**Opinion issued February 10, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-09-00764-CV**

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**ALLEN COBB, Appellant**

**V.**

**CATHIE GORDY, Appellee**

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**On Appeal from the 308th District Court**
**Harris County, Texas**
**Trial Court Case No. 917,087**

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## MEMORANDUM OPINION

Appellant, Allen Cobb, appeals a trial court order that determines his child-support arrearages as a matter of law, orders that appellee, Cathie Gordy, "is entitled to the issuance of child-support liens, levies, and writs of withholding as

remedies for the collection of unpaid child support," and orders a judicial writ of withholdings from Cobb's earnings that is binding on "his present employer and all subsequent employers." Specifically, Cobb contends that (1) the trial court lacked jurisdiction, (2) there is legally and factually insufficient evidence to support the trial court's judgment, and (3) he was denied due process. We affirm.

## BACKGROUND

In 1972, Cobb and Gordy were divorced in the 308th District Court of Harris County. The divorce decree ordered Cobb to pay $50 per month to support their minor child. On April 28, 2009, Gordy filed a "Notice of Application for Judicial Writ of Withholding" in the 308th District Court. In the notice, Gordy alleged $78,164.02 in unpaid child support. The notice was mailed to Cobb by regular first class mail and by certified mail, return receipt requested, and he received it on May 6, 2009.

On July 7, 2009, Cobb filed a "Motion to Stay Issuance and Delivery of Judicial Writ of Withholding and Request for Hearing and to Terminate Wage Withholding." On July 21, 2009, Gordy responded to Cobb's motion to stay, arguing that it was both untimely and unverified. On July 29, 2009, the trial court held a hearing, after which it signed the order complained of in this appeal. Although the order states that "a record of the argument and evidence was made"

at the hearing, Cobb did not request findings of fact and conclusions of law or a reporter's record from the hearing.

## JURISDICTION

In his first issue on appeal, Cobb contends that the trial court lacked jurisdiction because (1) the pleadings are deficient to invoke the trial court's jurisdiction to establish the amount of arrears, and (2) the judgment being enforced is dormant. We address each argument respectively.

*Defective Pleadings*

Cobb argues that Gordy's pleadings are deficient because, under section 157.002 of the Family Code, a motion to enforce child support must include (1) the provision of the child support order allegedly violated, (2) the manner of the alleged noncompliance, (3) the relief requested by the movant, and (4) the signature of the movant or the movant's attorney. *See* TEX. FAM. CODE ANN. § 157.002(a) (Vernon 2008). The motion to enforce should also include the amount of child support owed, the amount paid, and the amount of arrearages. *See* TEX. FAM. CODE ANN. § 157.002(b) (Vernon 2008).

Gordy argues that section 157.002 of the Family Code is not applicable because she did not file a motion to enforce; she filed a request for a judicial writ of withholding under Chapter 158 of the Family Code. We agree.

Chapter 158 of the Family Code contains a procedure whereby an obligee can obtain a judicial writ of withholding from the court of continuing jurisdiction after an

obligor is delinquent in making child support payments in an amount equal to or greater than the total support due for one month, or when income withholding was not ordered at the time child support was ordered. *In re Digges*, 981 S.W.2d 445, 446 (Tex. App.—San Antonio 1998, no pet.); TEX. FAM. CODE ANN. § 158.301(a) (Vernon 2008). The contents required by a notice of application for judicial writ of withholding are set forth in section 158.301 of the Family Code, which provides

> The notice of application for judicial writ of withholding shall be verified and:
>
> > (1) state the amount of monthly support due, including medical support, the amount of arrearages or anticipated arrearages, including accrued interest, and the amount of wages that will be withheld in accordance with a judicial writ of withholding;
> >
> > (2) state that the withholding applies to each current or subsequent employer or period of employment;
> >
> > (3) state that if the obligor does not contest the withholding within 10 days after the date of receipt of the notice, the obligor's employer will be notified to begin the withholding;
> >
> > (4) describe the procedures for contesting the issuance and delivery of a writ of withholding;
> >
> > (5) state that if the obligor contests the withholding, the obligor will be afforded an opportunity for a hearing by the court not later than the 30th day after the date of receipt of the notice or contest;
> >
> > (6) state that the sole ground for successfully contesting the issuance of a writ of withholding is a dispute concerning the identity of the obligor or the existence or amount of the arrearages, including accrued interest;
> >
> > (7) describe the actions that may be taken if the obligor contests the notice of application for judicial writ of withholding, including the procedure for suspending issuance of a writ of withholding; and

> (8) include with the notice a suggested form for the motion to stay issuance and delivery of the judicial writ of withholding that the obligor may file with the clerk of the appropriate court.

TEX. FAM. CODE ANN. § 158.302 (Vernon 2008). Gordy's Notice of Application for Judicial Writ of Withholding complies with these requirements.

*Dormancy*

Cobb also argues that the trial court lacked jurisdiction because the underlying judgments, i.e., child support payments, were dormant. Specifically, Cobb argues that a child support obligation becomes a final judgment when not paid, *see* TEX. FAM. CODE ANN. § 157.261(a), thus, the last child support payment obligation became a final judgment when the minor child turned 18 in 1988. Thus, Cobb argues, the final judgment was dormant under section 34.001 of the Civil Practices and Remedies Code and will not support Gordy's request for a writ of judicial withholding. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a) (Vernon Supp. 2010) (stating if writ of execution not issued within 10 years after rendition of a judgment, judgment is dormant). Until recently, this was a disputed issue in the courts of appeals.

In *In re Keykendall*, 957 S.W.2d 907, 910 (Tex. App.—Texarkana 1997, no pet.) the Texarkana Court of Appeals held that "although labeled as 'final judgments' in the Family Code, the individual monthly arrearages are not final judgments to which the dormancy statute should be applied." Several other courts of appeals have agreed. *See In re E.C.M.*, 225 S.W.3d 11, 13 (Tex. App.—El Paso 2005, no pet.); *In re T.L.K.*, 90 S.W.3d 833, 838—39 (Tex. App.—San Antonio 2002, no pet.); *In re S.C.S.*, 48 S.W.3d 831, 835—36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

However, in *Burnett-Dunham v. Spurgin*, 245 S.W.3d 14, 17—18 (Tex. App.—Dallas 2007, pet. denied), the Dallas court disagreed, holding that the 10-year dormancy statute applied to individual child support payments even if not reduced to a solitary judgment because "[t]here is simply no exception [to section 34.001 of the Civil Practices and Remedies Code] for family law cases[.]"

We need not decide the dormancy issue because the Legislature has already resolved the dispute. In 2009, section 34.01 of the Civil Practices and Remedies Code—the dormancy provision—was amended to provide that "[t]his section does not apply to a judgment for child support under the Family Code." TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(c) (Vernon Supp. 2010). The effective date of this amendment was June 19, 2009, before the trial court's order was signed. A historical note to the amendment provides that it "applies to each judgment for child support under the Family Code, regardless of the date on which that judgment was rendered." Act of May 28, 2009, 81st Leg., R.S., ch. 767, § 50. Thus, we reject Cobb's argument that the notice of application for judicial withholding was based on a dormant judgment.

Accordingly, we overrule issue one.

## SUFFICIENCY OF THE EVIDENCE

In issue two, Cobb contends the evidence is legally and factually insufficient to support the trial court's judgment. Specifically, appellant argues that he is entitled to credits for payments he made toward his child-support obligation. Gordy's response is two-fold: First, she argues that because Cobb did not properly

file a motion to stay issuance of the writ of withholding, the trial court properly determined the arrearages as a matter of law based on her pleadings. Second, she argues that because Cobb did not request findings of fact or a reporter's record, he cannot show that the evidence is insufficient. We agree with both of Gordy's arguments.

*Failure to Properly File Motion to Stay*

Gordy argues that Cobb's motion to stay issuance of writ of withholding was insufficient because it was (1) untimely, and (2) unverified. We agree. Section 158.307 provides as follows:

> (a) The obligor may stay issuance of a judicial writ of withholding by filing a motion to stay with the clerk of the court not later than the 10th day after the notice of application for judicial writ of withholding was received.
>
> (b) The grounds for filing a motion to stay issuance are limited to a dispute concerning the identity of the obligor or the existence or the amount of the arrearages.
>
> (c) The obligor shall verify that statements of fact in the motion to stay issuance of the writ are true and correct.

TEX. FAM. CODE ANN. § 158.307 (Vernon 2008). Here, Cobb's motion was not verified. According to the trial court's order, Cobb received notice of the application for judicial writ of withholding on May 6, 2009—a finding he does not challenge on appeal. However, Cobb did not file a motion to stay issuance of the judicial writ of withholding until July 7, 2009—almost two months later. As such, Cobb's motion to stay was untimely. In her response, Gordy objected to Cobb's motion to stay on both grounds.

Gordy contends that, because Cobb failed to properly file a motion to stay, he cannot now complain about the amount of arrearages determined by the trial court. In *Attorney General v. Mitchell*, 819 S.W.2d 556, 559-60 (Tex. App.—Dallas 1991, no writ), the court held that because the obligor did not properly file his motion to stay issuance of the writ of withholding, the trial court had no jurisdiction to consider his complaints regarding the issuance of the writ. *See also Effner v. Moore*, No. 04-01-00294-CV, 2002 WL 269116, at *1 (Tex. App.—San Antonio, 2002, no pet.) (holding same).

In *Glass v. Williamson*, 127 S.W.3d 114, 117 (Tex. App.—Houston [14th Dist.] 2004, no pet.), the Fourteen Court of Appeals, recognized that, post-*Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000), the failure to properly file a motion to stay does not deprive the trial court of jurisdiction, but "raised the issue of whether [the husband/obligor] was entitled to the relief he sought." Because the wife in *Glass* did not object to the husband/obligor's failure to properly file a motion to stay, the husband was entitled to contest the amount of arrearages in the trial court. *Id.*

Here, Gordy did object to Cobb's defective motion to stay. Thus, the trial court did not abuse its discretion in concluding that Cobb had not properly invoked his right to challenge the arrearages sought by Gordy and in deciding those arrearages as a matter of law based on the information in her notice.

*No findings of fact or conclusions of law or reporter's record*

Cobb also argues that he was not permitted to put on evidence at the hearing regarding whether the amount of arrearages alleged in Gordy's motion was correct.

However, the judgment indicates that "[a] record of the arguments and evidence was made," thereby indicating that the hearing was an evidentiary hearing. In a bench trial, when no findings of fact and conclusions of law are filed, the trial courts judgment implies all necessary findings of fact to support it. *Ryan v. Abdel-Salam,* 39 S.W.3d 332, 335 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *Lopez v. Hansen,* 947 S.W.2d 587, 589 (Tex. App.—Houston [1st Dist] 1997, no writ). When the implied facts are supported by evidence, it is our duty to uphold judgment on any theory of law applicable to the case. *Lopez*, 947 S.W.2d at 589.

Similarly, if no reporter's record is filed due to the fault of the appellant, we may consider and decide only those issues that do not require a reporter's record for a decision. *See* TEX. R. APP. P. 37.3(c). We cannot review the sufficiency of the evidence in the absence of a reporter's record from the trial. *See In re J.C.,* 250 S.W.3d 486, 489 (Tex. App.—Fort Worth 2008, pet. denied).

Because there are no findings of fact and conclusions of law and no reporter's record, we must presume there was sufficient evidence to support the trial court's ruling regarding the amount of arrearages.

We overrule issue two.

**DUE PROCESS**

In issue three, Cobb argues that Chapter 158 of the Family Code violates his right to due process of law. Specifically, Cobb argues that Chapter 158 does not

provide for a new citation, personal service, notice, time for response, or evidence. In *In re Digges*, 981 S.W.2d at 446, the appellant argued that Chapter 158 was unconstitutional because it did not contain a limitations period for obtaining a wage withholding order and because it limits the defenses that can be raised to the requested withholding. The court disagreed, holding that the protections necessary for an enforcement procedure punishable by contempt did not extent to proceedings for wage withholding orders. *Id.*

Chapter 158 does provide for notice to the obligor and a hearing to contest arrearages. Cobb has failed to demonstrate how the procedures set up by Chapter 158 are inadequate to protect his constitutional right to due process. Accordingly, we overrule issue four.

## CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.