Affirmed and Memorandum Opinion filed October 18, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00415-CV

IN THE INTEREST OF J.C.P., JR. AND C.N.P., CHILDREN

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Cause No. 2014-36000

MEMORANDUM OPINION

Appellant Juan Perez (Father) appeals the trial court's order modifying the parent-child relationship. Specifically, Father challenges the trial court's order requiring him to pay appellee Juana Perez (Mother) $1,089.53 per month in child support. In a single issue Father asserts that Mother failed to prove that the circumstances of the child or a person affected by the order to be modified had materially and substantially changed since the date of the order's rendition. *See* Tex. Fam. Code § 156.401 (requiring material and substantial change in circumstances for trial court to modify previous order). Concluding Father judicially admitted a material and substantial change in circumstances, we affirm the trial court's order.

BACKGROUND

The parties were divorced in 2014. As child support each parent was ordered to pay 50 percent of the weekly day care expense for the minor child as long as the child required after school day care.[1]

Six years later, Mother filed a petition to modify the parent-child relationship in which she alleged that the circumstances of the child, a conservator, or other party affected by the order had materially and substantially changed since the date of the divorce decree. Mother's primary assertion was that the original decree did not provide for appropriate child support for the minor child because she no longer required day care and the decree was silent as to child support after the child no longer required day care. The child had lived with Mother since the divorce.

Father filed a counter-petition to modify the parent-child relationship in which he alleged 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." Father further alleged that "[t]he circumstances of the children or of one or both of the joint managing conservators have so materially and substantially changed since the rendition of the order that it has become unworkable or inappropriate under existing circumstances." In seeking modification of child support, Father alleged, "[t]he circumstances of the children or a person affected by the order have materially and substantially changed since the rendition of the order to be modified, and the support payments previously ordered should be terminated."

At an evidentiary hearing in the trial court, Mother sought additional child

[1] The parties have four children, who, with the exception of the minor child at issue here, no longer require child support.

support and an order that the child remain living with her. Father sought to have the child live with him and an order requiring him to pay zero child support.

When the parties were divorced, they each had two children living with them. At the time of the hearing no children lived with Father, and the minor child lived with Mother. If the child moved in with Father she would have to change schools. Mother testified that there had been a material and substantial change in the parties' circumstances since the divorce because the minor child was eleven, almost twelve, years old and was no longer in after school day care.

The parties' son, who was supposed to live with Father, moved in with Mother for his last year of high school. By the time of the hearing, the son had graduated from high school.

Father testified that he filed the motion to modify seeking conservatorship with the exclusive right to determine the minor child's residence because he thought he could better raise the child "and teach her Christian values." Father objected to the way Mother disciplined the child.

After both parties rested, the trial court made findings on the record. The court found that Father judicially admitted a material and substantial change in circumstances by filing his counter-petition to modify. The court further found that Mother presented sufficient evidence to support a finding of material and substantial change under section 156.101 of the Family Code. The trial court denied Father's request to be named the conservator with the exclusive right to designate the residence of the child, specifically finding that such a modification would not be in the child's best interest. The trial court granted Mother's request to modify child support, specifically finding that the circumstances of the child or a person affected by the order had materially and substantially changed since the prior order. The trial court denied Mother's request for retroactive child support. The trial court

subsequently rendered a final order and findings of fact and conclusions of law reducing its oral findings to writing. This appeal followed.

ANALYSIS

In a single issue on appeal Father challenges the trial court's finding of a material and substantial change in circumstances.

We first address Mother's assertion that by filing a counter-petition to modify the parent-child relationship, Father judicially admitted a material and substantial change in circumstances.

Factual assertions in a pleading may constitute judicial admissions barring "the admitting party from later disputing the admitted fact." *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001); *see also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 1999) (judicial admission "occurs when an assertion of fact is conclusively established in live pleadings, making the introduction of other pleadings or evidence unnecessary").

A trial court may modify a child support order if, inter alia, "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed" since the previous order. Tex. Fam. Code § 156.101(a)(1). The change-in-circumstances requirement is a threshold issue for the trial court and is based on a policy of preventing constant re-litigation with respect to a child. *In re A.L.E.*, 279 S.W.3d 424, 428 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

In deciding whether a material and substantial change of circumstances has occurred, a fact finder is not confined to rigid or definite guidelines; instead, the determination is fact specific and must be made according to the circumstances as they arise. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 734–35 (Tex. App.—Houston [14th Dist.] 2012, no pet.). To demonstrate that a material and substantial

change of circumstances has occurred, the evidence must show the conditions that existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the trial on the petition to modify. *In re A.L.E.*, 279 S.W.3d at 429. One party's allegation of a change of circumstances of the parties constitutes a judicial admission of the common element of "change of circumstances" in the other party's similar pleading. *Obernhoff v. Nelson*, No. 01-17-00816-CV, 2019 WL 4065017, at *20 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, no pet.) (mem. op.); *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.). Further, an admission in a trial court pleading constitutes a judicial admission in the case in which the pleading was filed, requires no proof of the admitted fact, and authorizes the introduction of no evidence to the contrary. *Obernhoff*, 2019 WL 4065017, at *20; *In re A.E.A.*, 406 S.W.3d at 410; *see also Holy Cross Church*, 44 S.W.3d at 568 (assertion of fact in party's pleading can constitute judicial admission that may substitute for evidence that has "conclusive effect and bars the admitting party from later disputing the admitted fact").

Although Father argues that the evidence is legally and factually insufficient to support the trial court's finding that there had been a material and substantial change warranting modification since the 2014 decree, his live pleading at the time of trial alleged that "[t]he circumstances of the children or a person affected by the order have materially and substantially changed since the rendition of the order to be modified, and the support payments previously ordered should be terminated." Mother and Father sought different relief in their petitions to modify the parent-child relationship; however, their modification claims contained a common essential element, i.e., each required proof of "change of circumstances." *See In re A.E.A.*, 406 S.W.3d at 410. Father's allegation of a change of circumstances in his petition to modify constitutes a judicial admission of that same essential element in Mother's

claim for modification of the parent-child relationship even though the parties did not request the same relief. *See Obernhoff*, 2019 WL 4065017, at *20.

Father is therefore precluded from asserting on appeal that the evidence is insufficient to support the trial court's finding that there had been a material and substantial change warranting modification since the 2014 decree establishing conservatorship, possession, or child support. *See In re A.L.H.*, 515 S.W.3d 60, 81 n.5 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (appellate court must overrule sufficiency challenge where party judicially admitted material and substantial circumstances had occurred in petition to modify); *Filla v. Filla*, No. 03-14-00502-CV, 2016 WL 4177236, at *5 (Tex. App.—Austin Aug. 5, 2016, pet. denied) (mem. op.) ("[W]ell-established case law provid[es] that an allegation in a pleading of a material and substantial change constitutes a judicial admission of the same element in the opposing party's claim for modification of the previous order . . . [And] [b]ecause [party] judicially admitted th[e] element, she is barred on appeal from challenging the sufficiency of the evidence to support it." (internal citations omitted)); *In re A.E.A.*, 406 S.W.3d at 410–11 (because party judicially admitted change-of-circumstances element of other party's claim in his petition to modify, party barred on appeal from challenging sufficiency of evidence to support material and substantial change in circumstances).

In challenging the trial court's finding of judicial admission, Father argues (1) the trial court only found that a judicial admission had been made with regard to conservatorship; and (2) Father's allegation of a material and substantial change was "generalized," not clear and unequivocal.

After the parties' evidence and closing arguments, the trial court, on the record, made the following finding:

In regards to both Petitioner and Counter-Petitioner's Request to

> Modify, the Court does find there has been a material and substantial change in circumstances. In addition to that, I do believe that there is a judicial admission, being that there is a Counter-Petition on file and, therefore, the issue of material and substantial change, I don't believe the Court has to make a specific finding of but should my superiors of [sic] the Court of Appeals disagree with me, I am making that specific finding.

In conclusion of law number 21, the trial court concluded:

> The Court found that there was a judicial admission, by both parties, as to the existence of a material and substantial change in circumstances. Specifically, both parties plead to modify conservatorship of [the child].

The record reflects that the trial court's written conclusion of law was a memorialization of the court's findings made at the time of the hearing. The trial court's reference to the parties' pleadings to modify conservatorship does not act to restrict Father's judicial admission. Father's counter-petition, in seeking modification of child support, unequivocally alleged, "[t]he circumstances of the children or a person affected by the order have materially and substantially changed since the rendition of the order to be modified, and the support payments previously ordered should be terminated."

As to Father's assertion that his judicial admission was not clear and unequivocal, we find our sister court's opinion in *In re A.M.* instructive. *See In re A.M.*, No. 07-20-00130-CV, 2020 WL 7651973 (Tex. App.—Amarillo Dec. 23, 2020, pet. denied) (mem. op.).

In *A.M.*, the court found that the parent had not judicially admitted a material and substantial change. *Id.* at *2. In that case when the parent filed a counter-petition, the parent alleged, "that, if the court finds that the circumstances of the child or of one of the two parents have materially and substantially changed, then in view of those changes, [he] requests that the Court grant the following affirmative relief to

[him]....” *Id.* The court held, “Being in the alternative and, therefore, less than clear and unequivocal, the averment was and is not a judicial admission.” *Id.* In this case, however, Father did not plead in the alternative, but specifically alleged that a material and substantial change in circumstances had occurred. We conclude the trial court did not err in finding Father judicially admitted a material and substantial change in circumstances. Because Father’s judicial admission was conclusive on the issue of material and substantial change, we overrule Father’s sole issue on appeal.

CONCLUSION

Having overruled Father’s sole issue on appeal, we affirm the trial court’s judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Jewell, Bourliot, and Zimmerer.