TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00581-CV

Brooke Bruce, Appellant

v.

Carter Bruce, Appellee[1]

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT
NO. D-1-FM-06-002028, HONORABLE RHONDA HURLEY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Brooke Bruce appeals the trial court's final order in a child-support enforcement action. *See* Tex. Fam. Code §§ 157.001-.426 (enforcement proceedings). In three issues, Brooke challenges those portions of the order crediting her ex-husband, Carter Bruce, for payments that were not made through the state disbursement unit, as required by the couple's divorce decree. Brooke also challenges the trial court's refusal to award her attorney's fees. *See id*. § 157.671. Because we conclude that the trial court abused its discretion in failing to award Brooke attorney's fees, we will reverse that portion of the order and remand for further proceedings. In all other respects, we will affirm the trial court's order.

[1] Appellee Carter Bruce filed a separate notice of cross-appeal. However, in his appellee's brief, Carter states that, "after a thorough review of the record," he no longer wishes to pursue his cross-appeal issues. Accordingly, we dismiss Carter's cross-appeal. *See* Tex. R. App. P. 42.1(a) (voluntary dismissal in civil cases).

BACKGROUND

Brooke and Carter were married in 1992 and divorced in 2007. The couple had one child, M.B., who was 11 years old at the time of the divorce. The divorce decree appointed Brooke and Carter joint managing conservators and awarded Brooke the right to designate the child's primary residence. In addition, the decree ordered Carter to pay periodic child support in the amount of $1,500 per month beginning April 1, 2007, and then to pay $1,750 per month beginning April 1, 2008. The decree ordered "that all payments shall be made through the state disbursement unit . . . and thereafter promptly remitted to [Brooke] for the support of the child." The decree also required that Carter "provide and maintain health insurance" for M.B. and that Carter and Brooke each pay 50 percent of any health-care expenses for M.B. not covered by insurance.

In 2015, Carter sued Brooke to recover child-support payments that, according to Carter, were made in excess of the decree's child-support order. In his petition, Carter alleged that he made numerous payments directly to Brooke and that these payments should have been, but were not, credited to him as child-support payments. Carter sought a judgment in his favor for what he claimed were overpaid child-support payments and health-insurance premiums, plus interest and attorney's fees.[2] Brooke filed an answer, generally denying Carter's claims and asserting a counterclaim for recovery of child-support arrearages, unpaid medical support, and attorney's fees pursuant to section 157.167 of the Texas Family Code. *See id.* § 157.167 (requiring respondent to

[2] Carter also sued the Office of the Attorney General, Child Support Division. The Attorney General filed a general denial, did not appear at trial, and has not appeared in these appellate proceedings.

pay attorney's fees and costs when court finds respondent has "failed to make child support payments").

Following a final hearing, the trial court signed a "final order confirming child support arrearages and denying contempt." *See id*. § 157.161-.068 (hearing and enforcement order). In its order, signed on June 20, 2016, the trial court included the following relevant findings:

(1) "[Carter] failed to timely pay periodic child support to [Brooke] through the State Disbursement Unit in the amount of $22,965.00";

(2) "[Carter] failed to timely pay unreimbursed healthcare expenses for the child to [Brooke] in the amount of $939.49";

(3) "[Carter] is entitled to offsets of that total sum due to direct payments made by [Carter] to [Brooke] or to others."

(4) "[Carter] is entitled to offsets for the following payments for a total $19,816.83:

1.	11/1/2007	$3,000.00	Check to [Brooke]
2.	7/19/2009	$4,000.00	Check to [Brooke]
3.	8/25/2009	$10,000.00	Check to [Brooke]
4.	10/6/2009	$1,000.00	Check to [Brooke]
5.	12/16/2009	$1,816.83	Check to Nelda Well Spears for property taxes"

Based on these findings, the trial court denied Carter's "request to recover child support overpayments," declared that "the total final amount of arrearages confirmed and that remain due and owing for child and medical support is [$4,087.66]," and awarded a judgment in favor of Brooke for this amount. The court also ordered that "each party shall be solely responsible for his or her respective attorney's fees." Neither party requested separate findings of fact and conclusions of law,

see Tex. R. Civ. P. 296, or additional findings of fact and conclusions of law, *see* Tex. R. Civ. P. 298.

In three issues on appeal, Brooke challenges the trial court's decision to credit Carter's total outstanding child-support obligation with payments not made through the state disbursement unit and the denial of her request for attorney's fees.

STANDARD OF REVIEW

We review a trial court's decisions regarding child support, including confirmation of child-support arrearages, for an abuse of discretion. *In re M.K.R.*, 216 S.W.3d 58, 61 (Tex. App.—Fort Worth 2007, no pet.); *see also Lee v. Kaufman*, No. 03-10-00148-CV, 2011 WL 3796175, at *1 (Tex. App.—Austin Aug. 26, 2011, no pet.) (mem. op.) (applying abuse-of-discretion standard on review of order on motion to enforce child support). Applying this standard, legal and factual sufficiency are relevant factors in determining whether the trial court abused its discretion, but they are not independent grounds of error. *Zeifman v. Michels*, 212 S.W.3d 582, 587 (Tex. App.—Austin 2006, pet. denied); *see Miller v. Miller*, No. 03-14-00603-CV, 2015 WL 6830754, at *5 (Tex. App.—Austin Nov. 4, 2015, no pet.) (mem. op.). Consequently, we engage in a two-pronged inquiry: (1) whether the trial court had sufficient information upon which to exercise its discretion and (2) whether the trial court erred in its application of that discretion. *Echols v. Olivarez*, 85 S.W.3d 475, 477 (Tex. App.—Austin 2002, no pet.). The focus of the first inquiry is the sufficiency of the evidence. *Zeifman*, 212 S.W.3d at 588. Under the second inquiry, we must decide whether, based on the evidence before it, the trial court made a reasonable decision. *Id*.

When, as in this case, the trial court includes findings in its judgment but does not issue any separate findings of fact and conclusions of law, the findings in the judgment have probative value on appeal.[3] *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A., Inc.*, 403 S.W.3d 360, 364 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (explaining that findings recited in judgment are accorded probative value when they do no conflict with separately filed findings of fact); *In re C.A.B.*, 289 S.W.3d 874, 881 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("[F]indings improperly included in judgment still have probative value and are valid as findings . . . ."); *In re Estate of Jones*, 197 S.W.3d 894, 900-01 n.4 (Tex. App.—Beaumont 2006, pet. denied) ("[I]f findings of fact are recited in judgment, and no one complains or requests findings, and there is no conflict with separately filed findings of fact, the findings of fact in the judgment should not be ignored on appeal."); *see also Henties v. Schweppe*, No. 03-13-00593-CV, 2014 WL 2568490, at *4 (Tex. App.—Austin June 3, 2014, pet. denied) (mem. op.) (concluding that findings contained in judgment had probative value and were "valid as findings" and that appellant was not harmed by trial court's failure to separately file findings of fact and conclusions of law requested by appellant under rule 296 and rule 297). When challenged, we review the findings for sufficiency of the evidence under the same standards that are applied in reviewing evidence

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[3] Rule 299a of the Texas Rules of Civil Procedure states,

> Findings of fact shall not be recited in a judgment. If there is conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 [time to file findings of fact and conclusions of law] and 298 [additional or amended findings of fact and conclusions of law], the latter findings will control for appellate purposes. Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

Tex. R. Civ. P. 299a.

supporting a jury's answer. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Unchallenged findings are binding on the appellate court unless the contrary is established as a matter of law or there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). Any omitted findings that are supported by the evidence may be supplied by a presumption in support of the judgment. *See* Tex. R. Civ. P. 299 (omitted findings).

To determine if the evidence is legally sufficient to support the trial court's exercise of discretion, we consider the evidence in the light most favorable to the trial court's findings if a reasonable factfinder could and disregard evidence to the contrary unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 897 (Tex. 2005). An appellate court will sustain a legal-sufficiency challenge to an adverse finding on an issue on which the appellant did not have the burden of proof when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered; (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. *Zeifman*, 212 S.W.3d at 588 (citing *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998)). When reviewing the evidence for factual sufficiency, we consider and weigh all the evidence presented and will set aside the trial court's findings only if they are so contrary to the overwhelming weight of the evidence such that they are clearly wrong and unjust. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *Cain v. Bain*, 709 S.W.2d 175.176 (Tex. 1986); *Miller*, 2015 WL 6830754, at *3. When the evidence conflicts, we must presume that the factfinder resolved any inconsistencies in favor of the order if a reasonable person could do so. *City of Keller*, 168 S.W.3d at 821. The trial court does not

abuse its discretion if evidence of a substantive and probative character exists in support of its decision. *Zeifman*, 212 S.W.3d at 587.

ANALYSIS

In her first two issues on appeal, Brooke challenges the trial court's decision to credit Carter for payments not made through the registry of the state disbursement unit. First, Brooke asserts that the trial court abused its discretion by crediting Carter for any direct payments because, as a matter of law, such offsets are prohibited. Second, in the alternative, Brooke argues that the trial court abused its discretion by crediting Carter for certain direct payments (shown as payments 3, 4, and 5 in the final order, in the amounts of $10,000, $1,000, and $1,816.83, respectively) because the evidence is insufficient to establish that these payments were, in fact, made for the purpose of child support.

In a child-support enforcement action, once the amount of child-support arrearages is established, the trial court must confirm the amount of arrearages—that is, the amount of the child-support obligation that has not been satisfied—as a finding of fact. *See In re S.R.O.*, 143 S.W.3d 237, 248 (Tex. App.—Waco 2004, no pet.). A trial court's calculation and award of child-support arrearages is governed by section 157.263 of the Texas Family Code. Section 157.263(b-1) of the Family Code provides:

> In rendering a money judgment under this section, the court may not reduce or modify the amount of child support arrearages but, in confirming the amount of arrearages, may allow a counterclaim or offset as provided by this title.

Tex. Fam. Code § 157.263(b-1). Sections 157.008 and 157.009 authorize an offset or credit if (1) "the obligee voluntarily relinquished to the obligor actual possession and control of [the] child"

in excess of any court-ordered periods of possession, during which period the obligor provided actual support to the child, or (2) the obligor's disability resulted in a lump-sum payment to the obligee as the representative payee of the child. *Id.* §§ 157.008, .009. In this case, none of the payments claimed by Carter, nor any of the payments credited to Carter by the trial court in its judgment, implicate or are based on the statutory offsets available under section 157.008 or section 157.009.

Nevertheless, the Texas Supreme Court has recently recognized that, when confirming arrearages under Chapter 157 of the Family Code, the trial court also has discretion to consider "direct payments either to the other parent or to a third party in deciding whether an arrearage exists," even when the final decree requires payment of child support through a child-support registry. *Ochsner v. Ochsner*, No. 14-0638, 2016 WL 3537255, at *12 (Tex. June 24, 2016). In *Ochsner*, the child-support order at issue required the father to make tuition payments directly to his child's preschool and to make monthly payments of $240 to the mother, so long as his child attended the school specified in the decree. *Id.* at *1. The order also stated that, when the child stopped attending the specified school, the father was to pay $400 twice a month to the mother through the child-support registry of the Harris County Child Support Office. *Id.* After the child stopped attending the specified school, the father continued to make payments of $240 directly to the mother as well as tuition payments directly to various private schools that the child attended. *Id.* The mother subsequently brought a child-support enforcement action to collect on the amount not paid by father through the registry. *Id.* at *2. Because the undisputed evidence demonstrated that the father had paid more than $20,000 above the total amount contemplated in the support order as a result of the direct payments, the trial court concluded he had discharged his chid-support obligation. *Id.* The court of appeals subsequently reversed the trial court's order,

holding that the trial court was barred from considering the father's direct tuition payments when confirming the arrearages. *Id*. (citing *Ochsner v. Ochsner*, 436 S.W.3d 378, 382 (Tex. App.—Houston [14th Dist.] 2014, pet. granted)).

On review, the Texas Supreme Court reversed the judgment of the court of appeals and rendered judgment in favor of the father. *Id*. at *8. The Court concluded that the "divorce decree did not bar the trial court from concluding that [father's] direct tuition payments—non-registry payments to which [mother] assented—satisfied his child-support obligation." *Id*. As the Supreme Court explained, the trial court may consider "payments that the obligor contributed toward the child's upbringing" and decide "whether—and how much of—the obligation has been discharged. The court may determine that the payments did not contribute to the satisfaction of the obligor's child-support obligation, or it could conclude that the obligor has satisfied his duty . . . ." *Id*. at *5. In light of the Supreme Court's holding in *Ochsner*, we must reject Brooke's assertion that the trial court was categorically prohibited from considering any direct payments made by Carter. We overrule Brooke's first appellate issue.

Next, we consider Brooke's alternative argument that the trial court abused its discretion in crediting Carter's child-support obligation for the three challenged payments because, according to Brooke, the evidence is insufficient to support a finding that the payments constitute payments for "child support." At the hearing, Carter offered, and the trial court admitted, his "Non-Custodial Parent's Affidavit of Direct Payments," sworn to on March 4, 2015.[4] In his

[4] Carter utilized the form "Affidavit of Direct Payments" for non-custodial parents made available on Texas Attorney General's website. *See* https://texasattorneygeneral.gov /files/cv/1A007cr.pdf (last visited May 3, 2017). According to the form, it is "used to document child and medical support payments . . . made directly to the custodial parent (in any form)." *See id*.

affidavit, Carter averred that over a course of time, beginning in 2006, he made eleven child-support payments to Brooke, "the custodial parent, and that these payments were not sent through the county registry or State Disbursement Unit," including the three payments credited by the trial court that Brooke now challenges in this appeal. Attached to Carter's affidavit were copies of checks, including two checks made out to Brooke—a $10,000 check dated August 25, 2009, and a $1,000 check dated October 6, 2009—and a check made out to "Nelda Wells Spears" in the amount of $1,816.83 for "6002 Bullard."

During his testimony at the hearing, Carter acknowledged that at the time the checks were written in 2009, he and Brooke were "simply being" cordial for the sake of M.B. and that he was helping Brooke with the remodel of her home at 6002 Bullard. Carter testified that although he was writing numerous checks to contractors for the remodeling work during this period, the checks made payable to Brooke directly were for child support. Carter testified that he could specifically recall that the check for $10,000 was for child support because he "was being harassed so much" that he "paid way forward" to avoid further harassment. Carter also explained that he could recall that the checks written to Brooke were for child support because he wrote checks for child support in even amounts as "standard operating procedure." Finally, Carter testified that the check to Nelda Wells Spears was for the payment of property taxes at the home where M.B. and Brooke resided and that while he initially considered this payment to be a loan, he also considered this payment to be a child-support payment.

The trial court also heard testimony from Brooke about the challenged payments. Brooke did not deny that she received the payments from Carter. Instead, Brooke testified that during 2009, she and Carter had reconciled romantically and that she had spent money on expenses

jointly incurred by the couple, such as trips, dining, and remodeling costs. According to Brooke, Carter gave her the checks for $10,000 and $1,000 as repayment for those expenses. She did not provide any testimony concerning Carter's payment of the property taxes on her home.

On appeal, Brooke asserts that the evidence is insufficient to support the trial court's decision because Carter's testimony that the direct payments were intended as child-support payments is impermissibly conclusory and because he offered no testimony explaining the circumstances under which he made the payments. As support for this assertion, Brooke cites cases concerning the use of conclusory statements in the summary-judgment context. *See Beesley v. Hydrocarbon Separation, Inc.*, 358 S.W.3d 415, 424-25 (Tex. App.—Dallas 2012, no pet.) (citing Tex. R. Civ. P. 166a(c)). The issue here, however, is not whether some particular portion of Carter's testimony is conclusory but whether the evidence presented at the trial on the merits, in total, "would enable reasonable and fair-minded people to reach the [decision] under review." *See City of Keller*, 168 S.W.3d at 822 (discussing legal-sufficiency review).

Brooke also argues that to establish that a payment made outside of the child-support registry constitutes a payment of child support an obligor must demonstrate that payments were made regularly and in "compliance with the letter or spirt of the underlying court order." Brooke asserts that the evidence in this case demonstrates that the challenged payments were sporadic and unpredictable and that, as a result, there is insufficient evidence to show that the payments were made for the purpose of providing support to M.B. *See Ochsner*, 2016 WL 3537255, at *7 (noting that even under court of appeals' decision in *Chenault v. Banks*, 296 S.W.3d 186 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding that trial court could not consider direct payments of tuition in calculating child-support arrearages), trial court could have considered

"evidence of [father's] regular and direct tuition payments in confirming the amount of arrearages"). While evidence that direct payments were made by Carter on a regular, periodic basis would lend support to a finding that the challenged payments were, in fact, intended as child support, we see no reason why such evidence is necessarily required, nor do we interpret the Court's holding in *Ochsner* as requiring evidence of regular and periodic payments in every case.

The trial court is best able "to observe the demeanor and personalities of the witnesses and [to] 'feel' the forces, powers, and influences that cannot be discerned by merely reading the record." *Echols*, 85 S.W.3d at 477. As a reviewing court applying the abuse-of-discretion standard, we must defer to factual resolutions by the trial court that derive from conflicting evidence, as well as any credibility determinations that may have affected those resolutions, and we may not substitute our judgment for that of the trial court. *In re A.L.S.*, 338 S.W.3d 59, 66 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). A trial court's child-support calculations must be based on the payment evidence presented, not the trial court's assessment of what is fair or reasonable. *Ochsner*, 2016 WL 3537255, at *7 (citing *Chenault*, 296 S.W.3d at 190). "The trial court does not abuse its discretion if it bases its decision to award arrearages on conflicting evidence and some evidence supports its decision." *In re A.L.S.*, 338 S.W.3d at 66. Having reviewed the evidence under the appropriate standards, we conclude that there is sufficient competent evidence to support the trial court's findings that the challenged payments for $10,000, $1,000 and $1,816.83 were intended to provide support to M.B. *Cf. Ochsner*, 2016 WL 3537255, at *8 (noting that "under different circumstances a trial court might well be within its discretion in refusing to consider such payments"). We overrule appellant's second issue on appeal.

In her third issue, Brooke complains that the trial court erred in failing to award her attorney's fees. Under section 157.167, a movant in a child-support enforcement proceeding is entitled to recover reasonable attorney's fees "if the court finds that the respondent has failed to make child support payments." Tex. Fam. Code § 157.167(a). Absent a finding of good cause, the award of attorney's fees under section 157.167 is mandatory. *Id.* § 157.167(c). The statute does not require the court to find that the respondent is in contempt before awarding attorney's fees, only that the respondent failed to make child-support payments. *Russell v. Russell*, 478 S.W.3d 36, 46 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *McFadden v. Deedler*, No. 03-13-00486-CV, 2014 WL 4364540, at *2 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.).

Here, the trial court found that Carter failed to make all of his required child-support payments but did not specifically find that good cause existed to deny an award of attorney's fees. *See* Tex. Fam. Code § 157.167(c). Under these circumstances, the award of reasonable attorney's fees is mandatory, and the trial court abused its discretion in failing to award attorney's fees to Brooke.[5] *See Russell*, 478 S.W.3d at 44 (explaining that finding of "good cause" for denying

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[5] Carter asserts the trial court did not abuse its discretion in refusing to award attorney's fees to Brooke because, according to Carter, the evidence establishes that any amount owed was solely for unpaid reimbursement of health-insurance premiums. Carter points out that the couple's divorce decree required only that he maintain health insurance for M.B. and did not require him to "reimburse [Brooke] for the cost of providing health insurance." As a result, Carter reasons, Brooke was not entitled to any award of attorney's fees because unpaid reimbursements of health-insurance premiums do not qualify as outstanding "child support" under section 157.167. We disagree.

Medical support, including the providing of health-insurance coverage for a child, is an additional child-support obligation that may be enforced by any means available for the enforcement of child support. *In re A.L.S.*, 338 S.W.3d 59, 67 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see* Tex. Fam. Code §§ 154.181(a), .182(b), .183(a). Consequently, the trial court was entitled to enforce Carter's obligation under the decree to provide M.B.'s health insurance "by ordering him to compensate [Brooke] for assuming his neglected obligation." *See Roberts*

fees under section 157.167 could not be implied); *Higgins v. Higgins*, No. 05-98-02014-CV, 2000 WL 1264636, at *4 (Tex. App.—Dallas Sept. 7, 2000, no pet.) (not designated for publication) (same). We sustain Brooke's third issue on appeal and reverse the judgment to the extent it denies Brooke an award of attorney's fees. We remand the cause to the trial court to (1) determine and award Brooke's reasonable attorney's fees or (2) find that good cause exists to deny an award of attorney's fees and state any reasons supporting that finding. *See* Tex. Fam. Code § 157.167(c); *Russell*, 478 S.W.3d at 45.

CONCLUSION

Having sustained appellant's third issue on appeal related to attorney's fees, we reverse the trial court's final order, in part, and remand to the trial court for further proceedings. Having overruled appellant's remaining issues on appeal, we affirm the final order of the trial court in all other respects.

Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed in Part; Reversed and Remanded in Part

Filed: May 26, 2017

v. Roberts, No. 03-99-00296-CV, 2000 WL 45642, at *1-2 (Tex. App.—Austin Jan. 21, 2000, no pet.) (mem. op.). Thus, even if the entire amount of confirmed arrearages was for unpaid reimbursement of health-insurance premiums, as Carter claims, Brooke would still be entitled to recover her attorney's fees. *See McFadden v. Deedler*, No. 03-13-00486-CV, 2014 WL 4364540, at *2 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.) (confirming award of attorney's fees based on unpaid medical support).