

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-17-00672-CV**

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**Carter Bruce, Appellant**

**v.**

**Brooke Bruce, Appellee**

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

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**MEMORANDUM OPINION**

In this appeal after remand, appellant Carter Bruce challenges the trial court's order awarding attorney's fees to his ex-wife, appellee Brooke Bruce, in a child-support enforcement action. *See* Tex. Fam. Code § 157.167 ("Respondent to Pay Attorney's Fees and Costs"). For the reasons that follow, we will affirm the order of the trial court.

**BACKGROUND**

Brooke Bruce and Carter Bruce divorced in 2007. In the couple's divorce decree, the trial court appointed Brooke and Carter joint managing conservators over the couple's only child, M.B., awarded Brooke the right to designate M.B.'s primary residence, and ordered Carter to pay periodic child support. In 2015, Carter sued to recover child-support payments that, according to Carter, were made to Brooke in excess of his child-support obligation under the decree. *See id.* §§ 157.001-.426 (enforcement proceedings). 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. Following a final hearing, the trial court signed an order denying Carter's "request to recover child support overpayments," declaring \$4,087.66 as "the total final amount of arrearages confirmed and that remain due and owing for child and medical support," and awarding a judgment in favor of Brooke for this amount. *See id.* § 157.161-.168 (hearing and enforcement order). The trial court also ordered each party responsible for his or her own attorney's fees.

Brooke then filed a notice of appeal challenging the trial court's decision to credit Carter for certain payments that were not made through the registry of the state disbursement unit but instead made to Brooke directly. *Bruce v. Bruce*, No. 03-16-00581-CV, 2017 WL 2333298, at \*5, 7 (Tex. App.—Austin May 26, 2017, no pet.) (mem. op.) ("*Bruce I*"). On appeal, this Court rejected that challenge and affirmed that portion of the trial court's order confirming and awarding arrearages to Brooke in the amount of \$4,087.66. *Id.* (citing *Ochsner v. Ochsner*, 517 S.W.3d 717, 723 (Tex. 2016) (concluding that when confirming arrearages under chapter 157 of the family code, trial court may consider direct payments in calculating arrears)). We concluded, however, that the trial court had abused its discretion in failing to award attorney's fees to Brooke under section 157.167 of the Family Code, which requires an award of attorney's fees when the court "finds that the respondent has failed to make child support payments." *Id.* at \*6 (citing Tex. Fam. Code § 157.167(a)). Consequently, we reversed that portion of the order and remanded the cause for further proceedings. *Id.* Specifically, we directed the trial court to (1) determine and award to Brooke reasonable attorney's fees or (2) find that good cause exists to deny an award of attorney's fees and state any reason supporting that finding. *Id.* (citing Tex. Fam. Code § 157.167(c)).

Upon remand, the trial court conducted a hearing on the issue of attorney's fees and on September 13, 2017, signed an order awarding Brooke all of her requested attorney's fees, totaling \$17,372.30. Carter then timely filed his notice of appeal.

### STANDARD OF REVIEW

In two issues, Carter challenges the trial court's decision to award Brooke her requested attorney's fees. Generally, we review a trial court's decisions regarding child support, including a decision to award attorney's fees under section 157.167, for an abuse of discretion. *Russell v. Russell*, 478 S.W.3d 36, 47 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *see Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or when it acts without reference to any guiding rules or principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *In re C.Z.B.*, 151 S.W.3d 627, 634 (Tex. App.—San Antonio 2004, no pet.) (attorney's fees award will be upheld unless appellate court finds that trial court's actions were arbitrary and unreasonable).

Under an abuse-of-discretion standard, legal and factual sufficiency are not independent grounds of error, but are relevant factors in determining whether the trial court abused its discretion. *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, to determine whether the evidence is sufficient to support the court's exercise of discretion, 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. *Zeifman*, 212 S.W.3d at 587; *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.*

### ANALYSIS

Under section 157.167 of the Texas Family Code, a trial court “shall order the respondent to pay the movant’s reasonable attorney’s fees,” when, as in this case, “the court finds that the respondent has failed to make child support payments.” Tex. Fam. Code § 157.167(a). As we previously explained in *Bruce I*, “Absent a finding of good cause, the award of attorney’s fees under section 157.167 is mandatory.” 2017 WL 2333298, at \*8. Only if good cause is shown may the trial court, in its discretion, “waive the requirement that the respondent pay attorney’s fees and costs if the court states the reasons supporting that finding.” Tex. Fam. Code § 157.167(c).

In his first issue on appeal, Carter asserts that the trial court abused its discretion because “the failure to find that there was good cause to not award Brooke attorney’s fees was against the great weight and preponderance of the evidence.” *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (explaining that when appellant attacks factual sufficiency of adverse finding (or failure to find) appellant must show that adverse finding is against “the great weight and preponderance of the evidence”). To prevail under the applicable standard of review, Carter must establish both that (1) the great weight and preponderance of the evidence demonstrates that “good cause” exists to deny Brooke’s attorney’s fees and (2) in light of this evidence, the trial court abused its discretion in failing to “waive the requirement that [he] pay attorney’s fees.” *See Echols*, 85 S.W.3d at 477.

In support of his request for a good-cause finding before the trial court, Carter relied on evidence presented during the final hearing on the parties' competing motions for enforcement of child support. At this hearing, Carter testified that in 2009, he was paying \$250 each month to Brooke as reimbursement for what he assumed was the actual cost of M.B.'s health insurance, in addition to his regular \$1,750 child-support payment.<sup>1</sup> According to his testimony, Carter, and later his attorney, asked Brooke for information regarding the exact amount of M.B.'s health insurance premium, and Brooke refused to provide the information. Brooke also refused to credit Carter for any of the payments he had made directly to her. Believing that he had more than fulfilled his support obligation and that he had possibly overpaid any amounts owed for health insurance reimbursement, Carter altogether stopped making child-support payments to Brooke. He filed an "Affidavit of Direct Payments" with the Attorney General's Office to document the child and medical support payments he had paid directly to Brooke and, in 2015, sued to recover child-support payments allegedly made in excess of his court-ordered obligation. Carter asserts that he was acting in good faith because the uncontroverted record from the final hearing shows that at the time he stopped making child-support payments he was, in fact, ahead in his payments and had been paying more than required for M.B.'s health insurance premiums. In addition, Carter claims that Brooke was acting in bad faith in failing to provide accurate information related to M.B.'s health insurance premiums and in failing to recognize the direct payments made to her for child support. In short,

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<sup>1</sup> The divorce 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 on April 1, 2008. The decree also required Carter to "provide and maintain health insurance" for the child. Both parties acknowledge that at some point, Brooke began providing M.B.'s health insurance and Carter agreed to reimburse Brooke for the premium.

Carter argues that the “great weight and preponderance of the evidence” establishes that there was “good cause” to support his decision to stop making child-support payments and, consequently, for his failure to fully comply with his child-support obligation.

In assessing a trial court’s failure to make a requested finding, such as a finding of good cause, we defer to the reasonable credibility determinations made by the fact finder and do not substitute our judgment for that of the fact finder, even if the evidence would support a different result. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). Viewing the record as a whole, we cannot conclude that the trial court’s failure to find good cause for denying attorney’s fees is against the great weight and preponderance of the evidence. *See Dow Chem. Co.*, 46 S.W.3d at 241. While the trial court as the finder of fact could have believed that Carter stopped making child-support payments based on his reasonable belief that he had already fully complied, the court was also free to disbelieve this testimony or to conclude that this reason, even if believed, did not establish “good cause.” *See In re L.A.F.*, 270 S.W.3d 735, 741 (Tex. App.—Dallas 2008, pet. denied) (“[B]ecause the trial court was correct in its judgment with regard to appellant’s arrearages, the trial court was also justified in its decision to award fees and costs to appellee.”). Moreover, section 157.167 does not preclude a trial court from awarding attorney’s fees, even when good cause is established. *See Tex. Fam. Code 157.167(c)*. Instead, the statute *allows* the trial court, in the exercise of its discretion, “to waive the requirement that the respondent pay attorney’s fees” upon a finding of good cause. *See id.* (“[F]or good cause shown, the court may waive the requirement that the respondent pay attorney’s fees.”). Based on the record before us, we cannot conclude that the trial court’s decision to award attorney’s fees under section 157.167 was unreasonable or arbitrary. We overrule Carter’s first issue on appeal.

Next, we consider Carter's alternative argument that the trial court abused its discretion by awarding Brooke her requested attorney's fees because Brooke failed to prove that all of the fees requested and awarded were reasonable. To support an award of reasonable costs, testimony should be presented regarding the number of hours spent on the case, the nature of the preparation, the complexity of the case, the experience of the attorney, and the prevailing hourly rates. *In re C.Z.B.*, 151 S.W.3d at 635; *see Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997) (listing factors that factfinder should consider when determining reasonableness of attorney's fees). The reasonableness of attorney's fees is a question of fact to be determined by the trier of fact and must be supported by competent evidence. *Bahar v. Lyon Fin. Servs.*, 330 S.W.3d 379, 391 (Tex. App.—Austin 2010, pet. denied) (quoting *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied)); *Tull v. Tull*, 159 S.W.3d 758, 760 (Tex. App.—Dallas 2005, no pet.). When the evidence is legally or factually insufficient to support an award of attorney's fees, the trial court abuses its discretion in making the award. *See Bahar*, 330 S.W.3d at 391.

In support of her request for attorney's fees, Brooke presented the testimony of her attorney along with her attorney's billing statements. Brooke's attorney testified to the reasonableness of her rate, the complexity of the case, her total time spent preparing the case, and the total amount of legal fees incurred by Brooke in the matter. On appeal, Carter does not contend that there is legally insufficient evidence to support a finding that the attorney's fees awarded to Brooke are reasonable. In fact, Carter acknowledges that Brooke's attorney testified as to several of the *Arthur Andersen* factors. *See Arthur Andersen & Co.*, 945 S.W.2d at 818; *see also Brockie*

*v. Webb*, 244 S.W.3d 905, 909 (Tex. App.—Dallas 2008, pet. denied) (explaining that it is not necessary that record include evidence of each *Arthur Andersen* factor). Based on the record before us, we conclude that the evidence is factually and legally sufficient to support the trial court’s implied finding that the attorney’s fees requested by Brooke were reasonable.

In asserting that Brooke failed to establish the reasonableness of her requested fees, Carter also argues that Brooke is not entitled to full amount of the attorney’s fees awarded by the trial court because she failed to meet her burden to segregate those fees incurred in prosecuting her enforcement action—for which recovery of attorney’s fees is authorized—from those fees incurred in other matters. Texas law prohibits recovery of attorney’s fees unless authorized by statute or contract. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). Thus, as a general rule, a party seeking recovery of attorney’s fees must segregate fees between claims for which fees are recoverable and claims for which fees are not recoverable. *Id.* at 311. A recognized exception to the duty to segregate arises when discrete legal services advance both a recoverable and unrecoverable claim and thus are so intertwined that they need not be segregated. *Id.* at 313-14. The extent to which certain claims can or cannot be segregated is mixed question of law and fact for the factfinder. *Id.*

At the hearing on remand, Brooke’s attorney testified that her legal work associated with defending against Carter’s claim for repayment of excess fees and her work in prosecuting Brooke’s enforcement action against Carter were “inextricably intertwined.” Brooke’s attorney explained that (1) each party had presented competing motions for enforcement; (2) all of the legal services that she provided in prosecuting Brooke’s motion to enforce were also necessary to



defend against Carter's competing claim that he had over paid; and (3) it would have been impossible for Brooke to collect any of the child support owed without trying the entirety of the case.

While she did not prevail on the entirety of her claim for unpaid child support, Brooke ultimately established that Carter was in arrears on his child-support obligation. Consequently, Brooke was entitled to her reasonable attorney's fees associated with bringing and prosecuting that claim. *See* Tex. Fam. Code § 157.167. In addition, based on the record before us, we agree that to prevail on her claim for unpaid child support, Brooke was necessarily required to defeat Carter's claim that he had paid more than required by his child-support obligation and was entitled to reimbursement. *See Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (concluding that fees in defending counterclaim did not have to be segregated because plaintiffs had to overcome the defense to prevail on claim). Thus, the record supports the trial court's implied finding that all of the legal services for which Brooke sought recovery of attorney's fees were for, or inextricably intertwined with, services related to the advancement of her enforcement action. *See Tony Gullo Motors*, 212 S.W.3d at 311.

Because the record supports findings that the attorney's fees requested by Brooke were reasonable and that Brooke was not required to segregate her requested fees, we conclude that the trial court did not abuse its discretion in awarding Brooke her requested attorney's fees in the amount of \$17,327.30. We overrule Carter's second issue on appeal.

## **CONCLUSION**

Having overruled appellant's issues on appeal, we affirm the trial court's order awarding attorney's fees to Brooke.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Goodwin and Field

Affirmed

Filed: June 5, 2018