

Opinion issued May 3, 2018



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-17-00407-CV

CLINT THOMAS DOBYANSKI, Appellant

V.

MICHELLE LYNN BRESHEARS F/K/A MICHELLE HANKS, Appellee

**On Appeal from the 308th District Court
Harris County, Texas
Trial Court Case No. 2011-47824**

MEMORANDUM OPINION

Clint Thomas Dobyanski brings a restricted appeal, challenging the trial court's default judgment granting Michelle Breshears f/k/a Michelle Hanks's motion to modify Dobyanski's child-support obligation for their six-year-old son, Tom (a pseudonym). Dobyanski contends that the trial court erred in granting a default

judgment because legally insufficient evidence supports (1) the statutory grounds that justify modification, (2) the increase in the amount of child support owed, (3) a deviation from the statutory child-support guidelines, and (4) a finding that the child is disabled and entitled to child support into adulthood. Hanks did not submit a response brief. We reverse and remand.

BACKGROUND

Tom was born in 2011. When he was about 18 months' old, Hanks began legal proceedings to adjudicate Dobyanski's paternity. Dobyanski and Hanks entered into a mediated settlement agreement (MSA), and the trial court signed an agreed order setting out the parents' visitation schedules, duties as joint managing conservators, and child-support obligations. The agreed order requires Dobyanski to pay \$490 per month until Tom reaches the age of 18. Neither the MSA nor the agreed order identifies Dobyanski's occupation or income. The MSA states that Hanks is self-employed, but it does not show the type of self-employment she has or the amount of income she earns from it.

About five years after the trial court signed the agreed order, Hanks petitioned the trial court to modify the amount of child support. Dobyanski was served with citation, but he did not answer or appear for trial.

During the bench trial, Hanks provided documents prepared by Tom's physicians in 2015 and 2016, stating that Tom had been diagnosed with vaccination

delay, oppositional defiance disorder, attention deficit hyperactivity disorder; developmental language disorder, and autism spectrum disorder. Hanks attested that Tom visited a psychiatrist every two weeks. Most recently, the psychiatrist had prescribed Abilify, but had not yet found a medication that provided Tom with a long-term therapeutic benefit.

Hanks testified that Tom was attending special education classes during the school day. Hanks informed the trial court that, on a school day, Tom's schedule "has to be almost exactly the same every day." According to Hanks, Tom "just requires a very high level of care. You cannot take your eyes off him." She told the trial court that she believed Tom's disability would prevent her from working full-time.

In addressing Dobyanski's financial status, Hanks testified that Dobyanski was currently employed by Union Pacific Railroad as a conductor. She told the trial court that she discovered that an agreed order had been entered in a suit against Dobyanski involving a second child. Hanks provided the trial court with the case number for that proceeding, but she did not introduce the agreed order or any documents from that proceeding as evidence. According to Hanks, the agreed order included a finding that, in 2015, Dobyanski had gross monthly resources of \$7,437.56 and a net monthly income of \$5,423.30. She further stated that the agreed order required Dobyanski to pay \$600 in monthly child support for that child.

Hanks requested an increase to \$1,200 in monthly child support. She based the requested amount on the findings concerning Dobyanski's 2015 income in the other child-support proceeding, "as well as any increase [in income] [Dobyanski] could have had" since then. Hanks conceded that under the guidelines, Dobyanski would not owe \$1,200 in monthly support unless he had a gross monthly income of \$9,200, substantially more than the amount she testified that the Attorney General established in a finding in the other suit. She nevertheless opined that Dobyanski was capable of earning that much because, in 2015, he was "constantly telling [Hanks] he was working" as a reason for cancelling visitation with Tom.

Hanks concluded her testimony by asking the trial court to order Dobyanski to pay the increase in monthly child support because of Tom's disability and to find that Tom was disabled and would require continuous care beyond the age of 18.

The trial court's "Default Final Order of Modification" includes the following findings:

- "There has been a substantial and material change in circumstance that warrants a modification."
- Tom, "while not institutionalized, requires substantial care and personal supervision because of his mental disability and will not be capable of self-support and the disability presently exists."

The order increases Dobyanski's child-support obligation to \$1,200 per month, to "continue beyond the child's age of 18."

DISCUSSION

I. Restricted Appeal

To be entitled to a restricted appeal, Dobyanski must demonstrate that: (1) he filed a notice of restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying lawsuit; (3) he did not participate in the hearing that resulted in the complained-of judgment and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *See Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004) (citing TEX. R. APP. P. 26.1(c), 30). For purposes of a restricted appeal, the face of the record consists of “all the papers on file in the appeal,” including the reporter’s record. *See Norman Commc’ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). If the challenged error appears on the face of the record, a restricted appeal gives the appellant the same scope of review as an ordinary appeal. *Id.* A default judgment in a child-support case modification case must be supported by legally sufficient evidence. *See Miles v. Peacock*, 229 S.W.3d 384, 387 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Wilson v. Wilson*, 132 S.W.3d 533, 538 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *see generally Considine v. Considine*, 726 S.W.2d 253, 254 (Tex. App.—Austin 1987, no writ) (concluding that, for the same policy reasons that apply to divorce judgments affecting the parent-child relationship, “the allegations in [a] motion to modify may not be taken as confessed for want of an answer”).

The record demonstrates that Hanks met the first three elements. As to the fourth element, Dobyanski challenges the trial court's findings that (1) a substantial and material change has occurred since the 2012 agreed order was signed, (2) the evidence supports an increase to \$1,200 in Dobyanski's child-support obligation, and (3) the support obligation extends beyond Tom's eighteenth year because of disability. In particular, Dobyanski observes that Hanks did not adduce evidence of the parties' net resources that would justify the amount of child support or that the support should continue beyond Tom's eighteenth birthday.

II. Standard of Review

We review most appealable issues in a family-law case, including child support, for an abuse of discretion. *Thompson v. Smith*, 483 S.W.3d 87, 92 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). Under an abuse of discretion standard, legal and factual insufficiency are not independent reversible grounds, but are relevant factors in assessing whether the trial court abused its discretion. *Razo v. Vargas*, 355 S.W.3d 866, 870 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Bush v. Bush*, 336 S.W.3d 722, 729 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

To determine whether the trial court abused its discretion because the evidence is legally or factually insufficient to support its decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its

discretion, and (2) erred in its application of that discretion. *Bush*, 336 S.W.3d at 729; *Gonzalez v Gonzalez*, 331 S.W.3d 864, 866–67 (Tex. App.—Dallas 2011, no pet.).

III. Applicable Law

Child support is calculated by first applying statutory guidelines to the obligor’s monthly net resources. *See* TEX. FAM. CODE §§ 154.062(a). For one child, the guidelines provide that child support should amount to twenty percent of the obligor’s net resources. *Id.* § 154.125(b). The statute contains a presumption that a child-support payment in accordance with the guidelines is the best interest of the child. *Id.* § 154.122(a).

The trial court may depart from the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child. *Id.* § 154.123(a). If the guidelines are not followed, a trial court must make specific findings as to (1) the net resources of the obligor and the obligee, (2) the percentage applied to the obligor’s net resources, and (3) if applicable, the specific reasons for the deviation from the guidelines. *Id.* § 154.130(a)(3), (b).

In cases like this one, in which the parties’ agreed child-support order provides for a different amount of child support than the amount that would have been awarded under 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-1); *see generally id.* § 154.124(a), (b) (permitting parties to agree to child-support provisions that vary from guidelines as long as court finds that agreement is in child's best interest). The petitioner bears the burden to prove that a material and substantial change has occurred. *Trammell v. Trammell*, 485 S.W.3d 571, 576 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

In determining whether a modification of support is necessary, the trial court is to examine and compare the circumstances of the parents and the child when the initial order was entered with those existing when modification is sought. *Trammell*, 485 S.W.2d at 576; *London v. London*, 192 S.W.3d 6, 15 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The record must contain the relevant financial circumstances of the parties then and now, because without both sets of data, the court has nothing to compare and cannot determine whether a material and substantial change has occurred. *London*, 192 S.W.3d at 15.

IV. Analysis

Reviewing the record in the light most favorable to Hanks, we conclude that she failed to present legally sufficient evidence to support an award of \$1,200 per month in modified child support. Hanks conceded in the trial court that, even based on the highest level of income that she adduced regarding Dobyanski's 2015 income, a \$1,200 monthly award is beyond the statutory guidelines. Under those guidelines,

Dobyanski would need to earn at least \$2,000 more in gross monthly income. While the record contains some evidence of Dobyanski's income in 2015, it does not contain any information concerning either his current income or his income at the time of the 2012 order.

Hanks pointed to Tom's diagnosis as a reason for the trial court to grant more support than the amount required under the statutory guidelines, as well as Dobyanski's failure to visit Tom since mid-2015. Under the Family Code, a trial court may find that a child is mentally or physically disabled based on proof that the child "requires substantial care and personal supervision" because of a disability. TEX. FAM. CODE § 154.302. Hanks's testimony that Tom, at age six, requires a "very high level of care" and constant monitoring does not explain how Tom requires care beyond that required for a typical child of his age or the extent to which any care or supervision is made necessary by his diagnoses.

The list of Tom's diagnoses provides no information concerning the severity of those conditions or how they may limit his ability to function. Nor does the evidence show the extent to which Hanks takes more time or incurs additional expense to care for and supervise Tom. *Compare Thompson*, 483 S.W.3d at 93–95 (holding that evidence was legally and factually sufficient to support disability finding where family members testified that person had inappropriate and volatile behavior, physically acted out from mood swings, and required assistance in

performing basic activities like bathing, dressing herself, and preparing meals), *with In re J.M.C.*, 395 S.W.3d 839, 845–47 (Tex. App.—Tyler 2013, no pet.) (holding that blind person was not entitled to monthly support as adult disabled child where evidence showed that with support animal and other limited assistance, person lived independently in his own apartment, maintained employment, prepared his own meals, and had enough income to meet his needs).

The evidence before the trial court does not show Dobyanski’s current net resources or the additional financial support that is necessary to provide Tom with substantial care and personal supervision because of a disability; nor does it show that Tom will require substantial care and personal supervision indefinitely into the future. *Cf. In re D.C.*, No. 16-0543, ___ S.W.3d ___, ___, 2018 WL 1444071, at *2–3 (Tex. Mar. 23, 2018) (Guzman, J., concurring in denial of petition for review) (discussing evidentiary problems involved in determining, under Family Code, whether adult child requires monthly support because of disability).

Accordingly, we hold that the record lacks legally sufficient evidence to support the trial court’s findings to support the award of \$1,200 in monthly child support now and extending beyond Tom’s eighteenth birthday.¹ *See* TEX. FAM. CODE § 154.122(a).

¹ Our decision on this issue makes it unnecessary to address the remaining issues raised in Dobyanski’s brief. *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the judgment of the trial court and remand the case for further proceedings.

Jane Bland
Justice

Panel consists of Justices Bland, Lloyd, and Caughey.