

GRANT MOTION; and Opinion Filed May 20, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

**No. 05-16-00519-CV
No. 05-16-00520-CV**

IN THE INTEREST OF S.V. AND S.V., CHILDREN

**On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-04-11968**

**MEMORANDUM OPINION ON MOTION FOR REVIEW OF TRIAL
COURT ORDER SUSTAINING CONTEST TO AFFIDAVIT OF
INDIGENCE**

**Before Justices Bridge, Lang-Miers, and Stoddart
Opinion by Justice Stoddart**

Appellant, appearing pro se, filed an affidavit of indigence seeking to proceed in these appeals without advance payment of costs. *See* TEX. R. APP. P. 20.1(a)(2). The district clerk, official court reporter, and deputy court reporter contested the affidavit and, following a hearing, the trial court, in three separate order, sustained the contests. *See id.* 20.1(e)(1),(i)(4). Appellant now seeks review of the trial court's orders, asserting he met his burden of proving he is unable to pay costs. *See id.* 20.1(j). We agree. Accordingly, we grant the motion and reverse the trial court's orders.

BACKGROUND

Appellant received a Bachelor’s degree in electrical engineering in 1980 and a Master’s degree in management in 1983. He lives in a four-bedroom, 2,700 square foot house, which he purchased in 2002 and is valued by the Dallas Central Appraisal District at \$349,110. He was employed full-time until 2010. Since then, he has held a few contract jobs, making “like 10 or 15,000 in some years and “[an] average of 20,000. 25,000” in “2011, 2012.” His last contract job was in “2012-2013,” when he stopped because he started law school and did not have enough time for both. In 2015, he earned \$1095 through “IT consulting” and \$4755 from renting a room in his house through Airbnb Rental. He also withdrew \$10,512 from a retirement account.

He alleged in his affidavit, a pre-printed form from TexaLawHelp.org, that his assets consist of \$100 in cash, \$100 in each of two bank accounts, a 2000 Lexus SUV with 180,000 miles and valued at \$1000, and “miscellaneous” property valued at \$1000. He did not disclose as assets his house or equity in the house. His listed as debts a \$190,000 mortgage, \$150,000 in credit card debt, and \$55,000 in student loans. As expenses, he listed:

•Rent/house payments/maintenance	\$2000.00
•Food and household supplies	\$ 500.00
•Utilities and telephone	\$ 250.00
•Clothing and laundry	\$ 50.00
•Medical and dental expenses	\$ 400.00
•Insurance (life, health, auto, etc.)	\$ 350.00
•School and child care	\$ 100.00
•Vehicle payments	\$ 0.00
•Gas, bus fare, auto repair	\$ 100.00
•Child/spousal support	\$1118.72
•Wages withheld by court order	\$ 0.00
•Debt payments	\$2500.00.

These expenses total \$7368.72.

At the hearing on the contests, appellant testified he is currently a part-time law student and looking for work “through agencies, the Robert Half agency and Kelly Services” and

“any[where] that somebody will pay me based on whatever qualifications I have from the past.”¹ He testified if “offer[ed] a job tomorrow, I’ll take it.” He discussed his assets, stating he had a total of \$500 in three bank accounts and explaining that the “miscellaneous” property he valued at \$1000 in his affidavit consisted of “stuff in my house like the TV, my laptop and just all the usual things,” none of which was new. As for the house, he stated he refinanced the mortgage in 2012 and owed \$188,000 at that time. He has not missed a payment and has timely paid the property taxes. He explained he did not list the house and equity in the house on his affidavit because the pre-printed form he used stated “do not list the house you live in.” He acknowledged he has “substantial” equity in the house and testified he has applied for home equity loans, but has been unable to obtain one because he does not have any income or the ability to repay the loan. Asked if he had considered selling his house, he replied he had not because he “expect[s]” his daughters to “come back to my home” someday and “they need that home.”²

With respect to his expenses, he testified his debt payment was “\$1500 a month” or “around \$2000 per month.” He explained that, until early this year, he met his expenses by “withdrawing from credit cards.” He reached the limit on the cards, however, and entered into a debt management program. His cards were closed and he had to turn to his family for help. He received \$5000 from his father in January and again in February. He also received money from a cousin and brother.

No other witness testified and no evidence was offered rebutting appellant’s inability to pay costs.³ Rather, through cross-examination and in argument, the district clerk, court reporters,

¹ Appellant offered into evidence “documentation to show . . . that I’m trying to get [employment],” but the trial court sustained appellee’s hearsay objection to the documentation.

² Appellant is appealing a final order in suit affecting the parent-child relationship.

³ In addition to appellant’s 2015 tax return, four other exhibits were admitted into evidence: (1) a portion of a deed of trust showing that \$188,000 was owed on the house in 2012, (2) the valuation of the house by the Dallas Central Appraisal District, (3) the affidavit of indigence, and (4) an affidavit of indigence filed in 2015 were admitted into evidence.

and appellee attacked appellant's credibility and contended his family should pay for the record or he should sell the house. In denying appellant's affidavit and sustaining the contests, the trial court noted there were inconsistencies in appellant's hearing and affidavit testimony, and he had "an incredible amount of equity" in the house. The court found appellant's "credibility lacking" and concluded he had not met his burden of proof.

STANDARD OF REVIEW AND APPLICABLE LAW

The test for determining indigence is whether the record as a whole shows "by a preponderance of the evidence that the applicant would be unable to pay the costs, or a part thereof, or give security therefor, if he really wanted to and made a good-faith effort to do so." *In re C.H.C.*, 331 S.W.3d 426, 429 (Tex. 2011) (citing *Higgins v. Randall Cnty. Sheriff's Office*, 257 S.W.3d 684, 686 (Tex. 2008)). The applicant is not required to show family or friends are unable to pay the applicant's costs, and he is not expected to secure the necessary funds by depriving himself and his family of the necessities of life or borrowing money he cannot repay. *See Allred v. Lowry*, 597 S.W.2d 353, 355 (Tex. 1980); *Goffney v. Lowry*, 554 S.W.2d 157, 159 (Tex. 1977); *Pinchback v. Hockless*, 164 S.W.2d 19, 20 (Tex. Com. App. 1942).

In reviewing a trial court's ruling on a contest to an affidavit of indigence, we apply an abuse of discretion standard. *Basaldua v. Hadden*, 298 S.W.3d 238, 241 (Tex. App.—San Antonio 2009, no pet.) (per curiam). We will conclude the trial court abused its discretion if it acted without reference to any guiding rules or principles or in an arbitrary and unreasonable manner. *Id.* As the fact finder, the trial court is the sole judge of the credibility of the witnesses and evidence. *In re A.R.*, 236 S.W.3d 460, 471 (Tex. App.—Dallas 2007, no pet.) (op. on reh'g). However, the trial court may not disregard the only evidence adduced at the hearing concerning the applicant's ability to pay costs. *See Sansom v. Sprinkle*, 799 S.W.2d 776, 778 (Tex. App.—Fort Worth, orig. proceeding).

DISCUSSION

Viewing the record as whole, we conclude appellant has shown by a preponderance of the evidence that he is “unable to pay the costs, or a part thereof, if he really wanted to and made a good-faith effort to do so.” *See C.H.C.*, 331 S.W.3d at 429. He testified he is unemployed, but actively looking for employment and willing to take any job that “will pay me.” He has substantial debts, including a mortgage, student loans, and credit card debt, and he is dependent on his family to meet his living expenses. His only asset is his house. He has not considered selling it because of his daughters, and, although he has “substantial equity” in the house, he testified he is unable to obtain a home equity loan because he has no income and cannot repay the loan. While the record reflects inconsistencies in his hearing and affidavit testimony as to the amount of debt, the available funds in his bank accounts, and the amount of equity in his house, no evidence was offered to show his debt is considerably less than what he stated, he could in fact obtain a home equity loan or other loan, or he has undisclosed assets which he could sell, or undisclosed funds he could use, to pay the costs, or a portion of the costs, of the appeal without depriving him or his family of the necessities of life.

As the fact-finder, the trial court was required to evaluate appellant’s credibility, and we cannot disturb that finding. *See A.R.*, 236 S.W.3d at 471. However, the trial court was not free to disregard the only positive evidence establishing appellant’s inability to pay costs when no evidence was offered in rebuttal. *See Sansom*, 799 S.W.2d at 778; *see also In re S.T.*, 239 S.W.3d 452,457 (Tex. App.—Waco 2007, order) (per curiam) (concluding trial court abused its discretion in finding appellant did not prove his indigence where appellant’s monthly income as a self-employed carpenter approximated his monthly expenses and, although he had worked as an insurance adjuster in the past making more daily than he did weekly as a carpenter, no evidence was offered to refute his claim that insurance adjusters were not currently in demand);

In re Sosa, 980 S.W.2d 814, 816 (Tex. App.—San Antonio 1998, orig. proceeding) (concluding trial court abused its discretion in sustaining contest where no evidence was offered contradicting appellant’s hearing and affidavit testimony that her monthly expenses exceeded her income and she had no assets she could use to finance the appeal).

On the record before us, we conclude the trial court abused its discretion in sustaining the contests. We grant appellant’s motion and reverse the trial court’s orders. Appellant is allowed to proceed with this appeal without advance payment of costs.

/Craig Stoddart/

CRAIG STODDART
JUSTICE

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