In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00334-CV

IN THE INTEREST OF J.A.J.

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. F-178,869-A

MEMORANDUM OPINION

This is an appeal from a court's order retroactively increasing a father's child support obligation. The child's father, A.J.,[1] appeals from the trial court's order of July 27, 2009, which ordered that he pay $23,200 in retroactive child support.[2] In two appellate issues, A.J. argues that the trial court considered inadmissible evidence in determining his income during the 2004–2007 period.

---

[1] To protect the privacy of the parties involved in this appeal, we identify them by their respective initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (Vernon 2008).

[2] A.J. previously appealed the trial court's order retroactively increasing his child support obligation. *In the Interest of J.A.J.*, 283 S.W.3d 495 (Tex. App.–Beaumont 2009, no pet.). We reversed the prior order and remanded the case to the trial court because the trial court had insufficient evidence to calculate A.J.'s arrearage. *Id*. at 500-01.

Factual Background

On July 17, 2009, the trial court conducted a hearing to determine whether A.J. owed retroactive child support. An Assistant Attorney General with the Child Support Division called Lori Hardy, a child support officer from the Attorney General's office, who calculated A.J.'s monthly child support obligation for the years 2004–2007 at $1,200 per month.[3] Hardy testified that she subpoenaed A.J.'s employer for his wage information, and Hardy explained how she utilized that information to calculate A.J's monthly child support obligation. A.J. lodged several objections to Hardy's using and disclosing information she had obtained before the hearing from A.J.'s employer about his wages.

The trial court overruled all of A.J.'s objections to Hardy's testimony. According to Hardy, for each of the years 2004–2007, A.J.'s earnings exceeded $6,000 per month, the maximum amount the Attorney General generally used for the 2004–2007 period to calculate a parent's child support obligation.[4] In calculating A.J.'s monthly child support obligation, Hardy testified that she did not deduct for taxes, medical support, or union

---

[3]Under the trial court's support order in place for this period, A.J. paid $475 per month in child support.

[4]*See* Act of April 6, 1995, 74th Leg., R.S., Ch. 20, § 1, secs. 154.125, 154.126, 1995 Tex. Gen. Laws 113, 162-63 (current versions at TEX. FAM. CODE ANN. § 154.125 (Vernon Supp. 2009), § 154.126 (Vernon 2008)) (providing a presumptive child support guideline of twenty percent for one child when the obligor's net resources are $6,000 or less, and providing the procedure to follow if the obligor's net resources exceed the $6,000 monthly amount) (amended 2007).

dues because A.J. "was making so much more over that $6,000 cap." A.J. also testified at the hearing. With respect to his income, A.J. testified that it was more likely than not that he made more than $100,000 every year since 2004.

Shortly after the hearing, the trial court ordered A.J. to pay retroactive support in the amount of $23,200, payable in monthly installments of $500. The court's judgment also recites that A.J. is to be given credit for the payments he had already made.[5]

Standard of Review

A trial court's decision to modify a child support order is reviewed on appeal under an abuse of discretion standard. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). "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." *Id.* (citing *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex. 1985)). To determine whether the trial court abused its discretion, we 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. *In the Interest of J.A.J.*, 283 S.W.3d 495, 497-98 (Tex. App.–Beaumont 2009, no pet.).

---

[5]On appeal, A.J. does not argue that the trial court's judgment fails to credit approximately $11,000 that he paid as of July 27, 2009, toward the arrearage, and from the transcript of the hearing the court held on July 27, 2007, it appears that the parties did not dispute that A.J. was entitled to a credit that approximated $11,000. We express no opinion about whether the language used in the trial court's order accomplished the task of properly crediting A.J. with his undisputed payments on his arrearage. *See* TEX. R. APP. P. 47.1. *See Pat Baker Co. v. Wilson,* 971 S.W.2d 447, 450 (Tex. 1998) (appellate courts are prohibited from addressing unassigned error).

With respect to A.J.'s argument that the trial court erred by admitting portions of Hardy's testimony, evidentiary rulings are committed to the trial court's discretion. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). To reverse the trial court's judgment based on an erroneous evidentiary ruling, one must show that the trial court's ruling was in error and that the error "probably caused the rendition of an improper judgment." *Id.*; *see also* TEX. R. APP. P. 44.1.

Issue One

In his first issue, A.J. argues that the trial court admitted inadmissible hearsay to prove his 2004–2007 earnings. The Attorney General argues that Hardy can testify on the basis of hearsay sources because she qualifies as an expert. *See* TEX. R. EVID. 703.

Where the parties have adequately complied with their discovery obligations, experts can generally testify regarding their opinions and give the reasons they hold their opinions without prior disclosure of facts or underlying data, unless the court orders otherwise. TEX. R. EVID. 705(a). Importantly, trial courts are not automatically required to exclude the expert's underlying facts or data, even if inadmissible, but instead must only do so when "the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial." TEX. R. EVID. 705(d).

In this case, Hardy's calculation of A.J.'s child support obligation depended, in part, on his earned income for the 2004–2007 period. Although Hardy had obtained

information on A.J.'s earned income through a subpoena, the underlying records that she apparently received were not properly proven up and thus, inadmissible hearsay. Thus, we conclude that Hardy's testimony about A.J.'s levels of income between 2004 and 2007 was inadmissible hearsay. Nevertheless, A.J. also testified about his income for the period 2004–2007. According to A.J., it was more likely than not that he had made more than $100,000 every year since 2004.

The trial court found that A.J.'s net resources from October 2004 to May 2007 were $6,000 per month. We take judicial notice of the 2004–2007 tax charts of the Office of the Texas Attorney General used to calculate "Net Monthly Income" for child support purposes.[6] *See* Employed Persons 2004–2007 Tax Charts, Office of Texas Attorney General, http://www.oag.state.tx.us/cs/attorneys/index.shtml (last checked April 12, 2010). The tax charts reflect that individuals who have earned more than $100,000 annually have a derived "Net Monthly Income" in excess of $6,000 per month. *Id.*

In light of A.J.'s testimony that his income exceeded $100,000 for each year at issue, the evidence supports the trial court's use of the figure of $6,000 per month as A.J.'s net monthly income. On this record, other admissible testimony, consisting of A.J.'s testimony about his income, supports the figure the trial court used to calculate A.J.'s child support obligation. Therefore, the admission of Hardy's testimony to explain

[6]"A court of appeals has the power to take judicial notice for the first time on appeal." *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Texas*, 878 S.W.2d 598, 600 (Tex. 1994); *see also* TEX. R. EVID. 201.

the basis of her opinion was not unfairly prejudicial. *See* TEX. R. EVID. 705(d). We overrule issue one.

Issue Two

In issue two, A.J. argues that the trial court abused its discretion by calculating his arrearage from the date that the Attorney General filed suit to modify his child support payment. We note that the statute providing for modification of child support orders provides that the order may be modified from the earlier of the date of service of citation or from the date of the party's appearance in the suit to modify. TEX. FAM. CODE ANN. § 156.401(b) (Vernon 2008). Moreover, trial judges have broad discretion to decide whether all of the facts and circumstances necessitate and justify a retroactive award of child support. *See Rocha v. Villarreal*, 766 S.W.2d 895, 899 (Tex. App.–San Antonio 1989, no pet.).

A.J. was served with the suit to modify his child support payment on September 8, 2004. A.J. appeared on September 16, 2004, and on that date he filed a petition to modify the parent-child relationship. We hold that the trial court was authorized by statute to modify A.J.'s child support payment for the period at issue, which in this case dated back to October 1, 2004.

A.J. further argues that the trial court failed to properly weigh his testimony about the extra child support he provided over and above the amounts he paid pursuant to the trial court's orders. But at the trial, A.J. produced no supporting documentation that

verified his payment of these additional amounts, and the child's mother, with the exception of acknowledging that A.J. had provided additional support on one occasion in the amount of $250, denied that A.J. had provided her with any support beyond the amounts the trial court had ordered. Trial courts, when acting as finders-of-fact, can disbelieve disputed testimony. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819-20 (Tex. 2005); *McLane v. McLane*, 263 S.W.3d 358, 366-367 (Tex. App.–Houston [1st Dist.] 2008, pet. denied).

The record also does not show that the trial court did not credit A.J.'s undisputed testimony concerning his payment of $250 in additional support. The arrearage amount that the trial court determined A.J. owed is less than the maximum amount the trial court could have determined to be due for the period at issue because the trial court began its arrearage calculation from October 1, when it could have started the calculation from the date that A.J. appeared, September 16, 2004. The trial court's decision to adjust the starting date to begin in October, rather than starting the arrearage calculation date in September, serves to credit A.J. with his undisputed $250 additional support payment. In the absence of specific findings of fact, which A.J. did not request, and in viewing the evidence in the light most favorable to the judgment, we conclude that the trial court did not abuse its discretion in calculating A.J.'s arrearage. We overrule issue two.

Conclusion

We conclude that A.J. has not demonstrated that the trial court committed reversible error. The trial court's July 27, 2009 order is affirmed.

AFFIRMED.

____

HOLLIS HORTON
Justice

Submitted on March 17, 2010
Opinion Delivered April 22, 2010
Before McKeithen, C.J., Kreger and Horton, JJ.