Opinion issued August 25, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00062-CV

HECTOR CORTEZ, Appellant

V.

VERONICA GARZA AND THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS, Appellees

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On Appeal from the 505th District Court
Fort Bend County, Texas
Trial Court Case No. 12-DCV-199184

MEMORANDUM OPINION

In this child support modification proceeding, appellant Hector Cortez sought to decrease the amount of monthly child support payments for his two children. The

trial court lowered Hector's monthly support obligation to $1,169.86, and made the modified amount retroactive to January 1, 2018.

On appeal, Hector argues that the trial court erred by: (1) making the modified obligation effective as of January 1, 2018, a date nearly three years after Hector first pleaded for modification; and (2) setting the modified amount of child support at more than two times the proven needs of the children. Hector also argues that the court violated Texas public policy by making the modification retroactive only to January 1, 2018, and setting the modified child support amount above the proven needs of the children. We affirm.

Background

Hector married appellee Veronica Garza in 2001, and they have two children together: a son born in 2004 and a son born in 2009.

In 2012, Hector filed for divorce in Fort Bend County. During the divorce proceedings, Veronica and the children moved to Monterrey, Mexico. In 2013, the trial court signed an agreed final divorce decree that appointed both parents as joint managing conservators and granted Veronica the exclusive right to designate the primary residence of the children, subject to specific restrictions. The final decree acknowledged that Veronica and the children were living in Mexico, and it ordered Veronica to return to Fort Bend County with the children by August 1, 2014.

The parties agreed that Hector would pay $2,339.74 per month in child support to Veronica. This amount would decrease to $1,949.79 per month after the parties' eldest son reached the age of eighteen. Hector also agreed to make monthly contractual alimony payments to Veronica for three years following the divorce decree.

After the parties divorced, Veronica remarried in Mexico. Although the final divorce decree required her to return to Fort Bend County with the children on August 1, 2014, it is undisputed that she did not do so. The children continue to live in Mexico, and they have only visited Hector in Texas a few times since the signing of the divorce decree.

In April 2015, Hector filed a "Petition to Modify Parent-Child Relationship." Hector sought a modification of the conservatorship provisions of the divorce decree to grant him the exclusive right to designate the children's primary residence and to restrict the children's residence to Fort Bend County. Hector also stated in this filing, "Petitioner believes that the parties will enter into a written agreement containing provisions for modification of the order providing for support of the children." Hector did not state how he wished for the trial court to modify the support provision, although he did request that the court enter a temporary order requiring Veronica to pay child support "while this case is pending." Hector contemporaneously filed a

motion for enforcement of his possession and access rights based on Veronica's failure to return to Fort Bend County with the children.

Over the next several years, the parties engaged in protracted litigation concerning Hector's access to the children and Veronica's retention of the children in Mexico. In response to Hector's motion for enforcement, Veronica filed a plea to the jurisdiction and requested that the trial court decline jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") in favor of Mexico, which was a more convenient forum. Veronica filed a proceeding in Mexico to terminate Hector's parental rights to the children, and Hector filed a "Motion for Determination of Wrongful Retention." Hector also filed an application under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"), in which he sought a determination that Veronica had wrongfully retained the children in violation of Hector's custody rights. The trial court, at the request of the Mexican court hearing Hector's Hague Convention application, signed an order determining that Veronica's retention of the children in Mexico past August 1, 2014, breached Hector's custody rights.

Nevertheless, in August 2018, the trial court issued a ruling declining jurisdiction under the UCCJEA. After Hector moved for reconsideration, the trial court signed an order in April 2019, again declining to exercise jurisdiction over custody matters under the UCCJEA but retaining jurisdiction over child support

matters under the Uniform Interstate Family Support Act ("UIFSA"). Hector appealed the trial court's order declining to exercise jurisdiction over custody matters. Ultimately, a panel of this Court reversed the trial court's order and remanded the case to the trial court. *See Cortez v. Cortez*, 639 S.W.3d 298 (Tex. App.—Houston [1st Dist.] 2021, no pet.).

While the trial court was considering whether to retain jurisdiction over custody matters under the UCCJEA, Hector filed a motion for modification of child support on December 15, 2017. Hector argued that the amount of child support agreed to in the divorce decree was approximately 50% of his net resources and thus constituted "above guideline child support." He also argued that a material and substantial change in circumstances had occurred because Veronica had started working in March 2013 and Hector's employment had been terminated. He was working on a contract basis at the time of the motion, but his monthly net resources had been reduced to approximately $5,900 per month.

Hector further argued that below-guideline support was appropriate because the children's needs were significantly less than the child support guidelines; Hector's ability to pay child support had been hindered by the high costs of litigating the custody matters; Hector would be required to pay substantial amounts in airfare and fees to exercise his visitation rights; and Hector had accumulated a significant amount of debt. Hector requested that the trial court make any modified support

obligation "effective from April 2015, which is the date of the first modification filing in this cause." In a supporting brief, Hector pointed out that he had served requests for admissions on Veronica. Because she never answered these requests, they were deemed admitted. These deemed admissions included admissions that Veronica's monthly household expenses were less than 30,000 Mexican pesos, which was equivalent to $1,578.94, and the portion of household expenses related to the children's needs was "less than 35% of the overall household expenses."

The trial court held a hearing on the motion to modify child support on June 3, 2020. Both Veronica and Hector testified at this hearing. Hector requested that his child support obligation be reduced to $600 per month. Hector's documentary evidence included an evaluation performed at the behest of the Mexican court, which reflected that the approximate monthly gross income of Veronica and her husband was 54,000 Mexican pesos and their monthly expenses were approximately 29,000 Mexican pesos. The trial court also admitted Hector's tax returns from 2018 and 2019. These records reflected that Hector made $90,000 in wages in 2018 and 2019, and his adjusted gross income in 2019 was approximately $143,000.

The trial court signed an order modifying Hector's child support obligation. The court reduced Hector's monthly support obligation to $1,169.86 for both children. The court ordered this amount to decrease further to $935.90 per month upon the first child reaching age eighteen. The court found that the modified support

amount was below the child support guidelines. Specifically, the court found that Hector's monthly net resources were $7,564.46; Veronica's monthly net resources were $0; guideline child support of 25% of Hector's monthly net resources would be $1,891.11, and the actual amount of child support—$1,169.86—was 15.46% of Hector's monthly net resources. The court further found that below-guidelines support was appropriate because "[t]he needs of the children are significantly less [than] what is provided by the guidelines" and the cost for the children to travel to Texas, to be paid by Hector, was over $1,000. The court made the modified support obligation retroactive to January 1, 2018.

Hector requested findings of fact and conclusions of law, which the trial court did not file. This appeal followed.

Retroactive Effect of Child Support Modification

In his first issue, Hector argues that the trial court abused its discretion by making his modified support obligation retroactive only to January 1, 2018, a date nearly three years after he first sought modification in April 2015. In his second issue, Hector argues that the court's decision to make the modified obligation retroactive only to January 1, 2018, violated Texas public policy by rewarding Veronica's attempts to delay the proceedings and "by discouraging the efforts to engage in peaceable resolution of disputes through voluntary settlement procedures."

A. Standard of Review and Governing Law

A trial court may modify a 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 § 156.401(a)(1); *Trammell v. Trammell*, 485 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2016, no pet.). The party requesting the modification bears the burden of showing the required change in circumstances. *Trammell*, 485 S.W.3d at 576.

Family Code section 156.401(b) provides that the trial court may modify the amount of a support order "only as to obligations accruing after the earlier of (1) the date of service of citation; or (2) an appearance in the suit to modify." TEX. FAM. CODE § 156.401(b); *In re Moore*, 511 S.W.3d 278, 284 (Tex. App.—Dallas 2016, orig. proceeding) ("Generally, a trial court does not abuse its discretion by ordering child support retroactive to the date of service of citation or an appearance in the suit to modify."); *In re B.R.F.*, 457 S.W.3d 509, 510 (Tex. App.—El Paso 2014, no pet.) ("Retroactive support is authorized by statute but it is limited to the date citation was served upon the obligor or the date of obligor's appearance, whichever occurs earlier."). "The effective date of the modified order is within the broad discretion of the trial court." *In re Naylor*, 160 S.W.3d 292, 294 (Tex. App.—Texarkana 2005, pet. denied); *In re J.G.Z.*, 963 S.W.2d 144, 149 (Tex. App.—Texarkana 1998, no pet.). Although the trial court has statutory authority to modify a support order

retroactively, applying this statute 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); *see also Holley v. Holley*, 864 S.W.2d 703, 707 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (stating that trial court has broad discretion in deciding whether circumstances of case justify retroactive modification of support obligation).

We review a trial court's order on a modification request for an abuse of discretion. *Trammell*, 485 S.W.3d at 575. A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Id.*; *Brejon v. Johnson*, 314 S.W.3d 26, 29 (Tex. App.—Houston [1st Dist.] 2009, no pet.). We review the evidence in the light most favorable to the trial court's ruling and indulge every presumption in favor of the ruling. *Trammell*, 485 S.W.3d at 575. A trial court does not abuse its discretion if some probative and substantive evidence supports the order. *Id.*

B. Analysis

The trial court signed the agreed final divorce decree in January 2013. The decree set Hector's monthly child support obligation at $2,339.74. The decree also required Veronica and the children to return from Monterrey and reside in Fort Bend County by August 1, 2014. It is undisputed that Veronica did not comply with this requirement and that the children have resided in Mexico since 2012.

Hector filed a petition to modify the parent-child relationship in April 2015. Hector alleged generally that "[t]he circumstances of the children, a conservator, or other party affected by the order to be modified have materially and substantially changed since the date of rendition of the order to be modified." He further stated, "Petitioner believes that the parties will enter into a written agreement containing provisions for modification of the order providing for support of the children." Hector stated that "[t]he requested modification is in the best interest of the children," but he did not specifically state how he wished for the trial court to modify his support obligation. He also requested that the court temporarily order Veronica "to pay child support while this case is pending." The trial court did not enter a temporary order concerning child support.

Over the next several years, the parties engaged in litigation in both Texas and Mexico. These efforts primarily concerned whether Veronica wrongfully retained the children in Mexico. On December 15, 2017, before the trial court declined jurisdiction over custody matters under the UCCJEA, Hector filed a motion for modification of child support. This motion was the first filing in which Hector argued that, due to a change in his employment, his monthly net resources had decreased to approximately $5,900 per month. In a supporting brief, Hector also argued that, according to deemed admissions, Veronica's monthly household expenses were approximately 29,000 Mexican pesos, or $1,500, and the children's

monthly needs were less than 35% of the household expenses. Hector argued that because the needs of the children were only around $500 to $600 per month, the trial court should set his child support obligation at that amount, which was well below the child support guidelines.

After a hearing in June 2020, the trial court agreed to lower Hector's monthly child support obligation, but it did not lower the obligation as much as Hector had requested. Instead, the court set Hector's monthly child support obligation at $1,169.86 and provided that this modified amount was retroactive to January 1, 2018.

Trial courts are authorized by statute to make a modified child support obligation retroactive, but this authority is limited to the date citation was served or an appearance in the modification suit was made, whichever is earlier. *See* TEX. FAM. CODE § 156.401(b); *In re B.R.F.*, 457 S.W.3d at 510; *In re Naylor*, 160 S.W.3d at 294. Here, Hector filed his original petition to modify on April 21, 2015. The record does not reflect when Hector served Veronica with this petition, but she appeared on June 22, 2015, when she filed a pleading requesting that the court decline jurisdiction under the UCCJEA. The trial court therefore had the "broad range" to apply the modified child support amount retroactively from June 22, 2015, the date Veronica appeared in the modification suit, up until June 3, 2020, the date of the hearing on Hector's motion to modify. *See In re Naylor*, 160 S.W.3d at 294.

The trial court chose to make the modified support obligation retroactive to January 1, 2018, a date approximately two weeks after Hector filed his motion for modification of child support which set out detailed reasons for why he believed his child support obligation should be decreased. This date was within the range allowed by Family Code section 156.401(b). *See* TEX. FAM. CODE § 156.401(b); *In re B.R.F.*, 457 S.W.3d at 510; *In re Naylor*, 160 S.W.3d at 294. We conclude that the trial court did not abuse its discretion by making the modified child support obligation retroactive to January 1, 2018, as opposed to April 2015, when Hector first sought modification. *See In re Naylor*, 160 S.W.3d at 295 ("The trial court had discretion to either deny, grant, or permit partial relief sought. The court therefore did not err in setting the modification date later than the date the petition was served.").

Hector further argues that the trial court's decision was against Texas public policy because Veronica wrongfully retained the children in Mexico and had unclean hands, she engaged in dilatory tactics and did not negotiate in good faith, and the trial court caused delay by referring the parties to mediation.[1] He argues that making the modified obligation effective only as of January 1, 2018, rewards Veronica for delaying the proceedings.

[1] Hector and Veronica agreed to mediate their dispute in April 2020. They were unable to reach an agreement during mediation.

The Legislature has stated that "[it] is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE § 154.002. We do not agree that, to the extent the trial court referred the parties to mediation, attempting to resolve the parties' dispute in this way violated Texas public policy.

Moreover, although several years passed between the time Hector filed his first petition to modify and the time the trial court decreased his support obligation, trial courts are not required to give retroactive effect to modification orders. *See Nordstorm*, 965 S.W.2d at 582 (noting that while trial courts have statutory authority to make modified support obligation retroactive, this is not mandatory but is instead "left to the broad discretion of the trial court"). Hector's initial modification petition filed in April 2015 included no details on how he wanted the trial court to modify the support obligation or on how his changed circumstances justified a decreased obligation. It was not until December 2017 that he filed a modification motion setting out specific arguments and evidence for why he believed his obligation should be decreased. The trial court, in partially granting Hector's motion to modify, decreased his monthly obligation by half and made that change effective as of

approximately two weeks after Hector filed the December 2017 motion. We conclude that the trial court's decision making the modified support obligation retroactive only to January 1, 2018, did not violate Texas public policy.

We overrule Hector's first and second issues.

Amount of Child Support Modification

In his third issue, Hector argues that the trial court abused its discretion when it modified the amount of his support obligation because the modified amount was nearly two times greater than the proven needs of the children. In his fourth issue, Hector argues that the modified amount of child support violates Texas public policy because the amount encourages Veronica to retain the children in Mexico.

A. Governing Law

As stated above, the trial court may modify the amount of a child support obligation if the circumstances of a child or person affected by a support order have materially and substantially changed since rendition of the prior order. TEX. FAM. CODE § 156.401(a)(1); *Trammell*, 485 S.W.3d at 576. "Paramount to the trial court's determination of child support is the best interest of the child." *Trammell*, 485 S.W.3d at 576. The trial court should consider the circumstances of the children and parents at the time of the prior order and at the time the modification is sought. *Id.* The trial court should also consider the child support guidelines set out in the Family Code in determining whether a modification of the support obligation is warranted.

TEX. FAM. CODE § 156.402(a); *see id.* §§ 154.121–.133 (setting out child support guidelines). The court may also consider "other relevant evidence in addition to the factors listed in the guidelines." *Id.* § 156.402(b). The trial court has "wide discretion" with respect to child support matters. *In re K.A.M.S.*, 583 S.W.3d 335, 340 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

The amount of child support established by the child support guidelines is presumed to be reasonable, and a support order conforming to the guidelines is presumed to be in the best interest of the child. TEX. FAM. CODE § 154.122(a). Generally, the child support guidelines are based on the monthly net resources of the obligor parent. *Id.* § 154.125(b). The guidelines provide that, for two children, a support obligation of 25% of the obligor's monthly net resources is presumptively reasonable and in the children's best interests. *Id.* "Resources" include all wage and salary income; interest, dividends, and royalty income; self-employment income; net rental income; and "all other income actually being received." *Id.* § 154.062(b).

A court may, however, determine that application of the guidelines would be unjust or inappropriate under the circumstances, and it may order support in an amount other than that provided by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child. *Id.* §§ 154.122(b), 154.123(a). In determining whether application of the guidelines would be unjust or inappropriate, the court shall consider evidence of "all relevant

factors." *Id.* § 154.123(b). One of the non-exclusive factors set out in the Family Code is the "needs of the child." *Id.* Although the court may also consider the net resources of the obligee parent when considering modifying a support obligation, *see id.* § 154.123(b)(5), the court "may not add any portion of the net resources of a new spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be ordered in a suit for modification." *Id.* § 156.404(a).

B. Analysis

The agreed divorce decree set Hector's monthly child support obligation at $2,339.74. In his motion to modify child support, Hector argued that this amount "represented approximately 51%" of his net resources and was above the amount set by the guidelines for two children. Since the divorce decree, Hector's employment situation had changed: he was now working on a contract basis and his monthly net resources had decreased to approximately $5,900. He also pointed out that Veronica had wrongfully retained the children in Mexico since August 1, 2014, in violation of the divorce decree, and he had expended tens of thousands of dollars to maintain contact with the children and his paternity rights. Hector also pointed to a series of deemed admissions establishing that Veronica's monthly household expenses were approximately 30,000 Mexican pesos—or $1,578.94—and the children's monthly needs were less than 35% of Veronica's monthly expenses. He argued that below

guidelines support was appropriate in this case because the needs of the children were "significantly less" than the guidelines.

The trial court held an evidentiary hearing on the motion to modify, and both Hector and Veronica testified. The trial court admitted a psychological and social study completed by a Mexican agency in 2017. As part of this study, Veronica reported that her approximate gross monthly salary was 11,348 Mexican pesos[2] and her husband's approximate gross monthly income was 42,870 Mexican pesos. Veronica also reported that her monthly expenses were approximately 29,000 Mexican pesos. Hector argued that this report and the deemed admissions established that the children's actual needs were significantly less than guidelines support for two children, and therefore applying the guidelines would be unjust.

Hector also presented evidence demonstrating that it cost approximately $1,300 for the children to fly to Texas for visitation, and he argued that this amount should be considered when determining his support obligation. The trial court also admitted Hector's 2018 and 2019 federal income tax returns. The 2018 tax return reflected that Hector's wages were $90,000 and his adjusted gross income was approximately $76,000. The 2019 tax return reflected that Hector's wages were

[2] At the hearing, Veronica stated that this three-year-old report was no longer accurate. She testified that she was no longer employed.

again $90,000, but he had nearly $63,000 in additional income, and his adjusted gross income was approximately $143,000.

Hector requested that the trial court reduce his support obligation to "allow for equitable households." He argued that his current support obligation was nearly double the amount of the expenses for Veronica's entire household, "which would situate the children in a very inequitable households." He stated, "They would live a life of privilege in Mexico, and they would have to come and visit to a . . . middle class family household. So that certainly would create an incentive for the children not to want to come and visit to—to the other parents' household." He requested that the court deviate from the child support guidelines and reduce his monthly support obligation to $600. Veronica agreed that if Hector's income had decreased, then his child support obligation should decrease as well, but she did not agree that reducing the obligation to $600 per month was appropriate.

In the order modifying Hector's support obligation, the trial court found that application of the guidelines was unjust or inappropriate under the circumstances. The court ordered Hector to pay $1,169.86 in monthly child support until his older son reached age eighteen and then $935.90 per month until his younger son reached age eighteen. The court also found that Hector's monthly net resources were $7,564.46; Veronica's monthly net resources were $0; and guideline child support of 25% of Hector's monthly net resources would be $1,891.11. The court further

found that the modified child support amount of $1,169.86 was 15.46% of Hector's monthly net resources. Finally, the court found that application of the guidelines would be unjust or inappropriate because "[t]he needs of the children are significantly less [than] what is provided by the guidelines [and] the cost of travel for the children to visit Texas is $1,058.48."

On appeal, Hector does not argue that the trial court erred in calculating his monthly net resources or in determining that Veronica's monthly net resources were $0. Instead, he argues that the evidence does not support setting the modified child support amount at $1,169.86 because, as shown by the deemed admissions, the "proven needs" of the children were approximately $600 less than that amount, and the court should have based Hector's support obligation on the proven needs of the children. He argues that doing otherwise in this case incentivizes retaining the children in Mexico, which is contrary to Texas public policy.

This Court has already addressed whether a trial court errs if it does not set a support obligation based on the needs of the children. *See McGuire v. McGuire*, 4 S.W.3d 382, 387–88 (Tex. App.—Houston [1st Dist.] 1999, no pet.). In ordering child support, the trial court should consider the guidelines set out in the Family Code, but it may also consider "other relevant evidence." *Id.* at 387; TEX. FAM. CODE § 156.402; *see also* TEX. FAM. CODE § 154.125 (applying child support guidelines based on monthly net resources of obligor). We noted that the Family Code lists

"additional factors" to consider when ordering child support, and one of these factors is "the age and needs of the child." *McGuire*, 4 S.W.3d at 387 (quoting TEX. FAM. CODE § 154.123(b) (listing factors for court to consider in determining whether application of child support guidelines is unjust or inappropriate)). This factor "is only one of a nonexhaustive list of seventeen additional factors that a court 'may' consider." *Id.* at 388. We concluded that the trial court did not err "in failing to set child support on the additional factor regarding the needs of the children." *Id.*

The amount of child support established by the child support guidelines is presumed to be reasonable, and an order conforming to the guidelines is presumed to be in the best interest of the child. TEX. FAM. CODE § 154.122(a). However, the court may determine that application of the guidelines is unjust or inappropriate under the circumstances, and in making this determination, the trial court is instructed to consider evidence of "all relevant factors," including, among other factors, the needs of the child. *Id.* §§ 154.122(b), 154.123(b).

The trial court found that Hector's monthly net resources were $7,564.46, and Hector does not challenge this finding on appeal. Because Hector has two children, the guidelines would set his support obligation at 25% of his monthly net resources. *See id.* § 154.125(b). Hector's child support obligation under the guidelines would therefore be $1,891.11. The trial court, however, found that application of the guidelines would be unjust or inappropriate under the circumstances of this case, and

in making this determination, it specifically considered the needs of the children and the cost for the children to travel to Texas for visitation with Hector. The trial court set Hector's modified support obligation at $1,169.86, which is 15.46% of Hector's monthly net resources, and is approximately $700 less than the support obligation that application of the guidelines would impose upon Hector.

The trial court credited Hector's evidence that the needs of the children were less than what is provided by the child support guidelines. The court appropriately considered this evidence when it determined that application of the guidelines would be unjust or inappropriate and modified Hector's support obligation several hundred dollars below the guidelines. *See id.* § 154.123. Hector cites no authority supporting his argument that a child support obligation should be based *solely* on the needs of the children to the exclusion of other factors, such as the obligor's monthly net resources, and this Court has held to the contrary. *See McGuire*, 4 S.W.3d at 387–88.

In modifying Hector's support obligation and setting a below-guidelines amount, the trial court properly considered Hector's monthly net resources, which had decreased since the divorce decree, the travel expenses for the children to visit Texas, and the needs of the children. We conclude that the trial court did not abuse its wide discretion in modifying the amount of Hector's support obligation. *See In re K.A.M.S.*, 583 S.W.3d at 340. We further conclude that the trial court did not

violate Texas public policy when it considered factors other than the proven needs of the children—specifically, Hector's monthly net resources and the children's travel expenses—in modifying Hector's support obligation. *See McGuire*, 4 S.W.3d at 387–88.

We overrule Hector's third and fourth issues.

Conclusion

We affirm the order of the trial court.

April L. Farris
Justice

Panel consists of Justices Landau, Guerra, and Farris.