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

No. 07-17-00287-CV

IN THE INTEREST OF C.P.K., A CHILD

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court No. 14-003039-CV-272, Honorable Travis B. Bryan, Presiding

May 10, 2018

## MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Elizabeth, mother of C.P.K., a child, appeals from an order in a suit to modify the parent child relationship. Upon addressing each of her four issues, we affirm.[1]

*Issue One — Findings of Fact, Conclusions of Law*

Through the first issue, Elizabeth complains of the trial court's failure to comply with her request for findings of fact and conclusions of law. Such findings and conclusions were executed by the trial court on August 2, 2017 but omitted from the appellate record.

[1] Because this matter was transferred from the 10th Court of Appeals, we apply that court's precedent in case of conflicts with our own. *See* TEX. R. APP. P. 41.3.

They have since been made a part of the appellate record via a supplemental clerk's record. Once they were filed, both Elizabeth and Peter (C.P.K.'s father) were afforded and accepted the opportunity to submit supplemental briefings. Thus, Elizabeth's first issue is moot, and we overrule it.

*Issue Two — Pickup and Delivery of the Child*

In her second issue, Elizabeth contends that the trial court erred in failing to modify the provision of a previously agreed to order concerning the pickup and delivery of C.P.K. Modification was sought to accommodate Elizabeth's work schedule, minimize the "travel burden on Elizabeth's young daughter" who is not the child of Peter, and relieve "the parties" from travelling "with young children at night." We overrule the issue.

A trial court may modify an order providing for the terms and conditions of conservatorship to, possession of, or access to a child if 1) the change is in the child's best interests, and 2) the circumstances of the child, a conservator or other party have materially and substantially changed since the order was issued. *In re L.G.H.*, No. 10-16-00018-CV, 2017 Tex. App. LEXIS 4088, at *3-4 (Tex. App.—Waco May 3, 2017, no pet.) (mem. op.). This obligates the party seeking the modification to show, among other things, that the modification "'would be a positive improvement for the ***child***.'" *Id.* (quoting *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000)) (emphasis added). Moreover, a reviewing court may reverse the trial court's decision on the matter only when it appears from the record as a whole that the trial court abused its discretion. *Id.* A trial court abuses its discretion when its decision is arbitrary, unreasonable or made without reference to guiding rules and principles. *Id.* at *4. In assessing whether such an abuse occurred, we must view the evidence in a light most favorable to the decision. *Id.* Finally, to properly

present an issue on appeal, the appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to the record and to supporting authorities. *Id.* at *5.

The pickup and delivery times and locations at issue appeared in the "Agreed Order on Suit Affecting the Parent Child Relationship" executed by the trial court on April 9, 2014. The terms Elizabeth sought to modify were terms to which she agreed and pertain to the time at which the child was to be made available to Peter. Little was said in her brief about how the change would be in the best interests of the child C.P.K., other than concluding as much. Little was said about how the change "would be a positive improvement for the child [C.P.K.]." Instead, her argument focused on the convenience to her and her second child and how Peter had a flexible work scheduled which could be modified to accommodate hers.

An element of the applicable test is not the convenience to the parent but rather the best interests of the child. And, it would not have been unreasonable for a trial court to construe Elizabeth's request as merely seeking an accommodation for her own benefit as opposed to a change enhancing C.P.K.'s best interests. Thus, we cannot say that she carried her burden to prove that the trial court abused its discretion in denying the modification at issue.

*Issue Three — Child Support*

Next, Elizabeth contends that the trial court erred by increasing Peter's monthly child support obligation to only $625 rather than $773.57. It was $475 per month. Allegedly, the evidence illustrated that during a nine-month period between January of 2015 through September of 2015, Peter deposited approximately $49,207 into a bank

account. Dividing that by the number of months encompassed within January through September (i.e., 9), equals $5,467. The latter is the beginning point in calculating Peter's gross monthly income, according to Elizabeth. From it she deigned to subtract approximately $194 to reflect a "credit" and his health insurance obligation. The resulting amount allegedly reflected his true gross monthly income, and "[u]sing the 2015 Texas Attorney General Tax Charts, if [Peter's] adjusted monthly gross income is $5,272.83, his net monthly income is $3,867.83." In turn, 20% of $3,867.83 would equal $773.57 which should be Peter's monthly child support obligation, in her view. We overrule the issue.

Statute provides that in computing a parent's net resources for purposes of child support, "[w]henever feasible, gross income should first be computed on an annual basis and then should be recalculated to determine average monthly gross income." TEX. FAM. CODE ANN. § 154.061(a) (West 2014). Despite this statutory directive, Elizabeth opted to utilize a lesser period of time in her calculations. More importantly, she did not explain why it was infeasible to utilize the twelve-month period implicit in § 154.061(a) under the circumstances at bar. Given the questionable basis upon which she began her calculations, we cannot say she established that the trial court abused its discretion in denying monthly child support of $773.57. *See In re A.A.G.*, 303 S.W.3d 739, 740 (Tex. App.—Waco 2009, no pet.) (holding that generally review of a trial court's determination of child support is under an abuse of discretion standard).

Moreover, evidence indicates Peter was and is self-employed, and as represented through his 2014 tax return, his income was $23,727 and gross adjusted income was $20,567. His income was $20,264 and gross adjusted income was $17,598, according to his 2013 income tax return. Those returns also contained schedules itemizing the

business expenses deducted from his self-employment income for those years. For instance, in 2014, those expenses were $26,192. For 2013, those expenses were $29,146.

While those tax returns are not determinative of net resources, they are nonetheless relevant. *See In re S.R.S.*, No. 10-10-00139-CV, 2011 Tex. App. LEXIS 575, at *5-6 (Tex. App.—Waco Jan. 26, 2011, no pet.) (mem. op.) (stating that while the determination of income for purposes of paying taxes to the government differs from that used to calculate net resources to determine child support, the returns do contain some evidence as to the taxpayer's ordinary and necessary expenses to produce that income). This is especially so given that the trial court has the discretion to exclude from self-employment income amounts allowable under federal income tax law as depreciation, tax credits, and any other business expenses shown by the evidence to be "inappropriate in making the determination of income available for the purpose of calculating child support." TEX. FAM. CODE ANN. § 154.065(b).

If nothing else, the tax information above is evidence that Peter does have business expenses that must be paid and that monies deposited into his business account do not necessarily reflect his income. Yet, Elizabeth made no effort to provide for those expenses in attempting to calculate Peter's net resources simply by what he deposited into his account for a nine-month period. That too falls short of illustrating that the trial court abused its discretion in refusing to set child support at $773 per month.

*Issue Four — Arrearages*

Finally, Elizabeth contends that the trial court erred in failing to award her arrearages for the health insurance payments Peter neglected to pay. Those arrearages allegedly were $2,791. We overrule the issue.

Per the agreed order, Peter was obligated to reimburse Elizabeth "for the actual cost of the monthly premium for health insurance for" C.P.K. In turn, Elizabeth was ordered to "provide Peter . . . written proof of the actual total cost of the child's health insurance premium." In denying the request for arrearages, the trial court said at the end of trial: "I'm not going to order any arrearage of any . . . medical payments or vision or dental because, ma'am, all you had to do was show him the check stub; and you wouldn't do that. Just getting a little dig in on him on that, and so I'm not going to reward that behavior on your part." In other words, the trial court interpreted the obligation to provide Peter "written proof of the actual total cost of the child's . . . premium" as requiring her to provide written proof of what she actually paid. Once that was done, Peter was obligated to reimburse her for that "actual cost" or actual payment. Yet, she apparently provided him with a "breakdown" from her employer indicating the insurance premiums encompassed within the employer's health insurance plan; she did not provide Peter with proof of what she actually paid. Furthermore, some evidence appeared of record indicating that the premiums reflected in the documentation provided by her employer did not comport with what she actually paid.

Elizabeth does not contend that the trial court misinterpreted the order. Nor does she contend that she lacked any obligation to provide written proof of what she actually paid for C.P.K.'s insurance. Moreover, the notion of "reimbursement" carries with it the

idea that the party doing the "reimbursement" reimburse for what was actually paid. If there were no expenditures, there would be no basis for securing reimbursement. Given this and Elizabeth's failure to disclose to Peter what she actually paid for C.P.K.'s insurance, we find no fault in the trial court's decision to deny her the arrearage or that it abused its discretion. *See Sink v. Sink*, 364 S.W.3d 340, 347 (Tex. App.—Dallas 2012, no pet.) (holding that "[a] trial court's order pertaining to health insurance for the children will not be reversed on appeal unless the complaining party can show a clear abuse of discretion"). Simply put, Elizabeth did not prove she complied with the contingency upon which Peter's obligation to pay was dependent.[2]

The final order of the trial court is affirmed.

Brian Quinn
Chief Justice

[2] We note the presence of evidence indicating that Peter covered the potential health needs of C.P.K. through an alternate insurance plan.