Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed September 13, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00866-CV

ASH HUQ, Appellant

V.

YASMIN M. HUQ, Appellee

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Cause No. 1998-29528

MEMORANDUM OPINION

In this suit affecting the parent-child relationship, appellant Ash Huq appeals from the trial court's 2010 order raising his child support for his daughter from $1,200 per month to $1,500 per month. In two issues, he challenges the sufficiency of the evidence to support the trial court's exercise of discretion. Concluding there was sufficient evidence of a material change in the circumstances of the child to support modification of

child-support, but no evidence to support the amount awarded, we affirm in part, reverse in part, and remand for further proceedings.

I. Factual and Procedural Background

Ash and appellee Yasmin M. Huq divorced in 1999. There was one child of the marriage. Under the divorce decree, to which the parties consented, Yasmin was awarded the exclusive right to determine the residence and domicile of the child in Texas or within a 250 mile radius of London, England. The court ordered Ash to pay Yasmin monthly child support of $1,200 from February 15, 1999, forward.[1] Additionally, Ash was to reimburse Yasmin the actual cost of the child's health insurance benefits to a maximum of $100 per month and to pay 50% of the child's uninsured medical expenses.

After the divorce, Yasmin and the child moved to England, and Ash moved first to New York City, then to Hungary. In 2005, Yasmin and the child moved back to Harris County. In March 2009, Yasmin filed a petition to modify the parent-child relationship, seeking modification of both possession and access and child support. In response, Ash filed a special appearance, contending the High Court of Justice of England and Wales had continuing exclusive jurisdiction by virtue of a 2002 modification order entered by that court.[2]

On May 6, 2010, Yasmin filed an amended petition, seeking a modification only of child support. She alleged generally that "[t]he circumstances of the child or a person affected by the order have materially and substantially changed since the date of the rendition of the order to be modified," but did not specify the nature of the changes to which she was referring.

[1] The court ordered Ash to pay Yasmin monthly child support of $1,000 from November 15, 1998, through January 15, 1999, and monthly support of $1,200 from February 15, 1999, forward.

[2] Although Ash purportedly attached a copy of the 2002 modification order to his special appearance pleading, that order is not part of the appellate record. From the parties' discussion in the trial court, it appears that the 2002 order primarily concerned visitation.

On May 17, 2010, the court heard Ash's special appearance and denied it. The court also denied Ash's request for a continuance.[3] The court then proceeded to trial on the petition to modify child support.

Yasmin offered her own testimony, Ash's 2007 and 2008 United States income tax returns, and her suggested findings regarding child support. Ash offered Yasmin's May 7, 2010 financial information statement.

Ash's 2007 tax return showed a gross annual foreign income of $95,386 (i.e., $7948 gross monthly). His 2008 return showed a gross annual foreign income of $115,639 (i.e., $9639 gross monthly). Both tax returns showed negative U.S. income and no U.S. taxes paid or owed. As of the May 17, 2010 trial, Ash had not filed his 2009 return.

Yasmin testified that, at the time of the divorce, Ash was working for Sorenson and Associates, but also may have been unemployed around that time. She did not testify about the amount of Ash's income at the time of the divorce; and, in her 2010 financial information statement, she indicated Ash's then-current net monthly income was "unknown."

Yasmin also testified Ash was not presently reimbursing her for the child's health insurance or paying 50% of her uninsured medical expenses as required by the divorce decree. Major uninsured medical expenses included monthly orthodontic payments of $157 and medications costing approximately $50 per month. According to Yasmin's financial information statement, Yasmin was incurring expenses of $175 per month for "childcare/tuition" and $225 a month for a tutor for the child. Finally, Yasmin testified Ash was rarely visiting the child and was declining to have the child visit him.

At the conclusion of the trial, the court found (1) there had "been material and substantial changes in the circumstances since the entry of the order sought to be modified"

[3] On appeal, Ash does not challenge the trial court's rulings on his special appearance and request for a continuance. On May17, 2010, Ash filed a single page handwritten general denial.

and (2) Ash had "net resources, as that term is defined under the Texas Family Code, of not less than $7,500 per month." The court then set child support "at $1,740 per month."

The court subsequently signed a written order containing the following findings:

> The Court finds that the material allegations in the petition to modify are true and that the requested modification is in the best interest of the child. IT IS ORDERED that the requested modification is GRANTED.
>
> The Court specifically finds as follows:
>
> The statutory net resources of ASH HUQ are in excess of $7,500 per month.
>
> The amount of child support payments per month that is computed if the percentage guidelines of the Texas Family Code are applied to the first $7,500 of ASH HUQ's net resources is $1,500.

Among other items, the court then ordered Ash to pay Yasmin child support of $1,500 per month.[4] Ash appealed.

II. Discussion

In two issues, Ash argues the trial court abused its discretion in (1) increasing child support when there was no evidence, or alternatively, insufficient evidence, of changed circumstances from the time of the prior order and (2) basing his child support on a finding his present statutory net resources are in excess of $7,500 per month when there was no evidence, or alternatively, insufficient evidence, to support that finding.

A. *Standard of Review*

We review a trial court's determination of child support under an abuse-of-discretion standard. *Newberry v. Bohn-Newberry*, 146 S.W.3d 233, 235 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Evans v. Evans,* 14 S.W.3d 343, 345–46 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles.

[4] The court also ordered Ash to pay Yasmin $240 per month in reimbursement for health insurance.

Newberry, 146 S.W.3d at 235. Under the abuse-of-discretion standard, legal and factual sufficiency challenges are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion. *Id.*; *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ). When an appellant alleges the trial court abused its discretion because the evidence was insufficient, this court employs a two prong test. *Newberry*, 146 S.W.3d at 235. First, we must ask whether the trial court had sufficient information on which to exercise its discretion; and second, we determine whether the trial court abused its discretion by causing the child support order to be manifestly unjust or unfair. *Id.*; *Evans*, 14 S.W.3d at 346. The traditional sufficiency review applies to the first prong of this test. *Zeifman v. Michels*, 212 S.W.3d 582, 588 (Tex. App.—Austin 2006, pet. denied).

When, as here, an appellant challenges the legal sufficiency of an adverse finding on an issue on which he did not have the burden of proof, he must demonstrate on appeal there is no evidence to support the adverse finding. *London v. London*, 192 S.W.3d 6, 14 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). In reviewing a "no evidence" point, we consider all the evidence in the light most favorable to the trial court's finding, indulging every reasonable inference in favor of the prevailing party, and disregarding all evidence and inferences to the contrary. *Id.* If more than a scintilla of evidence exists to support the finding, the no evidence challenge fails. *Id.*

In challenging the factual sufficiency of an adverse finding on an issue on which he did not have the burden of proof, an appellant must demonstrate the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Id.* In a factual sufficiency challenge, we review all the evidence in the record, both for and against the finding. *Id.* at 15.

The trial court does not abuse its discretion when it bases its decision on conflicting evidence or when some evidence of a probative and substantive character exists to support the child support order. *Newberry* 146 S.W.3d at 235; *Zieba*, 928 S.W.2d at 787.

Conversely, a trial court does abuse its discretion when there is no evidence to support its decision. *Anderson v. Carranza*, No. 14-10-00600-CV, 2011 WL 1631792, at *4 (Tex. App.—Houston [14th Dist.] Apr 28, 2011, no pet.) (mem. op.). In determining whether the trial court abused its discretion, we are required to affirm the decision on any legal theory supported by the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990)).

B. ***Analysis***

Whether the evidence established a material and substantial change of circumstances. In his first issue, Ash challenges the sufficiency of the evidence to support a finding that there had been material and substantial changes in circumstances since the 1999 divorce. A 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)(A).[5] To determine whether modification of child support is warranted, the court must examine and compare the circumstances of the parents and any minor children at the time of the initial order with the circumstances existing at the time a party seeks modification. *London*, 192 S.W.3d at 15. The record must contain both historical and current evidence of the relevant person's financial circumstances. *Id.* Without both sets of data, the court has nothing to compare and therefore cannot determine whether a material and substantial change has occurred. *Id.*

In the present case, Yasmin sought modification of the child-support order set forth in the 1999 divorce decree. As the movant, Yasmin bore the burden of showing the requisite material and substantial change in circumstances since entry of that decree. *Id.*

[5] Although it has been well over three years since the 1999 divorce, Yasmin does not argue modification was warranted under subsection (a)(2), which allows the court to modify child support "if it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with the child support guidelines." Tex. Fam. Code § 156.401(a)(2).

Regarding the circumstances of the child and her parents in 1999, the trial court had before it Yasmin's testimony and the divorce decree.[6] That evidence established the following:

- The child, born January 19, 1997, was two years old;
- Ash was a resident of Harris County; and
- the child's home state was Texas.

Regarding the circumstances of the child and her parents in 2010, the trial court had before it Yasmin's testimony, Ash's 2007 and 2008 United States income tax returns, and Yasmin's financial statement. That evidence established the following:

- Ash was living in Hungary, was visiting the child infrequently, and was declining to keep the child with him;
- the child was thirteen years old;
- the child's medical insurance cost $207.53 biweekly and her uninsured medical expenses were $157 per month for orthodontics and $50 per month for medications; and
- the child's "childcare/tuition" cost $175 per month and her tutor cost $225 per month.

Thus, there was uncontroverted evidence that the child had matured from a two-year old to a thirteen-year old, and now had expenses for orthodontics, tuition, and tutoring. This evidence alone supported a finding that there had been a material and substantial change in the needs of the child since the entry of the divorce decree. *See Arndt v. Arndt*,

[6] The divorce decree was not formally introduced into evidence but is part of the appellate record. The trial court could take judicial notice of the decree. *See Douglas v. Ingersoll*, No. 14–05–00666–CV 2006 WL 2345968, at *3 (Tex. App.—Houston [14th Dist.] Aug. 15, 2006, pet. denied) (mem.op.) ("The trial court, as the court that rendered the original divorce decree, may take judicial notice of its own records in a case involving the same subject matter between the same parties.").

685 S.W.2d 769, 770 (Tex. App.—Houston [1st Dist.] 1985, no writ) (holding mother not required to offer evidence of her income and each expense at time of the prior order and her income and each expense at time of hearing so overall comparison could be made; instead, mother's testimony showing substantial increase in designated expenses for child, in absence of evidence showing any decrease in expenses, was sufficient to establish claim that there had been material and substantial increase in needs of child); *see also In re Marriage of Hamer*, 906 S.W.2d 263, 267 (Tex. App.—Amarillo 1995, no writ) (acknowledging that, as children grow into teenagers, their expenses increase).

Additionally, Ash had moved to Hungary. He was not abiding by the terms governing visitation and possession in the agreed divorce decree, terms which may have been modified by an English court.[7] Thus, Ash was no longer furnishing the degree of services to the child as he did at the time of the divorce, and Yasmin was providing more services. This situation, too, constituted a material and substantial change requiring reallocation of financial obligations. *In re Z.B.P.*, 109 S.W.3d 772, 782 (Tex. App.—Fort Worth 2003, no pet.), *disapproved on other grounds by Iliff v. Iliff*, 339 S.W.3d 74, 84 n.8 (Tex. 2011).

We conclude there was legally and factually sufficient evidence to support the trial court's finding there had "been material and substantial changes in the circumstances since the entry of the order sought to be modified." Accordingly, we overrule Ash's first issue.

Whether the evidence supported a finding that Ash's present statutory net resources were in excess of $7,500 per month. In his second issue, Ash challenges the trial court's finding that his statutory net resources exceeded $7,500 per month, the current statutory maximum to which the child support guidelines presumptively apply. *See* Tex. Fam. Code § 154.125(a). In 2010, gross monthly wages had to exceed $10,360.60 to result in net monthly income exceeding $7,500. *See* OFFICE OF THE ATTORNEY GENERAL

[7] See note 2, above.

2010 TAX CHARTS, https://www.oag.state.tx.us/cs/taxcharts/2010taxchart.pdf (last visited Aug. 11, 2011).

The only evidence presented to establish Ash's resources at the time of the May 2010 hearing consisted of the following:

- Ash was currently working as an executive for Deloitte and Touche;
- Ash had *gross* foreign income of $95,386 in 2007 (i.e., $7948 monthly) and $115,639 (i.e., $9636 monthly) in 2008, a negligible amount of non-foreign income in both years, and owed no United States taxes in either year;
- in 2008, Ash told the child he was making "lots of money"; and
- Yasmin could "only assume [Ash's current income] from what he made from 2007 to 2008 and the increase for 2009."

Thus, there is no evidence Ash had significant net resources in addition to his foreign income. *See* Tex. Fam. Code § 154.062(b) (listing items included in "resources"). There also is no evidence of Ash's net income in 2010.[8]

In short, there was no evidence to support the trial court's finding Ash's monthly net resources exceeded $7,500 in 2010. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."). Accordingly, we sustain Ash's second issue.

[8] Although the trial court could reasonably have inferred that Ash's income was at least as great in 2010 as it was in 2008; it could not reasonably have inferred that Ash paid no Hungarian taxes. Texas Family Code Section 154.062(d) requires the court to deduct taxes and certain other items from resources to determine the net resources available for child support. *See* Tex. Fam. Code § 154.062(d).

Conclusion

Having sustained Ash's second issue, we reverse those portions of the judgment in which the trial court (1) found that Ash's statutory net resources were in excess of $7,500 per month and (2) ordered Ash to pay $1,500 per month in child support. Having overruled Ash's first issue, we affirm the remainder of the judgment. We remand the cause to the trial court for further proceedings consistent with this opinion.[9]

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Frost, Jamison, and McCally.

[9] Ordinarily we reverse and render when there is no evidence to support a trial court's exercise of discretion. *See, e.g., In re H.S.B.*, ___S.W.3d ___, No. 14-10-00659-CV, 2011 WL 1005559, at *8 (Tex. App.—Houston [14th Dist.] Mar. 1, 2011, no pet.). Ash, however, has requested only remand. An appellate court cannot grant more relief than the appellant requests. *Banks v. State*, 158 S.W.3d 649, 650 n.1 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Board of Firemen's Relief & Ret. Fund Trs. v. Stevens*, 372 S.W.2d 572, 574 (Tex. Civ. App.—Houston 1963, no writ)); *see Elliott v. Elliott-Weber*, No. 14-04-00130-CV 2005 WL 481353, at *3 (Tex. App.—Houston [14th Dist.] Mar. 1, 2005, no pet.) (mem. op) (after holding there was no evidence of material and substantial change of circumstances, reversing and remanding for new trial, "as appellant requested").