NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1136

WILLIAM BUCHANAN DANIEL, IV

VERSUS

LYNDA HILTZ DANIEL

Judgment Rendered: FEB 14 2011

* * * * * *

Appealed from
The Family Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number F154164

Honorable Annette Lasalle, Judge Presiding

* * * * * *

Nancy Sue Gregorie
Baton Rouge, LA

Counsel for Plaintiff/Appellant
William B. Daniel, IV

Amy E. Counce
Baton Rouge, LA

Counsel for Defendant/Appellee
Lynda H. Daniel

* * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

Plaintiff, William Buchanan Daniel, IV, appeals a judgment of the trial court, granting a motion for involuntary dismissal in favor of defendant, Lynda Hiltz Daniel, and dismissing his rule to reduce child support. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

William Daniel and Lynda Daniel were married on February 16, 1991, and thereafter, had five children. On April 4, 2005, William filed a petition for divorce, and on April 19, 2005, Lynda reconvened, also seeking a divorce. A judgment of divorce was subsequently signed by the trial court on January 4, 2006.

By stipulated judgment signed on January 5, 2007, the parties were awarded joint custody of their five minor children, with William being ordered to pay monthly child support in the amount of $4,000, plus the obligation to maintain health insurance coverage on the five children. Thereafter, by consent judgment dated February 19, 2008, William's child support obligation was reduced to $2,500 per month, with said amount to decrease to $2,000 per month effective June 1, 2010, upon the oldest child attaining eighteen years of age and graduating from high school. William was also to continue to maintain the children as covered dependents on his health and dental insurance policies.

On April 20, 2009, William filed a rule to reduce child support.[1] William asserted that, since the rendition of the February 19, 2008 consent judgment, circumstances had changed, in that he had been laid off from his job and had a decrease in income due to the drop in oil prices. At a February 18, 2010 hearing

[1] William's rule also sought to change custody and requested that Lynda be held in contempt. However, on November 9, 2009, William voluntarily dismissed the request to change custody. Lynda subsequently filed an exception raising the objection of no cause of action as to William's rule for contempt. William agreed to dismiss the rule as it related to the return of the children issue and the Bolton's pharmacy charge card issue, and by judgment rendered on March 16, 2010, the trial court sustained Lynda's exception as to the removal of the pool liner issue and the cat issue.

on William's rule to reduce child support, William presented his case-in-chief, at the conclusion of which counsel for Lynda moved for an involuntary dismissal. The trial court granted the motion and, by judgment dated March 16, 2010, dismissed William's rule to reduce child support. William now appeals from this judgment.[2]

DISCUSSION

Louisiana Code of Civil Procedure article 1672(B) provides that in an action tried by the court without a jury, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for involuntary dismissal at the close of the plaintiff's case-in-chief on the ground that upon the facts and law, the plaintiff has not shown a right to relief. Jackson v. Capitol City Family Health Center, 04-2671, p. 3 (La. App. 1st Cir. 12/22/05), 928 So. 2d 129, 131. In determining whether involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence in his case-in-chief to establish his claim by a preponderance of the evidence. Tate v. Tate, 09-2034, p. 4 (La. App. 1st Cir. 6/11/10), 42 So. 3d 439, 442. Proof by a preponderance simply means that, taking the evidence as a whole, the evidence shows the existence of the fact or cause sought to be proved is more probable than not. Tate, 09-2034 at p. 4, 42 So. 3d at 442. A trial court's decision to dismiss based on La. C.C.P. art. 1672(B) should not be reversed in the absence of manifest error. Phillips v. Phillips, 95-2043, p. 3 (La. App. 1st Cir. 5/10/96), 673 So. 2d 333, 334.

A child support award may be modified if the circumstances of the child or of either parent materially change. La. C.C. art. 142. The party seeking modification of a child support award bears the burden of proving that a material

[2] The March 16, 2010 judgment also sustained an exception raising the objection of no cause of action filed by Lynda as to several contempt issues. However, William's appeal only seeks review of the judgment as it relates to the dismissal of his rule to reduce child support.

change in circumstances has occurred since the time of the previous award and the time of the rule for modification of the award. La. R.S. 9:311(A); Bonnecarrere v. Bonnecarrere, 09-1647, p. 9 (La. App. 1st Cir. 4/14/10), 37 So. 3d 1038, 1045, writ denied, 10-1639 (La. 8/11/10), 42 So. 3d 381. Once the moving party proves a material change in circumstances, a presumption exists that the support obligation must be modified. Hernandez v. Hernandez, 05-1342, p. 5 (La. App. 1st Cir. 6/9/06), 938 So. 2d 1019, 1022. The burden then shifts to the other party to disprove the change or to otherwise overcome the presumption. Hernandez, 05-1342 at p. 5, 938 So. 2d at 1022.

In any proceeding to modify child support, the child support guidelines found in La. R.S. 9:315 et seq. are to be used. Barrios v. Barrios, 95-1390, p. 4 (La. App. 1st Cir. 2/23/96), 694 So. 2d 290, 293, writ denied, 96-0743 (La. 5/3/96), 672 So. 2d 691. The guidelines mandate that each party provide the court with a verified statement of his or her income. Louisiana Revised Statute 9:315.2(A) states:

> Each party shall provide to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings. Spouses of the parties shall also provide any relevant information with regard to the source of payments of household expenses upon request of the court or the opposing party, provided such request is filed in a reasonable time prior to the hearing. Failure to timely file the request shall not be grounds for a continuance. Suitable documentation of current earnings shall include but not be limited to pay stubs or employer statements. The documentation shall include a copy of the party's most recent federal tax return. A copy of the statement and documentation shall be provided to the other party. When an obligor has an ownership interest in a business, suitable documentation shall include but is not limited to the last three personal and business state and federal income tax returns, including all attachments and all schedules, specifically Schedule K-1 and W-2 forms, 1099 forms, and amendments, the most recent profit and loss statements, balance sheets, financial statements, quarterly sales tax reports, personal and business bank account statements, receipts, and expenses. A copy of all statements and documentation shall be provided to the other party.

In many instances, the party seeking a decrease in his support obligation maintains that a decrease in his income constitutes the necessary change in circumstances. This can only be proven by examining the income and financial status of the party seeking a modification, as required by La. R.S. 9:315.2. See State ex rel. Joseph, 97-0780, p. 4 (La. App. 4th Cir. 12/23/97), 705 So. 2d 776, 779.

Furthermore, when asserting a material change in circumstances based on a decrease in income, it is incumbent upon the party seeking modification to establish his income at the time of the original child support order and at the time of filing of the rule to reduce child support. See McCorvey v. McCorvey, 05-1173, pp. 9-10 (La. App. 3rd Cir. 4/5/06), 926 So. 2d 114, 120, writ denied, 06-0959 (La. 6/16/06), 929 So. 2d 1290; see also Guinther v. Baird, 33,550, p. 5 (La. App. 2nd Cir. 10/6/00), 768 So. 2d 847, 850-851, writ denied, 00-3050 (La. 11/27/00), 775 So. 2d 1070.

In granting an involuntary dismissal in the instant case, the trial court stated that William failed to present evidence in accordance with La. R.S. 9:315 to establish his income, and therefore, did not meet his burden of proof on his rule to reduce child support. From our review of the record, we find no error in the trial court's judgment.

At the February 18, 2010 hearing on the rule to reduce child support, William testified as to his complex income history. At the time of the original consent judgment in February 2008, William worked for C-K Associates, LLC (C-K Associates); was a member of the Louisiana House of Representatives; worked for Gulf Coast Testing; was an owner of D-4 Resources Company, an Oklahoma corporation (D-4); was a partner in Tensas Exploration and Production Company, LLC (Tensas); and worked as an oil and gas consultant. In conjunction with his testimony, William introduced a copy of his 2008 federal income tax return and

copies of his 2008 W-2s. According to these documents, William earned $96,916.84 from C-K Associates; $796.78 from the Louisiana House of Representatives; $39,583.27 from Gulf Coast Testing; $4,782 from Tensas; and $181,112 from oil and gas consulting. William did not produce any documentation with regard to his income from D-4, but rather, submitted a yearly income analysis showing his 2008 income as $35,000, which he testified was calculated by adding his 2008 pay stubs.

William stated that since the date of the original consent judgment, he had been laid off from his job at C-K Associates and had experienced a decrease in his income due to the drop in oil and gas prices. William submitted copies of his 2009 W-2s from Gulf Coast Testing, reflecting income of $6,274.9, and C-K Associates, reflecting income of $3,151.26. William testified that he received a salary from Gulf Coast Testing for only two months in 2009, and due to business falling off, he was taken off salary. In March 2009, William purchased Gulf Coast Testing, but due to alleged losses in revenue, William had not paid himself a salary since the purchase. Further, William testified that his income from C-K Associates was in the form of health insurance benefits, which ceased at the end of 2009.

With regard to his other sources of income, William testified that he was not re-elected to the House of Representatives, so he no longer had that income. Additionally, William submitted an income-expense affidavit, which according to his testimony, reflected his *estimated* 2009 income from D-4 as $14,000, from Tensas as $15,000, and from his oil and gas consulting as $12,000. William also estimated that he was owed $40,000 from Pavement Maintenance Unlimited, a company that he had worked for, but that had not yet paid the salary owed to him.

From our review of the record, we find no error in the trial court's determination that William failed to present sufficient documentation to establish by a preponderance of the evidence that he is entitled to a modification of his child

support obligation. The only sources of income for which William submitted documentation, as required by La. R.S. 9:315.2, were from C-K Associates and Gulf Coast Testing. And while the W-2s for both companies reflected a substantial decrease in his income from 2008, they were not his *only* sources of income. See Barrios, 95-1390 at p. 5, 694 So. 2d at 293. William received income from three other sources, namely, D-4, Tensas, and oil and gas consulting, and he failed to provide *any* documentary evidence as to his 2009 income from those sources.[3]

Further, with regard to Gulf Coast Testing, William testified that he purchased that company in March 2009 and had not paid himself a salary since the purchase, because the company had not been doing well. However, such testimony, without supporting documentation as to the financial condition of the company, simply fails to meet the requirements of La. R.S. 9:315.2. See Preis v. Preis, 610 So. 2d 163, 164-165 (La. App. 3rd Cir. 1992), writ denied, 612 So. 2d 103 (La. 1993).

Therefore, because the record demonstrates that William simply failed to produce the documentary evidence necessary for a determination of his *entire* income subsequent to the February 2008 consent judgment, and therefore, whether he is entitled to a modification of his child support obligation, we find no error in the trial court's judgment granting the motion for involuntary dismissal.

---

[3] On appeal, William relies on Bonnecarrere, 09-1647, 37 So. 3d 1038 and State, Dept. of Social Services v. Taylor, 00-2048 (La. App. 1st Cir. 2/15/02), 807 So. 2d 1156, for the proposition that some evidence, even though not of every type listed in La. R.S. 9:315.2, is sufficient to establish income for purposes of modifying child support. However, in both Bonnecarrere and Taylor, the parties seeking modification submitted some type of documentary evidence as to all of their alleged income. See Bonnecarrere, 09-1647 at p. 12, 37 So. 3d at 1047 (wherein father submitted paycheck stubs and statement from military); and Taylor, 00-2048 at p. 14, 807 So. 2d at 1166 (wherein father's testimony was corroborated by income tax return). In the instant case, William's purported income, as listed on his income affidavit, from D-4, Tensas, and consulting is based solely on his *estimation*. Therefore, we find William's reliance on these two cases to be misplaced.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court granting Lynda's motion for involuntary dismissal and dismissing William's rule to decrease child support. All costs of this appeal are assessed to William Buchanan Daniel, IV.

AFFIRMED.