Opinion issued May 10, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00835-CV

MARY JACOB, Appellant

V.

ADAM JACOB, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Case No. 2013-51075

MEMORANDUM OPINION

Mary Jacob filed a petition to modify her child support obligations, which the trial court denied after a trial. In four issues on appeal, Mary argues the trial court erred by excluding evidence of her increased expenses and by failing to file findings of fact and conclusions of law.

We affirm.

Background

The facts relevant to this appeal are not in dispute. Mary and Adam divorced in 2010. They had one child. The parties agreed to a couple of modifications, the last one on December 16, 2014. On August 26, 2015, Mary give birth to another child. On September 11, 2015, Mary filed a petition to modify her child support obligations. In her response to Adam's requests for disclosure, Mary asserted, "The circumstances of a child or a person affected by the current order have materially and substantially changed: specifically, Petitioner [Mary] had a baby since the date of the rendition of the order to be modified, and the support payments previously ordered should be decreased by 2.5%."

At trial, Mary testified that her salary had stayed the same since the last order setting child support but that she had had a second child since that time. Mary's counsel attempted to question Mary about how her living situation had changed since she had a second child and about additional bills resulting from the second child. Adam objected to these questions, arguing the questions went "outside of [Mary's] responses to [Adam's requests for disclosure] and the discovery stating that the only reason is because another child has been born. So, it should be reduced by 2.5 percent. It says nothing of increased cost or anything else." The trial court sustained the objections.

The trial court denied the petition on July 26, 2016. On August 12, 2016, Mary filed a request for findings of fact and conclusions of law. The trial court did not file findings of fact and conclusions of law.

On August 25, 2016, Mary filed a motion for new trial. In the motion, Mary again asserted the trial court abused its discretion by excluding her evidence of increased expenses. She argued that her discovery responses established that Adam was on notice that she intended to introduce evidence of her increased costs at trial. In support, she attached some of her discovery responses to the motion for new trial. The motion was overruled by operation of law.

Exclusion of Evidence

In her first issue, Mary argues the trial court abused its discretion by excluding evidence of her increased costs after having a second child on the basis that she had failed to identify the increased costs in her response to Adam's requests for disclosure. In her second issue, Mary argues excluding the evidence functioned as a death penalty sanction. In her third issue, the trial court erred by excluding the evidence "because the best interest of the child is the primary consideration." We hold these issues have not been preserved for appeal.

To preserve a complaint about excluded evidence, the offering party must include the evidence in the record through an offer of proof or a bill of exception. *See* TEX. R. EVID. 103(a)(2); TEX. R. APP. P. 33.2. An offer of proof serves the dual

purpose of allowing the trial court to reconsider its ruling on the objection in light of the evidence and assisting the appellate court in reviewing the trial court's ruling. *Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 439 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

To be sufficient to preserve error, an offer of proof must describe or show the nature of the evidence specifically enough that the reviewing court can determine its admissibility. *Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd.*, 365 S.W.3d 688, 703 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While the offer of proof does not need to establish the specific facts the evidence would reveal, the offering party must reasonably summarize the offered evidence. *See PNS Stores, Inc. v. Munguia*, 484 S.W.3d 503, 511 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Here, Mary made no offer of proof at trial of the evidence excluded by the trial court. The record establishes that she was intending to testify about the increased costs she has incurred with having a second child. The record does not show, however, whether this testimony was primarily going to be through documents or through Mary's testimony. We also do not know what any such documents or testimony would have shown. *See id.* (requiring offering party to reasonably summarize excluded evidence).

In her brief, Mary relies on her motion for new trial to establish error. Mary attached some of her discovery responses to the motion to establish that Adam was

on notice that the she intended to introduce evidence of her increased costs at trial. "While a motion for a new trial may preserve some errors, standing alone, it cannot preserve error related to the admission or exclusion of evidence." *Mandeville v. Mandeville*, No. 01-15-00119-CV, 2015 WL 7455436, at *5 (Tex. App.—Houston [1st Dist.] Nov. 24, 2015, no pet.) (mem. op.) (citing TEX. R. EVID. 103; TEX. R. APP. P. 33.1). It is not presented during trial, as required for an offer of proof. *See* TEX. R. EVID. 103(c) (requiring offer of proof to be presented at trial). And it does not satisfy the requirements of a formal bill of exception. *See* TEX. R. APP. P. 33.2(c) (establishing procedure for filing bill of exception).

Moreover, the discovery responses attached to Mary's motion for new trial do not reasonably summarize the evidence of Mary's increased costs in comparison to her net resources. In her response to interrogatories, Mary summarized her current monthly expenses. She did not, however, identify which of those expenses had increased or by what amount.

Mary's complaints about the trial court's exclusion of her evidence concerning her increased costs have not been preserved for appeal. We overrule Mary's first, second, and third issues.

Findings of Fact and Conclusions of Law

In her fourth issue, Mary argues the trial court erred by failing to file findings of fact and conclusions of law.

"A trial court's failure to file findings in response to a timely and proper request is . . . presumed harmful, unless the record before the appellate court affirmatively shows that the complaining party has suffered no injury." *Ad Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 135 (Tex. 2017) (internal quotations omitted). "If a party is prevented from presenting his case on appeal, he has been harmed." *Alsenz v. Alsenz*, 101 S.W.3d 648, 652 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

Typically, the remedy for failure to file timely requested findings of fact and conclusion of law is to abate. *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 54 (Tex. App.—Houston [14th Dist.] 2003, no pet.). We do not need to abate, however, if the error is harmless. *See id.* "[W]here . . . there is only a single ground of recovery or a single defense in the case, an appellant is not harmed by a failure to file findings and conclusions because he is not required to guess the reasons for a trial court's judgment." *Wood v. Pharia L.L.C.*, No. 01-10-00579-CV, 2010 WL 5060621, at *9 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, no pet.) (mem. op.).

Mary argues that she was harmed because we cannot know the basis for the trial court's denial of her petition to modify her child support obligations. We disagree. Mary based her petition on the fact that she has experienced a material and substantial change by having another child. "[T]he fact that [a parent] has additional children, without more, is insufficient to support a material and substantial change

in circumstances." *In re D.S.*, 76 S.W.3d 512, 520 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Instead, the parent must establish additional expenses incurred as a result and the overall change in financial circumstances. *See id.*; *Swate v. Crook*, 991 S.W.2d 450, 454 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), *abrogated on other grounds by Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

Because evidence of Mary's additional expenses and change in her net resources was not admitted at trial, we do not need to guess the trial court's basis for denying her petition. *See Wood*, 2010 WL 5060621, at *9. Because Mary did not preserve her complaint that the trial court erred by excluding this evidence, there are no findings relevant to the trial court's decision that are necessary for disposition of this appeal.

We overrule Mary's fourth issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Higley and Bland.