Opinion issued October 5, 2021.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00473-CV

JIMMIE S. SELLERS, Appellant

V.

MARY CROWE, Appellee

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Case No. 816,898

MEMORANDUM OPINION

This is a dispute about past-due child support, mainly interest, that has accumulated since Jimmie Sellers and Mary Crowe divorced in March 1970. Sellers appeals a judgment in favor of Crowe that determined child support arrearages as a

matter of law and ordered that Crowe could withhold from Sellers's income and foreclose on liens on his bank accounts to satisfy the arrearages.

Sellers argues that the trial court lacked jurisdiction due to the age of the original support order, that the trial court erred in barring him from presenting defenses and evidence, and that the evidence is insufficient to support the court's arrearages determination. We hold that the trial court erred in concluding that the amount of arrearages was the amount listed in the notice for income withholding without first hearing Sellers's evidence and that there is insufficient evidence to support the trial court's arrearages determination. The trial court also erred in permitting Crowe to foreclose on liens without hearing Sellers's evidence or defenses. We reverse the trial court's judgment and remand for further proceedings.

Background

Sellers and Crowe divorced in March 1970. Their children were five and six years old at the time. Sellers was ordered to pay $120 per month in child support until the children turned eighteen or became emancipated. The children turned eighteen in 1981 and 1982, respectively, and are approximately 57 and 58 years old today.

On November 21, 2018, which was the day before Thanksgiving, Crowe served a Notice of Application for Judicial Writ of Withholding on Sellers by certified mail. The notice, sworn to by Crowe's counsel, stated that Sellers owed

$345,439.75 in child support including interest as of October 26, 2018. Sellers received the notice at an address in Fort Worth. On December 7, 2018, Sellers moved to stay the issuance of the writ. His motion was a form response that had been attached to the notice of income withholding. The form had boxes the recipient could check to state the grounds on which he contested the writ. Sellers indicated on the form that the amount of arrearages was incorrect and that he had fulfilled his child support obligation.

Crowe answered that Sellers's objections were untimely. Her answer states that in October 2018 she issued a notice of child support lien, and, in November 2018, she served a notice of judicial writ of withholding. She requested that she be granted the right to foreclose on her child support liens, that she be granted a writ of withholding from Sellers's social security income, and that the court determine the arrearages pursuant to "Texas Family Code §§ 157.323 and/or 158.309."[1] Finally, she requested attorney's fees. She attached copies of a temporary child support order from January 1970, the divorce decree from April 1970, a certified copy of the Tarrant County support registry record, and a complete payment record of unknown origin.

[1] *See* TEX. FAM. CODE § 157.323 (procedure to foreclose on liens and determine arrearages); *id.* § 158.309 (hearing on motion to stay issuance of judicial writ of withholding).

On January 16, 2019, the court held a hearing on Sellers's motion to stay the issuance of the writ of withholding. Each party was represented by counsel. Counsel for the bank where Sellers held accounts that were subject to Crowe's liens also appeared. The bank's counsel stated that the bank was holding approximately $60,000 pursuant to a notice of lien and levy served by Crowe's counsel. The bank sought direction from the court whether to disburse the funds.

Crowe argued that Sellers filed his motion to stay the issuance of the writ of withholding four days late, and because the filing was late, the arrearages were determined as a matter of law to be the amount listed in Crowe's withholding notice. Crowe also argued that Sellers did not properly plead the affirmative defense of payment.

In response, Sellers's counsel argued that he should be allowed to present evidence of the amount of arrearages. He argued that a court should not issue a default judgment of over $300,000 because Sellers filed his motion to stay a few days late. He argued that doing so would be "an extreme remedy not supported by the case law or the statute." Sellers's counsel pointed out that Sellers and Crowe had divorced more than forty years prior, and the children were in their late 50s. Out of the blue, Sellers received the notice for income withholding during Thanksgiving week with a mere ten days to hire counsel, move to stay the issuance of the writ, and find proof of child support payments made "back to the Nixon Administration." He

noted that Sellers's ability to retain counsel was complicated by the fact that Crowe had placed liens on Sellers's bank accounts. Sellers's counsel conceded that the motion to stay was filed days late, but he argued that the late filing did not deprive the court of the ability to hear evidence regarding the amount of arrearages for purposes of withholding and did not deprive the court of its duty to hold a hearing on the child support liens that Crowe filed. Sellers stated that he had records showing payments had been made and that he had documents showing the children may have been adopted.

The court held that the facts were analogous to *Cobb v. Gordy*[2] and stated, "The motion to stay was filed untimely, and therefore, the relief is going to be denied. I do not believe . . . I have jurisdiction over the case." Crowe's counsel then testified as to his fees and offered into evidence the notice of writ of withholding and the certified receipt showing that Sellers had received it.

The court signed an order on arrearages that stated that the court found "it has jurisdiction of the parties and the subject matter of this case." The order also stated that a "record of the arguments and evidence was made." The court found that Sellers was served via certified mail with the notice of application for judicial writ of withholding on November 21, 2018, and he did not file a verified motion to stay

---

[2] *Cobb v. Gordy*, No. 01-09-00764-CV, 2011 WL 494801 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, no pet.) (mem. op.).

within ten days. Therefore, the court ordered that the amount of child support arrearages was determined as a matter of law to be $345,439.75 as of October 26, 2018, and ordered that Crowe was entitled to that amount plus interest. The court ordered that Sellers pay attorney's fees, conditional appellate attorney's fees, and costs. The court also ordered that Crowe was entitled to issue child support liens and levies as remedies to collect the unpaid support and that she was entitled to foreclose on the liens on Sellers' bank accounts. The court ordered that the funds in the accounts be paid to Crowe and credited against the judgment.

Sellers requested a de novo hearing regarding the determination that he had waived his right to contest the amount of child support arrearages.[3] The parties appeared with counsel at the hearing. Crowe's counsel argued that the associate judge properly found that the arrearages amount was the amount listed in the notice of withholding and that Sellers waived his ability to present any defenses by failing to timely move to stay the issuance of the writ. He cited to *Cobb v. Gordy* to support the conclusion.[4]

Sellers's counsel argued that the court erred in determining the amount of arrearages to be the amount listed in the notice of income withholding. He stated that the amount did not account for payments made in Florida and multiple payments

---

3 TEX. FAM. CODE § 201.015

4 Crowe's counsel also informed the court that his firm represented the obligee in *Cobb v. Gordy*.

made in Harris County. The court stated that Sellers could not present evidence at the de novo hearing and that he had the opportunity to present evidence at the hearing before the associate judge. Sellers's counsel responded that the associate judge did not allow him to present any evidence. Neither Sellers nor Crowe disputed that Sellers was prohibited from putting on evidence before the associate judge, and neither disputed that the associate judge determined the arrearages to be the amount listed in the notice of income withholding without hearing evidence.

The court concluded that Sellers was not denied the opportunity to put on evidence at the hearing before the associate judge and adopted the associate judge's order. The court heard testimony regarding Crowe's attorney's fees for the de novo hearing and ordered that Sellers pay both attorney's fees and costs. The court ordered that the fees and costs could be collected as child support.

Sellers moved for a new trial and his motion was overruled by operation of law. This appeal followed.

Dormancy

Preliminarily, Sellers argues that the trial court lacked jurisdiction to determine arrearages because it had been more than ten years since the children reached the age of majority. The children were in their late 50s when Crowe attempted to recover the arrearages.

An order or writ for income withholding "may be issued until all current child support and child support arrearages, interest, and any applicable fees and costs, including ordered attorney's fees and court costs, have been paid." TEX. FAM. CODE § 158.102. A child support lien is effective until all current support and arrearages, including interest, costs and attorney's fees have been paid. *Id.* § 157.318(a). The dormancy provision of the Civil Practices and Remedies Code does not apply to judgments for child support under the Family Code. *See* TEX. CIV. PRAC. & REM. CODE § 34.001. The trial court had jurisdiction to issue liens and writs of income withholding to satisfy the child support arrearages. *Khaligh v. Khaligh*, No. 01-18-0119-CV, 2020 WL 4006445, at *2 (Tex. App.—Houston [1st Dist.] July 16, 2020, no pet.) (mem. op.) (holding court has jurisdiction to enforce child support through withholding and liens until all arrearages have been paid); *Isaacs v. Isaacs*, 338 S.W.3d 184, 187 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (holding same). We overrule Sellers's issue related to jurisdiction.

Determination of Arrearages

Sellers also contends that the evidence is legally and factually insufficient to support the trial court's judgment. He argues that the trial court erred in prohibiting him from presenting defenses and evidence as to the arrearages amount and that the court erred in determining the arrearages without hearing any evidence. Crowe responds that Sellers did not timely move to stay the issuance of the writ of

withholding, and the trial court properly determined the arrearages as a matter of law. She also argues that Sellers failed to preserve his argument because he did not make an offer of proof as to any evidence the trial court excluded. We hold that there is insufficient evidence to support the trial court's arrearages determination, that the trial court erred in prohibiting Sellers from offering evidence regarding the amount of arrearages, and that the trial court erred in ordering foreclosure of liens without first hearing Sellers's evidence and defenses.

A. Standard of Review

Issues regarding the payment of child support, including a determination of child support arrearages, are reviewed for an abuse of discretion. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The trial court abuses its discretion when it acts arbitrarily or unreasonably, or without any reference to guiding rules and principles. *Id.*

In family law cases, the legal and factual sufficiency of the evidence do not constitute independent grounds for asserting error but are relevant factors in determining whether the trial court abused its discretion. *Reddick v. Reddick*, 450 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2014, no pet.). "To determine whether the trial court abused its discretion because the evidence is legally or factually insufficient to support the trial court's decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion, and

(2) erred in its application of that discretion." *Id.* (citing *Moroch v. Collins*, 174 S.W.3d 849, 547 (Tex. App.—Dallas 2005, pet. denied)). We conduct the applicable sufficiency review when considering the first prong of the test. *Reddick*, 450 S.W.3d at 187. We then determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Id.* A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Id.*

B. Preservation of Error

Preliminarily, Crowe asserts that Sellers failed to preserve his complaint regarding the exclusion of evidence because he failed to make an offer of proof. We disagree.

Texas Rule of Evidence 103 states that a party may preserve complaint on the exclusion of evidence by informing the court of its substance by an offer of proof "unless the substance was apparent from the context." TEX. R. EVID. 103(a)(2). The reporter's record from the hearing demonstrates that Sellers's attorney made numerous efforts to offer evidence. Sellers's attorney repeatedly stated that there was conflicting evidence about the amount of arrearages as reported by Harris County, that there were child support payments in Florida, and that there was evidence that the children may have been adopted in the 1970s. *See R.G.* 362 S.W.3d at 124–25 (similar exclusion of evidence complaint was preserved from context apparent in reporter's record). Sellers's attorney also stated that his client had

evidence of payments made in the 1970s and early 1980s. From the context of the hearing, it was apparent that Sellers intended to show that the calculation in the notice was incorrect, that he had made child support payments, and that perhaps his obligation to pay support changed when his children were adopted. His efforts to offer evidence were fruitless because the trial court determined that it lacked jurisdiction to consider his defenses or hear evidence relating to the amount of arrearages. The substance of Sellers's evidence was apparent from the context of the record. *See* TEX. R. EVID. 103(a)(2). Accordingly, Sellers preserved his complaint for our review.

C. Analysis

In a single hearing, Crowe sought, and the trial court granted, relief under both section 158 of the Texas Family Code, governing income withholding, and section 157, governing liens. We address each in turn.

1. Section 158: Income Withholding

A writ of income withholding may be issued until all child support arrearages have been paid. TEX. FAM. CODE § 158.102. A notice of application of judicial writ of withholding may be filed by an obligee if a delinquency occurs in child support payments equal to or greater than the total support due for one month. *Id.* § 158.301. The notice shall state the amount of arrearages and the amount of wages that are to be withheld in accordance with the writ. *Id.* § 158.302(1). The notice may be

delivered to the obligor by certified mail, return receipt requested, and if so, it is considered received on the date of receipt. *Id.* § 158.306(a)(2); (c).

Sellers concedes that his motion to stay was untimely. He received the notice for withholding by certified mail on Wednesday, November 21, 2018, the day before Thanksgiving. He filed his motion to stay on December 7, 2018. *See* TEX. FAM. CODE § 158.307(a). He argues that the statute's ten-day requirement is unreasonable because it meant that he received a notice 40 years after his divorce that gave him 10 days to hire counsel, move to stay the issuance of the writ, and provide proof of payment for every child support payment he had made several decades ago.

The statutory scheme for enforcing child support through income withholding creates a short time frame for the obligor to stay the issuance of a judicial writ. *See* TEX. FAM. CODE § 158.307(a). An obligor may stay the issuance of a judicial writ of withholding by filing a motion to stay disputing the amount of arrearages with the clerk of court "not later than the 10th day after the date the notice of application for judicial writ of withholding was received." *Id.* § 158.307(a). The filing of a motion to stay in accordance with section 158.307 prohibits the clerk of the court from delivering the judicial writ of withholding to the obligor's employer before a hearing is held. *Id.* § 158.308. Section 158.309 states "that "[if] a motion to stay is filed in the manner provided by Section 158.307, the court shall set a hearing on the motion.

. . .” *Id.* § 158.309(a). The purpose of the hearing is to decide any contest on the issue of arrearages. *See id.* §158.309(b), (c).

The Legislature has chosen a short time frame for an obligor to pause the issuance of a writ of income withholding. With respect to current support or recent child support arrearages, the quick turnaround ensures that children are swiftly financially supported. In instances such as this one, where the arrearages are decades old and the children are approaching retirement age, the statutory scheme has been abused. The ten-day limit allows the obligee to seek a windfall of interest with a daunting timeline for contesting the writ.[5] We must enforce a statute “as written” and “refrain from rewriting text that lawmakers chose.” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009) (citing *Simmons v. Arnim*, 220 S.W. 66, 70 (1920)). Despite our concerns, the statute is clear. Sellers did not move to stay the issuance of the writ within 10 days.

The question becomes whether Sellers’s failure to file the motion divested the trial court of jurisdiction to hear evidence regarding the accuracy of the amount of arrearages listed in the notice of application for writ of withholding. We have held that an obligor’s failure to timely file a motion to stay does not divest the trial court

---

[5] The timeline in this case was especially cruel, given that Crowe served the notice on the day before Thanksgiving. Sellers’s allotted 10 days still occurred during a time when it would be more difficult to obtain proof of payment from agencies closed or short staffed for the holiday. Additionally, prospective counsel may have been less available.

of jurisdiction. *See Glass v. Williamson*, 137 S.W.3d 114, 116–17 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (op. on reh'g). Instead, the issue becomes whether the obligor was entitled to the relief sought, i.e., entitled to assert his defenses to the arrearages. *Id.* At the hearing on Sellers's motion to stay, the trial court stated on the record that it did not have jurisdiction over the case. This was erroneous. The trial court had jurisdiction over the case, but Sellers's untimely filing deprived him of the right to assert his defenses. *See id.* The untimely filing did not affect the trial court's continuing jurisdiction to determine arrearages. *See id.*

The trial court stated that it made its findings after reviewing *Cobb v. Gordy*, but that case is distinguishable. *Cobb v. Gordy*, No. 01-09-00764-CV, 2011 WL 494801 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, no pet.) (mem. op.). In *Cobb*, the trial court held that the obligor's motion to stay was untimely and determined arrearages as a matter of law to be the amount listed in the notice of application for income withholding. *Id.* at *5. On appeal, Cobb argued that the trial court abused its discretion in concluding that he had not properly invoked his right to challenge the arrearages sought by the obligee. *Id.* at *4. Cobb did not provide a reporter's record for the appellate court to review. *Id.* at *5. While we upheld the trial court's ruling that the obligor did not timely file his motion to stay and therefore could not present defenses, we did not decide the issue of the sufficiency of the evidence to support the determination of the amount of arrearages because doing so would have required

a reporter's record. *Cobb*, 2011 WL 494801 at *5 (citing *In re J.C.*, 250 S.W.3d 486, 489 (Tex. App.—Fort Worth 2008, pet. denied)).

In contrast to *Cobb*, Sellers has provided the reporter's record for our review. Recitals in judgments are presumed to be correct, but this presumption is rebuttable. *Alcantar v. Okla. Nat'l Bank*, 47 S.W.3d 815, 823 (Tex. App.—Fort Worth 2001, no pet.). In this case, the reporter's record conflicts with the trial court's order on arrearages. Though the order states that the trial court held a hearing and heard evidence on the amount of arrearages, the reporter's record reveals that the trial court believed it was without jurisdiction in the case. Believing that it did not have jurisdiction, the trial court determined the arrearages "as a matter of law" to be the amount in the notice of income withholding without hearing any evidence. Failure to timely file a motion to stay prohibited Sellers from presenting defenses, but it should not have prevented him from presenting evidence as to whether the specific amount of arrearages listed in Crowe's notice was correct. *Glass*, 137 S.W.3d at 116–17. We hold that the trial court correctly decided that Sellers could not present defenses, but the trial court erred in prohibiting Sellers from presenting evidence regarding the amount of arrearages.

Moreover, it appears that the trial court's procedural approach to the case led the court to believe that the arrearages amount listed in the self-serving Notice of Application for Judicial Writ of Withholding established the amount of arrearages

as a matter of law, despite the absence of evidence supporting the arrearage calculation. *See R.G.*, 362 S.W.3d at 125 n.2. There was no evidence admitted at the hearing to assist in calculating the amount of arrearages. The record reflects that the trial court did not have sufficient evidence upon which to exercise its discretion. *See Reddick*, 450 S.W.3d at 187.[6] We conclude that the evidence was insufficient to support the trial court's arrearages determination.

2. Section 157: Child Support Liens

In addition to erroneously concluding that Sellers had no right to present evidence under section 158, the trial court likewise erred by granting relief under section 157 without hearing evidence of Sellers's defenses.

Counsel for the bank where Sellers's accounts were subject to lien appeared at the hearing. Counsel informed the court that there was approximately $60,000 in Sellers's accounts and that the bank sought the court's instruction whether to disperse the funds to Crowe.

Crowe sought and the trial court granted relief in a single hearing under both section 158, governing income withholding, and section 157, governing liens. The

---

[6] On remand, the parties may wish to provide additional mathematical assistance regarding the determination of child support arrearages dating back forty years. *See In re R.G.*, 362 S.W.3d, 118, 125 n.2 (Tex. App.—San Antonio 2011, pet. denied) ("Given the necessary mathematical calculations, a trial judge in these circumstances would not abuse its discretion in requiring additional detailed evidence and mathematical assistance from the parties apart from the divorce decree and child support payment registry.").

trial court's order permitted Crowe to foreclose on the child support liens she had filed. The reporter's record reflects that the court did not allow Sellers to contest the amount of arrearages listed in the notice of lien. Unlike section 158.307, which places the onus on the obligor to file a motion to stay in order to trigger a hearing on an application for a judicial writ of withholding, it is the court's nondiscretionary duty to set a hearing under section 157.323. *See* TEX. FAM. CODE § 157.323 (noting obligor may dispute the amount of arrearages stated in the lien and providing that those procedures generally applicable to motions for enforcement apply); TEX. FAM. CODE § 157.061 (setting forth procedure for setting hearing); *In re R.G*. 362 S.W.3d 118, 123 n.1 (Tex. App.—San Antonio 2011, pet. denied) (recognizing burden on trial court rather than litigants to set a hearing may be burdensome but acknowledging courts must take statutes as they find them) (citing *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 860 (Tex. 2005)).

Nothing in section 157 prohibited Sellers from presenting his defenses to the liens. Without permitting Sellers to assert defenses or present any evidence regarding the amount of arrearages, the court ordered that the funds in the accounts be disbursed to Crowe to satisfy the judgment. The trial court erred by determining the

amount of arrearages and ordering that Crowe could foreclose on the liens without hearing Sellers's defenses or evidence.[7]

[7] To the extent that Crowe believed that by obtaining an arrearages determination under the relief requested in section 158, the arrearages determination was res judicata with regard to the relief requested under section 157, res judicata does not apply because there was no prior final determination. *See R.G.*, 362 S.W.3d at 124 (citing *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010)). The court granted relief under both sections in a single hearing.

Conclusion

We conclude that the trial court erred (1) by precluding Sellers from presenting evidence about the amount of arrearages listed in the notice of application for income withholding, and (2) by ordering that Crowe could foreclose on child support liens on Sellers's bank accounts without hearing Sellers's defenses or evidence. We further conclude that the trial court abused its discretion in its order because there is insufficient evidence to support the trial court's arrearages determination. In light of these conclusions, we do not need to address Sellers's fourth and fifth issues regarding attorney's fees. *See* TEX. R. APP. P. 47.1.

The trial court's order is vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.