underemployment with testimony that she knew husband was capable of earning between $75,000 and $100,000 per year when there was no explanation of how he could accomplish that level of earning).

Having reviewed the evidence, we conclude that, even if the trial court did not believe Mother's testimony regarding her income or her rebuttal evidence that her health and/or economic conditions precluded her from earning more, there is no evidence of a "substantive and probative character" to support the trial court's finding that Mother is either intentionally underemployed or has an earning potential of $50,000 per year. Accordingly, the trial court abused its discretion by ordering Mother to pay $652 in monthly child support. We sustain Mother's second issue.

MATERNAL GRANDFATHER'S ACCESS

In her third issue, Mother asserts the trial court abused its discretion by requiring Maternal Grandfather's access to J.D.A. be supervised because res judicata barred relitigation of the claim, which was resolved at the time of the divorce decree. Res judicata, or claims preclusion, prevents "relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." *See Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992). In a family law case, a prior decree or

order "is res judicata of the best interests of the child as to conditions existing at that time." *Knowles v. Grimes*, 437 S.W.2d 816, 817 (Tex. 1969); *Bates v. Tesar*, 81 S.W.3d 411, 421 (Tex. App.—El Paso 2002, no pet.); *In re C.Q.T.M.*, 25 S.W.3d 730, 734-35 (Tex. App.—Waco 2000, pet. denied). However, custody, possession and access terms under an order may be modified if it is 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 rendition of the order sought to be modified. *See* TEX. FAM. CODE ANN. § 156.101(a)(1) (West 2014). Thus, the trial court must examine what material changes have occurred since the time of the order. *In re T.W.E.*, 217 S.W.3d 557, 559-60 (Tex. App.—San Antonio 2006, no pet.); *In re C.Q.T.M.*, 25 S.W.3d at 735.

The trial court's primary consideration in issues of possession and access to a child is always the best interest of the child. TEX. FAM. CODE ANN. § 153.002 (West 2014). We review a trial court's decision to modify possession or access under an abuse-of-discretion standard. *In re H.D.C.*, 474 S.W.3d 758, 763 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

J.D.A. made an outcry of sexual misconduct by Maternal Grandfather in October 2008. Father acknowledged that CPS investigated the allegation thoroughly and resolved it as "unable to determine." Thereafter J.D.A. saw psychologists on and off, and a Dr. Doyle, who treated J.D.A., testified at the divorce proceedings. Although Father requested that Maternal Grandfather's access to J.D.A. be supervised, the trial court denied the request in the decree.

Father now argues for modification because, at the time of the divorce, he never contemplated that J.D.A. would be living in the same house with Maternal Grandfather. Father acknowledged there were no new allegations of sexual misconduct. Indeed, he proffered no evidence of Maternal Grandfather's mistreatment of, or even conduct with, J.D.A. during the eight years between entry of the divorce decree and the trial on Father's petition to modify. Nor was there any evidence about how much access Maternal Grandfather had to J.D.A. over those eight

years and the extent to which that access would change under the modified possession terms he sought. Father presented no evidence, either through his own testimony or that of any other witnesses, to show supervised access to Maternal Grandfather was in J.D.A.'s best interest. The fact that J.D.A. will live with Mother at Maternal Grandfather's house during her possession periods, alone, is not evidence of a substantial and probative character to show a material change of circumstances requiring supervision of Maternal Grandfather's access to J.D.A. *See, e.g., In re T.W.E.*, 217 S.W.3d at 560 (abuse of discretion to modify conservatorship when father offered no evidence of what changes, other than his out-of-state move, had occurred since entry of order or how modification would be in son's best interest). Because there was no evidence presented to support this modification, the trial court abused its discretion by requiring Maternal Grandfather's access to J.D.A. be supervised. Accordingly, we sustain Mother's third issue.

In her first issue, Mother argues the trial court abused its discretion by not entering findings of fact and conclusions of law in response to her request and notices of past due findings and conclusions. *See* TEX. R. CIV. P. 296. Mother also complains the trial court did not enter the specific findings of fact required when a court uses factors other than net resources to determine child support. *See* TEX. FAM. CODE ANN. § 154.130(a)(3) (West 2014). Because of our disposition of Mother's second and third issues, we need not address this issue because the trial court's error, if any, did not prevent Mother from properly presenting her case to this Court. *See Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996).

We modify the trial court's Final Order in Suit to Modify Parent-Child Relationship by striking the Other Injunctive Provision ordering that "Maternal Grandfather shall NOT have any

unsupervised access with" J.D.A., reverse the order with respect to the determination of child support, and remand this case to the trial court for further proceedings consistent with this opinion.

/Ada Brown/
ADA BROWN
JUSTICE

170053F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF J.D.A., A MINOR CHILD	On Appeal from the 255th Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-09-15331.
No. 05-17-00053-CV	Opinion delivered by Justice Brown; Justices Lang-Miers and Boatright participating.

In accordance with this Court's opinion of this date, the Final Order in Suit to Modify Parent-Child Relationship is **MODIFIED** as follows:

> We **DELETE** the words "IT IS ORDERED that the Maternal Grandfather shall NOT have any unsupervised access with the child."

As modified, the order is **REVERSED** with respect to the determination of child support and **AFFIRMED** in all other respects. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant L.A. recover her costs of this appeal from appellee D.A.

Judgment entered this 19th day of December, 2017.