AFFIRM; and Opinion Filed January 28, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01449-CV

IN THE INTEREST OF J.C.J., A CHILD

On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-53747-2009

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Fillmore

On November 15, 2010, the trial court signed an Order in Suit Affecting the Parent–Child Relationship requiring D.E.P., who is J.C.J.'s biological father, to pay child support and to post two bonds, one to cover costs associated with any international abduction by him of J.C.J. and one payable to S.D.J. (Mother), conditioned on Father's compliance with the trial court's order pertaining to possession of and access to J.C.J. On December 27, 2012, Father filed a motion to modify the November 15, 2010 order, requesting unsupervised possession of J.C.J. and that child support be set according to the child support guidelines. Mother filed a motion to enforce the November 15, 2010 order by contempt and an amended motion to terminate Father's parental rights or, alternatively, to modify the November 15, 2010 order to require Father to pay cash medical support for reimbursement of the premiums for J.C.J.'s health insurance. Both Mother and Father requested the trial court confirm the amount of Father's child support arrearages.

Following an evidentiary hearing, the trial court denied Mother's motion to terminate Father's parental rights and to enforce the November 15, 2010 order by contempt. The trial court modified the November 15, 2010 order as to periods when, and the conditions under which, Father had the right to possession of J.C.J., and to require Father to pay cash medical support, for the reimbursement of health insurance premiums for J.C.J., as additional child support. Mother filed a motion to reconsider the denial of her motion to enforce, asserting the trial court was required to determine the amount of Father's child support arrearages. The trial court granted Mother's motion to reconsider, found the total amount of Father's child support arrearages was $38,537.30, including accrued interest, and denied Mother's request for attorney's fees.

In four issues, Father asserts the trial court erred by finding there had not been a material and substantial change in circumstances regarding child support, by denying his motion to modify the child support order, in determining the amount of child support arrearages owed by Father, and by denying Father's motion for a trial amendment. In a fifth issue, Father contends the bonds required by the November 15, 2010 order impose an absolute bar to his access to J.C.J. and are not justified under applicable law. In a cross-issue, Mother argues the trial court erred by failing to award attorney's fees relating to her motion to enforce the November 15, 2010 order. We affirm the trial court's orders.

Background

Mother and Father were in a romantic relationship when J.C.J. was born on June 8, 2009, but separated soon after J.C.J. was born. On August 6, 2009, Father filed a suit affecting the parent–child relationship, seeking to establish that he was J.C.J.'s father. Mother filed a counter-petition, requesting she have the right to designate J.C.J.'s primary residence and that Father be ordered to pay child support and medical support. Mother also alleged Father had a history of

committing family violence and requested that he be denied access to J.C.J. or, alternatively, be allowed supervised visitation only.

On August 20, 2009, the trial court held a hearing on the parties' request for temporary orders. As relevant to this appeal, the trial court heard evidence of Father's earnings from his employment at a roofing company and as well as from JP Strategies, a credit repair company operated by Father. Mother also testified about instances of family violence committed by Father. The trial court signed temporary orders appointing Mother and Father temporary joint managing conservators of J.C.J., granting Mother the exclusive right to designate J.C.J.'s primary residence within Collin and contiguous counties, setting out Father's right to possession of J.C.J. as she reached certain ages, and ordering Father to pay $1,000 per month in child support and $300 per month for half of the expenses of child care. The trial court found that Father had child support arrearages of $2,600. The trial court also ordered that J.C.J. remain insured under Mother's health insurance policy and that Mother and Father each pay fifty percent of the uninsured health care expenses.

In September 2010, Father was convicted of engaging in organized criminal activity and of making a false statement to obtain property or credit and sentenced to five years' imprisonment on each offense. On November 15, 2010, while Father was incarcerated, the trial court held the final hearing on the parties' competing petitions. The trial court appointed Mother the sole managing conservator of J.C.J. and appointed Father the possessory conservator. The trial court found there was credible evidence of a risk of international abduction by Father of J.C.J., prohibited Father from removing J.C.J. from the United States, and ordered that Father post a bond or security in the amount of $25,000 to offset the costs of recovering J.C.J. if she was abducted by Father to a foreign country. The trial court also found that Father had taken, enticed away, kept, withheld, or concealed J.C.J. in violation of Mother's right of possession and

had threatened to take, entice away, keep, withhold, or conceal J.C.J. in violation of Mother's right of possession and ordered that Father post a cash or surety bond of $10,000 payable to Mother, conditioned on Father's compliance with the order permitting possession of or access to J.C.J. The trial court also found that Father had a history or pattern of committing family violence during the two-year period preceding the filing of the suit or during the pendency of the suit. The trial court ordered that Father's visitation with J.C.J. occur under the supervision of a person selected by Mother on the days and times agreed upon by Mother and the supervisor and enjoined Father from removing J.C.J. from the school or child care facility at which she was enrolled or from approaching J.C.J. at any location other than a site designated for supervised visitation. Once J.C.J. was three years old, the standard possession order would be in effect.[1]

The trial court ordered that Father was obligated to pay $1,300 per month in child support with the first payment being due on the first day of the month following thirty days after Father's release from incarceration. In an order signed November 15, 2010, the trial court found the ordered child support was in accordance with the percentage child support guidelines,[2] the percentage applied to Father's net resources was twenty percent, and "the amount of net resources available to Father per month [had] been previously computed by the Court and Father [had] been found to have earning capacity sufficient to warrant a monthly support obligation of $1,300." The trial court also ordered both Mother and Father to provide medical support for J.C.J. as additional child support, with Mother required to maintain health insurance for J.C.J. "so long as [Father] remains current on his child support obligation." The trial court determined Father had child support arrearages of $15,600 from December 1, 2009, through November 15,

[1] *See* TEX. FAM. CODE ANN. § 153.312 (West 2014) (setting out standard possession order for parents living less than 100 miles apart).

[2] *See* TEX. FAM. CODE ANN. § 154.121–.133 (West 2014 & Supp. 2015).

2010, and interest had accrued in the amount of $324.83. The trial court granted judgment for Mother in the amount of $15,924.83 for the child support arrearages and the accrued interest.

Father was released from prison in October 2012. On December 27, 2012, Father filed a motion to modify the November 15, 2010 order and to confirm the amount of his child support arrearages. Father asserted there had been a material and substantial change in circumstances since the November 15, 2010 order was signed and the child support ordered was not in substantial compliance with the child support guidelines. Father also requested he be allowed unsupervised standard possession of J.C.J.

Mother filed a counter-petition seeking termination of Father's parental rights. Alternatively, Mother asserted there had been a material and substantial change in circumstances since the November 15, 2010 order and requested the amount of the bond Father was required to post for the costs relating to any abduction by Father of J.C.J. to a foreign country be increased to $50,000, and the amount of the bond conditioned on Father's compliance with the trial court's order permitting possession of or access to J.C.J be increased to $20,000. Mother also requested that, before Father began visitation with J.C.J., he be required to undergo psychological counseling and classes to develop his parenting skills and to pay for J.C.J. to undergo psychological counseling to assist her in developing a relationship with Father. Mother subsequently amended her motion to modify and removed the allegation there had been a material and substantial change in circumstances. In the amended motion to modify, Mother requested only that Father be ordered to pay cash medical support to reimburse her for J.C.J.'s health insurance premiums. Mother also filed a motion to enforce, seeking, as relevant to this appeal, to have Father held in contempt and placed in jail for failure to comply with the November 15, 2010 order by paying the required child support.

At the evidentiary hearing on the motions on August 19, 2014, Father requested a trial amendment "to include a specific request to eliminate the bond requirements of the existing orders." Father indicated he believed the request was already implicitly included in his pleaded request for unsupervised visitation, but was requesting a trial amendment for "clarification." Mother objected that she was not aware Father was seeking to eliminate the bonds. The trial court asked how Mother was prejudiced by the request, and Mother's counsel responded that he had not done any research or preparation for addressing a bond reduction request, had not looked at the appropriate standard for the trial court to apply in analyzing a bond reduction request, and had never dealt with that issue in a prior case. The trial court denied Father's request for a trial amendment.

As relevant to the issues in this appeal,[3] Father testified he was incarcerated on November 15, 2010, did not participate in the hearing, and did not read the November 15, 2010 order until after he was released from prison in October 2012. Father testified that, on November 15, 2010, he did not have any income. Since his release from prison, he had been living with different friends, none of whom had required him to pay rent. Father believed he was capable of having a relationship with J.C.J. and wanted to be involved in her life. Father requested unsupervised visitation with J.C.J. and that his child support obligation be based on his income.

According to Father, his status as a convicted felon hindered his employment opportunities. However, shortly after he was released from prison, he began working for Outback Roofing, the same company that employed him prior to his incarceration. Father testified that his compensation for the first three months of his post-incarceration employment was based on commission and he did not receive any compensation. Beginning January 1, 2013,

[3] Although the trial court repeatedly instructed the parties to limit the time frame of the evidence to encompass only events that occurred after November 15, 2010, there was a significant amount of testimony relating to events that occurred prior to the November 15, 2010 order. Because that evidence is not relevant to the issue of whether there had been a material and substantial change in circumstances since the November 15, 2010 order, we do not recite that testimony here.

he was paid $10 an hour as a project manager for Outback Roofing. Father's employer also paid for his cell phone. Father introduced a number of check stubs showing his compensation from Outback Roofing from December 31, 2013, through July 14, 2014, and indicating he was paid $10 an hour.

Father submitted evidence that his gross monthly pay from Outback Roofing was $1,733 and after deductions, including his child support payment through the Office of the Attorney General, his monthly net income was $683.79. Father testified he had also begun offering credit repair services through JP Strategies, the company he operated before being incarcerated. Although JP Strategies had a bank account, Father failed to offer the bank account records into evidence. Father testified he was currently earning an additional $200 to $300 per month from his work at JP Strategies and "odd jobs" such as building a fence and mowing a lawn. However, Father also submitted a "Financial Information Statement" that stated his average monthly income from sources other than Outback Roofing was $515.22. This statement indicated Father had a net monthly income of $1,199.01 and his monthly expenses, including $400 for food and $450 for gasoline and other travel expenses, equaled $1,199.01. Father testified he had not yet filed his income tax return for calendar year 2013 and could not provide a total of his income during the year.

Father admitted that child support was not deducted from his pay from Outback Roofing for the "first few months" that he was earning $10 per hour. Father testified he did not use the extra funds to pay child support, but spent the money on his parole fees and "helping out the people that took care of me."

Father testified he did not have the financial ability to pay the $1,300 per month in child support required by the trial court's November 15, 2010 order. He also did not have any assets to sell or the ability to borrow money to pay the ordered child support. According to Father, he

exhausted every asset he owned when he was defending the criminal charges against him. Father admitted he owned a truck prior to going to prison that a friend stored for him while he was in prison. Father needed to make repairs on the truck after he was released from prison, and his employer paid for the necessary parts. According to Father, the truck had a lien on it and was worth less than what he owed on it. Father indicated he had been unable to discover who owned the lien on the truck and was not making payments to the lienholder. Further, because he did not have a title to the truck, he was unable to sell it.

Father testified he attempted to borrow money from friends and family to pay the ordered child support, but "they didn't feel that was appropriate" since he did not have access to his daughter. Certain of these friends, however, were paying his attorney's fees in the case, and Father believed they would continue to contribute funds to offset any expenses necessary for him to reestablish a relationship with J.C.J. Father testified he had contacted various companies, brokers, and attorneys about the bonds required by the November 15, 2010 order, but had not found an available bond and did not have the funds to post a cash bond.

Mother testified that, if the trial court did not terminate Father's parental rights, the only relief she requested was "the cost of health insurance tacked on." The health insurance premium for J.C.J. was approximately $348 per month. According to Mother, other than the child support deducted from Father's paycheck from Outback Roofing, Father had never paid any child support for J.C.J. and had paid nothing toward the arrearages confirmed in the November 15, 2010 order. In Mother's opinion, Father had done nothing since he was released from prison to demonstrate he was no longer a danger to J.C.J. or that he would do anything he was ordered to do by the trial court.

The trial court denied Mother's motion to terminate Father's parental rights and motion to enforce the November 15, 2010 order by holding Father in contempt. The trial court modified

the November 15, 2010 order to allow Father to have supervised visitation at Hannah's House if Mother did not authorize another person or entity to supervise the visitation. The trial court ordered that, "when and if supervised visitation" between Father and J.C.J. was authorized under the terms of the November 15, 2010 order, Father was entitled to at least six hours of supervised possession of J.C.J. on Father's Day of each year as well as at least six hours of supervised possession at least one weekend per month. The trial court also modified the November 15, 2010 order to require Father to pay cash medical support of $348.70 per month.

Mother filed a motion to reconsider the ruling on the motion for enforcement, asserting the trial court was required to determine the cumulative amount of the child support arrearages. The trial court granted Mother's motion to reconsider and rendered judgment of $38.537.30 in favor of Mother for the child support arrearages and accrued interest.

Father also filed a motion to reconsider the ruling on his motion to modify, arguing "the dueling positions of the parties established a change in circumstances." As to child support, Father asserted the only issue before the trial court was the amount of child support, and the evidence established he was unable to pay the ordered support. As to his right to possession of J.C.J., Father argued the trial court found he was entitled to supervised possession, but failed to remove the bond provisions in the November 15, 2010 order. Father contended the trial court's failure to address the bonds resulted in an absolute bar to his access to J.C.J. The trial court denied Father's motion to reconsider.

Father requested the trial court make findings of fact and conclusions of law. As relevant to the issues in this appeal, the trial court found that, since the entry of the November 15, 2010 order, Father had not sought treatment, education, or counseling, or taken any other measure to satisfactorily address his conduct which resulted in the previous findings relating to the risk of international abduction of J.C.J., commission of family violence, a history or pattern of child

neglect, physical abuse, and absconding with the child in violation of the court order. As to child support, the trial court found, based on Father's earning capacity, history of earning money by unconventional means, and returning to the same employer and almost identical position he had prior to going to prison, that there was no material and substantial change in circumstances related to child support. The trial court also found Father received benefits from his employer in addition to the amounts contained in his paycheck.

Standard of Review

We review the trial court's decision to modify child support or conservatorship for an abuse of discretion. *In re P.C.S.*, 320 S.W.3d 525, 530 (Tex. App.—Dallas 2010, pet. denied); *In re C.C.J.*, 244 S.W.3d 911, 917 (Tex. App.—Dallas 2008, no pet.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or without reference to guiding rules or principles. *In re P.C.S.*, 320 S.W.3d at 530. Under this standard of review, challenges to the sufficiency of the evidence do not constitute independent grounds for asserting error, but are relevant factors in determining whether the trial court abused its discretion. *Id.* at 531. A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *In re C.C.J.*, 244 S.W.3d at 917.

Findings of fact made after a bench trial are of the same force and dignity as a jury's verdict upon special issues. *In re C.H.C.*, 392 S.W.3d 347, 349–50 (Tex. App.—Dallas 2013, no pet.). The trial court's findings of fact are reviewable for factual and legal sufficiency of the evidence under the same standards as applied in reviewing the sufficiency of the evidence supporting a jury's answer to a special issue. *Id.* at 350. In determining whether there is legally sufficient evidence to support a finding, we examine the record and credit evidence favorable to the finding if a reasonable fact finder could and disregard evidence contrary to the finding unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Evidence is legally insufficient only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence established conclusively the opposite of a vital fact. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010); *Gonzalez v. Gonzalez*, 331 S.W.3d 864, 867 (Tex. App.—Dallas 2011, no pet.). In a factual sufficiency review, we consider the entire record and will set aside the finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Cameron v. Cameron*, 158 S.W.3d 680, 683 (Tex. App.—Dallas 2005, pet. denied).

Child Support

In his first issue, Father challenges the trial court's finding of fact that there was no material and substantial change in circumstances related to child support and, in his second issue, argues the trial court abused its discretion by denying his motion to modify child support. Father first contends that both he and Mother judicially admitted there had been a material and substantial change in circumstances and, therefore, the trial court erred by finding there had not been such a change. Father then asserts the evidence was legally and factually insufficient to support the trial court's finding that there was not a material and substantial change in circumstances, and the evidence conclusively established he was unable to pay the ordered child support. Father finally asserts that, by denying Mother's motion to enforce the November 15, 2010 order by contempt, the trial court implicitly found that Father lacked the ability to pay the ordered child support and, therefore, erred by refusing to modify the amount of child support he was required to pay.

As relevant to this appeal, the trial court may modify a previous child support order if "the circumstances of the child or a person affected by the order have materially and substantially changed" since the date of the order's rendition. TEX. FAM. CODE ANN. § 156.401(a)(1) (West Supp. 2015). The movant has the burden to show a material and substantial change in circumstances. *In re P.C.S.*, 320 S.W.3d at 530.

We first turn to Father's argument Mother judicially admitted in her original motion to modify that there had been a material and substantial change in circumstances and, therefore, the trial court erred by finding there had not been such a change relating to child support. Assertions of fact, not pleaded in the alternative, in live pleadings constitute judicial admissions by the party. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001); *see also Randol Mill Pharmacy v. Miller*, 465 S.W.3d 612, 616 n.4 (Tex. 2015). However, Mother's amended motion to modify, her live pleading at the time of the hearing, did not contain the allegation there had been a material and substantial change in circumstances. Accordingly, we cannot conclude Mother judicially admitted there had been a material and substantial change in circumstances relating to child support. *See Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam) ("Contrary to statements in live pleadings, those contained in superseded pleadings are not conclusive and indisputable judicial admissions."); *Barnes v. Navarro Hosp., LP*, No. 13-14-00030-CV, 2014 WL 4402500, at *3 (Tex. App.—Corpus Christi Aug. 29, 2014, no pet.) (mem. op.).

However, even if we were to consider Mother's allegation of a material and substantial change in circumstances in her original motion to modify, we would not conclude she judicially admitted there had been a material and substantial change in circumstances relating to child support. The consequence of a judicial admission is that the admitted fact is conclusively established and the party is barred from later disputing the fact. *See Horizon/CMS Healthcare*

Corp. v. Auld, 34 S.W.3d 887, 905 (Tex. 2000); *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). However, to constitute a judicial admission, there must be a "clear, deliberate, and unequivocal" statement of fact. *Auld*, 34 S.W.3d at 905. In her original motion to modify, Mother did not request the amount of child support be modified; rather she requested only that the order be modified to impose greater restrictions on Father's access to J.C.J. Therefore, Mother's statement there had been a material and substantial change in circumstances was directed toward possession of and access to J.C.J., not the previously ordered child support. Accordingly, Mother did not make a "clear, deliberate, and unequivocal" statement in her original motion to modify that there had been a material and substantial change in circumstances relating to Father's financial condition or to the amount of child support Father had been ordered to pay. *See Auld*, 34 S.W.3d at 905.[4]

We next turn to Father's argument the trial court erred by denying his motion to modify because the evidence was legally and factually insufficient to support the trial court's finding there had not been a material and substantial change in circumstances relating to child support. Father asserts the only evidence before the trial court was that he made $10 an hour at Outback Roofing and $200 per month doing odd jobs, and Mother offered no evidence to rebut this testimony.

It was Father's burden to show a material and substantial change in circumstances since the prior order. The trial court determines whether the movant satisfied its burden by comparing the circumstances at the time of the initial order with those at the time the modification was sought. *In re P.C.S.*, 320 S.W.3d at 530; *In re C.C.J.*, 244 S.W.3d at 917. The record must contain both historical and current evidence of the relevant person's financial circumstances. *In*

[4] *See Duffie v. Hollander*, No. 01-92-00563-CV, 1993 WL 235945, at *5 (Tex. App.—Houston [1st Dist.] July 1, 1993, no pet.) (not designated for publication) (concluding no judicial admission of material and substantial change in circumstances when parties did not allege same material and substantial change).

re. C.C.J., 244 S.W.3d at 917; *London v. London*, 192 S.W.3d 6, 15 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Without both sets of data, the trial court has nothing to compare and cannot determine whether a material and substantial change has occurred. *In re C.H.C.*, 392 S.W.3d at 349; *London*, 192 S.W.3d at 15.

The amount of child support set in the November 15, 2010 order was based on the evidence of Father's earnings presented at the temporary orders hearing on August 20, 2009, including JP Strategies' bank records. Father did not present this evidence to the trial court during the hearing on his motion to modify and that evidence is not in the record on appeal.[5] *See In re C.C.J.*, 244 S.W.3d at 917 (record must contain evidence relevant to party's historical and current financial circumstances); *London*, 192 S.W.3d at 15. Father also failed to provide records relating to JP Strategies' current bank account at the hearing on his motion to modify, had not completed his income tax return for calendar year 2013, and provided inconsistent evidence concerning his earnings from sources other than Outback Roofing. *See In re C.H.C.*, 392 S.W.3d at 350 (without specific evidence of income, court cannot make requisite comparison to determine whether there had been a material and substantial change in circumstances); *Baker v. Baker*, 719 S.W.2d 672, 676 (Tex. App.—Fort Worth 1986, no writ) (bare assertion by mother that she was making less money, without some testimony as to how much she was making, was no more than a scintilla of evidence that her circumstances had changed).

The trial court found that after Father was released from prison, he began working for the same company in an almost identical position as he held before going to prison. After his release from prison, Father also began operating JP Strategies, the same credit repair company he

[5] The record on appeal contains the transcript of the August 20, 2009 hearing. However, the exhibits that were admitted at that hearing are not included in the reporter's record, and the court reporter noted the retention period for the exhibits has expired.

operated before going to prison. The trial court found Father received benefits from his employer in excess of the amounts contained in his paycheck. Finally, there was evidence Father had resources available from friends who provided him a place to live without requiring him to pay rent and were willing to pay his attorney's fees in this litigation as well as other expenses relating to access to J.C.J.

The trial court, as the fact finder, was in the best position to observe the witnesses' demeanor and assess their credibility, determine the weight to be given their testimony, and resolve conflicts and inconsistencies in the testimony. *Allman v. Butcher*, 314 S.W.3d 671, 674 (Tex. App.—Dallas 2010, no pet.); *In re E.R.T.*, No. 04-15-00071-CV, 2015 WL 9486824, at *2 (Tex. App.—San Antonio Dec. 30, 2015, no pet.) (mem. op.). We may not substitute our judgment for that of the trier of fact. *Allman*, 314 S.W.3d at 674; *Branham v. Davenport*, No. 01-11-00992-CV, 2013 WL 5604736, at *4 (Tex. App.—Houston [1st Dist.] Oct. 10, 2013, no pet.) (mem. op.). Based on the inconsistencies in Father's testimony about his income, Father's failure to produce all information about his income, and evidence that Father's lifestyle was not supported solely by his earnings, the trial court could have reasonably determined Father failed to carry his burden of establishing there had been a material and substantial change in circumstances relating to child support. *See In re E.R.T.*, 2015 WL 9486824, at *2 (trial court has broad discretion in determining whether to modify amount of child support; if some probative and substantive evidence supports trial court's decision, trial court has not abused its discretion).

Father finally argues the trial court erred by denying his motion to modify because, by denying Mother's motion that Father be held in contempt for failing to pay child support, the trial court implicitly found Father was unable to pay the amount of support set in the November 15, 2010 order. The trial court made no findings of fact or conclusions of law regarding its basis

for denying Mother's motion for enforcement by contempt and neither party requested that the trial court make additional findings of fact or conclusions of law on the issue. However, the trial court found in the November 15, 2010 order that it had previously computed the net resources available to Father, Father had earning capacity sufficient to warrant a monthly support obligation of $1,300, and the percentage applied to Father's net resources for child support was twenty percent. These findings support the trial court's determination, on November 15, 2010, that Father had the ability to pay $1,300 per month in child support. Following the hearing on Father's motion to modify, the trial court found there had been no material and substantial change in circumstances relating to child support since the entry of the November 15, 2010 order. Accordingly, the trial court implicitly found Father did have the ability to pay $1,300 per month in child support. We resolve Father's first two issues against him.

In his third issue, Father contends the trial court erred in its determination of the amount of Father's child support arrearages in the order granting Mother's motion to enforce. Father's only argument is the amount of the child support arrearages is incorrect because the trial court abused its discretion by refusing to modify Father's child support obligation. We have concluded the trial court did not abuse its discretion by denying Father's motion to modify. Accordingly, we resolve Father's third issue against him.

Trial Amendment

In his fourth issue, Father asserts the trial court erred by denying his oral motion for a trial amendment requesting removal of the bonds required by the trial court's November 15, 2010 order. A trial amendment must be filed as a written pleading; an oral amendment at trial is insufficient to modify the pleadings. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex. 2000); *Dallas Area Rapid Transit v. Morris*, 434 S.W.3d 752, 760 (Tex. App.—Dallas 2014, pet. denied). Although this defect may be waived by a failure to object, *see Zimlich*, 29 S.W.3d at

73, the record reflects Mother did object to the amendment. Accordingly, Father's oral request for a trial amendment was insufficient to modify the pleadings.

However, even if Father had appropriately presented his requested trial amendment to remove the bond requirement, we cannot conclude the trial court erred by denying the request. Under rule of civil procedure 66, a trial court is required to freely grant a request to amend pleadings during trial unless the opposing party presents evidence the amendment would prejudice that party in maintaining an action or defense on the merits. TEX. R. CIV. P. 66; *see also State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) (per curiam). The trial court must allow an amendment to a pleading if it is merely procedural in nature such as conforming the pleadings to the evidence at trial. *Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992) (per curiam); *Hampden Corp. v. Remark, Inc.*, 331 S.W.3d 489, 498 (Tex. App.—Dallas 2010, pet. denied). However, an amendment is not mandatory if it asserts a new substantive matter that reshapes the cause of action. *Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990); *see also Chapin*, 844 S.W.2d at 665; *Remark*, 331 S.W.3d at 498. If the amendment is not mandatory, the decision to allow the amendment is within the trial court's discretion. *Kilpatrick*, 874 S.W.2d at 658; *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We will reverse the trial court's decision to allow an amendment only if the trial court clearly abused its discretion. *Kilpatrick*, 874 S.W.2d at 658; *Stephenson*, 16 S.W.3d at 839.

"Under Rules 63 and 66 a trial court has no discretion to refuse an amendment unless: 1) the opposing party presents evidence of surprise or prejudice, or 2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment." *Greenhalgh*, 787 S.W.2d at 939 (internal citations omitted); *see also Greenville Automatic Gas Co. v. Automatic Propane Gas & Supply, LLC*, 465 S.W.3d 778, 783–

84 (Tex. App.—Dallas 2015, no pet.); *Rodriguez v. Crowell*, 319 S.W.3d 751, 758–59 (Tex. App.—El Paso 2009, pet. denied). However, merely because an amended pleading asserts a new cause of action does not make it prejudicial to the opposing party as a matter of law. *Smith Detective Agency & Nightwatch Serv., Inc. v. Stanley Smith Sec., Inc.*, 938 S.W.2d 743, 749 (Tex. App.—Dallas 1996, writ denied); *Rodriguez*, 319 S.W.3d at 759. Rather, the amendment must be evaluated in the context of the record of the entire case. *Smith Detective Agency*, 938 S.W.2d at 749; *Rodriguez*, 319 S.W.3d at 759. An amendment is prejudicial on its face if, viewed in the context of the record, (1) it asserts a new substantive matter that reshapes the cause of action or the nature of the trial, (2) the opposing party could not have anticipated the amendment in light of the prior development of the case, and (3) the amendment would detrimentally affect the opposing party's presentation of the case. *Smith Detective Agency*, 938 S.W.2d at 749; *Rodriguez*, 319 S.W.3d at 759. An additional cause of action may not be a new substantive matter if it has common elements with previously pleaded matters and the evidentiary proof required to support it is the same for an already pleaded cause of action. *Smith Detective Agency*, 938 S.W.2d at 749 (citing *Kilpatrick*, 874 S.W.2d at 658).

In this case, Father pleaded for unsupervised possession of J.C.J. and for a standard possession order. He did not plead for removal of the required bonds. Whether a bond is required to protect a parent from the other parent's abduction of the child or refusal to comply with court-ordered periods of possession is a separate issue from whether the parent is allowed unsupervised possession of the child. *See* TEX. FAM. CODE ANN. §§ 153.011 (upon finding person who has possessory interest in child may violate court order relating to interest, trial court may order party to execute bond or deposit security); 153.503(2), (6) (setting out supervised visitation or imposition of bond as separate actions trial court can take to prevent abduction of child) (West 2014). Accordingly, Father's trial amendment asserted a new cause of action.

We next turn to whether Mother could have anticipated the amendment in light of the prior development of the case. Father points to his testimony at a temporary orders hearing on January 31, 2013, to support his claim that Mother should have been aware that he was seeking to have the bond requirement removed. However, Father's testimony at the temporary orders hearing was only that the amount of the bonds was excessive. Father offered no testimony that he had addressed any of the conduct that led the trial court to initially impose the bond requirement. Although Father's testimony arguably put Mother on notice that Father would seek a reduction in the amount of the bonds, an issue relating to Father's financial condition, we cannot conclude it placed her on notice that he was seeking to eliminate the bond requirement, the only relief he sought in his trial amendment.

Finally, we consider whether the amendment would have detrimentally affected Mother's presentation of the case. The evidence necessary to address Father's request the bond requirement be eliminated is not clearly related to either Father's request that child support be reduced or that he be allowed unsupervised visitation with J.C.J. To address a request that the bond requirement be removed, Mother needed to be prepared to offer evidence of conduct by Father since his release from prison that was relevant to either a potential risk of international abduction by Father of J.C.J. or to Father's ongoing refusal to comply with the trial court's order relating to possession of and access to J.C.J. Mother's counsel indicated he was not prepared to address this issue in the trial court at that time. Accordingly, Mother's presentation of the case would have been detrimentally affected by the amendment.

We conclude Father's oral request to amend his pleadings to seek elimination of the bond requirement was prejudicial on its face. Accordingly, the trial court did not abuse its discretion by denying the trial amendment. We resolve Father's fourth issue against him.

In his fifth issue, Father argues the required bonds pose an absolute bar to access to J.C.J., which is not justified under applicable law.[6] Father did not appeal from the trial court's November 15, 2010 order, and cannot challenge in this appeal the trial court's decision on November 15, 2010, to require Father to post the two bonds. *See* TEX. R. APP. P. 26.1. (unless extended by proceedings in trial court, notice of appeal must be filed within thirty days after judgement is signed in trial court). Further, we have already concluded the trial court did not err by refusing to allow Father to amend his pleadings to litigate the removal of the bond requirement. Because the issue of whether the bond requirement should be eliminated was not tried below, we will not address Father's complaint that the trial court erred by refusing to modify the November 15, 2010 order to remove the requirement he post the bonds. We resolve Father's fifth issue against him.

Mother's Attorney's Fees

In a cross-point, Mother asserts the trial court abused its discretion by failing to award her attorney's fees pursuant to section 157.167 of the family code. *See* TEX. FAM. CODE ANN. § 157.167(a) (West 2014) ("If the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages."). In her motion for enforcement of the November 15, 2010 order, Mother requested that Father be held in contempt and placed in jail for failure to make required child support payments and that the trial court confirm Father's child support arrearages. Mother generally pleaded for attorney's fees without providing the trial court with the statutory basis for her request. After the trial court denied Mother's motion for enforcement, Mother filed a motion to reconsider in which she argued the trial court was required under

[6] In his brief, Father also argues the required bonds infringe on his rights under the Ninth and Fourteenth Amendments of the United States Constitution. Father did not raise these arguments in the trial court and, therefore, has waived them on appeal. *See Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (claims, including constitutional claims, must have been asserted in trial court in order to be preserved on appeal).

section 157.263 of the family code to confirm the amount of child support arrearages and render a cumulative judgment. *See id.* § 157.263(a) ("If a motion for enforcement of child support requests a money judgment for arrearages, the court shall confirm the amount of arrearages and render one cumulative money judgment). Although Mother again generally requested that the trial court award her attorney's fees and costs, she did not cite the trial court to section 157.167 of the family code. Further, the proposed order Mother submitted to the trial court granting the motion for enforcement, which the trial court subsequently signed, did not include an award of attorney's fees and expressly stated that all relief requested and not expressly granted was denied.

On this record, we conclude Mother waived her right to recover attorney's fees under section 157.167 of the family code by not presenting a timely request to the trial court. *See* TEX. R. APP. P. 33.1(a)(1). We resolve Mother's cross-point against her.

We affirm the trial court's orders.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

141449F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF J.C.J., A CHILD

No. 05-14-01449-CV

On Appeal from the 219th Judicial District Court, Collin County, Texas,
Trial Court Cause No. 219-53747-2009.
Opinion delivered by Justice Fillmore,
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the trial court's September 5, 2014 :Order in Suit to Modify Parent–Child Relationship and Order Denying Termination" and September 5, 2014 "Order on Motion for Enforcement of Child Support" are **AFFIRMED**.

It is **ORDERED** that appellee Stephney Denise Jackson recover her costs of this appeal from Dan Eddie Paschall.

Judgment entered this 28th day of January, 2016.