Affirmed and Memorandum Opinion filed February 8, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00865-CV

JOHN W. OVERTON, Appellant

V.

MAE W. OVERTON, Appellee

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 000-818,738

MEMORANDUM OPINION

This is an appeal from the trial court's cumulative judgment for child support arrearages entered in favor of appellee, Mae W. Overton ("Mae"), and against appellant, John W. Overton ("John"). In five issues, John contends that the trial court abused its discretion by (1) denying his verified plea of defect of parties; (2) failing to recognize that it no longer had jurisdiction to confirm the child support arrears; (3) allowing Mae to recover on a dormant judgment; (4) entering a cumulative judgment which included interest; and (5) allowing Mae to enforce an award of attorney's fees through a judicial writ of withholding. We affirm.

I. Factual and Procedural Background

On November 17, 1970, Mae and John, an attorney, were divorced, and Mae was granted custody of their four minor children.[1] The divorce decree ordered John to pay $350 per month in child support to Mae until the youngest child turned eighteen.[2] On September 6, 1977, the trial court entered an order holding John in contempt for failure to pay child support and finding him in arrears in the amount of $7,500 ("1977 order").

In 1985, after Mae assigned her child support rights to the State of Texas, support payments and arrearages were ordered paid to the Office of the Attorney General.[3] In August 2008, upon an application for services from Mae, the Attorney General's office opened a child support case file and was again assigned Mae's support rights. Later that month, the Attorney General's office closed the file due to the children's age.[4]

On May 28, 2009, Mae filed a notice of application for judicial writ of withholding as well as notices of child support liens. John subsequently filed a motion to stay issuance and delivery of the writ, in which he challenged the existence and amount of arrearages. On June 12, 2009, Mae filed her answer and request for affirmative relief in which she requested foreclosure of her child support liens and a determination of child support arrears. On June 29, 2009, John filed his second amended motion to stay in which he alleged that Mae's enforcement action was time-barred. On June 30, 2009, Mae filed a supplemental answer and request for affirmative relief.

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[1] At the time of the divorce, J.W. was eleven years old, S.K. was seven years old, S.N. was five years old, and T.W. was one year old.

[2] T.W. turned eighteen years old on January 30, 1987.

[3] Title IV-D of the Social Security Act requires states to provide services relating to the enforcement of child support obligations for children who receive government assistance payments and for other children whose guardians request the services. *See* 42 U.S.C. § 654(4) (West Supp. 2010). In Texas, the Office of the Attorney General is designated as Texas's Title IV-D agency. *See* Tex. Fam. Code Ann. § 231.001 (West 2008). When the Attorney General provides Title IV-D services, it becomes entitled to an assignment of support rights. *Id.* § 231.104 (West 2008).

[4] At the time the file was closed, J.W. was forty-nine years old, S.K. was forty-four years old, S.N. was forty-three years old, and T.W. was thirty-nine years old.

On July 2, 2009, the trial court held a hearing on John's motion to stay and Mae's request for affirmative relief. At the conclusion of the hearing, the associate judge presiding at the hearing orally rendered judgment (1) denying John's motion to stay and (2) granting Mae's request for affirmative relief and a cumulative child support arrearage judgment to Mae in the amount of $263,215.52, inclusive of interest, plus court costs and attorney's fees. On July 30, 2009, the trial court entered the order on arrears ("2009 order") as well as an order denying John's limitations defenses. John subsequently filed a request for trial de novo and a motion to vacate order or for new trial; the trial court denied both. This timely appeal followed.

II. Standard of Review

A trial court's decision to grant or deny the relief requested in a motion for enforcement is reviewed for an abuse of discretion. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Chenault v. Banks*, 296 S.W.3d 186, 189 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (reviewing an enforcement order under an abuse of discretion standard). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *Worford*, 801 S.W.2d at 109; *Evans v. Evans*, 14 S.W.3d 343, 346 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A trial court does not abuse its discretion as long as some evidence of a substantive and probative character exists to support the trial court's decision. *In re C.A.M.M.*, 243 S.W.3d 211, 214 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). When, as here, the trial court did not file findings of fact and conclusions of law, we imply that the trial court made all findings necessary to support the judgment and will uphold those findings if supported by sufficient evidence. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Chenault*, 296 S.W.3d at 189.

III. Analysis

A. Mae's Standing to Bring Suit

In his first issue, John contends that the trial court abused its discretion by denying his verified plea of defect of parties. Specifically, he argues that Mae lacks standing to bring her claim for enforcement of child support.

The record reflects that Mae first assigned her child support rights to the State of Texas in 1985. In August 2008, upon Mae's application for services, the Attorney General's office opened a child support case file and was again assigned Mae's support rights. At the July 2, 2009 hearing, evidence was presented that the Attorney General had closed the file on August 28, 2008, due to the children's age and had taken no further action.

John first argues that Mae lacks standing to bring this action to enforce payment of child support arrearages because she assigned her support rights to the Attorney General's office in August 2008. However, the undisputed evidence establishes that the Attorney General's office closed the case on August 28, 2008, and the assignment was terminated.

John next asserts that even if the assignment was terminated, he did not receive notice of the termination as required by Texas Family Code section 231.106(a).[5] Thus, he argues, the Attorney General's failure to notify him of the termination prevented him

[5] Section 231.106 provides, in relevant part, as follows:

> (a) On termination of support rights to the Title IV-D agency, the Title IV-D agency shall, after providing notice to the obligee and the obligor, send a notice of termination of assignment to the obligor or other payor, which may direct that all or a portion of the payments be made payable to the agency and to other persons who are entitled to receive the payments.
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> . . . .

Tex. Fam. Code Ann. § 231.106 (West 2008).

from making payments to Mae because he believed that he was still obligated to make payments to the Attorney General's office.

It is true that section 231.106 requires the Attorney General's office to send a notice of termination of assignment to the obligor and obligee upon the termination of support rights to the office. *See* Tex. Fam. Code Ann. § 231.106(a). Notwithstanding this requirement, we find nothing in Chapter 231 suggesting that there is a penalty for failure to send a notice. Further, we find John's argument that he was precluded from making payments to Mae because he was not notified of the termination to be disingenuous. When the trial judge asked John whether it was his position that he had paid the arrearages to the Attorney General's office, he admitted that it was not.

John also argues that Mae is precluded from bringing this action because there is no evidence that the Attorney General's office reassigned, transferred, or released the claim to Mae following termination of the assignment pursuant to Family Code section 231.002(i).[6] However, John has not properly preserved the issue of release for appellate review.[7] *See* Tex. R. App. P. 33.1 (requiring, as prerequisite to presenting issue for appellate review, that record show appellant's presentation of issue before trial court by timely request, objection, or motion, stating grounds with sufficient specificity to make trial court aware of complaint). Having failed to raise the issue of lack of release in the trial court, he has waived this argument on appeal. *See id.* We overrule John's first issue.

[6] Section 231.002(i) provides that "[t]he Title IV-D agency may provide a release or satisfaction of a judgment for all or part of the amount of the arrearages assigned to the Title IV-D agency under section 231.104(a)." *Id.* § 231.002(i) (West Supp. 2009).

[7] In his answer to Mae's request for affirmative relief, John alleged only that Mae no longer owned her claim for child support due to the August 6, 2008 assignment of her support rights to the Attorney General's office. At the July 2, 2009 hearing, John argued only that if the assignment had, in fact, been terminated, he had not received notice of the termination.

B. Trial Court's Jurisdiction to Confirm Child Support Arrearages

In his second issue, John contends that the trial court did not have jurisdiction to determine the child support arrearages. Specifically, he claims that the court abused its discretion because it failed to recognize the time limitations imposed on its jurisdiction by Family Code section 157.005(b).

The version of section 157.005(b) in effect when Mae filed her request for affirmative relief provided, in pertinent part,

. . . .

> (b) The court retains jurisdiction to confirm the total amount of child support arrearages and render judgment for past-due child support if a motion for enforcement requesting a money judgment is filed not later than the 10th anniversary after the date:
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> (1) the child becomes an adult; or
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> (2) on which the child support obligation terminates under the child support order or by operation of law.

Act of May 29, 2005, 79th Leg., R.S., Ch. 916, § 21, 2005 Tex. Gen. Laws 3148, 3155 (amended 2009) (current version at Tex. Fam. Code Ann. § 157.005(b) (West Supp. 2009)). John claims that under this provision, Mae was required to file her pleading seeking confirmation of child support arrearages within ten years of the emancipation of their youngest child, which she did not do. We disagree.

After Mae filed her notice of application for judicial writ of withholding and delivered notices of child support liens to John, John filed his motion to stay issuance and delivery of the writ, in which he challenged the existence and the amount of arrearages. Thereafter, Mae requested affirmative relief under two different enforcement remedies: a determination of arrearages under section 158.309,[8] and a foreclosure of the child support

[8] Section 158.309(c) provides that "[u]pon hearing [a motion to stay], the court shall: (1) render an order for income withholding that includes a determination of the amount of child support arrearages,

liens and judgment for the arrears under section 157.323.[9] Contrary to John's contention, Mae did not request a determination of child support arrears and a judgment under section 157.005(b).[10]

Further, section 158.102 imposes no deadline on the trial court's jurisdiction to issue an order or writ for income withholding under the chapter and authorizes the entry of such an order "until all current 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 Ann. § 158.102 (West 2008); *see also In re A.D.*, 73 S.W.3d 244, 249 (Tex. 2002) (recognizing that administrative wage withholding by Attorney General's office is available regardless of length of time obligor has avoided his court-ordered support duty); *Packard v. Davis*, No. 2-08-022-CV, 2008 WL 4925998, at *2 (Tex. App.—Fort Worth Nov. 13, 2008, no pet.) (mem. op., not designated for publication). Similarly, section 157.318 provides that a child support lien, which secures payment of all child support arrearages owed by the obligor under the underlying child support order, "is effective until all current support and child support arrearages, including interest, any costs and reasonable attorney's fees … have been paid …." Tex. Fam. Code Ann. § 157.318 (a), (c) (West Supp. 2009).

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including medical support and interest; or (2) grant the motion to stay. Tex. Fam. Code Ann. § 158.309(c) (West 2008).

[9] Section 157.323(c)(1) provides that if arrearages are owed by the obligor in an action to foreclose a child support lien, "the court shall … render judgment against the obligor for the amount due, plus costs and reasonable attorney's fees …." Tex. Fam. Code Ann. § 157.323(c)(1) (West 2008).

[10] Our conclusion is further supported by the following statements made by Mae's counsel at the June 2, 2009 hearing:

> Ms. Marvel: We are not seeking a judgment under 157.005(B) because that statute is the ten-year statute. And we recognize that that does not apply here. We are seeking two separate remedies under the Family Code under Chapter 158. Specifically, 158.309 which allows us under judicial writ of withholding when he files a motion to stay, which the obligor has done, asks the Court to confirm the child support arrears and make a determination. And under 157.323, when someone challenges the issuance of a child support lien, the Court can determine the arrears and render judgment.

We conclude that the trial court possessed jurisdiction to sign an enforcement order allowing Mae to collect unpaid child support by means of a child support lien or writ of withholding. We overrule John's second issue.

C. Applicability of Dormancy Statutes

In his third issue, John contends that Mae is barred from recovering past-due child support because her "judgment of May 18, 1977" as well as her "statutory judgments" pursuant to Texas Family Code section 157.261(a) are dormant under Texas Civil Practice and Remedies Code section 34.001. He also argues that Mae failed to revive the judgments under Texas Civil Practice and Remedies Code section 31.006.

Texas Civil Practice and Remedies Code section 34.001(a) provides that "[i]f a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived." Tex. Civ. Prac. Rem. Code Ann. § 34.001(a) (West Supp. 2009). Section 31.006 of the Code provides that "[a] dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant." *Id.* § 31.006 (West 2008).

John argues that Mae's "judgment of May 18, 1977" is more than ten years old and is, thus, dormant under section 34.001. The "judgment" to which John refers is the trial court's 1977 order in which it found John in arrears and held him in contempt for his failure to pay his support obligations. John's argument, however, is without merit. The ten-year dormancy statute comes into play only when child support arrearages are reduced to a judgment confirming arrearages. *In re S.C.S.*, 48 S.W.3d 831, 836 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *see also In re D.T.*, No. 12-05-00420-CV, 2007 WL 4465250, at *2 (Tex. App.—Tyler Dec. 21, 2007, no pet.) (mem. op.); *In re J.M.D.*, No. 14-03-01196, 2006 WL 1148113, at *1 (Tex. App.—Houston [14th Dist.] Mar. 30, 2006, pet. denied) (mem. op., not designated for publication). The ten-year

dormancy period began to run upon the signing of the judgment confirming arrearages, not from the date of the contempt order. *See* Tex. Civ. Prac. & Rem. Code Ann. § 34.001; *In re D.T.*, 2007 WL 4465250, at *2 (finding trial court's order to pay arrearages was not judgment confirming arrearages and, therefore, not barred by section 34.001); *In re J.M.D.*, 2006 WL 1148113, at *1 (concluding divorce decree is not child support judgment and dormancy period under section 34.001 does not run from date of divorce decree).

John also contends that Mae's "statutory judgments" under Family Code section 157.261(a) are dormant. Section 157.261(a) of the Family Code provides that "[a] child support payment not timely made constitutes a final judgment for the amount due and owing, including interest as provided in this chapter." Tex. Fam. Code Ann. § 157.261(a) (West 2008).[11] Thus, John argues, each missed child support payment, the last of which would have presumably occurred in January 1987 when his youngest child turned eighteen years old, became dormant ten years from the date it became due. *See* Tex. Fam. Code Ann. § 157.261(a); Tex. Civ. Prac. & Rem. Code Ann. § 34.001. John's reliance on section 157.261(a) is misplaced. We have previously held that the ten-year dormancy period under section 34.001 does not run from the dates on which individual child support payments are due. *See In re S.C.S.*, 48 S.W.3d at 836; *see also in re J.M.D.*, 2006 WL 1148113, at *1.

Because John's child support arrearages were not reduced to a judgment until July 2009, his dormancy argument fails. *See In re S.C.S.*, 48 S.W.3d at 836. Accordingly, we overrule John's third issue.[12]

[11] It is undisputed that John missed numerous support payments between the date the divorce decree was signed and the date of emancipation of his youngest child on January 30, 1987. The record reflects that his last child support payment was made on March 25, 1983.

[12] Because we find that Texas Civil Practice and Remedies Code section 34.001(a) does not bar Mae's action, we need not address John's argument that subsection (c), which provides that "[section 34.001] does not apply to a judgment for child support under the Family Code," violates article I, section

D. Calculation of Cumulative Child Support Arrearage Judgment

In his fourth issue, John contends that the trial court abused its discretion by granting Mae a cumulative money judgment in the amount of $263,215.52. Specifically, he argues that because the judgment included interest, it impermissibly modified the amount of previously determined arrearages.

In calculating child support arrearages, the trial court's discretion is very limited. *See Chenault*, 296 S.W.3d at 189. Family Code section 157.262(a) states that in rendering a money judgment, a trial court "may not reduce or modify the amount of child support arrearages" except as specifically provided in the Family Code. Tex. Fam. Code Ann. § 157.262(a) (West Supp. 2009); *Chenault*, 296 S.W.3d at 189. The trial court "acts as a mere scrivener in mechanically tallying up the amount of arrearage." *Chenault*, 296 S.W.3d at 189.

At the July 2, 2009 hearing, in support of her request for a cumulative money judgment, Mae presented uncontested evidence that John owed $140,845.33 in missed child support payments to date. This amount included the $7,500 arrearage reflected in the 1977 order and all subsequent missed payments. In addition, Mae presented evidence showing $122,370.19 in accrued interest; this sum reflected the interest that had accrued on the $7,500 arrearage as well as John's subsequent missed payments. At the conclusion of the hearing, the trial court granted a cumulative child support arrearage judgment to Mae in the amount of $263,215.52.

John complains that the trial court impermissibly modified the "final judgment of November 17, 1970" and "the order of May 18, 1977" in calculating the arrearages and interest in the 2009 judgment. However, the 1970 "judgment" to which John refers is not a judgment, but rather the divorce decree. A divorce decree is not a child support

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16 of the Texas Constitution prohibiting retroactive laws. *See* Tex. Fam. Code Ann. § 34.001(c) West Supp. 2009); Tex. Const. art. I, § 16.

judgment. *See S.C.S.*, 48 S.W.3d at 836. Likewise, the 1977 order is the contempt order previously discussed and is not a child support judgment. *See In re D.T.*, 2007 WL 4465250, at *2.

Nevertheless, John's argument is flawed for another reason. The Family Code provides that "[i]f a motion for enforcement of child support requests a money judgment for arrearage, the court shall confirm the amount of arrearages and render one cumulative money judgment" that includes "interest on the arrearages." Tex. Fam. Code Ann. § 157.263(a), (b)(3) (West 2008). Awarding interest on child support arrearage is mandatory, and the trial court has no discretion to not award the full amount of interest due. *See Chenault*, 296 S.W.3d at 193.

In the absence of findings of fact and conclusion of law, we imply that the trial court made all findings necessary to support the judgment and will uphold those findings if supported by sufficient evidence. *See Heine*, 835 S.W.2d at 83; *Chenault*, 296 S.W.3d at 189. Here, based on the uncontested evidence and the terms of the divorce decree, the trial court properly calculated the arrearages and interest John owed and rendered one cumulative money judgment.[13] We overrule John's fourth issue.

[13] John also contends that the judgment in arrears entered on July 30, 2009, was a judgment nunc pro tunc because it "provide[d] a different amount of child support [and] is not a change to correct a clerical error and is void." As support for his contention, John points to Mae's supplemental answer and request for affirmative relief, in which she requested that "[a]ny orders relied upon by Obligor John W. Overton and held valid by this Court should be modified *nunc pro tunc* to accurately reflect the correct arrears and interest."

A trial court may at any time correct a clerical error in the judgment by entering a judgment nunc pro tunc. *See* Tex. Civ. P. 316, 329b(f); *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex.1986). A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered and does not arise from judicial reasoning or determination. *Hernandez v. Lopez*, 288 S.W.3d 180, 184 (Tex. App.—Houston [1st Dist.] 2009, no pet.). By contrast, a judicial error occurs in the rendering, as opposed to the entering, of a judgment. *Escobar*, 711 S.W.2d at 231. It arises from a mistake of law or fact that requires judicial reasoning to correct. *Butler. v. Cont'l Airlines, Inc.*, 31 S.W.3d 642, 647 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). The trial court can only correct the entry of a final written judgment that incorrectly states the judgment actually rendered. *Escobar*, 711 S.W.2d at 231–32. Even if the trial court incorrectly rendered judgment, it cannot alter a written judgment that precisely reflects the incorrect rendition. *Id*. at 232. A judgment rendered to correct a

E. Award of Attorney's Fees

In his fifth issue, John contends that the trial court abused its discretion by allowing Mae to enforce her judgment for attorney's fees though a judicial writ of withholding. Specifically, John argues that Family Code section 157.167(b) does not authorize Mae to collect attorney's fees through income withholding.

Under Family Code section 157.167(a), "[i]f the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages. Fees and costs ordered under this subsection may be enforced by any means available for the enforcement of child support, including contempt." Tex. Fam. Code Ann. § 157.167(a) (West 2008). In its 2009 order, the trial court found that John had failed to pay his court-ordered child support and ordered him to pay arrearages and accrued interest as well as Mae's attorney's fees. Under subsection (a), Mae was entitled to enforce payment of her attorney's fees by any means available for the enforcement of child support, one of which is through an order withholding earnings. *See* Tex. Fam. Code Ann. §§ 157.167(a), 158.0051 (West 2008).[14]

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judicial error after the court's thirty-day plenary period has expired is void. *Hernandez*, 288 S.W.3d at 185.

Notwithstanding the request in Mae's pleading, there is nothing in the record to suggest that the trial court's 2009 order in arrears was a judgment nunc pro tunc. Besides the fact that the words "nunc pro tunc" appear nowhere in the 2009 order, the court was not attempting to correct an error in the 1970 divorce decree or 1977 contempt order—rather, the court was fulfilling its statutory obligation to award interest on John's child support arrearages. *See* Tex. Fam. Code Ann. § 157.263(a), (b)(3); *Chenault*, 296 S.W.3d at 193.

[14] Section 158.0051 provides, in relevant part:

> (a) In addition to an order for income to be withheld for child support, including child support and child support arrearages, the court may render an order that income be withheld from the disposable earnings of the obligor to be applied towards the satisfaction of any ordered attorney's fees and costs resulting from an action to enforce child support under this title.

Tex. Fam. Code Ann. § 158.0051 (West 2008).

John's reliance on section 157.167(b) is misplaced. Subsection (b) applies only when a respondent "has failed to comply with the terms of an order providing for the possession of or access to a child," which is not the case here. *Id.* § 157.167(b).[15] John also cites *Finley v. May*, 154 S.W.3d 196, 199 (Tex. App.—Austin 2004, no pet.), in support of his contention that the trial court improperly assessed attorney's fees as child support. However, *Finley* is distinguishable from the case before us. In *Finley*, the appeals court found that the trial court had erred in assessing the mother's attorney's fees and costs as child support because the case involved modification of the parent-child relationship, not the enforcement of delinquent child support obligations, as is the case here. *See* 154 S.W.3d at 199 (recognizing attorney's fees may be assessed as child support during child support enforcement proceedings).

We conclude that the trial court did not abuse its discretion in allowing Mae to enforce the collection of attorney's fees through a judicial writ of withholding. We overrule John's fifth issue.

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[15] Section 157.167(b) provides as follows:

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> (b) If the court finds that the respondent has failed to comply with the terms of an order providing for the possession of or access to a child, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to any other remedy. If the court finds that the enforcement of the order with which the respondent failed to comply was necessary to ensure the child's physical or emotional health or welfare, the fees and costs ordered under this subsection may be enforced by any means available for the enforcement of child support, including contempt, but not including income withholding.

Id. § 157.167(b).

IV. Conclusion

Having overruled all of John's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Price.[*]

[*] Senior Justice Frank C. Price sitting by assignment.