Opinion issued September 17, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00433-CV

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, Appellant

V.

ROBERT SEAN McBEE, Appellee

On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Cause No. 96FD2141

MEMORANDUM OPINION

After Robert Sean McBee requested a de novo hearing of an associate judge's order determining child support arrearages, the referring trial court heard new evidence and modified the judgment to reduce it. The Office of the Attorney General of the State of Texas (OAG), appeals the trial court's judgment, contending that the trial court erred because it (1) lacked jurisdiction, and (2) abused its discretion in reducing the child support arrearage as determined by the associate judge. We conclude that the trial court had jurisdiction to review the associate judge's order, but abused its discretion in applying nonstatutory reasons to modify the amount of arrearage and interest due. We therefore reverse the judgment and remand for further proceedings.

Background

This suit arises out of a 1997 proceeding that dissolved the marriage between McBee and April Michelle Tew, and addressed visitation and child support obligations for K., their child. A 1997 order requires McBee to pay Tew $ 145.00 in monthly child support beginning on February 1, 1997, and to pay retroactive child support in the amount of $7,500.00.

McBee did not comply with the 1997 order. On August 27, 2007, the OAG moved to enforce the order against McBee and sought a contempt order and an arrearage judgment. An associate judge of the trial court found

McBee was in contempt of the 1997 order. The associate judge also signed an order, agreed to and signed by the parties, enforcing and modifying the child support obligation, and confirming the arrearage owed. The effect of the order was a cumulative judgment against McBee for $39,231.26.

Seven days later, McBee filed a "Notice of De Novo Hearing Request for Associate Judge's Hearing." In it, McBee challenged the validity of his waiver of the right to contest the order, objected to the awards of child support arrearage and current child support, protested the exclusion of a witness whose testimony, he asserted, would have aided his defense, and requested a hearing on these issues.

The trial court held an evidentiary hearing in which McBee presented evidence that (1) he was incarcerated for several months, and, as a result, was not employed during that period; (2) he had difficulty securing employment for a period after that incarceration; (3) K. and his mother lived with K.'s maternal grandmother for several years until her death; (4) K.'s mother did not provide substantial support to K. during that period; (5) McBee's parents made some contribution toward K.'s support during that period; and (6) after K.'s mother attempted suicide, K. was sent to live with McBee's sister and her family.

After the hearing, the trial court found that McBee owed an arrearage

of $7,500.00 as set forth in the 1997 judgment. In determining that McBee owed an arrearage of $13,133.00 for the period from January 1997 to May 2006, the trial court included

> an offset for those periods of time in which the respondent was incarcerated from April 2002 to September 2002 and reduced for those periods of time in 1998 [through] May 2006 when the child resided with [the] paternal grandmother.

The trial court also held that "[n]o interest is being awarded on those arrearages due to [the mother] on the Theory of Unjust Enrichment since the evidence showed she was not in possession of the child during the periods in question."

Discussion

Jurisdiction

As a threshold matter, the OAG contends that the trial court lacked jurisdiction to sign the second child support arrearage judgment because McBee did not timely file his request for a de novo hearing of the associate judge's order in the referring trial court, as required by section 201.015 of the Family Code. TEX. FAM. CODE ANN. § 201.015(a) notes (Vernon 2009).

Section 201.015 falls within Chapter 201 of the Texas Family Code, which outlines the role and powers of the associate judge in family court. *See generally* TEX. FAM. CODE ANN. §§ 201.001–201.209 (Vernon 2009). The chapter specifies the types of cases that an associate judge may hear and

describes the effect of the associate judge's rulings on those cases. If a timely request for a de novo hearing is not filed, the associate judge's order or judgment generally "becomes the order or judgment of the referring court only on the referring court's signing the proposed order or judgment." TEX. FAM. CODE ANN. § 201.013(b) (Vernon 2009). Under certain circumstances, however, an associate judge has the authority to render and sign orders that automatically constitute orders or judgments of the referring court without ratification. *See* TEX. FAM. CODE ANN. §§ 201.007(a)(14)(A), (c), 201.013(b). These include default orders and agreed orders, like the one at issue here. *See id.*

Even if the associate judge's order constitutes one of the referring court under these provisions, the statute preserves the parties' right to a direct appeal to the referring court under section 201.015. *See* TEX. FAM. CODE ANN. § 201.007(a)(14). Under the version of section 201.015 in effect when this suit was filed, a party could "appeal an associate judge's report by filing notice of appeal not later than the third day after the date the party receives notice of the substance of the associate judge's report." *See* TEX. FAM. CODE ANN. § 201.015(a) notes (Vernon 2009).[1] McBee did not notice

[1] In 2007, the Legislature amended section 201.015(a) to provide a party seven working days within which to appeal. TEX. FAM. CODE ANN. § 201.015(a) notes (Vernon 2009). This amendment took effect on September 1, 2007, and applies

his appeal until the seventh day after he received the report.

The State contends that McBee's belated request for de novo hearing was ineffective and, under *State ex rel. Latty v. Owens*, 907 S.W.2d 484 (Tex. 1995), the trial court's jurisdiction lapsed thirty days after the associate judge signed the October 31, 2007 enforcement order, rendering the February 8, 2008 order void.

Latty does not require the conclusion that the referring court lost jurisdiction before entering the second order. In *Latty*, the referring court signed an initial order adopting the master's recommendation after Owens, one of the parties, filed a request for a de novo hearing, but before holding the required hearing. *Id.* at 485. Eleven days after signing the initial order, the court held a hearing on Owens's appeal, which it suspended to allow supplementation of discovery and later reconvened. *Id.* The State noticed its appeal from the trial court's second order in the case, signed 135 days after the initial order. *Id.*

The Supreme Court dismissed the appeal for lack of jurisdiction, holding that the trial court lost plenary jurisdiction before signing the second enforcement order. The Court explained that

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only to suits filed on or after that date. *Id.* The OAG filed the motion for enforcement giving rise to this appeal after the amendment was signed into law, but four days before it went into effect.

> [w]hen Owens did not appeal from the first order, it became final. . . . Even though Owens timely requested a de novo hearing to contest the court master's recommendations and fully expected such a hearing to be set, he should have petitioned the district court to vacate the first order (which would have had the effect of a motion for new trial), timely appealed, or filed a bill of review.

Id. at 485–86. The OAG's contention that the referring court lacked jurisdiction to sign the February 8, 2008 enforcement order rests on the proposition that section 201.015(a) provides the sole avenue for seeking review of the associate judge's order. We disagree with that proposition. Because the agreed order here is tantamount to an order of the referring court, McBee, alternatively, could seek relief under Texas Rule of Civil Procedure 329b by moving for new trial, which would have the effect of extending the trial court's plenary power beyond the date of the second enforcement order. *See* TEX. R. CIV. P. 329b(g).

The OAG urges us not to view McBee's notice as a motion for new trial under Rule 329b. That position, however, is out of step with the Texas policy of safeguarding access to judicial review. As the Texas Supreme Court has frequently instructed, "a party should not lose the right to appeal because of an 'overly technical' application of the law." *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 717 (Tex. 2003) (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001)); *Verburgt v. Dorner*, 959

S.W.2d 615, 616–17 (Tex. 1997). We therefore do not restrict McBee's right to review based on the title of the document he filed, but rather, we look to the substance of his request for relief. *See Hodge v. Smith*, 856 S.W.2d 212, 214 n.1 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *see also* TEX. R. CIV. P. 71 ("When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated.").

Citing the Texas Supreme Court's decision in *Lane Bank Equipment Co. v. Smith Sales Equipment Inc.*, the OAG contends that McBee's notice does not have the effect of a motion for new trial because it does not expressly request for a substantive change to the associate judge's order. *See* 10 S.W.3d 308, 310, 312–13 (Tex. 2000).[2] We do not read *Lane Bank* so narrowly. In that case, the Supreme Court affirmed the appellate court's holding that a postjudgment motion for sanctions was a motion to modify, correct, or reform the existing judgment within the meaning of Rule 329b(g), even though the issue was one that did not need to be resolved in the final

[2] We reject the OAG's assertion that McBee's failure to request a vacatur of the associate judge's enforcement order prevents his request for review from serving as a motion for new trial. The OAG relies on *State ex rel. Latty v. Owens*, 907 S.W.2d 424 (Tex. 1995), in which the Supreme Court suggested that Owens "should have petitioned the district court to vacate the first order which would have the effect of a motion for new trial)." *Id.* at 486. We do not read this suggestion as nullifying the other possible grounds for new trial set forth in Rule 329b.

judgment. *Id.* at 312.

Here, McBee would not have objected to the arrearage determinations, the exclusion of his witness, and requested a new hearing if he were not seeking a substantive change in the judgment. The lack of a formal prayer for relief does not bar the trial court's exercise of jurisdiction.

A trial court "has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed." TEX. R. CIV. P. 329b; *see L.M. Heathcare, Inc. v. Childs*, 929 S.W.2d 442, 443 (Tex. 1996) (per curiam) ("A party must file a motion for new trial no later than the thirtieth day after the judgment was signed."); *Coinmach, Inc. v. Aspenwood Apt. Corp.*, 98 S.W.3d 377, 380 (Tex. App.—Houston [1st Dist.] 2003, no pet.). McBee filed his notice less than thirty days after the second enforcement order was signed. We hold that the trial court properly treated McBee's notice as a timely filed motion for new trial under Rule 329b(g), and therefore, retained plenary power over the case.

Offset of child support arrearages

Most appealable issues in a family law case, including a trial court's confirmation of child support arrearages, are reviewed under an abuse of discretion standard. *Att'y Gen. v. Stevens*, 84 S.W.3d 720, 722 (Tex. App.—Houston [1st Dist.] 2002, no pet.). On appeal, the OAG challenges the trial

court's application of law. "[A] trial court has no discretion in determining what the law is or applying the law to the facts, even when the law is unsettled." *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135 (Tex. 2000) (citing *Huie v. DeShazo*, 922 S.W.2d 920, 927–28 (Tex. 1996), and *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (internal quotations and footnote omitted)); *see In re Tex. Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 642–43 (Tex. 2009). Thus, we review de novo the trial court's interpretation and application of law. *See id.* When we review a ruling that results from the trial court's having resolved underlying facts, we must defer to the trial court's factual resolutions, and any credibility determinations that may have affected those resolutions, and may not substitute our judgment for the trial court's judgment in those matters. *See Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

In rendering a money judgment on unpaid child support, the trial court may not reduce or modify the amount of an arrearage. *See* TEX. FAM. CODE ANN. § 157.262(a) (Vernon 2002); *see Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991); *George v. Jeppeson*, 238 S.W.3d 463, 472 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Once the arrearages are proven, section 157.263(a) imposes on the trial court an affirmative, ministerial duty to confirm the arrearages and reduce them to judgment. *George*, 238 S.W.3d

at 472; *accord in re J.I.M.*, 238 S.W.3d 504, 509 (Tex. App.—El Paso 2008, pet. filed) (citing *George*); *see In re S.R.O.*, 143 S.W.3d 237, 248 (Tex. App.—Waco 2004, no pet.); *Curtis v. Curtis*, 11 S.W.3d 466, 471 (Tex. App.—Tyler 2000, no pet.). The Family Code further provides that the judgment must include "interest on arrearages." TEX. FAM. CODE ANN. § 157.263(b)(3).

The statutory purpose for these restrictions is that past due child support is properly characterized as an unfulfilled duty to the child rather than a debt to the custodial parent. *Williams*, 821 S.W.2d at 145; *In re J.I.M.*, 281 S.W.3d at 509; *George*, 238 S.W.3d at 472.

Once calculated, however, the amount of arrearage may be subject to an offset or counterclaim as provided by statute. *See* TEX. FAM. CODE ANN. § 157.262(f). Grounds for an offset or counterclaim include a showing that "the obligee voluntarily relinquished to the obligor actual possession and control of a child" for a period beyond any court-ordered periods of possession of and access, and that the obligor actually supported the child. TEX. FAM. CODE ANN. § 157.008(a) and (b). The obligor asserting offset or counterclaim as an affirmative defense must prove entitlement to offset by a preponderance of the evidence. *See* TEX. FAM. CODE ANN. § 157.006(b) (Vernon 2002).

The OAG contends the trial court abused its discretion in reducing the amount of child support arrearage by reducing the amount owed based on factors not authorized by statute. First, the OAG specifically objects to the trial court's reliance on its finding that McBee was incarcerated for a period to offset the amount of arrearage owed. We agree that the statute does not authorize reduction of past due arrearages for this reason.

Second, the OAG contends that the trial court impermissibly reduced the amount of arrearage due for periods during which K. resided with and received primary support from his grandparents and aunt, rather than his mother. Under the Family Code "[a]n obligor may plead as an affirmative defense in whole or in part to a motion for enforcement of child support that the obligee voluntarily relinquished to the obligor actual possession and control of a child." TEX. FAM. CODE ANN. § 157.008(a). To the extent the evidence supports a finding that K.'s mother voluntarily relinquished actual possession and control of K., it does not show that she voluntarily relinquished K. to McBee or to another whom McBee paid support. The Family Code does not allow for an offset of child support because the obligee relinquished control of the child to a third party under circumstances like those here, where McBee did not fulfill his duty to provide financial support for K. during the relevant period. *Cf. In re A.L.G.*, 229 S.W.3d 783,

787 (Tex. App.—San Antonio 2007, no pet.) (upholding right of offset as affirmative defense where obligor proved he directly paid day care expenses for child, with mother's acquiescence). *See* TEX. FAM. CODE ANN. § 157.008.

The OAG also complains that no evidence supports the trial court's finding No. 4 that McBee is entitled to an offset for the periods of time that K. resided with his **paternal** grandmother. We agree that the undisputed evidence shows that K. resided with his **maternal** grandmother during those periods, and that no evidence shows that McBee provided financial support for K. at any time during them. Because McBee did not provide financial support, the fact that K.'s mother did not do so either does not provide any basis for reduction or offset of the arrearages due. The trial court abused its discretion to the extent it relied on the nonstatutory, equitable theory of unjust enrichment to reduce the amount owed. *See Beck v. Walker*, 154 S.W.3d 895, 905–06 (Tex. App.—Dallas 2005, no pet.) (holding that trial court abused its discretion by granting parent's request to offset child support arrearage to recoup travel expenses and attorney's fees awarded by out-of-state court in connection with his defense against custody dispute in that court; trial court was not authorized to consider "equitable offset"); *Stevens*, 84 S.W.3d at 722 (holding that trial court abused its discretion in

crediting as equitable offset Social Security disability payments made to child toward satisfaction of court-ordered child support payments). Accordingly, McBee is not entitled to any offset for those time periods. *See* TEX. FAM. CODE ANN. §§ 157.008(a), 157.262(a).

For these reasons, we hold that the trial court erred to the extent it offset the arrearage owed on nonstatutory grounds. Further, we agree with the OAG that the statute prohibits a trial court from reducing the amount of interest that has accrued on unpaid child support. *See* TEX. FAM. CODE ANN. § 157.263(b)(3); *Herzfeld v. Herzfeld*, 285 S.W.3d 122, 129 (Tex. App.—Dallas 2009, no pet.); *In re M.C.R.*, 55 S.W.3d 104, 108–09 (Tex. App.—San Antonio 2001, no pet.).

Conclusion

We hold that the trial court properly exercised its jurisdiction to consider McBee's request for de novo hearing as a motion for new trial, and thus had jurisdiction to sign the order at issue in this appeal. We further hold that the trial court erred in equitably offsetting the arrearage McBee owed based on (1) McBee's inability to pay child support during the period of his incarceration, and (2) a finding that relatives other than McBee or K.'s mother had possession of K. and provided for K.'s support, as the Family Code limits the bases for an offset to those enumerated by statute. The trial

court further erred in declining to award interest on the arrearages due, as the Family Code mandates such an award. We therefore reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

Jane Bland
Justice

Panel consists of Judges Bland, Sharp, and Taft.[3]

[3] Justice Tim Taft, who retired from the First Court of Appeals on June 1, 2009, continues to sit by assignment for the disposition of this case, which was submitted on April 28, 2009.