**NUMBER 13-16-00644-CV**

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**In the Interest of L.L.O., a Child.**

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**On appeal from the 357th District Court of Cameron County, Texas.**

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# MEMORANDUM OPINION

## Before Chief Justice Valdez and Justices Longoria and Hinojosa
## Memorandum Opinion by Justice Longoria

Appellant, the Office of the Texas Attorney General, (the AG), appeals the trial court's orders which (1) denied the A.G.'s motion for summary judgment on the statute of limitations and (2) reduced appellee E.O.'s child support payments to $0 per month. We reverse and remand.

### I. BACKGROUND

M.R. is the mother of L.L.O., a minor child. In October 2008, E.O. and M.R. signed a voluntary acknowledgment of paternity (AOP) stating that E.O. was L.L.O.'s father. *See*

TEX. FAM. CODE ANN. § 160.301 (West, Westlaw through 2017 R.S.). The AOP was filed with the bureau of vital statistics the same month. *See id.* § 160.304(c) (West, Westlaw through 2017 R.S.) (stating an AOP becomes effective on the child's date of birth or when the AOP is filed with the bureau of vital statistics, whichever is later).

In September 2015, an associate judge signed an "Order in Suit Affecting the Parent-Child Relationship" appointing M.R. as the managing conservator of L.L.O. with the right to designate the child's primary residence without geographic restriction. E.O. was appointed as the possessory conservator and ordered to pay $350 a month in child support. The court did not give E.O. specific visitation rights but left that matter to the "mutual agreement of the parties." The order recites that M.R. and E.O. both appeared at that hearing without counsel.

E.O. later filed a "Petition to Challenge Acknowledgement of Paternity," a motion for genetic testing of L.L.O., and a motion for a writ of attachment of L.L.O. *See generally id.* §§ 160.308–309 (West, Westlaw through 2017 R.S.). The trial court granted E.O.'s motion to consolidate his petition with the already-existing suit affecting the parent child relationship regarding L.L.O.[1] E.O. attempted to serve M.R. at the address in Brownsville she gave the A.G. for receiving child support payments but was unsuccessful. According to an affidavit from the process server attached to E.O.'s motion for substituted service, a female at the address informed him that M.R. lives in Matamoros, Mexico, and only comes to the Brownsville address on the weekends. The trial court granted E.O.'s motion, and copies of his petition and other documents were left with a person at that address. M.R. did not appear at any subsequent hearing in this case.

[1] At this point, the case was before a district court judge.

E.O. subsequently filed a Motion to Modify Child Support reciting that the court had granted a motion for genetic testing and asserted that M.R. was "secreting the child in Mexico" to avoid complying with the order. E.O. asked the court to suspend his child support obligation or allow him to make payments into the court's registry until M.R. complied with the order. While the trial court stated on the record that it would grant the motions for genetic testing and a writ of attachment if M.R. did not appear, there is no signed order granting either motion in the record. Over the A.G.'s opposition, the trial court issued a temporary order that allowed the A.G. to continue to collect child support payments from E.O. but prohibited it from disbursing any funds to M.R. The A.G. filed a traditional motion for summary judgment asserting that E.O.'s petition was barred by the statute of limitations.

Several days later, the court held a hearing "on all motions." The trial court (1) denied the A.G.'s motion without stating its reasons and (2) issued an order granting E.O.'s motion to modify providing that "for the safety and welfare and in the best interest" of the child, E.O. would pay $0 in child support per month "until further order of this Court." The trial court did not explicitly address E.O.'s motions for genetic testing and a writ of attachment or his petition challenging the AOP. This appeal followed.

At the A.G.'s request, we abated this case for the trial court to enter findings of fact and conclusions of law regarding its order modifying E.O.'s child support obligation. The trial court filed findings and conclusions, which we set out below, and we reinstated the case. The A.G. now asserts in two issues that the trial court erred in denying its motion

for summary judgment and abused its discretion by modifying E.O.'s child support obligation to $0 a month.[2]

## II. Summary Judgment

By its first issue, the A.G. argues that it was entitled to summary judgment on its affirmative defense of limitations. We do not address the merits of this issue because we conclude it is not properly before us.

An order denying summary judgment "is an interlocutory order over which an appellate court typically lacks jurisdiction absent some special statutory grant." *Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50, 59 (Tex. 2011); *see CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011). Appellate courts also lack jurisdiction to review the denial of summary judgment after a trial on the merits. *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *Cullum v. White*, 399 S.W.3d 173, 188–89 (Tex. App.—San Antonio 2011, pet. denied). A party's remedy in this circumstance is to challenge the judgment rendered by the trial court after the trial on the merits. *Williams v. Colthurst*, 253 S.W.3d 353, 360 n.3 (Tex. App.—Eastland 2008, no pet.). Because we lack jurisdiction to review the trial court's order denying summary judgment, we overrule the A.G.'s first issue.

## III. Modification of Child Support

The A.G. asserts in its second issue that the trial court abused its discretion when it modified E.O.'s child support obligation to $0 a month. We agree.

### A. Standard of Review

[2] This Court granted E.O.'s attorney's motion to withdraw and directed E.O. to notify the Court if he retained new counsel. Proceeding *pro se*, E.O. filed a document with this Court entitled "Respondent's Original Answer" stating that he was "really going through an[ ] emotional phase and pocket expense with this case" but did not address the A.G.'s issues. E.O. has filed nothing else with this Court to date.

We review a court's decision on a motion to modify a child support order for an abuse of discretion. *In re J.I.Z.*, 170 S.W.3d 881, 883 (Tex. App.—Corpus Christi 2005, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, *see id.*, or when it clearly fails to correctly analyze or apply the law. *In re Arriola*, 159 S.W.3d 670, 674 (Tex. App.—Corpus Christi 2004, orig. proceeding) (en banc).

Under an abuse of discretion review, the legal and factual sufficiency of the evidence are not independent grounds of relief but relevant factors for us to consider. *In re Moore*, 511 S.W.3d 278, 283 (Tex. App.—Dallas 2016, no pet.) (orig. proceeding). We review the evidence in the light most favorable to the trial court's ruling and indulge every presumption in its favor. *Id.* There is no abuse of discretion if the record contains some probative and substantive evidence that supports the court's ruling. *Id.* When the appellate record contains a complete reporter's record, as it does in this case, the trial court's findings of fact are not conclusive and are binding only if supported by the evidence. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

**B. Applicable Law**

A trial court has the power to modify an order providing for child support if "the circumstances of the child or a person affected by the order have materially and substantially changed" since the date the order was rendered. TEX. FAM. CODE ANN. § 156.401(a)(1) (West, Westlaw through 2017 R.S.). The trial court's primary consideration when determining whether a modification is warranted is the best interest of the child. *See id.* § 156.402 (West, Westlaw through 2017 R.S.); *Rumscheidt v. Rumscheidt*, 362 S.W.3d 661, 666 (Tex. App.—Houston [14th Dist.] 2011, no pet.). When making this decision, the trial court should consider the financial circumstances of the

child and parents at the time of the court's prior support order in relation to the circumstances existing at the time the modification is sought. *Trammell v. Trammell*, 485 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *see In re C.C.J.*, 244 S.W.3d 911, 917 (Tex. App.—Dallas 2008, no pet.) ("The record must contain both historical and current evidence of the relevant person's financial circumstances."). The burden to show a material and substantial change is on the party requesting the modification. *Trammell*, 485 S.W.3d at 576

**C. Analysis**

In response to our order of abatement, the trial court filed the following findings of fact:

> 1. The prior order sought to be modified in this case is entitled Order in Suit Affecting Parent-Child Relationship and was rendered on September 4, 2015. A Motion to Modify Child Support was duly filed on January 29, 2016, which sought to modify child support due to a material and substantial change in the circumstances of the parties. That is allowed under the Texas Family Code, Section 156.401. The court finds that both [M.R.'s] actions in regards to secreting the child and telling others that the child did not belong to [E.O.] rise to the level of a material and substantial change which would warrant a modification of child support. The court finds that [E.O.] has sufficient grounds and standing to bring such a motion.
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> 2. Evidence was presented to the court that since the rendition of the prior order, [M.R.], mother of the child, was telling people that [E.O.], was not the father of the child. Furthermore, she has been secreting the child in Mexico. [E.O.] testified that he had reason to believe [M.R.] was aware of his efforts to obtain genetic testing of the child and was intentionally staying out of the country so she could continue to receive child support.
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> 3. After [a] hearing, the court found that the application of the percentage guidelines in this case would be unjust or inappropriate. A variance from the guidelines is in the best interest of the child.
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> 4. The specific reasons that the amount of support per month ordered by the Court varies from the amount computed by applying the percentage guidelines of the Texas Family Code are as follows: [t]he court has

> authority under section 154.122(b) of the Texas Family Code to determine that the application of the guidelines would be unjust or inappropriate under the circumstances. The court duly considered evidence that since the rendition of the previous order, the mother of the child has not allowed any contact, time with, or possession of the child to [E.O.]. The mother of the child is believed to have secreted the child to Mexico and is believed to be aware of [E.O.'s] attempt to obtain genetic testing to challenge paternity. Section 154.123 of the Texas Family Code allows the court to consider, among other things, the amount of time of possession and access to the child as a factor in establishing support payments in an amount other than the guidelines. The court utilized the authority given to it by this and other sections of the Texas Family Code. The court's actions are not to be considered as conditioning payment of child support on visitation with the child as prohibited by [Texas Family Code] Section 154.011. Due to the material and substantial changes in the circumstances of the parties since the rendition of the last order, child support should be modified as noted below. Therefore, the court finds and concludes that it has sufficient jurisdictional and legal grounds to modify the monthly child support amount to zero dollars.

The trial court essentially made three findings of fact: (1) M.R. told others that E.O. was not the biological father of L.L.O.; (2) M.R. hid L.L.O. in Mexico because she knew E.O. was seeking a genetic testing order and she wanted to continue to receive support; and (3) M.R. denied E.O. any access to L.L.O. The A.G. asserts that the evidence for these findings is insufficient because the record contains no evidence to support any of them. *See In re A.E.A.*, 406 S.W.3d 404, 414 (Tex. App.—Fort Worth 2013, no pet.) (observing that evidence is legally insufficient to support a finding if "the record discloses a complete absence of a vital fact"). We agree that the trial court abused its discretion.

Assuming for the sake of argument that the first and third findings would constitute a material and substantial change in financial circumstances, there is no evidence in the record to support either finding. The only evidence that M.R. told anyone that E.O. was not L.L.O.'s biological father is from the opening statement of his counsel that E.O. was told at the time of the divorce that L.L.O. was "not your daughter—likely not your daughter,

and he said okay and moved on." Similarly, the only evidence in the record that E.O. had no visitation with L.L.O., or that M.R. prevented him from seeing L.L.O., is the opening statement of E.O.'s counsel that M.R. "left to Mexico with the child" after the divorce and that E.O. "has not seen the child for the rest of the time, almost seven years." Neither of these statements can support the court's findings because the arguments and statements of counsel are not evidence. *See Kellmann v. Workstation Integrations, Inc.*, 332 S.W.3d 679, 685 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *see also Hernandez v. Hernandez*, No. 13-08-00722-CV, 2010 WL 3820900, at *6 (Tex. App.—Corpus Christi Sept. 30, 2010, pet. denied) (mem. op.). Furthermore, even if the trial court could credit counsel's arguments regarding how long it had been since E.O. had seen L.L.O., the trial court's previous order expressly gave M.R. possession of L.L.O. with the right to designate the child's residence without geographical restriction and provided that E.O. may visit her only through "mutual agreement of the parties." Even if it is true that E.O. has not seen L.L.O. since the divorce, there is no evidence E.O. even tried to locate M.R. to ask for visitation between the time of the rendition of the prior order and the beginning of this case, much less that he was rebuffed.[3]

The court's third finding is that M.R. "sequestered" L.L.O. in Mexico because she knew E.O. was seeking genetic testing and wanted to continue to receive child support. Regarding L.L.O.'s knowledge of E.O.'s efforts to secure genetic testing, the trial judge

[3] We do not disagree with the trial court's observation in its findings that "the amount of time of possession and access to a child" is a relevant factor that courts must consider when ordering child support payments in an amount different from that established by the guidelines. TEX. FAM. CODE ANN. § 154.123(b)(4) (West, Westlaw through 2017 R.S.). On this record, however, the amount of visitation and possession E.O. had with L.L.O. does not show a material and substantial change in the circumstances of a person affected by the order. *See id.* § 156.401(a)(1) (West, Westlaw through 2017 R.S.).

asked E.O. whether he had asked for genetic testing during the hearing in September 2015 before the associate judge. E.O. replied:

> I did ask for [DNA testing], but the judge denied it, the DNA. Because she was brought here in court and she—he denied it, so I told him I was going to pay for the DNA. I just wanted to make sure the daughter is mine or not.

At most, this testimony establishes only that M.R. was present during the previous hearing—a fact already established by the recitations in the previous child support order. But that hearing took place in September 2015, and there is no evidence in the record whether L.L.O. was already in Mexico at this time or for how long she had been there. Without at least knowing when L.L.O. moved to Mexico compared to when the hearing occurred, the trial court could not determine if the move was in response to E.O.'s efforts to obtain genetic testing or was entirely unrelated. On this record, M.R.'s knowledge of E.O.'s efforts to obtain genetic testing is not substantive and probative evidence of a material and substantial change in the circumstances of herself, L.L.O., or E.O.

The fact that M.R. moved to Mexico, presumably with L.L.O., could itself constitute a change in circumstances regardless of its motives. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 739 (Tex. App.—Houston [14th Dist.] 2012, no pet.). But even if we assume that the move inevitably caused some change in the financial circumstances of L.L.O. or her parents, E.O. still bears the burden of producing historical and current information of the relevant person's financial circumstances. *See In re C.C.J.*, 244 S.W.3d at 917. There is no information in the record of how the financial circumstances of L.L.O. or either of her parents changed as a result of the move to Mexico. On this record, L.L.O.'s presumed move to Mexico is not substantive and probative evidence of a material and substantial change in circumstances.

The record contains no evidence of the vital facts supporting the trial court's findings, and we find no other substantive and probative evidence in the record of a material and substantial change in the circumstances of L.L.O. or another person affected by the previous order. *See* TEX. FAM. CODE ANN. § 156.401(a)(1). On this record, it was an abuse of discretion for the trial court to modify E.O.'s child support obligations to $0. We sustain the A.G.'s second issue.[4]

## IV. CONCLUSION

We reverse the trial court's order modifying E.O.'s child support obligation to $0 per month and remand for further proceedings consistent with this opinion.[5]

NORA L. LONGORIA
Justice

Delivered and filed the
17th day of August, 2017.

[4] We express no opinion on whether substantive evidence that a managing conservator of a child is avoiding service of a petition to challenge paternity can even constitute grounds for modifying the child support obligation of the possessory conservator. *See* TEX. R. APP. P. 47.1.

[5] We note that there are other options available that do not involve reducing E.O.'s child support obligation while the issue is being contested. For example, if E.O. made a prima facie showing that he is entitled to bring a proceeding to challenge the AOP—an issue we express no opinion on—the trial court could issue an order for genetic testing of L.L.O. *See In re Rodriguez*, 248 S.W.3d 444, 451 (Tex. App.—Dallas 2008, orig. proceeding). After issuing the order, and if appropriate and supported by a verified pleading or affidavit, the court could issue a temporary order attaching L.L.O. or taking her into the possession of the court. *See* TEX. FAM. CODE ANN. § 105.001(c) (West, Westlaw through 2017 R.S.). Failure to comply with such an order is punishable by contempt and enforceable through all the remedies provided for in Chapter 157 of the Texas Family Code. *See id.* § 105.001(f). We do not say or imply that pursuing any of these options would be meritorious on the facts of this case, only that there are more appropriate tools available than modification of E.O.'s child support obligations.