

IN THE SUPREME COURT OF GUAM

NELSON RODRIGUEZ

Plaintiff-Appellant,

v.

RAMONITA RODRIGUEZ

Defendant-Appellee

OPINION

Filed: April 30, 2003

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Supreme Court Case No. CVA02-013
Superior Court Case No.: DM0895-98

Appeal from the Superior Court of Guam
Submitted on the briefs February 11, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice, FRANCES M. TYDINGCO-GATEWOOD, Associate Justice, PETER C. SIGUENZA, JR., Justice *Pro Tempore*

TYDINGCO-GATEWOOD, J.:

[1] Defendant-Appellee Ramonita Rodriguez (“Ramonita”) filed a motion to order Plaintiff-Appellant Nelson Rodriguez (“Nelson”) to show cause why he should not be held in contempt for failing to comply with the Divorce and Property Settlement Agreement (“Settlement”) that the parties entered into when they divorced in 1999. Nelson responded to Ramonita’s motion by filing a motion to modify child and spousal support. The Superior Court ruled in favor of Ramonita on both motions. The Superior Court found that Nelson had not met his burden of showing changed circumstances to justify a modification of support and that Nelson was in contempt for not complying with the Settlement. We affirm the Superior Court’s ruling.

I.

[2] Nelson and Ramonita were married in 1973. They have one minor child. On October 12, 1999, the parties entered into the Settlement, in which Nelson was ordered to pay \$300 in spousal support per month until either Ramonita remarried or the minor turned eighteen. Nelson was also ordered to pay \$538.49 in child support per month. The spousal support obligation was to be considered satisfied, and child support payments reduced to \$150 per month, for as long as Nelson paid the mortgage on their family residence and Ramonita remained unmarried and continued to live in the residence with the child. In August 2001, Nelson stopped making mortgage payments. Although he continued to pay \$150 per month in child support, Nelson did not increase that amount or begin making spousal support payments as the Settlement required. Ramonita and the child lived in the residence until December 15, 2001, when the mortgage was foreclosed and they moved to California.

[3] At the time of the divorce, Nelson was employed at Guam Memorial Hospital (“GMH”) as the director of the x-ray section, earning \$26.57 per hour. He also worked twenty hours per week at X-Ray Pro, a private company, where he earned \$10 per hour. Nelson owns thirty-nine percent of the shares in X-Ray Pro. On September 22, 2000, Nelson was terminated from his position at GMH. He then became employed full time at X-Ray Pro, where he continues to work at a rate of \$10 per hour.

[4] On March 15, 2002, Ramonita filed a Motion for and Order to Show Cause re: Contempt, in which she alleged that Nelson had intentionally disobeyed several provisions of the Settlement. Nelson responded with an opposition memorandum and a motion to amend the support orders on April 10, 2002. In his motion, Nelson requested a modification of child and spousal support, alleging a substantial and material change of circumstances.

[5] The trial court granted Ramonita’s motion and denied Nelson’s motion. Nelson appealed.

II.

[6] Child support orders are final orders and are appealable. *Leon Guerrero v. Moylan*, 2002 Guam 17 ¶ 4. A judgment of contempt is also appealable. Title 7 GCA §§ 25102(a) (1993). This court has jurisdiction over final orders of the Superior Court. Title 7 GCA § 3107(b) (1994).

III.

A. Motion to Modify Support

[7] In his motion to decrease child and spousal support, Nelson asserted a reduction in his income. Guam law permits the modification of a support order “upon a showing of a substantial and material change of circumstances.” Title 5 GCA § 34121 (1996). The burden to establish a substantial and material change of circumstances is on the moving party. *In re Marriage of*

Stephenson, 46 Cal. Rptr. 2d 8, 12 (Cal. Ct. App. 1995).

[8] The trial court held that Nelson did not establish that he suffered a change in his financial situation sufficient to warrant modification of the support orders. Nelson claims that the trial court erred in holding that he had not met the burden of proof regarding his change in circumstances. Nelson argues that he submitted paycheck stubs showing a salary decrease of around \$11,000 to \$12,000 from what he made at the time he entered into the Settlement.

[9] We review a denial of a motion to modify child or spousal support for an abuse of discretion. *See County of San Diego v. Sierra*, 265 Cal. Rptr. 749, 751 (Cal. Ct. App. 1990). Under the abuse of discretion standard, “a reviewing court does not substitute its judgment for that of the trial court.” *People v. Tuncap*, 1998 Guam 13, ¶ 12. Instead, the appellate court must simply determine whether substantial evidence supports the trial court’s decision. *In re Marriage of Meegan*, 13 Cal. Rptr. 2d 799, 801 (Cal. Ct. App. 1992). “[T]he responsibility of the reviewing court is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.” *In re Ciruolo*, 900 P.2d 241, 243 (Cal. 1969).

[10] The trial court found that the income reflected on Nelson’s pay stubs is not an adequate measure of Nelson’s income. We agree. Nelson did not produce any evidence relating to the financial status of his employer, X-Ray Pro. Because Nelson owns thirty-nine percent of X-Ray Pro, Nelson’s paycheck stubs alone were insufficient to establish a substantial and material change in circumstances. The burden was on Nelson, not Ramonita, to provide enough information for the trial court to adequately assess Nelson’s financial situation. *See In re Marriage of Stephenson*, 46 Cal. Rptr. 2d at 12. Nelson’s failure to provide any information about the financial status of X-Ray Pro rendered his account of his personal financial situation incomplete. *See Schmidt v. Schmidt*, 432 N.W.2d 860, 864 (N.D. 1988) (agreeing with trial court that the burden of proving substantial change in circumstances was not met when moving party “presented at best an incomplete picture

of his financial condition, and at worst, a confusing and incredible account”); *Cymbal v. Cymbal*, 204 N.W.2d 235, 236 (Mich. Ct. App. 1973) (“[T]he defendant failed to carry his burden of proof in showing changed circumstances. The record establishes only that the defendant’s income may have fallen. The defendant refused to produce a full financial disclosure.”). Thus, we find that the trial court did not abuse its discretion in denying Nelson’s motion to modify child and spousal support.

B. Contempt

[11] In addition to denying Nelson’s motion to modify the support orders, the trial court also found Nelson in contempt for failing to maintain a life insurance policy and to either pay the mortgage payments on the residence or pay spousal support and increased child support.

[12] The Settlement required Nelson to maintain a life insurance policy designating Ramonita and their child beneficiaries for a minimum of \$50,000 each until the child turns twenty-two. At the contempt hearing, Nelson testified that he allowed the life insurance policy in effect at the time of the Settlement to lapse and that he did not enter into a new policy. As a result, the trial court found that Nelson was in contempt for failing to maintain a life insurance policy as required by the Settlement.

[13] As discussed above, the Settlement also set spousal support at \$300 per month until either Ramonita remarries or the minor turns eighteen and set child support at \$538.49 per month. The spousal support amount was to be considered fully satisfied and the child support payments reduced to \$150 per month as long as Ramonita remained in their residence and Nelson continued to pay the mortgage. Nelson stopped making mortgage payments in August 2001 but did not begin paying spousal support and did not increase the child support as required. Thus, the trial court found him in contempt of these provisions as well.

[14] We review the trial court's findings of contempt for an abuse of discretion. *See Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991). "In reviewing a contempt judgment, we will not reweigh the evidence or judge the credibility of the witnesses. If the evidence and all reasonable inferences which may be drawn therefrom support the trial court's decision, that decision stands." *Srivastava v. Indianapolis Hebrew Congregation, Inc.*, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002) (citations omitted).

[15] The elements of contempt are generally: "1) a valid order, 2) knowledge of the order, 3) ability to comply with the order, and 4) willful failure to comply with the order." *In re Ivey*, 102 Cal. Rptr. 2d 447, 451 (Cal. Ct. App. 2000). However, "where the order is a family law order for payment of support or attorney fees, and the family law court has already determined the alleged contemner's [sic] ability to pay the underlying order, ability to comply with the order is not an element of the contempt." *Id.* Instead, the inability to pay is an affirmative defense.¹

[16] The trial court held that Nelson did not convincingly establish his inability to pay. We agree. As discussed above, Nelson's paycheck stubs alone did not present a complete picture of his financial situation. Moreover, even if Nelson's paycheck stubs accurately portrayed his entire income, Nelson's testimony revealed that his gross income is \$600 every two weeks² and his monthly expenses are \$400 to \$450.³ Thus, the record supports the trial court's conclusion that

¹ *Ivey* was decided in the context of a California statute expressly providing that the inability to pay is an affirmative defense in family law cases. The statute's purpose was to reconcile two conflicting lines of cases and to clarify that the burden to prove the inability to pay is on the alleged contemnor. *See Moss v. Superior Court (Ortiz)*, 71 Cal. Rptr. 2d 215, 235 (Cal. 1998) (agreeing with a previous court holding that "[t]his approach is consistent with legislative intent, constitutional law, and common sense") (citation omitted). The rationale for this shift in the burden is that "[t]he contemner[sic] is the person in the best position to know whether inability to pay is even a consideration in the proceeding and also has the best access to evidence on the issue, particularly in cases of self-employment." *Id.* (citation omitted)(also discussing the constitutionality of characterizing the ability to pay as an affirmative defense rather than an element of contempt). Nelson does not dispute that he carries the burden of proving his inability to pay, although Guam does not have a similar statute.

² Transcript, vol. I, p. 41 (Mot. for OSC Re: Contempt and Mot. to Modify, April 17, 2002).

³ Transcript, vol. I, p. 42 (Mot. for OSC Re: Contempt and Mot. to Modify, April 17, 2002).

Nelson has enough income after his expenses to pay the additional \$689.49 that the Settlement requires. In addition, Nelson withdrew \$28,000 from his retirement account on his termination from GMH that could have helped to meet his obligations. Finally, despite Nelson's argument that his income decreased significantly in September 2000, he did not file a motion to modify support until after the contempt proceedings began in April 2002. Thus, substantial evidence in the record supports the trial court's finding of contempt.

[17] Nelson argues that the trial court erred in considering his retirement withdrawal as evidence of his ability to pay. Nelson asserts that the court cannot compel him to pay support obligations from the retirement withdrawal because he was entitled to that amount as part of the division of the former community property. This argument is not persuasive. Nelson offers no authority supporting his assertion that he cannot be compelled to pay support obligations from his share of the division of property. In contrast, courts have held that even where property is exempt, an alimony debtor can be held in contempt where the otherwise exempt property evidences an ability to pay. *See Ex parte Smallbone*, 106 P.2d 873, 874 (Cal. 1940) ("Under such circumstances, a trial court is justified in finding [the alimony debtor] guilty of contempt for his failure to pay such an award out of any money available, regardless of the source from which it was obtained."); *Conaway v. Conaway*, 32 Cal. Rptr. 890, 891-92 (Cal. Ct. App. 1963) (holding that a person can be held in contempt for failing to make alimony payments from retirement funds). Thus, the trial court properly considered Nelson's retirement withdrawal in determining his ability to pay. Accordingly, we hold that the trial court did not abuse its discretion in finding Nelson in contempt for failing to meet his obligations under the Settlement.

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IV.

[18] Nelson presented an incomplete financial record. Thus, he did not establish a substantial and material change in circumstances that would warrant a modification of child and spousal support. Substantial evidence in the record also supports the trial court's conclusion that all of the elements of contempt have been met. A valid order existed, Nelson knew of the order, and he willfully disobeyed the order. Nelson had the burden of proving by a preponderance of the evidence that he was unable to comply with the order, and he did not meet this burden. Thus, we find no abuse of discretion and **AFFIRM** the trial court's order.