# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-15-00438-CV

IN THE INTEREST OF J.M., A CHILD

On Appeal from the 154th District Court
Lamb County, Texas
Trial Court No. 13,951, Honorable Felix Klein, Presiding

October 13, 2016

## MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant Maria I. Hernandez and appellee Richard F. McDowell were divorced in 1996. In April 2007, Hernandez filed a motion seeking to enforce and modify provisions of the couple's divorce decree. The trial court heard the motion on December 5, 2011. On August 18, 2015, it signed an order denying Hernandez's enforcement request but modifying the decree and retroactively awarding additional child support. This appeal followed. Finding no abuse of discretion under each of the four issues Hernandez has raised, we will affirm the trial court's order.

## Background

Hernandez and McDowell are the parents of two children. The younger child, J.M., was born in 1991. In relevant part, the Hernandez-McDowell divorce decree ordered McDowell to pay total monthly child support of $406. McDowell also was ordered to provide health insurance for the two children. Hernandez was ordered to furnish McDowell copies of all statements and bills for the children's health care expenses not covered by insurance.

McDowell worked in Iraq from March 2006 through November 2008 as a civilian police instructor. His gross pay from that work was $143,761.93 for 2007, and $93,709.44 for 2008. For the months in 2006 he was employed in Iraq, his gross monthly pay was over $11,000. McDowell completed his foreign work assignment in November 2008 and returned to the United States. He was initially unable to find employment. Thereafter, he worked as an airport police officer before accepting a position with the Slaton, Texas, police department. He was next hired as a police academy instructor for the South Plains Association of Governments, the position he held at the time of trial. As an instructor his gross monthly pay is about $2,600.

In her motion, Hernandez requested enforcement of the decree's requirement that McDowell provide health insurance coverage, alleging he failed to do so for the period January 1, 2006 through April 5, 2007. Hernandez asked that McDowell be held in contempt and she be awarded the medical expenses she incurred on behalf of J.M. during the coverage-lapse period. Hernandez also requested modification of the decree's child support order, retroactively increasing the amount of support from the

time McDowell was served with Hernandez's original motion in April 2007 until the time of J.M.'s emancipation in 2009. Findings of fact and conclusions of law were not filed.

## Analysis

### Applicable Standards

A trial court's orders in a suit affecting the parent-child relationship will not be disturbed on appeal, absent proof of a clear abuse of discretion. *R.J. v. K.J.,* No. 02-14-00266-CV, 2015 Tex. App. LEXIS 10212, at *7 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.) (mem. op.) (citing *McCain v. McCain,* 980 S.W.2d 800, 802 (Tex. App.—Fort Worth 1998, no pet.)). The test is whether the trial court acted arbitrarily, unreasonably or without reference to guiding rules or principles. *McLane v. McLane,* 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), *disapproved on other grounds, Iliff v. Iliff*, 339 S.W.3d 74, 83 (Tex. 2011). We review the evidence in the light most favorable to the trial court's actions and indulge every legal presumption in favor of the order. *Id.* "There is no abuse of discretion if some probative and substantive evidence supports the order." *Brejon v. Johnson,* 314 S.W.3d 26, 29 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Holley v. Holley,* 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied). "An abuse of discretion does not exist where the trial court bases its decisions on conflicting evidence." *Gen. Tire, Inc. v. Kepple,* 970 S.W.2d 520, 526 (Tex. 1998) (quoting *Davis v. Huey,* 571 S.W.2d 859, 862 (Tex. 1978)).

Under an abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error, but are instead relevant factors in assessing whether the trial court abused its discretion. *Henry v. Henry,* 48 S.W.3d 468, 475 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

First Issue: Delay of Ruling

Through her first issue, Hernandez asserts the trial court abused its discretion by waiting over three years from the hearing date to sign the dispositive order and then did not notify Hernandez or her attorney of the ruling. Hernandez's discussion of this issue consists of three sentences and contains no record references and case citations. The issue is inadequately briefed, and therefore waived. *See* TEX. R. APP. P. 38.1(i) (appellant's brief must contain clear and concise argument for contentions made, with appropriate citations to authorities and the record); *In re Estate of Valdez,* 406 S.W.3d 228, 235 (Tex. App.—San Antonio 2013, pet. denied) (stating failure to satisfy appellate rule 38.1(i) waives the issue on appeal). Moreover, even had the complaint been properly presented and even were error shown, Hernandez has not demonstrated how the error probably caused the rendition of an improper judgment or probably prevented her from properly presenting her case on appeal. TEX. R. APP. P. 44.1(a)(1)(2). Hernandez's first issue is overruled.

Second Issue: Reimbursement of J.M.'s Health Care Expenses

Hernandez alleged in her motion that McDowell failed to provide health insurance coverage for J.M. during the period January 2006 through April 5, 2007. At trial Hernandez testified the total health care expense incurred for J.M. was $4,012.30 for doctors' visits and $1,171.63 for hospitalization. In other testimony, Hernandez stated she paid $3,083.83 toward J.M.'s health care expenses.

J.M. gave birth to a child in June 2007. Hernandez testified that some or all of J.M.'s pregnancy-related health care expenses were paid by Medicaid. But she denied

seeking reimbursement from McDowell for J.M.'s health care expenses covered by Medicaid.

At trial, McDowell presented pay stubs from his overseas work. Some stubs, but not all, showed a deduction for insurance. He testified this deduction paid the health insurance premium for J.M. He further testified he provided Hernandez with a health-insurance card for J.M. in 2006, a claim Hernandez disputed. A copy of an insurance card in evidence indicates J.M. had health insurance from March 1, 2009 through June 1, 2009.

It was undisputed at trial Hernandez knew how to contact McDowell, but did not provide him with any of the medical bills she contended he was obligated to pay or repay. The trial court denied Hernandez reimbursement of any health care expenses. While findings of fact and conclusions of law were not filed, the order states J.M. "was covered by Medicaid and therefore no reimbursement for medical support was owed."

Our review of the testimony and documentary evidence shows Medicaid coverage was in place only during J.M.'s pregnancy. Even if we assume Medicaid coverage was the only reason for the trial court's denial of Hernandez's claim for reimbursement for J.M.'s medical expenses, however, its denial was not necessarily erroneous. When a court provides a wrong reason for its decision, its statement of a wrong reason is not necessarily reversible error. *In re L.D.,* 12-06-00193-CV, 2007 Tex. App. LEXIS 1714, at *4-5 (Tex. App.—Tyler Mar. 7, 2007, no pet.) (mem. op.) (juvenile case) (citing *Hawthorne v. Guenther,* 917 S.W.2d 924, 931 (Tex. App.—Beaumont 1996, writ denied)). An abuse of discretion is not shown if a court reaches the right result, but for the wrong reason. *Id.*

The record here presents some evidence of a substantive and probative character supporting the trial court's decision. Some or all of J.M.'s pregnancy-related health care expenses were covered by Medicaid. Additionally, there was evidence McDowell maintained health insurance coverage for J.M. and Hernandez never presented the unpaid medical bills to McDowell despite the decree's requirement and her knowledge of McDowell's contact information. *See In Re T.J.L.,* 97 S.W.3d 257, 266-67 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (finding fact that wife failed to comply with decree's requirement that she timely supply husband with children's health care bills, by itself, supported order that wife was solely responsible for payment of children's health care expenses she incurred during an earlier period of almost four years). In view of the evidence supporting its decision, we are unable to say the trial court abused its discretion by denying Hernandez's motion to enforce. Hernandez's second issue is overruled.

Issues Pertaining to Retroactive Modification of Child Support

Hernandez's third and fourth issues concern her dissatisfaction with the amount of increased child support awarded when the trial court retroactively modified the amount of support required by the decree.

A trial court may retroactively modify child support obligations accruing after the earlier of the date of service of citation or the date of the appearance of the respondent in the modification action. TEX. FAM. CODE ANN. § 156.401(b) (West Supp. 2016). While Family Code section 156.401 empowers a trial court to modify support orders retroactively, the application of the provision is not mandatory, but is left to the broad discretion of the trial court. *Nordstrom v. Nordstrom,* 965 S.W.2d 575, 582 (Tex. App.—

Houston [1st Dist.] 1997, pet. denied) (citing *Willis v. Willis,* 826 S.W.2d 700, 702 (Tex. App.—Houston [14th Dist.] 1992, no writ) (interpreting earlier version of statute)).

A trial court "may consider 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 . . . ." TEX. FAM. CODE ANN. § 156.402(a) (West 2014). "If the amount of support contained in the order does not substantially conform with the guidelines . . . the court may modify the order to substantially conform with the guidelines . . . ." TEX. FAM. CODE ANN. § 156.402(b). Besides the guideline factors, a court may consider other relevant evidence in deciding a motion to modify child support. *Id.* Consequently, in a modification proceeding a court's consideration of the guidelines is discretionary, not mandatory. *Brejon,* 314 S.W.3d at 30-31 (citing *Friermood v. Friermood,* 25 S.W.3d 758, 760 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

The trial court's August 18 order states in part:

> The Court finds that child support should be set at Nine Hundred Four and 26/100ths Dollars ($904.26) per month beginning July 1, 2007 through November 30, 2008 which results in a total amount due of $14,468.16 for this time period.
>
> From December 1, 2008 through May 31, 2009, the date of the child's emancipation, child support should be based on $2,300.00 gross earnings per month. The Court finds that child support should be set at Three Hundred Eighty-Four and 87/100ths ($384.87) per month, beginning December 1, 2008 through May 31, 2009 which results in a total amount due of $2,309.22 for this time period.
>
> During the time period of July 1, 2007 through May 31, 2009, Rick McDowell owed child support in the total amount of $16,777.68.
>
> * * *
>
> Rick McDowell paid child support in the amount of $14,719.00 from July 1, 2007 through May 31, 2009.
>
> * * *

> JUDGMENT is granted against Rick McDowell and in favor of Maria I. Hernandez for unpaid child support in the amount of $2,058.38 as of August 1, 2015 with interest at the rate of 6% per annum, for which let execution issue.

Third Issue: Conversion of Non-Exempt Assets to Exempt Assets

Hernandez argues in her third issue that after she filed the motion in April 2007 McDowell spent substantial portions of his lucrative overseas earnings to pay off a home loan and purchase vehicles. Hernandez likens this spending to a fraudulent transfer and the conversion of non-exempt assets to exempt assets. The crux of the argument seems to be McDowell should have reserved a sufficient portion of his income in anticipation that his child support obligation would be retroactively increased when the court heard Hernandez's motion. Without reaching the merits of this issue, it is overruled. Hernandez did not plead or present this theory with authorities to the trial court. For this reason her claim of error is not preserved for our review. TEX. R. APP. P. 33.1(a). Further, Hernandez presents us with no controlling authority substantiating the application of her fraudulent-transfer theory to the retroactive modification of a child support order. Finally, how she was harmed is not shown. TEX. R. APP. P. 44.1(a).

Fourth Issue: Material and Substantial Change in Circumstances

Hernandez next argues she presented sufficient evidence of a material and substantial change in circumstances warranting increased child support retroactive to April 2007 because of McDowell's 2006-2008 salary increase, a 2007 increase in the presumptive amount of net resources to which the statutory guidelines are applied, and J.M.'s increased needs because of her pregnancy. Because the court retroactively modified the support order and rendered a judgment in favor of Hernandez we assume

by this issue she contends the trial court abused its discretion by not calculating support based on the 2007 increase of the monthly net resources "cap" of $7,500 under section 154.125, up from the predecessor statute's cap of $6,000, and by failing to award additional support over the cap under section 154.126 for added expenses associated with J.M.'s pregnancy.

A 2007 amendment to Family Code section 154.125 changed the monthly net-resource amount of section 154.125(a) from $6,000 to $7,500. *See* Act of May 22, 2007, 80th Leg., R.S., ch. 620, § 2, 2007 Tex. Gen. Laws 1188, 1189 (current version at TEX. FAM. CODE ANN. § 154.126 (West 2014)). Whether this statutory change could constitute a material and substantial change warranting a retroactive modification of child support we do not say. *See Brejon,* 314 S.W.3d at 31 (declining to consider this argument as other evidence supported trial court's findings of a material change of circumstances). Because Hernandez's suit was filed before September 1, 2007, former Family Code section 154.125 governs the award of child support in this case. *See* Act of May 22, 2007, 80th Leg., R.S., ch. 620, § 7, 2007 Tex. Gen. Laws 1188, 1190 (providing, "The changes in law made by this Act to Section 154.125, 154.126, and 154.130(b), Family Code, apply only to a suit affecting the parent-child relationship that is commenced on or after September 1, 2007. A suit affecting the parent-child relationship commenced before September 1, 2007, is governed by the law in effect on the date the suit was filed, and the former law is continued in effect for that purpose").

Family Code section 154.126(a) provides: "If the obligor's net resources exceed the amount provided by Section 154.125(a), the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommended by these

guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child."

Hernandez argues, "J.M.'s pregnancy brought on new concerns, new expenses, and unexpected schedule changes to both [Hernandez] and J.M.'s lives." Aside from Hernandez's testimony that she bought J.M. a car for an unspecified amount when J.M. became pregnant and could no longer drive her Mustang, we are not directed to, nor do we find, evidence of specific facts showing the type and amount of each additional unreimbursed expense Hernandez incurred on behalf of J.M. because J.M. was pregnant.

We find the trial court did not abuse its discretion and overrule Hernandez's fourth issue.

## Conclusion

Having overruled each of Hernandez's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice