Affirmed and Memorandum Opinion filed October 24, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00133-CV

LAIRD ANDERSON SWEET, Appellant

V.

BARBARA ANNE SWEET, Appellee

On Appeal from the 257th District Court
Harris County, Texas
Trial Court Cause No. 2017-49546

MEMORANDUM OPINION

Appellant Laird Sweet ("Father") appeals from the trial court's order terminating his obligation to pay child support for his son. In two issues, Father asserts that (1) the trial court should have retroactively ended his child support obligation as of his son's eighteenth birthday and (2) the trial court should have awarded him attorney's fees and court costs. We affirm.

I. BACKGROUND

In 2015 at age fourteen, C.S.[1] enrolled as an eighth grader in the American School, a private, not-for-profit distance education school serving students in grades six through twelve. When he enrolled, C.S. was already a semester to an academic year behind in public school. Students at the American School take two courses at a time, which they complete by correspondence and by computer-based work. A student must complete one course before the American School will provide the student another course. Each course earns the student one-half to one unit. At the high school level, the American School requires eighteen units for a student to graduate.

C.S's brother died in April 2017, his mother moved out of their home in June 2017, and his parents filed for divorce in July 2017 while he remained living with his father, occurrences which the testimony at trial implied led to C.S. falling behind in his schoolwork at the American School. C.S. had a lapse of nine to ten months in which he performed no work in his courses at the American School.

In 2018, when C.S. was seventeen, his parents entered into an agreed divorce decree and child support order, and Father's $1,710 in monthly child support commenced. At the time of his parents' agreed order, C.S. was already delayed roughly two years in attaining his high school diploma. As applicable to private secondary school, the agreed child support order included language that child support "shall not terminate" so long as C.S. was enrolled "on a full-time basis in a private secondary school in a program leading toward a high school diploma and is complying with the minimum attendance requirements imposed by

[1] We use initials to protect a minor's identity. *See* Tex. R. App. P. 9.8 cmt; *Dolgener v. Dolgener*, 651 S.W.3d 242, 247 n.3 (Tex. App.—Houston [14th Dist.] 2021, no pet.); *see also* Tex. Fam. Code Ann. § 109.002(d).

that school."[2]

In 2020, Father filed a motion to terminate his child support obligation just after his son's nineteenth birthday, alleging that C.S. was no longer enrolled on a full-time basis in private secondary school in a program leading toward a high school diploma complying with the minimum attendance requirements imposed by that school.[3] A letter from the school, dated December 1, 2020, showed that C.S. had accumulated ten and a half units of high school credit towards the eighteen units he needed to graduate and his expected graduation date was August 10, 2021. C.S.'s mother testified that he had also recently completed an additional three and a half units that were not reflected in the letter, for Essential Math II, Algebra I, and European Literature. At the time of the temporary orders' hearing in February 2021, C.S. was taking Economics and a computer course. Thus, C.S. had earned fourteen of eighteen units needed for graduation and was in the midst of two additional courses. C.S.'s mother testified that her son was enrolled full time at the American School, had been enrolled on his eighteenth birthday, attended classes "just about every day" for about four hours a day, and was now normally progressing at the school. At the time of the June 2021 final hearing, C.S. was in his last class before graduating in July or August 2021.

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[2] *See* Tex. Fam Code Ann. § 154.002 (entitled "Child Support Through High School Graduation"). "The intent of section 154.002(a) is to require a parent to help support his child, even if the child is over eighteen years of age," so long as that child meets enrollment and attendance requirements for a program leading to a high school diploma. *Crocker v. Att'y Gen. of Tex.*, 3 S.W.3d 650, 653 (Tex. App.—Austin 1999, no pet.).

[3] Although calling his pleading a petition to "Terminate Income Withholding," Father sought to modify his child support obligation to end it altogether. We thus address it as a motion to modify the original child support order. *See, e.g., In re J.R.G.*, No. 11-17-00205-CV, 2018 WL 3384596, at * 1 (Tex. App.—Eastland July 12, 2018, no pet.) (mem. op.) (reflecting Texas Attorney General's suit to modify child support order where child was not shown to be a full-time student in home school or private secondary school).

After the final hearing, the trial court signed an order terminating Father's duty to pay child support effective February 26, 2021. The trial court denied Father's request for recovery of "excess" child support payments paid since C.S.'s eighteenth birthday and denied Father's request for attorney's fees and costs. This appeal followed.

II. Retroactive Modification of Child Support Order

In his first issue, Father appeals that the trial court erred when it did not terminate his obligation to pay child support as of C.S.'s eighteenth birthday on June 18, 2019, and order Mother to repay $34,200 in child support paid since that birthday. Father contends that no evidence shows that C.S. was enrolled on his eighteenth birthday in a private secondary school on a full-time basis in a program leading toward a high school diploma. Father reasons that his obligation to pay child support should have ceased on that date and thus the trial court's order should have been made retroactive to C.S.'s eighteenth birthday.

A. Applicable Law

The term "retroactive support" is used to refer to two different concepts. *In re J.G.Z.*, 963 S.W.2d 144, 146 (Tex. App.—Texarkana 1998, no pet.). Retroactive support can be ordered in instances where child support has not been previously ordered. Tex. Fam. Code Ann. § 154.009. Trial courts can also retroactively modify existing child support obligations with certain limitations. *See id.* § 156.401; *In re J.G.Z.*, 963 S.W.2d at 146; *see also Holley v. Holley*, 864 S.W.2d 703, 707 (Tex. App.—Houston [1st Dist.] 1993, writ denied). This case involves the latter, a modification of an existing support order, which was made effective retroactively.

The Family Code provides three possible grounds for modifying child support: (1) a material and substantial change in circumstances, (2) the monthly amount of child support varies by twenty percent or $100 from the child support guidelines, three years after the prior support order, or (3) the parties' agreement. *See* Tex. Fam. Code Ann. §§ 154.124, 156.401(a), (b); *In re D.S.*, 76 S.W.3d 512, 519 (Tex. App.—Houston [14th Dist.] 2002, no pet.).[4] The parent seeking modification has the burden to show a material and substantial change in circumstances. *See In re D.S.*, 76 S.W.3d at 520.

B. Standard of Review

A trial court's child support order will not be disturbed on appeal unless the complaining party shows the order constituted a clear abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam). Once the trial court determines a material and substantial change has occurred, the extent of the alteration in child support also lies within the trial court's discretion. *Nordstrom v. Nordstrom*, 965 S.W.2d 575, 578 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). Although a trial court may modify support orders retroactively under § 156.401(b) of the Family Code, application of the provision is not mandatory but is also left to the trial court's discretion. *See id*. at 582 (interpreting an earlier version of the statute). The test for abuse of discretion is whether the trial court acted arbitrarily or unreasonably, without reference to any guiding rules or principles. *Holley*, 864 S.W.2d at 706. In making this determination, the reviewing court must view the evidence in the light most favorable to the actions of the trial court and indulge every legal presumption in favor of the judgment. *Id.* Abuse of

[4] Although not specifically stated as a requirement for modifying child support based on a material and substantial change, courts have held that the primary consideration in determining child support is the child's best interest. *Reagins v. Walker*, 524 S.W.3d 757, 761 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

discretion does not exist as long as there is some evidence of a substantive and probative character to support the decision. *Id*.

C. Analysis

Assuming the trial court correctly found that a material and substantial change occurred to justify terminating child support before C.S.'s high school graduation, Father is mistaken about the date to which the trial court may apply the modification retroactively. Section 156.401(b) of the Family Code empowers the trial court to modify support orders "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" by the adverse party. Tex. Fam. Code Ann. § 156.401(b); *see In re J.G.Z.*, 963 S.W.2d at 149. Father filed his petition to modify in July 2020, but there is no evidence in the record of the date of service of citation. C.S.'s mother appeared in the suit on September 16, 2020. Father then amended his petition on February 23, 2021, to specifically seek retroactive relief. Both the trial court's temporary order and final order terminate child support as of February 26, 2021, which is just two days after the trial court held a temporary orders' hearing and first heard evidence about C.S.'s schooling.

Because the trial court did not have the authority to modify the child support obligation before the date of citation or an appearance by C.S.'s mother in the suit to modify, the trial court did not err in refusing the request to terminate the child support obligation as of C.S.'s eighteenth birthday. *See* Tex. Fam. Code Ann. § 156.401(b); *see also In re Naylor*, 160 S.W.3d 292, 294 (Tex. App.—Texarkana 2005, pet. denied) ("Nonetheless, a trial court has broad discretion under the Family Code to set the effective date of the modified order any time after the earlier of the date of service of citation or an appearance by the respondent."). As a

corollary, the trial court did not err in denying Father's request for a refund of child support dating to C.S.'s eighteenth birthday. We overrule issue one.

III. ATTORNEY'S FEES

In his second issue, Father argues that the trial court should have ordered C.S.'s mother to pay attorney's fees and all court costs, together totaling $10,561.25. Father argues that he is entitled to mandatory attorney's fees under § 154.012(b) of the Family Code. Section 154.012 addresses support paid in excess of a support order that an obligee fails to return. *See* Tex. Fam. Code Ann. § 154.012. "If the court finds that the obligee failed to return a[n overpayment], the court shall order the obligee to pay the obligor's attorney's fees and all court costs in addition to the amount of support paid after the date the child support order terminated." *Id*. The child support payments to which § 154.012 refer are excess payments mistakenly made or intended to be advances against future obligations. *See In re B.S.H.*, 308 S.W.3d 76, 81 (Tex. App.—Fort Worth 2009, no pet.). This case does not involve mistaken payments or advances against future obligations in excess of a support order. Section 154.012 is simply inapplicable to this case.

Rather than mandatory attorney's fees, the trial court has broad discretion to award attorney's fees and costs in a suit affecting the parent-child relationship. *See* Tex. Fam. Code Ann. § 106.002(a); *Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996). Neither party in a family law proceeding is entitled to an award of attorney's fees as a matter of right. *Banakar v. Krause*, 674 S.W.3d 564, 578 (Tex. App.—Houston [1st Dist.] Mar. 28, 2023, no pet.). The trial court need not award attorney's fees but instead may order each party to pay his or her own attorney's fees. *Id*. Father does not explain how the trial court abused its discretion in denying him an award of attorney's fees and costs. *See* Tex. R. App. P. 38.1(i). Because Father does not show that the trial court abused its discretion, we

conclude that the trial court did not err in declining to award attorney's fees and costs to him. *See Banakar*, 674 S.W.3d at 578. We overrule Father's second issue.

IV. CONCLUSION

Having overruled both of Father's issues, we affirm the judgment of the trial court.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant.