NUMBER 13-23-00005-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN THE INTEREST OF I.J.D., A CHILD

On appeal from the 444th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

J.D.L. (Father) and J.M. (Mother) are the parents of I.J.D., a minor child.[1] Father filed a petition to modify child support order, arguing that his circumstances had materially and substantially changed due to a reduction in his income since the rendition of a prior order. The trial court denied his petition. On appeal, Father contends that the trial court abused its discretion (1) by failing to issue findings of fact and conclusions of law and

[1] To protect the identity of the minor child, we refer to the child and his or her relatives by their initials or an alias. *See* TEX. FAM. CODE ANN. § 109.002(d).

(2) in denying his petition. We affirm.

I. BACKGROUND

On September 9, 2015, the trial court entered an agreed order in a suit to modify the parent child relationship. This agreed order, among other things, set Father's monthly child support obligation for I.J.D. at $1,231.78[2] and his monthly medical support obligation at $105.00. This agreed order did not include any findings regarding Father's net resources or indicate that Father's child support obligation was based on application of the child support guidelines.

On October 25, 2021, Father filed his "Original Petition to Modify Parent-Child Relationship." In his motion, Father alleged that his circumstances had materially and substantially changed "due to his income" since the rendition of the prior order, requested that his child support obligation be decreased, and alleged that modification was in the best interest of the child. Mother filed a response generally denying the allegations in Father's petition on December 13, 2021. In addition, Mother filed her "Objections to Reduction in Child Support," arguing that the modification agreement in 2015 "was not based on the standard Family Code guideline amount." She asserted that the 2015 order contained no indication that the parties relied on Father's income in establishing his child support amount, and therefore, any changes in Father's income could not qualify as a material and substantial change because Father's income was not a "material" consideration to begin with.

The trial court held a hearing on Father's motion on September 2, 2022. At the

[2] The agreed order required Father to initially pay $1,332.90 in monthly child support for the months of May through August 2015 and $1,231.78 thereafter.

hearing, Father stipulated that the cost of medical, dental, and vision insurance for I.J.D. had increased to $159.46 and he agreed that his medical support obligation should be modified to reflect that amount. Father testified that in 2015, he had three children, and that I.J.D. was the only child he had with Mother. In addition, Father had another child that was born after entry of the 2015 order. Father indicated that the 2015 agreed order took into account that he had two children outside his relationship with Mother. A 2015 paystub was admitted into evidence, which indicated that Father's year-to-date earnings through the end of April 2015 was $53,089.57. Father testified that this paystub was used to calculate or assist in calculating his child support obligation. However, Father admitted there was nothing in the 2015 order which indicated what number or percentage was used to calculate his child support obligation.

Father testified that, in 2015, he worked in the "auto industry" with Bert Ogden Auto Group (Bert Ogden) and earned close to $120,000.00 in total earnings for that year. Two W-2 forms admitted into evidence indicated that Father had earned $119,089.57 in gross income in 2015. According to Father, "100 percent of the income [from Bert Odgen was] commission" and he had no guaranteed salary. Father then quit Bert Ogden and subsequently worked for Gillman Auto Group (Gillman) in 2020. A W-2 form admitted into evidence indicated that Father had earned $136,184.49 in gross income at Gillman in 2020. Father then left Gillman and worked for Boggus Auto Group. Thereafter, Father had a period of unemployment, after which he became employed at First Innovations, Inc. (First Innovations) in August 2021.

At the time of the hearing, Father indicated he still worked in the auto industry but no longer sold vehicles and that his annual salary at First Innovations as a regional

manager was $72,000.00 of “guaranteed pay,” plus commission. According to Father, commission was not guaranteed and it would vary each month. An employment agreement signed by Father and First Innovations on August 3, 2021, was admitted into evidence. An “Employee Compensation and Benefits” form signed by Father on that same day was also admitted and indicated that Father’s “base salary” of $72,000.00 would be paid via direct deposit to his bank twice a month, each deposit consisting of $3,000.00. This form also stated that “if employee is a commissioned employee, the commissions are established separately by management per employee, job duty, account performance, territory, production, etc. Commission compensation can be changed at any time at the discretion of management.”

A W-2 from First Innovations was admitted into evidence, indicating that Father had earned $29,500.00 in wages, tips and other compensation in 2021. Father testified that this particular W-2 represented his earnings from August until the end of 2021. A 2022 paystub admitted into evidence indicated that Father’s total year-to-date earnings through July 31, 2022 were $58,973.00—comprising $45,000.00 in salary and $13,973.00 in commissions. Father testified that his commissions were not contractually capped. Father was not actively seeking other employment and testified that the pandemic affected the auto industry when he was a car salesman, that he had sold less cars and earned less money at that time, and that his current employment provided security and a guarantee of income.

Father further testified that he did not know whether he would earn $120,000 in 2022, but nevertheless projected he would earn $98,922.20 in 2022 based on his year-to-date earnings at First Innovations. According to Father, he divided $98,922.20 by 12

"to come up with a monthly amount" of $8,234.51. After inputting the stipulated $159.46 for "medical, dental, [and] vision," Father concluded that his monthly child support amount should be $920.77 "based on one child with [J.M.] and three children outside the relationship." He claimed the requested amount was based on the "Attorney General guidelines" and the "Attorney General calculator."

On October 10, 2022, the trial court entered its "Order in Suit to Modify Parent-Child Relationship." In said order, the trial court denied Father's request to modify his monthly child support obligation, finding that "[Father] has failed to establish the material allegations in his Petition to Modify."[3]

On October 17, 2022, Father requested findings of fact and conclusions of law pursuant to Rule 296 of the Texas Rules of Civil Procedure. On November 8, 2022, Father filed his "Notice of Past Due Findings of Facts and Conclusions of Law" pursuant to Rule 297 of the Texas Rules of Civil Procedure. On the same day, Father filed his "Motion to Reconsider and Motion for New Trial." Father filed his "First Amended Motion to Reconsider and Motion for New Trial" on November 28, 2022.

On December 16, 2022, the trial court held a hearing on Father's motion for new trial and denied it. The trial court did not file separate findings of fact and conclusions of law. This appeal followed.[4]

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[3] The order also increased Father's health care support obligation to $159.46, as stipulated by the parties.

[4] On December 30, 2022, Father timely filed his notice of appeal of the trial court's October 10, 2022 "Order in Suit to Modify Parent-Child Relationship." On March 28, 2023, the trial court entered its "Nunc Pro Tunc Order in Suit to Modify Parent-Child Relationship." The corrections made in the nunc pro tunc order are not relevant to this appeal. On April 6, 2023, Father filed his amended notice of appeal, which indicated he was appealing both orders. Father does not appeal the trial court's denial of his motion for new trial.

I. FAILURE TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a sub-issue, Father argues that the trial court abused its discretion by failing to issue findings of facts and conclusions of law regarding its decision to deny his child support modification motion.

The record demonstrates that Father requested findings of fact and conclusions of law pursuant to the Rules of Civil Procedure.[5] In any case tried in a district or county court without a jury, a party may request the court to state in writing its findings of fact and conclusions of law. TEX. R. CIV. P. 296. Once a party makes a proper request under Rule 296, the trial court is generally obligated to make findings of fact and conclusions of law. *See id.* R. 297 ("The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed."). "However, a party is not entitled to findings and conclusions in every case." *Hous. Auth. of City of El Paso v. Beltran Elec. Contractors, Inc.*, 550 S.W.3d 707, 711 (Tex. App.—El Paso 2018, pet. denied.).

"When a trial court makes a discretionary decision—one we review under the abuse-of-discretion standard—the trial [court] can, but is *not required* to issue findings of fact and conclusions of law." *Id.*; *see IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 445 (Tex. 1997) (Baker, J., dissenting) ("Under an abuse of discretion

[5] Texas Family Code section 154.130 requires a trial court to make certain findings of fact if a party timely requests them in writing or in open court or the amount of child support varies from the amount computed by applying the percentage guidelines under Section 154.125 or 154.129. *See* TEX. FAM. CODE ANN. § 154.130. However, Father filed his written request for findings of fact and conclusions of law pursuant to Texas Rules of Civil Procedure 296 and 297 rather than § 154.130. *Compare* TEX. R. CIV. P. 296 and 297, with TEX. FAM. CODE ANN. § 154.130. Father also did not request section 154.130 findings in open court. Absent a request for section 154.130 findings, we conclude the court did not err by not making such findings. *See In re T.A.*, 346 S.W.3d 676, 678–79 (Tex. App.—El Paso 2009, pet. denied). Futhermore, Father does not argue on appeal that the trial court was required to issue findings pursuant to § 154.130. TEX. FAM. CODE ANN. § 154.130; *see also Rumscheidt v. Rumscheidt*, 362 S.W.3d 661, 664–65 (Tex. App.—Houston [14th Dist.] 2011, no pet.)(holding that when a motion to modify child support is denied, the trial court is not required to make the specific statutory findings under Family Code § 154.130).

standard of review, findings of fact and conclusions of law are neither appropriate nor required."); *Davis v. Spring Branch Med. Ctr., Inc.*, 171 S.W.3d 400, 413 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (concluding trial court did not err in denying request for findings of fact and conclusions of law under Rule 296 because standard of review was abuse of discretion); *Samuelson v. United Healthcare of Tex., Inc.*, 79 S.W.3d 706, 710 (Tex. App.—Fort Worth 2002, no pet.) (noting that when abuse-of-discretion review applied to trial court's ruling, findings of fact and conclusions of law are helpful, but not required); *Keever v. Finlan,* 988 S.W.2d 300, 306–07 (Tex. App.—Dallas 1999, pet. dism'd) (same); *Crouch v. Tenneco, Inc.,* 853 S.W.2d 643, 649 (Tex. App.—Waco 1993, writ denied) (same); *see also Wiltshire v. Humpal Physical Therapy, P.C.*, No. 13-04-00310-CV, 2005 WL 2091092, at *8 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2005, no pet.) (merm. op.) (same) (citing *Crouch*, 853 S.W.2d at 649). We review a denial of child support modification under an abuse of discretion standard. *See In re A.A.T.*, 583 S.W.3d 914, 920 (Tex. App.—El Paso 2019, no pet). Accordingly, the trial court was under no obligation to issue findings of fact or conclusions of law pursuant to the Rules of Civil Procedure. *See Hous. Auth. of City of El Paso*, 550 S.W.3d at 711; *Crouch*, 853 S.W.2d at 649.

We observe that our sister court in Houston has held that findings of fact and conclusions of law under Rule 296 are required when requested by a party in a child support modification proceeding. *See Rumscheidt v. Rumscheidt*, 362 S.W.3d 661, 665 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In that case, our sister court noted that "[u]nder Texas Rule of Civil Procedure 296, a trial court's failure to file findings of fact and conclusions of law is presumed reversible error, unless the record affirmatively shows

that the requesting party was not harmed by their absence." *Id.* (citing *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996)). "Error is harmful if it prevents an appellant from properly presenting a case to the appellate court." *Id.*

Even assuming without deciding the trial court was required to issue findings of fact and conclusions of law in this case, the record affirmatively demonstrates that Father was not harmed by their absence. Father aptly presented his issues on appeal, and his appellate presentation confirms he was not prevented from properly presenting a case. *See id.* Furthermore, Father was able to brief all relevant issues and does not identify any issue that he was unable to brief as a result of the trial court's failure to make findings of fact and conclusions of law. *See id.*

We overrule this sub-issue.

II. ORDER DENYING THE PETITION FOR MODIFICATION

In his brief, Father argues that the trial court abused its discretion in denying his modification request because the evidence established that he was entitled to modification under the family code. *See* TEX. FAM. CODE ANN. § 156.401(a)(1), (a)(2), (a-1).

A. Standard of Review & Applicable Law

Under the Texas Family Code, a court may modify a prior child support order. The relevant provisions provide,

> (a) Except as provided by Subsection (a-1), (a-2), or (b), the court *may* modify an order that provides for the support of a child, including an order for health care coverage under Section 154.182 or an order for dental care coverage under Section 154.1825, if:

(1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:

(A) the date of the order's rendition; or

(B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or

(2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with the child support guidelines.

(a-1) If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court *may* modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

Id. § 156.401(a), (a-1) (emphasis added).

"The party requesting the modification bears the burden to show such a change in circumstances." *In re N.H.N.*, 580 S.W.3d 440, 445 (Tex. App.—Houston [14th Dist.] 2019, no pet.). "The court retains broad discretion in making the equitable decision of whether to modify a support order." *In re A.A.T.*, 583 S.W.3d at 920. "In determining whether a modification of child[ ]support payments is appropriate, a trial court should consider the circumstances of the child and the parents at the time of the prior child[ ]support order as compared to the circumstances existing at the time of the trial of the modification suit." *In re K.A.M.S.*, 583 S.W.3d 335, 346 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The trial court may consider the child support guidelines and other relevant evidence. *Id.* (citing TEX. FAM. CODE ANN. § 156.402(a), (b)). The trial court's

consideration of the child support guidelines in a modification proceeding is discretionary, not mandatory. TEX. FAM. CODE ANN. § 156.402(a); *In re K.A.M.S.*, 583 S.W.3d at 346. In addition, the best interest of the child should be the trial court's primary consideration in deciding whether to modify a child support obligation. *See* TEX. FAM. CODE ANN. § 156.402(a); *In re K.A.M.S.*, 583 S.W.3d at 346.

"An order regarding child support will not be disturbed on appeal unless the complaining party can demonstrate a clear abuse of discretion." *In re A.A.T.*, 583 S.W.3d at 920. "The test for abuse of discretion is whether the court acted arbitrarily or unreasonably, that is, without reference to guiding rules and principles." *In re N.H.N.*, 580 S.W.3d at 445 (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam)). "Under this standard, the legal and factual sufficiency of the evidence are not independent grounds of error but are merely factors in determining whether the trial court abused its discretion." *Id.* "The mere fact that in a similar circumstance an appellate court would have ruled differently does not show that the trial court abused its discretion when the matter falls within its discretionary authority." *In re A.A.T.*, 583 S.W.3d at 921.

We review the "evidence in a light most favorable to the court's decision and indulge every legal presumption in favor of its judgment." *In re J.I.Z.*, 170 S.W.3d 881, 883 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.). "In making this determination, we are mindful that the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *In re A.A.T.*, 583 S.W.3d at 920. Where, as here, no findings of fact and conclusions of law are filed,[6] it is "implied that the trial court made

[6] Although the trial court's order includes a statement that could be interpreted as a finding of fact, such "finding" does not meet the requirements of Texas Rule of Civil Procedure 299a. TEX. R. CIV. P. 299a (requiring findings of fact to be separately filed and not simply recited in the judgment); *see also Martinez*

all the findings necessary to support its judgment." *Worford*, 801 S.W.2d at 108.

In this case, the trial court's order denied Father's modification request. In his petition to modify, Father alleged that his circumstances had materially and substantially changed due to his reduced income since rendition of the prior order. By denying Father's petition, the trial court impliedly found that there was no material and substantial change in his circumstances.—an issue on which Father bore the burden of proof; therefore, the evidence is legally and factually insufficient only if it conclusively establishes that there has been such a change. *See Dow Chem. Co v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam).

B. Discussion

In this case, Father urges that the evidence and testimony were "sufficient" to prove a material and substantial change in his circumstances, justifying his request for a reduction of his child support obligation from $1,231.78 to $920.77 per month. According to Father's testimony, he calculated $920.77 per month based on his projected earnings for 2022 and application of the child support guidelines "based on one child with [Mother] and three children outside the relationship." The evidence demonstrated that Father became employed with First Innovations in August 2021, and his compensation consisted of a guaranteed annual salary of $72,000, plus commissions. Father testified that he projected his 2022 earnings to be $98,922.20 based on his year-to-date earnings through July 31, 2022, which included his salary and commissions.

However, the trial court was not required to credit Father's projections or his

v. Hauling 365, LLC, No. 13-20-00195-CV, 2022 WL 480251, at *4 (Tex. App.—Corpus Christi–Edinburg Feb. 17, 2022, no pet.) (mem. op.) (holding that findings in a final order were improper under Rule 299a).

testimony about application of the child support guidelines. *See In re A.A.T.*, 583 S.W.3d at 921 ("[T]he trial court is the sole judge of the witnesses' credibility and the weight to be given to the evidence."). We observe that the 2015 agreed order which established Father's $1,231.78 monthly child support obligation did not contain any findings regarding his earnings or net resources. Furthermore, the order contains no indication that the amount of Father's child support obligation agreed to in 2015 was based on application of the child support guidelines and contains no findings regarding how many children Father had outside his relationship with Mother at that time. At the hearing, Father testified that a 2015 paystub was used to calculate his child support obligation at the time the parties entered into the 2015 agreed order. This paystub indicated Father's year-to-date earnings through the end of April 2015 was $53,089.57. But given the 2015 agreed order contained no findings regarding any of this information, the trial court could have simply discounted Father's testimony. *See In re A.A.T.*, 583 S.W.3d at 921.

In addition, Father's testimony and evidence indicated he earned nearly $120,000.00 in 2015. Despite his assertions that he earned less at his new job, Father admitted that he did not know whether he would earn $120,000 in 2022 and admitted his commissions were not capped. In other words, Father's projections were merely speculative as Father indicated that he did not know whether his 2022 earnings would actually be less than his 2015 earnings.

Father also suggests that Mother offered no countervailing evidence showing that the parties did not rely on Father's 2015 income when entering the 2015 agreed order or that his child support obligation would not change under the family code guidelines when accounting for his testimony that he had an additional child after entry of the 2015 order

and his change in income. This argument is misplaced because, as the party requesting the modification, Father bore the burden to show a change in circumstances. *See In re N.H.N.*, 580 S.W.3d at 445. In addition, the trial court was not required to consider the child support guidelines in determining whether a modification was warranted. *See* TEX. FAM. CODE ANN. § 156.402(a); *In re K.A.M.S.*, 583 S.W.3d at 346 ("The trial court's consideration of the child[ ]support guidelines in a modification proceeding is discretionary, not mandatory.").

We hold that the the trial court did not abuse its discretion by implicitly finding no material and substantial change in Father's circumstances. *See In re A.A.T.*, 583 S.W.3d at 921; *Dow Chem. Co*, 46 S.W.3d at 241. We also observe that the trial court could have determined that modification was not in the best interest of I.J.D. *See* TEX. FAM. CODE ANN. § 156.402(a); *In re K.A.M.S.*, 583 S.W.3d at 346.[7]

Father also argues in his brief that, even if the trial court found no material and substantial change in circumstances, he was entitled to modification under § 156.401(a)(2).[8] Under § 156.401(a)(2), a trial court may rely on a "20 percent or $100" difference between the amount awarded and the guidelines amount as a basis to modify child support, even if there is no material and substantial change in circumstances. *See* TEX. FAM. CODE ANN. § 156.401(a)(2). However, as previously discussed, the trial court

[7] Father does not argue in his brief that the denial of his petition to modify is contrary to the child's best interests.

[8] Mother argued in the trial court that the child support obligation set forth in the 2015 agreed order "was not based on the standard Family Code guideline amount." If that were true, then § 156.401(a)(2) would not apply; instead, Father would need to show a material and substantial change in circumstances to obtain modification. *See* TEX. FAM. CODE ANN. § 156.401(a-1). We assume for purposes of this analysis that the child support obligation set forth in the 2015 order did not "differ[] from the amount that would be awarded in accordance with the child support guidelines." *See id.*

could have disbelieved Father's testimony regarding his projected earnings and application of the child support guidelines, and concluded that Father had not met his burden to prove a "20 percent or $100" difference. *See* TEX. FAM. CODE ANN. § 156.401(a)(2); *see also In re A.A.T.*, 583 S.W.3d at 921.

In light of the above, we cannot say that the trial court abused its discretion in denying Father's request for modification. *See In re A.A.T.*, 583 S.W.3d at 920. We overrule this issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

Delivered and filed on the
24th day of August, 2023.