Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00498-CV

IN THE INTEREST OF C.L.G., a Child

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2010-EM5-03031
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: August 12, 2020

AFFIRMED

Derrick Avina appeals from an order denying his petition requesting a decrease in his child support. Avina argues the trial court abused its discretion because (1) he established a material and substantial change in his financial circumstances, and (2) the trial court failed to apply the child support guidelines. We affirm the trial court's order.

BACKGROUND

On June 25, 2010, the trial court established the parent-child relationship between Avina and C.L.G. and ordered Avina to pay child support for C.L.G. in the amount of $351.00 per month.

More than four years later, on October 15, 2014, the trial court modified Avina's child support to $946.00 per month.

On February 22, 2018, the Texas Attorney General filed a petition to modify Avina's child support. In response, Avina filed a counter-petition requesting a decrease in his child support. On July 18, 2018, the trial court denied the Attorney General's petition and Avina's counter-petition.

Four months later, on November 18, 2018, Avina filed another modification petition requesting a decrease in his child support. C.L.G.'s mother, the person with the right to receive child support for C.L.G., filed a general denial.

On June 20, 2019, the trial court held a bench trial. At trial, Avina testified that he had been in the event planning and management business for about fifteen years. His last position was executive director of creative production at a company called AV Concepts, where he earned about $10,000.00 per month. However, on September 30, 2018, AV Concepts dissolved its creative production department and terminated Avina's employment. Avina decided to start his own event planning and management company, building on the relationships he had formed at AV Concepts. According to Avina, his earnings had decreased substantially since starting his own company and he felt that the decrease in his earnings justified a decrease in his child support. Avina further testified that he had three other children to support.

C.L.G.'s mother testified that she did not have any evidence or direct knowledge of Avina's income since he was terminated, except for the information provided by Avina's attorney. This information included paystubs showing some of Avina's earnings with his new company. C.L.G.'s mother was aware that Avina had borrowed money from his father to start his new company. C.L.G.'s mother further testified that C.L.G. was an active nine-year-old child, who was eager to learn new things. C.L.G. wanted to play the piano and to participate in robotics. Supporting C.L.G.'s interests was sometimes hard, but she did not want to deny C.L.G. the opportunity to participate in these activities.

The trial court also admitted documents into evidence, including a letter from AV Concepts stating that Avina was one of its employees from October 31, 2012, to September 30, 2018; paystubs from Avina's company for October, November, and December 2018; and a W2 form from Avina's company showing his earnings for 2018.

At the end of the trial, the trial court denied Avina's petition. Avina appealed.

STANDARD OF REVIEW AND APPLICABLE LAW

An appellate court must not disturb a trial court's order concerning child support "unless the complaining party can show a clear abuse of discretion." *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *see Melton v. Toomey*, 350 S.W.3d 235, 238 (Tex. App.—San Antonio 2011, no pet.). "The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable." *Worford*, 801 S.W.2d at 109; *see Melton*, 350 S.W.3d at 238.

In a bench trial, the trial court is sole judge of the credibility of the witnesses and the weight to be given their testimony. *In re M.A.G.*, No. 04-01-00347-CV, 2002 WL 501657, at *3 (Tex. App.—San Antonio Apr. 3., 2002, no pet.) (not designated for publication). "The trial court may take into consideration all the facts and surrounding circumstances in connection with the testimony of each witness and accept or reject all or any part of the testimony." *Id*. When, as here, the trial court does not file formal findings of fact and conclusions of law, we imply that the trial court made all the findings necessary to support its order. *Worford*, 801 S.W.2d at 109. We must affirm the trial court's order if it can be upheld on any legal theory that finds support in the evidence. *Id*.

A trial court may modify a child support order if the petitioner demonstrates that the circumstances of the child or a parent have materially and substantially changed since the date of the prior child support order. *Melton*, 350 S.W.3d at 238; TEX. FAM. CODE § 156.401(a). To

determine if there has been a material and substantial change in circumstances concerning child support, the trial court must compare the financial circumstances of the child and the parties when the prior child support order was rendered with their financial circumstances at the time the modification is sought. *Melton*, 350 S.W.3d at 238. The relevant prior order is the order setting the current child support; a prior order denying a modification request and continuing the same child support is irrelevant to establishing a change in circumstances. *In re G.J.S.*, 940 S.W.2d 289, 292-93 (Tex. App.—San Antonio 1997, no writ). The party seeking the modification has the burden to establish a change in circumstances since the order setting the current child support. *Melton*, 350 S.W.3d at 238.

"[N]ot every change in a party's income will qualify as a material and substantial [change], and instead, what is required is a marked decrease in income or steady decline without offsetting circumstances." *In re A.A.T.*, 583 S.W.3d 914, 922 (Tex. App.—El Paso 2019, no pet.) (internal quotations omitted). "[A] court may take a parent's earning potential into account when determining the amount of child support the parent must pay." *In re M.A.G.*, 2002 WL 501657, at *3.

ANALYSIS

Avina argues the trial court abused its discretion because his trial testimony established a material and substantial change in his financial circumstances and C.L.G.'s mother did not refute his testimony.

At trial, Avina testified that he managed and produced conferences and live events for companies and organizations. His most recent employer was a company called AV Concepts, and he had worked for AV Concepts for six years. While at AV Concepts, Avina held positions as the company's national account director and client services director. Most recently, he had served as the company's executive director of creative production. However, on September 30, 2018, AV

Concepts dissolved its creative production department and terminated everyone in the department, including Avina. At the time he was terminated, Avina was earning "just a little bit beneath $10,000.00" per month. Avina did not believe he could earn the same salary at another company, attributing his success at AV Concepts to the fact that he was "home grown" in the company. Avina pointed out that he had only an associate's degree and he had two felony convictions "from about 10 or 15 years ago." Avina believed his lack of formal education and his criminal history would make it difficult for him to earn the same salary at another company. These circumstances factored into his decision to start his own company.

As to his earnings with his new company, Avina testified that beginning in October 2018 he was paid every two weeks based on an annual salary of $45,000.00. Avina claimed his company did not generate any income from clients until January 2019. On January 13, 2019, Avina increased his pay so it was based on an annual salary of $60,000.00. Avina's company had two employees. Initially, these employees worked without compensation, but Avina's company started paying them an annual salary of $60,000.00 in January 2019. Avina believed his company was underpaying both employees. One of the employees, the company's office manager and backstage coordinator, had earned $75,000.00 a year at AV Concepts. Avina suggested that his company's other employee, its media director, could earn significantly more under a different arrangement. Avina stated that he knew someone in the industry with the same talents and capabilities as his company's media director who earned more than $200,000.00 a year as an independent contractor.

"To determine whether there has been a substantial and material change, the court must compare the financial circumstances of the child and the affected parties at the time the order was entered with their financial circumstances at the time the modification is sought." *Melton*, 350 S.W.3d at 238. In this case, Avina testified about his financial circumstances once he was terminated from AV concepts, which was after the date the trial court denied the Texas Attorney

General's petition and Avina's counter-petition to modify child support. However, Avina did not present any evidence about his financial circumstances on October 15, 2014, the date the trial court rendered the order setting his current child support. Without evidence about Avina's financial circumstances at the time the court rendered the order setting Avina's current child support, the trial court could not compare Avina's historical financial circumstances to his current financial circumstances and could not determine if there was a material and substantial change in these circumstances. *See id.*; *In re G.J.S.*, 940 S.W.2d at 292-93.

Furthermore, based on Avina's testimony, the trial court could have reasonably found that Avina had a high earning potential and any decrease in his earnings while he started his new company was temporary. "A court may take a parent's earning potential into consideration when determining an issue of child support." *Watler v. Watler*, No. 01-01-01038-CV, 2003 WL 1091765, at *2 (Tex. App.—Houston [1st Dist.] March 13, 2003, no pet.). "Short term slumps in parental income are not sufficient to support modification of a child support order." *Id*. In determining if some evidence supports the trial court's order and its implied findings of fact, it is proper for the reviewing appellate court to consider only the evidence most favorable to the trial court's findings and disregard any contradictory evidence. *Worford*, 801 S.W.2d at 109.

Here, Avina testified that he left AV Concepts on September 30, 2018, and his new company started receiving payments from clients in January 2019. That same month, his company began paying salaries to two employees and it increased Avina's salary. Additionally, Avina testified that his company had been hired by one of its "key accounts" to handle an event in Barcelona, Spain. Finally, Avina testified that his company was providing the same services that AV Concepts had provided and was taking over some of AV Concepts' former clients and accounts. Based on this evidence, the trial court could have reasonably concluded there was no material and substantial change in Avina's financial circumstances. *See Watler*, 2003 WL

1091765, at *3 (holding "[t]he trial court could have reasonably found that appellant's financial condition was only a temporary slump" when the evidence showed a decrease in earnings but also a high earning potential).

We conclude the trial court acted within its discretion in concluding that Avina failed to satisfy his burden to establish a material and substantial change in circumstances.

Avina further argues the trial court abused its discretion because he contends his child support does not comply with the child support guidelines.[1] We disagree. "[A] court's consideration of the child support guidelines in a modification proceeding is discretionary, not mandatory." *Melton*, 350 S.W.3d at 238; *see* TEX. FAM. CODE § 156.402.[2] "Accordingly, a child support order not in compliance with guidelines does not in and of itself establish a material and substantial change in circumstances warranting modification." *Melton*, 350 S.W.3d at 238. "[T]he court retains broad discretion in making the equitable decision of whether to modify a prior support order." *Friermood v. Friermood*, 25 S.W.3d 758, 760 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (rejecting the argument that the trial court must order child support in strict conformity with the child support guidelines in a modification proceeding).

[1]The existing child support order indicates that Avina's three other children were considered in determining his current child support for C.L.G.

[2]Section 156.402 of the Texas Family Code provides:

> (a) The court *may* consider the child support guidelines for single and multiple families under Chapter 154 to determine whether there has been a material or substantial change of circumstances under this chapter that warrants a modification of an existing child support order if the modification is in the best interest of the child.
>
> (b) If the amount of support contained in the order does not substantially conform with the guidelines for single and multiple families under Chapter 154, the court *may* modify the order to substantially conform with the guidelines if the modification is in the best interest of the child. *A court may consider other relevant evidence in addition to the factors listed in the guidelines.*

TEX. FAM. CODE § 156.402 (emphasis added).

CONCLUSION

Because Avina has not shown that the trial court clearly abused its discretion in denying his petition to modify child support, we affirm the trial court's order.

Irene Rios, Justice