

AFFIRMED and Opinion Filed August 20, 2019



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00201-CV

IN THE INTEREST OF A.R.W., A CHILD

**On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-52158-2016**

MEMORANDUM OPINION

Before Justices Whitehill, Partida-Kipness, and Pedersen, III
Opinion by Justice Whitehill

This is an appeal from a child-support modification order. Mother and Father are the divorced parents of one child, Daughter. By court order, Father had primary custody of Daughter, Mother had expanded standard possession of Daughter, and Father had to pay Mother monthly child support of \$1,360. Father then filed a motion to modify seeking an order requiring Mother to pay him child support under the statutory guidelines. After a bench trial, the trial court found a material and substantial change in Mother's circumstances, but it gave Father only partial relief by reducing his monthly child support obligation to \$700. Father appeals.

The pivotal question is whether the trial court acted arbitrarily, unreasonably, and without regard to guiding rules and principles by deciding that requiring Father to pay Mother monthly child support of \$700 was in Daughter's best interest. We conclude that the child-support

guidelines and the evidence support the trial court's decision, so it was not an abuse of discretion. Accordingly, we affirm.

I. BACKGROUND

A. The Original Divorce Decree

Father and Mother married in 2000, and Daughter was born in 2005. Father and Mother divorced in 2013. Although the divorce decree is not in the appellate record, Father's brief asserts that neither party paid child support under that decree. We therefore accept that statement as true. *See* TEX. R. APP. P. 38.1(g).

B. The First Modification Order

In October 2015, the trial court (the 367th District Court of Denton County) rendered a new final order based on Mother's petition to modify and Father's counterpetition.¹ This order (i) appointed Father and Mother as Daughter's joint managing conservators, (ii) gave Father the right to designate Daughter's primary residence, (iii) gave Mother possession per an expanded standard possession order, and (iv) required Father to pay Mother monthly child support of about \$1,360.

The order recited that the court was departing from the statutory child-support guidelines and stated that "after considering the factors set forth in section 154.123 of the Texas Family Code it is in the child's best interest to have an adequate amount of resources available in each home to support a child." The court calculated Father's obligation by subtracting the guideline amount that Mother would owe as an obligor from the guideline amount that Father would owe as an obligor.

C. The Present Modification Suit

In April 2016, Father filed the present modification suit, which was then transferred from Denton County to Collin County.

In May 2016, Mother remarried.

¹ These pleadings and the order do not appear in the clerk's record, but the order was admitted into evidence at the trial and so appears in the reporter's record.

Mother later filed a counter-petition to modify in which she sought the exclusive right to designate Daughter's primary residence.

In Father's last amended motion, he (i) alleged that Mother was intentionally underemployed, (ii) asked the court to order child support in strict compliance with the Family Code's guidelines, and (iii) argued that strict compliance would result in Mother's paying child support to Father.

In May 2017, the trial court conducted a one-day bench trial. At the trial's end, the judge said she would find that Mother's circumstances had materially changed for the better. At the judge's request, the parties filed supplemental briefs on the child-support issue.

Two months later, the trial judge signed a memorandum order that ordered Father to pay child support of \$700 per month. Father requested findings of fact.

The trial judge later signed findings in support of her memorandum order. She found that it would be unjust and inappropriate to apply the Family Code § 154.125 guidelines. She also found that (i) Father's net monthly resources were \$8,827.65, (ii) Mother's monthly net resources were \$4,550, and (iii) each parent should pay child support based on 20% of the first \$8,550 of that parent's net resources. Then she offset the awards, reducing Father's guideline obligation (\$1,710) by Mother's guideline obligation (\$910) and by an additional \$100 to reflect Father's duty to provide Daughter's health insurance. The judge hand-wrote the following reasons for deviating from § 154.125:

Providing adequate resources for the child @ both residences; the child support guidelines amount is being reduced in accordance with Mom's resources increasing since the entry of the last order in Denton County and are therefore, offset, but Court allows by this Order an acknowledgement of the nature of [Mother's] community college employment and recent employment of Mom's evidence at trial [sic].

A few months later the trial judge signed the final modification order. The order did the following:

- repeated the court’s previous findings;
- ordered Father to pay child support of \$700 per month, again calculated by taking Father’s guideline support amount (\$1,710) and subtracting both Mother’s guideline support amount (\$910) and \$100 per month because Father paid for Daughter’s health insurance;
- maintained both parents as joint managing conservators and maintained Father’s existing right to designate Daughter’s primary residence; and
- maintained Mother’s existing right to possession consistent with an expanded standard possession order, except for a minor change to the parents’ right of first refusal if a parent had to be away from Daughter for more than two consecutive nights during a possession period.

Father timely appealed.

II. ISSUES PRESENTED

Although Father’s brief lists four issues presented, the argument section has three distinct sections. We treat his brief as raising three issues corresponding to those sections, and we paraphrase those issues as follows:

1. Did the trial court abuse its discretion by rendering an order that ignores the Family Code and the child’s best interest?
2. Did the trial court abuse its discretion by creating a new “adequate resources” rule that had no legal basis and risks harmful and inequitable consequences?
3. Did the trial court err by ordering Father to pay Mother child support when Mother did not plead for such relief?

III. ANALYSIS

A. Standard of Review

We review a child-support order for abuse of discretion. *Iloff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to guiding rules or principles. *Id.* A trial court also abuses its discretion if it fails to analyze or apply the law correctly. *Id.*

Legal and factual sufficiency of the evidence are relevant considerations in our abuse of discretion analysis. *In re A.M.W.*, 313 S.W.3d 887, 890 (Tex. App.—Dallas 2010, no pet.). We review the evidence in the light most favorable to the order and indulge every presumption in the order’s favor. *Id.* “If some probative and substantive evidence supports the order, there is no abuse of discretion.” *Id.*

B. Applicable Law

Two fundamental principles operate in the background of every child-support determination:

First, the paramount guiding principle in child-support decisions should always be the child’s best interest. *Iiff*, 339 S.W.3d at 81.

Second, “[t]he function of child support is to help a custodial parent maintain an adequate standard of living for the child.” *Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991).

1. Initial Child-Support Determinations

Although this is a modification case, we must place the modification statutes in context by first sketching out the statutory scheme governing initial child-support determinations. That scheme is found in Family Code Chapter 154.

The trial court can order either or both parents to support their child. TEX. FAM. CODE § 154.001(a); *id.* § 151.001(3) (every parent has a duty to support his or her child). The trial court may order a joint managing conservator to pay child support to another joint managing conservator. *Id.* § 153.138. In determining the amount of child support, the court cannot consider a parent’s sex or marital status. *Id.* § 154.010.

The Code establishes guidelines “to guide the court in determining an equitable amount of child support.” *Id.* § 154.121.² This generally means calculating the child-support obligor’s monthly “net resources” and applying the statutory guidelines (that is, a specific percentage based on the number of children) to that amount. *See In re P.C.S.*, 320 S.W.3d 525, 532–33 (Tex. App.—Dallas 2010, pet. denied); *see also* FAM. § 154.125. But the court may use the obligor’s earning potential instead of actual net resources if the obligor earns significantly less than he or she could earn because of intentional unemployment or underemployment. FAM. § 154.066(a). In determining whether an obligor is intentionally unemployed or underemployed, the court may consider evidence that the obligor is a veteran who is seeking or has been awarded certain disability benefits. *Id.* § 154.066(b).

Part of Father’s argument is that Mother is, or should be, the statutory child-support “obligor” because he has possession of Daughter most of the time. But we find nothing in the Code saying which parent should be treated as the obligor for guideline purposes, and, as noted above, the Code authorizes the trial court to order either joint managing conservator to pay child support to the other. FAM. § 153.138. Father argues that Mother should be the presumptive obligor because the function of child support is “to help a *custodial* parent maintain an adequate standard of living for the child.” *Williams*, 821 S.W.2d at 145 (emphasis added). But the possession order gives Mother possession of Daughter for roughly seven or more days a month during the school year and thirty days during the summer, plus certain holidays. Both parents are “custodial parents” to a degree.

² In 1984, Congress required the states to adopt child-support guidelines. The federal Family Support Act of 1988 went further and required that state guidelines operate as a rebuttable presumption of the proper support amount. *See* Margaret Campbell Haynes & Susan Friedman Paikin, “Reconciling” *FFCCSOA and UIFSA*, 49 FAM. L.Q. 331, 333 n.10 (2015); Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIM. LAW. 103, 104 (1990). But the guidelines may vary from state to state. *See* Charles J. Meyer et al., *Child Support Determinations in High Income Families—A Survey of the Fifty States*, 28 J. AM. ACAD. MATRIM. LAW. 483, 485, 488 (2016).

The Code establishes presumptions favoring the guideline-determined amount. Specifically, that amount is presumed to be reasonable, and a support order conforming to the guidelines is presumed to be in the child’s best interest. FAM. § 154.122(a). However, the court may depart from the guidelines “if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines.” *Id.* § 154.123(a). Section 154.123(b) supplies a lengthy list of nonexclusive factors that the trial court “shall consider” when determining whether applying the guidelines would be unjust or inappropriate under the circumstances. *Id.* § 154.123(b)(1)–(17).

If the trial court departs from the guidelines, Chapter 154 generally requires the court to make specific findings about the parties’ net resources, the percentage the court is applying to the obligor’s net resources, and the reasons for the departure. *Id.* § 154.130(a)(3), (b).

2. Modification Proceedings

Modification proceedings are governed by Family Code Chapter 156, and the provisions specific to child-support modification are found in Subchapter E, §§ 156.401–.409.

Per Chapter 156, a court with exclusive, continuing jurisdiction may modify a child-support order under certain circumstances, such as when the circumstances of the child or another person affected by the child-support order have materially and substantially changed since the order was rendered. *Id.* §§ 156.001, 156.401(a)(1)(A).

Further, concerning child support modifications, under § 156.402:

- (a) The court may consider the child support guidelines for single and multiple families under Chapter 154 to determine whether there has been a material or substantial change of circumstances under this chapter that warrants a modification of an existing child support order if the modification is in the best interest of the child.
- (b) If the amount of support contained in the order does not substantially conform with the guidelines for single and multiple families under Chapter 154, the court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child. A court

may consider other relevant evidence in addition to the factors listed in the guidelines.

FAM. § 156.402.

Subsections (a) and (b) are somewhat contradictory in that subsection (a) makes it merely permissive for the trial court in a modification case *to consider* the Chapter 154 guidelines when deciding whether there has been a material and substantial change since the existing order was decreed but subsection (b) authorizes the trial court to modify the prior order *to comply with* the Chapter 154 guidelines if doing so is in the child’s best interest. Thus, like in an original Chapter 154 proceeding, the ultimate legislative directive in modification cases is that the guidelines are just that—factors to be considered but that can be deviated from if doing so is in the child’s best interest. *See Melton v. Toomey*, 350 S.W.3d 235, 238 (Tex. App.—San Antonio 2011, no pet.) (“[A] court’s consideration of the child support guidelines in a modification proceeding is discretionary, not mandatory.”).

Other Code sections further show that the guidelines are relevant in modification cases. For example, § 156.406 says, “In applying the child support guidelines in a suit under this subchapter, if the obligor has the duty to support children in more than one household, the court shall apply the percentage guidelines for multiple families under Chapter 154.” FAM. § 156.406.

Finally, Chapter 156 provides other rules applicable to modification proceedings. For example, an increase in the obligee’s needs, standard of living, or lifestyle “does not warrant an increase in the obligor’s child support obligation.” FAM. § 156.405. Chapter 156 however limits the courts’ consideration of a new spouse’s net resources or expenses in a modification suit. *Id.* § 156.404.

3. Summary of Guiding Rules and Principles

Since we review the child-support order for abuse of discretion, it is helpful to summarize the foregoing guiding rules and principles relevant to this case:

- The ultimate guiding principle is Daughter’s best interest. *See Iliff*, 339 S.W.3d at 81.
- The more specific purpose of child support also must be kept in mind: “to help a custodial parent maintain an adequate standard of living for the child.” *Williams*, 821 S.W.2d at 145.
- The Chapter 154 guidelines and the other Chapter 154 factors may be consulted in a modification proceeding and may be relevant to the child’s best interest and thus to the propriety of the trial court’s child-support modification order. *Cf. Iliff*, 339 S.W.3d at 81 n.5; *In re P.C.S.*, 320 S.W.3d at 532–34.

C. Issues One and Two: Did the trial court abuse its discretion under the law and the evidence?

No, it didn’t. The evidence reasonably supports a conclusion that ordering Father to pay Mother monthly child support of \$700 was in Daughter’s best interest.

1. Unchallenged Fact Findings

Before addressing Father’s arguments, we note that Father has not challenged all of the trial court’s fact findings. Naturally, he does not challenge the trial court’s implied finding of a material and substantial change of circumstances sufficient to warrant a modification.³ Nor does he challenge the finding that his net monthly resources are \$8,827.65. He does not directly challenge the finding that Mother’s net monthly resources are \$4,550, but he does argue that the trial court erred by failing to find that Mother was intentionally underemployed.

2. Did the trial court abuse its discretion by failing to find that Mother was intentionally underemployed?

No. We reject Father’s intentional underemployment argument for two reasons.

First, Father does not refer us to evidence establishing that Mother’s true earning potential was higher than the \$4,550 net resources figure the trial court found. He argues instead that the evidence showed that Mother’s earning potential was \$45 per hour, but the evidence he cites relates

³ Although the court expressly found a material and substantial change in its final order, we cannot consider findings contained in a judgment. *R.S. v. B.J.J.*, 883 S.W.2d 711, 715 n.5 (Tex. App.—Dallas 1994, no writ) (construing Texas Rule of Civil Procedure 299a); *see also In re E.A.C.*, 162 S.W.3d 438, 442–43 (Tex. App.—Dallas 2005, no pet.) (applying Rule 299a to final order in an original SAPCR proceeding). Instead we imply the finding from the relief granted.

to a part-time position. This evidence did not compel the trial court to find that Mother could have obtained a full-time position at that wage.

Second, the evidence about Mother's employment supported the trial court's failure to find that Mother was not intentionally underemployed. Mother testified about her part-time employment, her full-time employment pursuing her own business, and her veteran's disability benefits. She also testified that she is working on getting a teaching certificate so she can teach twelfth grade. *See Iliff*, 339 S.W.3d at 82 (trial courts may consider that a parent has laudable reasons for underemployment, such as seeking further education). Father testified to the reasons he thought Mother was underemployed, but the trial court was entitled to weigh the witnesses' testimony and credibility as it chose. And the Family Code specifically allowed the court to take Mother's veteran's disability benefits into account in determining whether she was underemployed. FAM. § 154.066(b).

In sum, the trial court did not abuse its discretion by failing to find that Mother was intentionally underemployed.

3. Was the trial court's decision an abuse of discretion based on the evidence and the § 154.123 factors?

No, on this record the trial court could reasonably determine that requiring Father to pay \$700 per month in child support was in Daughter's best interest. We review the evidence in light of the § 154.123 factors and favorably to the trial court's decision.

a. Sections 154.123(b)(2), (3), (5), (13): Available Resources, Employment, and Special or Extraordinary Expenses

(1) Resources

Father does not challenge the finding that his monthly net resources are \$8,827.65. Nor has he successfully attacked the finding that Mother's monthly net resources are \$4,550. Thus,

Father's monthly net resources are almost twice Mother's. This evidence supports the discretionary decision to make Father the net child-support obligor.

(2) Expenses

Mother introduced a financial statement stating that her monthly living expenses totaled \$5,732. This exceeded her monthly net resources by over \$1,000. Although the trial court rejected the part of the financial statement showing Mother's net monthly income to be \$1,614 (since the court found her monthly net resources to be \$4,550), the court was entitled to credit the remainder of the financial statement if it chose. Thus, the evidence that Mother's monthly living expenses exceeded her monthly net resources could reasonably support the trial court's conclusion that Daughter's best interest required Father to pay some child support.

Mother also introduced evidence that in October 2015 she could not afford to pay \$110 for Daughter to go on a camping trip.

Father testified that his financial condition had recently deteriorated, he owed his girlfriend around \$90,000, and he was currently running a deficit of \$4,000 to \$5,000.⁴ He also testified that his girlfriend, whom he lived with, had been ill and unable to work. He further testified that (i) he pays for Daughter's school activities and social functions and (ii) Mother testified at her deposition that she had adequate resources in her home to provide for Daughter. But the trial court was entitled to assess Father's credibility and give his evidence whatever weight it deemed appropriate.

Father argues that there was evidence that Mother's new husband contributes towards their household expenses and has a gross monthly income of \$13,000. In a modification suit, however, "[t]he court may not add any portion of the net resources of a new spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be awarded." FAM. § 156.404(a).

⁴ Father did not explain what time period this deficit figure covered.

Father also cites evidence that in October 2016 Mother upgraded her living arrangement from an apartment to a 3,500 square-foot house costing some \$434,000. Mother testified that she and her new husband factored the \$1,360 she was receiving in child support into their monthly budget when they were looking at homes to buy. This testimony suggests that reducing Father's child-support obligation could make it more difficult for Mother and her new husband to afford their new house. This evidence also supports the trial court's order.

Finally, Father also introduced into evidence Mother's interrogatory answers in which she said that the court should set child support based on the Family Code guidelines. But this didn't necessarily mean, as Father assumes, that Mother was agreeing she should have to pay Father child support. Under the guidelines, the trial court could have treated Father as the obligor, given him no offset, and required him to pay Mother significantly more than \$700 per month. Thus Mother's interrogatory answer is not a concession that she should have to pay Father child support.

b. Section 154.123(b)(4): Possession of the Child

Father testified that Mother had expanded standard possession. The order gives Mother possession of Daughter roughly seven or more days a month during the school year (counting overnight Thursday visits as half days, and varying depending on how many Fridays a given month has), plus thirty days during the summer and certain holidays. *See* FAM. § 153.317. We estimate that Mother has custody of Daughter between 20% and 30% of the time. This is consistent with evidence showing that Father once sent an electronic message referring to his "70%+ parenting schedule."

Father argues that there was evidence that Mother did not attend some of Daughter's school events, but this evidence did not establish a significant failure to exercise possession. He also argues that Mother did not exercise all of her possession time, but the evidence he cites shows only a failure to exercise three days of possession in June 2016. Thus, the evidence did not compel the

trial court to treat Mother as having materially less actual custody of Daughter than the possession order entitled her to.

In sum, the trial court could reasonably consider that Mother has custody of Daughter for roughly 20% to 30% of the time and thus is a “custodial parent” for child-support purposes.

c. Section 154.123(b)(17): Any Other Factor

Section 154.123(b)(17) is a catch-all provision allowing the trial court to consider any other reason to depart from the guidelines consistent with the child’s best interest and taking the parents’ circumstances into account. FAM. § 154.123(b)(17).

Under this provision, the trial court could have considered the evidence of the parties’ history. In March 2015, Mother was living in an apartment with her boyfriend. In October 2015, the Denton County trial court ordered Father to begin paying Mother monthly child support of \$1,360. That same month, Mother was able to move to a larger residence. A year later, she and her then-husband were able to buy their house, which had many amenities beneficial for Daughter. During the same 2015–2016 time frame, Mother’s employment situation improved, but her net monthly resources were still only about half of Father’s.

Taking these facts into account and consulting the child-support guidelines, the trial court could see that considering each parent as an obligor and offsetting their child-support obligations would reduce Father’s monthly support obligation to \$800. Giving an offset for Father’s health-insurance obligation reduced it still further to \$700—around half what it had been under the prior order.

d. Conclusion

The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. As to factual matters, we must defer to the trial court if some evidence supports the trial court’s decision. As the foregoing discussion shows, the trial court could have

concluded that the guiding legal principles—the child’s best interest and the need for Mother to give Daughter an adequate standard of living—were best served by continuing but reducing Father’s child-support obligation.

4. Did the trial court abuse its discretion by considering “adequate resources” as a factor in its decision?

Father argues that the Family Code doesn’t allow the trial court to base its child-support decision on the goal of providing the child with “adequate resources” at both residences. He urges that this justification (i) ignores the § 154.123(b) factors and (ii) is a fig leaf for attempting to equalize the parents’ income, which he urges is not a legitimate goal of child support.

We disagree with Father’s argument. In the child-support context, the guiding legal principle is protecting the child’s best interest, specifically by helping a custodial parent give the child an adequate standard of living. Father calls Mother “the non-custodial parent” and asserts that Daughter lives with him “full-time,” but these assertions are contrary to the evidence—Mother has possession of Daughter a significant part of the time and can reasonably be considered a custodial parent. Thus, the trial court could properly consider whether ordering Father to pay child support was necessary to help Mother give Daughter an adequate standard of living. In our view, the trial court’s expressed goal of giving Daughter “adequate resources” at both residences is harmonious, if not synonymous, with the premise that “[t]he function of child support is to help a custodial parent maintain an adequate standard of living for the child.” *Williams*, 821 S.W.2d at 145.

The nub of Father’s complaint seems to be that the child-support order benefits Mother as well as Daughter, as when he argues that the legislature did not intend “to have custodial parents subsidize the lifestyles of non-custodial parents who choose to work part-time.” To some extent, this is unavoidable; helping a custodial parent give a child an adequate standard of living will generally boost the parent’s standard of living as well. But the Family Code addresses Father’s

concern by including provisions regarding intentional unemployment and underemployment. *See* FAM. § 154.066. Sometimes seeming underemployment may be in the child's best interest, such as when a parent makes employment decisions in order to spend more time with the child, start a new business, pursue further education, or address health needs. *See Iliff*, 339 S.W.3d at 82. It is up to the trial court to consider the evidence and make the necessary determinations. *Id.*

For these reasons, we reject Father's argument that the trial court abused its discretion by basing its decision on the intent to provide adequate resources for Daughter at both parents' residences.

D. Issue Three: Did the trial court abuse its discretion by ordering Father to pay child support to Mother when she did not plead for such relief?

Father's third issue argues that the trial court had no discretion to order him to pay child support because Mother did not plead for such relief in her live counter-petition to modify. We reject this argument because Father's pleading was sufficient to support the order.

The status quo when Father filed his motion to modify was a court order requiring him to pay Mother child support of about \$1,360 per month. His live pleading in this case requested that the court modify its order and establish child support according to the statutory guidelines, which Father asserted meant an order requiring Mother to pay child support to Father. Instead, the trial court reduced Father's existing child-support obligation, which means the trial court's order granted relief to Father, not Mother. Thus, in the context of Father's existing child-support duty, the modification order was supported by Father's pleading and need not also have been supported by Mother's. *See Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967) (father's pleading for a certain custody arrangement would support a judgment for lesser relief in the form of modified visitation rights).

We overrule Father's third issue.

IV. DISPOSITION

We affirm the trial court's Order in Suit to Modify Parent-Child Relationship.

/Bill Whitehill/

BILL WHITEHILL

JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE INTEREST OF A.R.W., A CHILD

No. 05-18-00201-CV

On Appeal from the 417th Judicial District
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Trial Court Cause No. 417-52158-2016.
Opinion delivered by Justice Whitehill.
Justices Partida-Kipness and Pedersen, III
participating.

In accordance with this Court's opinion of this date, we **AFFIRM** the trial court's February 12, 2018 Order in Suit to Modify Parent-Child Relationship.

It is **ORDERED** that appellee Annette Greenslade recover her costs of this appeal from appellant Ryan West.

Judgment entered August 20, 2019.