AFFIRMED and Opinion Filed March 30, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00499-CV

IN THE INTEREST OF O.K.L. AND M.L.L., CHILDREN

On Appeal from the 256th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-14-21272

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Garcia
Opinion by Justice Smith

Mother appeals the trial court's judgment denying her motion for enforcement of Father's $11,500 monthly payment obligation in an Agreement Incident to Divorce (AID) and awarding Father $32,759 in attorney's fees. Because we conclude that the trial court did not err in finding that Mother had not satisfied the condition precedent required under the AID, we affirm.

Background and Procedural History

Mother and Father married in 2005. They had two children together. On October 23, 2015, the trial court entered a final decree of divorce in which the trial court approved the AID, incorporated it by reference as part of the decree, and

ordered that the AID constituted an enforceable contract obligation between Mother and Father. As part of the AID, the parties agreed Father would pay Mother $11,500 per month in Contract Support Payments (CSP) to provide her and the children an "alternative lifestyle."

Specifically, section 3.2(f) of the AID provided:

> (f) Husband and Wife agree and acknowledge that the Contract Support Payments which Husband has agreed to pay to wife in accordance with Section 3.2(b) of this Agreement are intended to provide Wife and Children with an alternative lifestyle in which they travel and live abroad at times for purpose of educating the Children in other cultures and for purposes of the Children learning to speak foreign languages. In that regard, the Husband and Wife acknowledge that they have determined the amount of monthly Contract Support Payments to be paid by Husband to Wife, as set forth above, by budgeting for the costs of such lifestyle, and Wife agrees as a condition precedent to receiving the Contract Support Payments to maintain such lifestyle as contemplated by Husband and Wife by expending the Contract Support Payments, as necessary, for such purpose.

From October 2015 until July 2018, Mother and the children traveled to multiple countries including France, Switzerland, Canada, China, Japan, Belgium, Germany, Spain, Italy, and India. They also traveled throughout the United States and took an extended road trip visiting national and state parks. However, the children were only enrolled in school in Switzerland, France, and Canada. Mother taught the children outside of those time periods in which they were enrolled in

school. She did not follow any set curriculum and referred to her teaching methods as "unschooling."

In the summer of 2018, Father became increasingly concerned with the children not being enrolled in a more structured school environment. He was also concerned with their hygiene and health while in Mother's care. In July 2018, Mother went to Victoria to visit her elderly parents and discovered they were ailing and needed her care. Mother advised Father that she and the children were going to remain in Victoria, British Columbia, Canada to care for her parents. Mother claimed she planned to only temporarily remain in Victoria; however, Father believed she was trying to establish permanent residency in violation of the decree and AID and disputed that her parents required her care.

On July 23, 2018, Father sent Mother an Article VIII notice[1] that she was violating the Court's orders under the decree and her obligations under the AID. Specifically, Father asserted that he had the right to current possession of the children because it was during their summer break, that their primary residence was

[1] Article VIII of the AID provided:

> Wife agrees that in the event that Wife fails to comply with any material term or condition of this Agreement (or of any agreement that is ancillary to this Agreement or that is contemplated under this Agreement and to which Wife and Husband or the Larson Trusts become parties) and such failure continues for a period of thirty (30) days after Husband has provided Wife with written notice of such failure, which contains a detailed description of Wife's actions or omissions that constitute the basis for Wife's failure to comply with material terms and conditions of this Agreement, then for any period of time during which Wife fails to comply with the terms of this Agreement (any such period of time being hereinafter referred to as the "Abatement Period") the monthly Contract Support Payments which Husband is obligated to pay under Article [III] of this Agreement shall be abated during the Abatement Period.

to be maintained in Dallas County, and that he had not given consent for the children to move to Victoria. Father requested that Mother return the children to his possession and purchased airline tickets for their return. Mother refused, arguing the decree provided that her right to move to Victoria to care for her parents trumped Father's right to move the children to Dallas.

In response, Father did not pay the August 2018 CSP and filed a Petition to Modify Parent-Child Relationship, Request for Ex Parte Temporary Restraining Order, and Request for Order of Attachment seeking, among other things, Mother to return the children to Dallas from Victoria. The trial court issued a Temporary Restraining Order enjoining Mother from taking possession of the children until further court order and a Writ of Attachment commanding any Sheriff within Texas to deliver the children safely to Father. Mother continued to refuse to return the children to Dallas.

A temporary orders hearing was held on Father's motion to modify on August 31, 2018.[2] The temporary orders required Mother to return the children to within fifty miles of Father's residence in Dallas by September 20, 2018, restricted the children's primary residence to Dallas County with Mother having the exclusive right to designate the children's primary residence, and set an alternating weekly possession schedule.

[2] The modification suit is not before us on appeal. According to the parties, the modification suit is still pending in the trial court.

Mother returned the children to Dallas on September 25, 2018, and subsequently filed a motion to enforce the CSP.

On January 18, 2019, Father filed a petition for declaratory judgment. He amended his pleadings on April 3, 2019. Father sought a ruling that the CSP were no longer required effective October 1, 2018, and that, additionally, he was not obligated to pay the CSP for August 2018 when Mother attempted to establish residency in Canada, which violated the terms of the decree and the AID, and such violation continued more than thirty days after the July 23, 2018 notice was given, ending on September 20 when the children were returned to Dallas.

In Mother's second amended motion for enforcement filed on May 1, 2019, she alleged Father had failed to make the CSP in August 2018, January 2019, and each month thereafter. Mother also alleged that all conditions precedent had been performed. Father filed a trial brief on May 8, 2019, arguing that Mother failed to satisfy the condition precedent in section 3.2(f) of the AID.

Mother's motion for enforcement and Father's petition for declaratory judgment were presented to the trial court in September 2019. The trial court found that Father's obligation to pay the CSP was abated or suspended effective October 1, 2018, until Mother could comply with the terms and conditions of the contract. The trial court denied Mother's motion for enforcement and granted Father's petition for declaratory judgment. Father was awarded attorney's fees in the amount of $32,759.

Mother filed a motion for reconsideration requesting the trial court reconsider its finding that the CSP be abated because she cured the alleged default from the July 2018 notice and because Father sent no other default notice. Mother also sought clarification of what terms and conditions she must satisfy to end the period of abatement. After a hearing, the trial court denied Mother's motion for reconsideration finding "that the abatement language of [Article VIII] is not an exclusive remedy and other remedies are available." Mother's motion for new trial was overruled by operation of law, and Mother filed a notice of appeal as to the trial court's denial of her Motion for Enforcement.[3]

On appeal, Mother presents the following three issues: (1) whether the evidence and rules of procedure, evidence, and contract construction support the trial court's abatement or suspension of CSP under AID section 3.2(f); (2) whether the evidence and rules of procedure, evidence, and contract construction support the trial court's abatement or suspension of CSP under AID Article VIII; and (3) if the trial court's order denying her motion for enforcement is reversed, whether the trial court's award of attorney's fees should also be reversed.

Condition Precedent

[3] Mother did not appeal the trial court's order granting Father's petition for declaratory judgment. The parties dispute whether such order was final and appealable. However, because Mother has not appealed the order, it is not necessary for us to resolve the dispute in this appeal. *See* TEX. R. APP. P. 47.1.

! In her first issue, Mother argues that the conditions precedent specifically denied by Father are not conditions precedent required under the AID and, thus, she was relieved of proving compliance. A condition precedent to an obligation to perform under a contract is an act or event that must occur before there is a right to performance and before there can be a breach of contractual duty. *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010). A party seeking to recover under a contract bears the burden of proving that all conditions precedent have been satisfied. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998); *Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8, 11 (Tex. App.—Dallas 1983, writ ref'd n.r.e). Rule 54 of the Texas Rules of Civil Procedure governs the burden of both pleading and proving the performance of a condition precedent:

> In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

TEX. R. CIV. P. 54. When the opposite party fails to specifically deny the performance or occurrence of a condition precedent, the pleading party is relieved of the burden of proving satisfaction of the condition precedent and the opposite party waives its right to complain about the lack of proof on appeal. *Cmty. Bank &*

Trust, S.S.B. v. Fleck, 107 S.W.3d 541, 542 (Tex. 2002) (per curiam); *Shin-Con Dev. Corp. v. I.P. Invs., Ltd*., 270 S.W.3d 759, 768 (Tex. App.—Dallas 2008, pet. denied).

Mother argues that Father's characterization of the condition precedent was not proper and, therefore, he did not specifically deny the condition precedent at issue. We disagree. Whether Father's interpretation of the condition precedent is accurate, his pleadings make clear that he denied Mother performed the condition precedent required in section 3.2(f) of the AID. In Father's trial brief, filed seven days after Mother filed her second amended motion for enforcement in which she alleged all conditions precedent to her right of recovery had occurred or been performed, he set out the language of AID section 3.2(a), (b), and (f) and argued that his obligation to pay the CSP was dependent on the condition precedent that Mother maintain the contemplated alternative lifestyle for the children. Father specifically quoted section 3.2(f)'s condition precedent: "Wife agrees as a condition precedent to receiving the [CSP] to maintain such lifestyle as contemplated by Husband and Wife by expending the [CSP], as necessary, for such purpose." He further argued that section 3.2(f)'s language "by expending [CSP], as necessary, for such purpose" meant that Mother must spend the full amount of CSP she received each month on maintaining the intended alternative lifestyle for the children. In conclusion, Father asserted:

> In this case, the condition precedent has not been satisfied by [Mother] since September 20, 2018. [Mother] has failed to expend the CSP for the contemplated purpose of traveling and residing internationally for

> the purpose of educating the Children in other cultures and foreign languages. Instead [Mother] has spent only a portion of the CSP on the intended purpose or she has used to [sic] CSP to make purchases for unrelated purposes. As a result of the condition precedent not being satisfied by [Mother], [Father] was not obligated to pay CSP in the months of January 2019 through the current date.

Section 3.2(f) contains only one condition precedent, and it is clear throughout the parties' filings that Father specifically denied Mother met it even though the parties disagreed as to what the condition precedent required. Thus, Mother was not relieved of her burden to prove performance of the condition precedent. *See Trevino*, 651 S.W.2d at 11. Therefore, we must determine the meaning of the condition precedent at issue and whether Mother satisfied it.

The provision at issue here is contained within the AID, which was incorporated into the decree by reference. We interpret an agreed decree of divorce, including the terms of an agreement incident to divorce, utilizing rules of contract construction. *In re E.H.G.*, No. 04-08-00579-CV, 2009 WL 1406246, at *7 (Tex. App.—San Antonio May 20, 2009, no pet.) (mem. op.). We review the construction of a contract, including whether it is ambiguous, de novo. *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). We must ascertain the true intentions of the parties as expressed in the agreement itself. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). In doing so, we "examine and consider the entire writing in an effort to harmonize and give effect to

all the provisions of the contract so that none will be rendered meaningless." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

Generally, "the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls." *Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam) (citation omitted). "We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Ambiguity does not exist simply because the parties disagree over a term's meaning and present different interpretations of the agreement. *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009); *DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999).

As set forth above, Mother agreed "as a condition precedent to receiving the [CSP] to maintain such lifestyle as contemplated by Husband and Wife by expending the [CSP], as necessary, for such purpose." The AID further provided that the lifestyle for Mother and the children contemplated by the parties was "an alternative lifestyle in which they travel and live abroad at times for purpose of educating the Children in other cultures and for purposes of the Children learning to speak foreign languages."

We agree with Mother that Father's interpretation of section 3.2(f)'s requirements is incorrect. Section 3.2(f) does not require Mother to expend the *full*

amount of monthly CSP on the alternative lifestyle in order to receive the CSP. The plain language of the provision requires her to expend it *as necessary*. Nor is there any requirement in section 3.2(f) itself that the children attend school full time. While section 3.3(a) does provide that the children shall be enrolled in school on a continuous basis each school year until graduation and that the CSP are intended to cover at least some of the costs of schooling, the AID does not provide that such requirements are conditions precedent to Mother receiving the CSP. Failing to comply with section 3.3(a) could of course lead to an Article VIII notice of breach and CSP withheld as a result, but such an available remedy does not transform general requirements of the AID into conditions precedent for Father's obligation to pay Mother the monthly CSP. *See Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990) (to make performance specifically conditional, a term such as "if," "provided that," or "on condition that" must normally be included and, when no such conditional language is used, the terms should be construed as a covenant to prevent a forfeiture).

We do not, however, agree that Mother satisfied the condition precedent. Even though the plain language of section 3.2(f) does not require her to expend the full amount of CSP to maintain the alternative lifestyle, she still must maintain that lifestyle, which requires that she and the children not only travel abroad at times but also live abroad for the purpose of educating the children in other cultures and languages.

Mother testified that she was ready, willing, and able to continue traveling and living abroad with the children, as well as exposing them to foreign languages and cultures while overseas. But Mother admits that she cannot currently do so. She argues that Father has thwarted her ability to maintain the alternative lifestyle and, thus, prevented her performance of the condition precedent thereby prohibiting Father from availing himself of her nonperformance. Mother claims that it is undisputed that Father has required the children to reside permanently in Dallas since late September 2018 and, therefore, she cannot travel and live abroad with them. But it is not Father who is preventing her from performing the condition precedent. Although Father filed the modification suit, it is the trial court's temporary possession order requiring alternate weeks of possession in Dallas that prevents Mother and the children from living the alternative lifestyle the parties had once envisioned. In essence, the trial court found that the alternative lifestyle was no longer in the best interest of the children and modified the possession orders accordingly.

Since September 2018 when the children were returned to Dallas and the parties began a weekly alternating possession schedule, Mother could not, and has not, satisfied section 3.2(f)'s condition precedent. Therefore, the trial court did not err in denying Mother's motion for enforcement.

Because we have concluded that the trial court did not err in finding that Mother failed to meet Section 3.2(f)'s condition precedent, it is not necessary for us

to reach Mother's alternative argument that there was no evidence to support the trial court's denial of her motion to enforce under Article VIII of the AID or Mother's argument that the trial court's award of attorney's fees should be reversed. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

/Craig Smith/
CRAIG SMITH
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF O.K.L. AND M.L.L., CHILDREN No. 05-20-00499-CV	On Appeal from the 256th Judicial District Court, Dallas County, Texas Trial Court Cause No. DF-14-21272. Opinion delivered by Justice Smith. Justices Carlyle and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee SCOTT ARTHUR LARSON recover his costs of this appeal from appellant JIHONG ZHANG LARSON.

Judgment entered this 30th day of March 2022.