COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00119-CV

MICHAEL SHAWN BURLEY — APPELLANT

V.

JUDITH ELAINE BURLEY — APPELLEE

FROM THE 233RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 233-581082-15

MEMORANDUM OPINION[1]

Appellant Michael Shawn Burley appeals from the trial court's final decree of divorce, which it entered following a bench trial. In three issues, he argues that the trial court reversibly erred by failing to file findings of fact and conclusions of law following his timely request for the same, that the trial court's child-support

[1]*See* Tex. R. App. P. 47.4.

award was an abuse of discretion, and that the trial court abused its discretion by denying his motion for continuance. We affirm.

I. BACKGROUND

Michael and Appellee Judith Elaine Burley married in November 1994 and had a son approximately four years later. On August 10, 2015, Judith filed an original petition for divorce. Michael filed a pro se answer. He subsequently retained an attorney, who on November 9, 2015, filed a second amended counterpetition for divorce.[2] On January 25, 2016, Michael's counsel filed a motion seeking to withdraw as Michael's counsel, and on February 4, 2016, the trial court granted that motion. The order noted that final trial was set for February 10, 2016.

Michael filed a pro se motion for continuance February 8, 2016. When the trial court called the case for trial on February 10, 2016, and asked the parties if they were ready to proceed, Michael replied that he was not and that he would "like to file for a continuance since [he] wasn't able to get representation in a timely fashion." The trial court overruled Michael's oral motion and proceeded to conduct a bench trial. Judith's evidence at trial consisted of her own testimony and that of her attorney. She also called Michael as a witness, but he invoked his Fifth Amendment right against self-incrimination. Michael's evidence

[2]Neither an original nor a first amended counterpetition for divorce appears in our record.

consisted only of the testimony of his brother, Tim Burley. After the parties rested and closed, the trial court orally granted the divorce.

On February 24, 2016, the trial court sent the parties a signed rendition letter that set forth its rulings on the various matters at issue in the divorce proceeding. The trial court ordered Michael to pay $686.00 in monthly child support, appointed and ordered a receiver to sell the marital residence, and ordered that Judith receive sixty percent of the net proceeds of the sale and Michael receive forty percent. On March 24, 2016, Michael filed a request for findings of fact and conclusions of law and a motion for new trial.[3] On April 13, 2016, he filed a notice of past due findings of fact and conclusions of law. The trial court signed its final decree of divorce on April 29, 2016, and the record does not show the trial court filed findings of fact and conclusions of law.

II. FINDINGS AND CONCLUSIONS

In his first issue, Michael asserts that both his request for findings and conclusions and his notice of past due findings and conclusions were timely filed, and thus the trial court erred by failing to file findings and conclusions. He argues further that this error harmed him because without the trial court's findings and conclusions, he cannot properly present his case on appeal.

[3]Michael requested findings pursuant to rules 296 and 297 of the Texas Rules of Civil Procedure, as well as under family code section 6.711. A request for findings and conclusions under family code section 6.711 "must conform to the Texas Rules of Civil Procedure." Tex. Fam. Code Ann. § 6.711(b) (West 2006).

When, as here, a case is tried in a district court without a jury, any party may request that the court state in writing its findings of fact and conclusions of law. Tex. R. Civ. P. 296. A request for findings and conclusions must be filed within twenty days after the judgment is signed. *Id.* A trial court is required to file its findings of fact and conclusions of law within twenty days after a timely request is filed. Tex. R. Civ. P. 297. If the trial court fails to timely file its findings and conclusions after a party files a timely request, the requesting party must, within thirty days after filing the original request, file with the clerk and serve on all other parties a notice of past-due findings and conclusions. *Id.* If the requesting party fails to file a notice of past-due findings, the party waives the trial court's error on appeal. *See Burns v. Burns*, 116 S.W.3d 916, 922 (Tex. App.—Dallas 2003, no pet.). The date a judgment or order is signed determines the beginning of the period for calculating a party's deadline for filing a request for findings of fact and conclusions of law. Tex. R. Civ. P. 296, 306a(1).

Michael filed his request for findings and conclusions on March 24, 2016—thirty-seven days before the trial court signed the final decree of divorce on April 29, 2016. Thus, Michael's request for findings and conclusions was premature. *See* Tex. R. Civ. P. 296 (providing request for findings and conclusions shall be filed "within twenty days *after* judgment is signed" (emphasis added)). Under Rule 306c, "[n]o . . . request for findings of fact and conclusions of law shall be held ineffective because prematurely filed." Tex. R. Civ. P. 306c. Rather, a premature request for findings and conclusions "shall be deemed to have been

filed on the date of but subsequent to the time of the signing of the judgment." *Id.* Thus, Michael's request for findings and conclusions was deemed timely filed on April 29, 2016. *See id.*; *Worlds v. Reynolds*, No. 02-14-00287-CV, 2015 WL 4685254, at *1 (Tex. App.—Fort Worth Aug. 6, 2015, no pet.) (mem. op.).

With his request for findings and conclusions being deemed timely filed on April 29, 2016, the trial court was required to file its findings and conclusions by May 19, 2016. *See* Tex. R. Civ. P. 297 ("The court shall file its findings of fact and conclusions of law within twenty days after a timely request is filed."). If it failed to do so, Michael was required to file a notice of past due findings of fact and conclusions of law within thirty days *after* his request for findings and conclusions was filed. *Id.* (emphasis added). Here, however, Michael filed a notice of past due findings and conclusions on April 13, 2016—before both the trial court signed its final decree of divorce and Michael's original request was deemed filed. Unlike a premature request for findings of fact and conclusions of law, Rule 306c does not provide for deeming as timely filed a premature notice of past due findings. *See* Tex. R. Civ. P. 306c; *Echols v. Echols*, 900 S.W.2d 160, 161 (Tex. App.—Beaumont 1995, writ denied) ("Rule 306c applies to motions for new trial and requests for findings of fact, not notices of past due findings."); *see also Nisby v. Dentsply Int'l, Inc.*, No. 05-14-00814-CV, 2015 WL 2196627, at *2 (Tex. App.—Dallas May 11, 2015, no pet.) (mem. op.) (holding same)*; Joseph v. Joseph*, No. 01-11-01096-CV, 2012 WL 1564318, at *2–3 (Tex. App.—Houston [1st Dist.] May 3, 2012, no pet.) (mem. op.) (holding same); *Estate of Gorski v.*

Welch, 993 S.W.2d 298, 301–02 (Tex. App.—San Antonio 1999, pet. denied) (holding same). And Michael did not file a notice of past due findings and conclusions after his original request for findings and conclusions was deemed filed on April 29, 2016. Thus, because Michael failed to timely file a notice of past due findings and conclusions, he waived any error in the trial court's failure to file findings of fact and conclusions of law. *See Nisby*, 2015 WL 2196627, at *2 (holding failure to timely file notice of past due findings waived complaint regarding trial court's failure to file findings and conclusions); *Joseph*, 2012 WL 1564318, at *2–3 (holding same); *Estate of Gorski*, 993 S.W.2d at 301–02 (holding same).

We overrule Michael's first issue.

III. CHILD SUPPORT

In his second issue, Michael contends the trial court abused its discretion by ordering him to pay $686.00 in monthly child support because the evidence is insufficient to support that amount of child support.

A. STANDARD OF REVIEW

We review a trial court's determination of child support for an abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). A trial court abuses its discretion if it acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). A trial court also abuses its discretion by ruling without supporting evidence. *Ford*

Motor Co. v. Garcia, 363 S.W.3d 573, 578 (Tex. 2012). But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character supports its decision. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) (op. on reh'g).

Under an abuse of discretion standard, legal and factual sufficiency challenges are not independent grounds of error; rather, they are relevant factors in assessing whether the trial court abused its discretion. *Newberry v. Bohn–Newberry*, 146 S.W.3d 233, 235 (Tex. App.—Houston [14th Dist.] 2004, no pet.). To determine whether a trial court abused its discretion because the evidence is legally or factually insufficient, we consider (1) whether the trial court had sufficient information upon which to exercise its discretion and (2) whether it erred in its application of that discretion. *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex. App.—Fort Worth 2010, no pet.). The traditional sufficiency review comes into play with regard to the first question. *Id.* With regard to the second question, we determine, based on the elicited evidence, whether the trial court made a reasonable decision. *Id.*

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital

fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

In a bench trial, when no findings of fact or conclusions of law are filed or requested, we presume that the trial court made all the necessary findings to support its judgment. *Pharo v. Chambers Cty.*, 922 S.W.2d 945, 948 (Tex. 1996); *Byrnes v. Byrnes*, 19 S.W.3d 556, 561 (Tex. App.—Fort Worth 2000, no pet.). Consequently, if the trial court's implied findings are supported by the

evidence, we must uphold its judgment on any theory of law applicable to the case. *See Worford*, 801 S.W.2d at 109.

B. APPLICABLE LAW

The amount of child support established by the guidelines in the family code is presumed to be reasonable. *See* Tex. Fam. Code Ann. § 154.122(a) (West 2014). Under those guidelines, when an obligor's net monthly resources do not exceed $7,500 and only one child is involved, the guidelines provide for a child-support obligation of twenty percent of the obligor's net resources. *Id.* § 154.125(b) (West Supp. 2016). A parent who is qualified to obtain gainful employment cannot evade his or her child support obligation by voluntarily remaining unemployed or underemployed. *Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011). Thus, if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor. Tex. Fam. Code Ann. § 154.066(a) (West 2014).

C. EVIDENCE

Judith's testimony is the only evidence adduced at trial on the issue of Michael's net resources. Judith testified that she and Michael both worked at a company called Abbott Laboratories and that she had worked there twenty-seven years, while Michael had worked there twenty-five years. She further testified that when Michael worked at Abbott Laboratories, he earned approximately $50,000 per year. Judith also testified that Michael voluntarily quit his job at

Abbott Laboratories. As for why Michael quit, Judith testified that Michael had been working in Chicago, that their marriage had not been faring well, and that Michael wanted to "return home" when he turned fifty years old. Additionally, Michael had received some written warnings for his behavior at work. So, the plan was that Michael would return home and get another job.

Judith's testimony reflects that upon returning home, Michael got at least two jobs—at UPS and at a company called Flextronics—but his jobs did not last very long. Judith also testified that although Michael did not make as much money at his UPS job as he had at Abbott Laboratories, his compensation when he worked at Flextronics was the same as it had been when he had worked at Abbott Laboratories. She stated Michael had inventory-management job skills—that is, he was experienced in working with inventory and getting it to the places it needed to be in a manufacturing environment. She testified that Michael was capable of driving a forklift and "probably earned 15, 16, 17, $20.00 an hour." Judith confirmed that under the court's temporary orders, Michael had been paying $600.00 in monthly child support, and she was asking the court to increase that amount based upon his earning capacity and his underemployment.

D. APPLICATION

Judith's uncontradicted testimony supports a finding that Michael was skilled in inventory-management and was experienced in moving inventory to the places it needed to be in a manufacturing environment. Her testimony further

supports a finding that he had held a job at Abbott Laboratories for twenty-five years. Her testimony supports a finding that he earned an annual salary of $50,000 while working at Abbott Laboratories and that he voluntarily quit that job to move home. Her testimony supports a finding that when Michael moved back home, he was able to find at least two jobs, one of which provided the same salary he had previously made at Abbott Laboratories. And her testimony supports a finding that Michael had not kept those jobs. Given these findings, the trial court could reasonably have concluded that Michael was intentionally unemployed or underemployed and that he was capable of holding a job earning $50,000 per year. *See id.* § 154.066(a). The trial court therefore had discretion to apply the child-support guidelines to Michael's potential annual gross income of $50,000.[4] *Id.*; *Iliff*, 339 S.W.3d at 80–81. And the trial court's award of $686.00 in monthly child support is consistent with the statutory guidelines for one child where the obligor has an income of $50,000 per year. *See* Tex. Fam. Code Ann. § 154.061(b) (West 2014), § 154.125(b); Office of the Att'y Gen., 2016 Tax Charts, 40 Tex. Reg. 8933, 8933–42 (2015), https://www.texasattorneygeneral.gov/files/cs/2016taxchart.pdf.

We conclude the trial court did not abuse its discretion by ordering Michael to pay $686.00 in monthly child support because it had sufficient information

[4]An annual gross salary of $50,000 translates into an approximate monthly gross salary of $4,166.67.

upon which to exercise its discretion, and its decision was reasonable. *See M.M.M.*, 307 S.W.3d at 849. We overrule Michael's second issue.

IV. MOTION FOR CONTINUANCE

In his third issue, Michael argues the trial court abused its discretion by denying his motion for continuance. On January 25, 2016, Michael's counsel filed a motion to withdraw on the ground that he was "unable to effectively communicate with [Michael] in a manner consistent with good attorney-client relations." The motion recites that it had been served on Michael and he was thereby notified of his right to object. Michael was further notified that a hearing on the motion to withdraw would be held on February 4, 2016, at 8:30 a.m. and his obligation to appear if he wished to contest the motion. The record in this court does not reflect that Michael attended the hearing. Finally, the motion stated that once the trial court granted the motion to withdraw, Michael would be given a copy of his file. The trial court granted the motion to withdraw on February 4, 2016. Its order reflected that final trial was set for February 10, 2016.

On February 8, 2016, Michael filed a motion for continuance, which requested a continuance because his previous attorney "withdrew as counsel on February 4, 2016, less than one week before trial." He requested a continuance to "contract other legal counsel so that he may have a fair trial and not proceed to trial pro se, which would put him at a great disadvantage to [Judith]." The record does not show that Michael formally presented this motion to the trial court, nor

does it reflect that the trial court entered a written ruling on it. On February 10, 2016, the trial court called the case for trial and asked the parties whether they were prepared to proceed. Michael replied that he was not and stated, "I'd like to file for a continuance since I wasn't able to get representation in a timely fashion. [My attorney] withdrew from me on the 4th and I just received a certified letter in the mail yesterday." The trial court replied, "Your motion is overruled. We'll proceed."

Michael points to his statement that he "just received a certified letter in the mail yesterday" to suggest that he had only received notice of his attorney's withdrawal on February 9, 2016. Thus, he argues, he only had one day's notice that he would be going to trial without a lawyer. We note, however, that Michael's February 8, 2016 motion for continuance noted his attorney's withdrawal, so he had notice of that fact at least as early as that date. In any event, Michael argues in his third issue that the trial court abused its discretion by denying his motion for continuance, arguing that the trial court should have granted the continuance to allow him to find new counsel.

Whether to grant a continuance is a decision within the trial court's sound discretion, and we will not disturb a trial court's denial of a motion for continuance absent a clear abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). Rule 253 of the rules of civil procedure provides,

> [A]bsence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters

> within the knowledge or information of the judge to be stated on the record.

Tex. R. Civ. P. 253. When, as here, the ground for a movant's requested continuance is the withdrawal of counsel, the movant must show that the failure to be represented at trial was not due to his or her own fault or negligence. *Id.*; *Villegas*, 711 S.W.2d at 626; *Ruiz v. Ruiz*, No. 02-14-00047-CV, 2014 WL 4458952, at *3 (Tex. App.—Fort Worth Sept. 4, 2014, pet. denied) (mem. op.).

Michael argues the trial court should have granted him a continuance upon the withdrawal of his counsel "because there is no evidence in the record that shows [he] was [] negligent or at fault in causing his attorney's withdrawal." But this confuses the burden under Rule 253. As the movant seeking the continuance on the ground that his counsel withdrew, the burden was on Michael to show the withdrawal of his counsel was not due to his own fault or negligence. *See* Tex. R. Civ. P. 253; *Villegas*, 711 S.W.2d at 626; *Ruiz*, 2014 WL 4458952, at *3. Michael's written motion for continuance merely stated he was seeking a continuance due to the withdrawal of his counsel and to allow him "to contract other legal counsel so that he may have a fair trial and not proceed to trial pro se, which would put him at a great disadvantage to [Judith]." Michael's oral motion for continuance provided no further elaboration as to the circumstances of his counsel's withdrawal; he simply stated he wanted a continuance because he was not able to get representation in a timely fashion since his attorney withdrew on February 4, 2016, and he had only received a certified letter in the mail the day

before trial. Michael simply ignored that the motion reflects it was served on him more than two weeks prior to trial and that he was notified of the hearing on February 4, 2016, in the trial court, and he continues to ignore these facts on appeal. There is no explanation or evidence in the record concerning Michael's role in his counsel's withdrawal. Given that lack of explanation and evidence, the trial court could reasonably have concluded that Michael failed to meet his burden to show the withdrawal of his counsel was not due to his own fault or negligence. Thus, we conclude the trial court did not abuse its discretion in denying Michael's request for a continuance. *See* Tex. R. Civ. P. 253; *Villegas*, 711 S.W.2d at 626; *Ruiz*, 2014 WL 4458952, at *3. We overrule Michael's third issue.

V. CONCLUSION

Having overruled all of Michael's issues, we affirm the trial court's judgment. Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: GABRIEL, KERR, and PITTMAN, JJ.

DELIVERED: October 12, 2017