Reversed and Rendered; Opinion filed February 8, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01307-CV

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JOHN GRAHAM, Appellant

V.

RONDA GRAHAM, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 87B2957

O P I N I O N

The issue in this appeal is whether the trial court abused its discretion in modifying a child-support order. We find the trial court abused its discretion and reverse and render.

John Graham and Ronda Graham were divorced in 1988. At the time of divorce, John was ordered in the divorce decree to pay $350 per month for child support for the three children of the marriage.

Since 1991, John has been disabled as a result of a work-related injury. As a result of

the injury, he brought a personal injury action, which settled in 1997.

Before John received his portion of the personal-injury settlement, $110,000, Ronda was paid $24,000 for past due in back child support. According to the evidence, John, after receiving his portion of the settlement, paid back his family for the support they gave him while he was disabled.

The evidence reveals that John is currently unable to work, lives with his grandmother, is under a doctor's care, and has his mother pay for his gas to go back and forth to the doctor, his medication, his food, and his clothes.

Appellant argues the trial court abused its discretion by modifying the support order, because there was no evidence of his financial circumstances at the time of the original divorce decree. He argues, citing *Stofer v. Linville*, that this evidence is needed to compare with his current income to show a change of circumstances to support an increased award of child support. 662 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1983, no writ). We agree.

A trial court's order of child support will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Friermood v. Friermood*, 25 S.W.3d 758, 760 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The Texas Family Code allows a court to modify a child support order if the movant has shown that "the circumstances of the child or person affected by the order have materially and substantially changed since the date of the order's rendition." TEX. FAM. CODE § 156.401(a)(1).

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 circumstances at the time the modification is sought. *See Cole v.* Cole, 882 S.W.2d 90, 92 (Tex. App.—Houston [14th Dist.] 1994, writ denied). If a material change has occurred in either the needs of the child or the ability of either parent to support the child,

then the order modifying the prior support is not an abuse of the trial court's discretion. *See Stofer*, 662 S.W.2d at 785.

In *Stofer*, the husband appealed the modification of a child-support order for two children. At the modification hearing, the wife presented the following evidence of the husband's income:

> (1) appellant draws an annual salary of $48,000.00 from his solely-owned corporation, Stofer Companies, Inc., which had an earned surplus of $20,000.00 in 1981; (2) he may borrow from this corporation at any time; (3) he drives a Cadillac, bought by the corporation, and a second car which costs him $500.00 per month; (4) he has a one-half ownership interest in an airplane which he rents to the corporation; (5) he owns a motorcycle costing him $250.00 per month; (6) he owns a home; and finally (7) appellant's health insurance and business expenses are covered by the corporation.

Id. at 785. After considering this evidence of his current income, this Court noted that the wife did not introduce any evidence of appellant's total income at the time of their 1980 divorce. *See id*. at 785. We concluded the evidence of his new income was insufficient to support a material and substantial change in circumstances:

> The lack of such evidence precludes this court from comparing appellant's prior income to his current income, and thus determining whether there has been a material increase. *Williams* [*v. Williams*, 596 S.W.2d 245, 247 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).] We hold that the evidence does no more than show appellant's ability to pay more child support and constitutes no evidence of a material and substantial change in appellant's circumstances since the 1980 divorce decree.

Id.

As in *Stofer* and *Williams*, Ronda did not provide any evidence of John's income at the time of divorce. *See id*.; *Williams*, 596 S.W.2d at 247. Although Ronda provided substantial evidence of John's recent personal-injury award, there was no evidence of his previous income to permit the judge to compare against to determine if there was a material and substantial change in his income. Further, the only evidence at the hearing indicated that most of the

settlement proceeds had been spent. No other financial information was developed at the hearing.

The proof necessary to sustain a child support modification must be of a material and substantial change. *See Stofer*, 662 S.W.2d at 785; *Williams*, 596 S.W.2d at 247. We find the evidence before us is not sufficient to support the judgment. Thus, the record reveals the burden of proving a "material and substantial" change has not been met and the trial court abused its discretion. Consequently, because the trial court abused its discretion in modifying John's child support payments and ordering a lump-sum payment, we sustain his first point of error, and reverse the trial court's judgment and render judgment that Ronda take nothing.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 8, 2001.

Panel consists of Justices Sears, Draughn, and Lee.

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