Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed August 19, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00101-CV

BRIAN DAVES, Appellant

V.

MIRANDA MCKNIGHT, Appellee

On Appeal from the 353rd District Court
Travis County, Texas
Trial Court Cause No. D-1-FM-14-006286

MEMORANDUM OPINION

In this appeal from a judgment in a suit affecting the parent-child relationship, Brian Daves ("Father") challenges the judgment on the grounds that (1) the trial court improperly calculated his net resources by including insurance premiums paid by his employer; (2) the trial court taxed an excessive award of attorney's fees as child support; and (3) there is legally insufficient evidence to support the trial court's finding that he committed a fraud against Miranda McKnight ("Mother"). For the

reasons given below, we sustain Father's first issue and overrule his second and third issues.

BACKGROUND

In the final decree of divorce, the trial court appointed both Mother and Father as joint managing conservators of their two children, with Mother having the exclusive right to determine the children's primary residence. The trial court also ordered Father to pay child support to Mother, to provide the children with health-care coverage, and to reimburse Mother for half of the children's health-care expenses not paid by insurance.

Three years after the divorce, Mother filed a motion to modify the decree, seeking changes to the terms of Father's possession and access, as well as an increase in his child support. Mother also filed a separate motion to enforce, alleging that Father had violated the decree by not reimbursing her with his share of the children's health-care expenses.

During the discovery period, Mother obtained tax documents which appeared to indicate that Father possessed certain retirement assets that had not been disclosed or divided at the time of the divorce. Mother then filed another motion that requested the trial court to find that Father had committed a fraud and to make a just and right division of the undivided retirement assets.

All of these motions were consolidated for a single trial, in which the trial court heard evidence from both Mother and Father. After receiving post-trial briefing, the trial court signed a judgment that increased Father's child support, awarded attorney's fees to Mother that were further taxed as child support, and granted a money judgment to Mother based on a finding that Father had falsely represented and failed to disclose the extent of his retirement assets. Father now

appeals from this judgment (which, after the notice of appeal was filed, was amended by the trial court to correct a clerical error nunc pro tunc).

CHILD SUPPORT

In a post-trial brief, Mother submitted a proposed calculation for Father's increased child support obligation, using the following figures and methodology:

Father's Monthly Gross Wages	$6,742.34
less Federal Income Taxes	(914.52)
less Social Security Taxes	(515.79)
plus Insurance Premiums Paid by Father's Employer	2,266.31
less Costs of Children's Health Insurance Paid by Father	(147.22)
Net Resources	$7,431.12
multiplied by Guidelines for Two Children	0.25
Child Support Obligation	**$1,857.78**

Father objected to this proposed calculation and argued that, under the Texas Family Code, the trial court could not consider the insurance premiums paid by his employer in the determination of his net resources. The trial court overruled Father's objection and signed a judgment that tracked Mother's proposal. Father now challenges that ruling.

To our knowledge, the Texas Supreme Court has not specifically addressed whether the Texas Family Code permits a trial court to consider insurance premiums paid by an employer in the calculation of an obligor's net resources. Neither has the Austin Court of Appeals, from which this appeal was transferred. *See* Tex. R. App. P. 41.3 (requiring the transferee court to decide the appeal in accordance with the precedent of the transferor court). Absent binding precedent, we must resolve Father's challenge by engaging in statutory interpretation.

We review questions of statutory interpretation de novo. *See In re C.J.N.-S.*, 540 S.W.3d 589, 591 (Tex. 2018) (per curiam). When interpreting a statute, we presume that the Legislature's intent is reflected in the words of the statute, and we give those words their fair meaning. *Id.* We analyze statutes "as a cohesive, contextual whole, accepting that lawmaker-authors chose their words carefully, both in what they included and in what they excluded." *Id.* We also presume that the Legislature intended for all of the words in a statute to have meaning and for none of them to be useless. *Id.*

The starting point in our analysis is Section 154.062(b) of the Texas Family Code, which defines an obligor's resources as follows:

> (1) 100 percent of all wage and salary income and other compensation for personal services (including commissions, overtime pay, tips, and bonuses);
>
> (2) interest, dividends, and royalty income;
>
> (3) self-employment income;
>
> (4) net rental income (defined as rent after deducting operating expenses and mortgage payments, but not including noncash items such as depreciation); and
>
> (5) all other income actually being received, including severance pay, retirement benefits, pensions, trust income, annuities, capital gains, social security benefits other than supplemental security income, United States Department of Veterans Affairs disability benefits other than non-service-connected disability pension benefits, as defined by 38 U.S.C. Section 101(17), unemployment benefits, disability and workers' compensation benefits, interest income from notes regardless of the source, gifts and prizes, spousal maintenance, and alimony.

Nowhere in this text is a provision for insurance premiums paid by an employer. That omission is significant because the Legislature has shown in other provisions that it was capable of addressing such resources. For example, in another

subsection of the same statute, the Legislature provided that a trial court must calculate the obligor's net resources by deducting the "expenses for the cost of health insurance . . . for the obligor's child." *See* Tex. Fam. Code § 154.062(d)(5). That provision does not expressly refer to health insurance premiums paid by an employer, but comparable language appears in a separate statute, which provides that the trial court may consider "other benefits furnished by [the obligor's] employer" when deciding whether to deviate from the guidelines. *See* Tex. Fam. Code § 154.123(b)(10). When taken together, the words of these two provisions demonstrate that the Legislature could have defined an obligor's resources by factoring in the health insurance benefits furnished by his employer. But because the Legislature did not provide for such a definition in Section 154.062(b), we must conclude that the omission was intentional and that such premiums are not included in the calculation of the obligor's net resources. *See In re P.C.S.*, 320 S.W.3d 525, 540 (Tex. App.—Dallas 2010, pet. denied) (reaching this same conclusion).

Mother counters that the trial court properly calculated Father's net resources because the insurance premiums constitute "compensation" within the meaning of Section 154.062(b)(1). The only case law that Mother cites in support of this argument is *City of Corpus Christi v. O'Brien*, No. 13-08-00267-CV, 2009 WL 265281 (Tex. App.—Corpus Christi Feb. 5, 2009, pet. denied) (mem. op.). But that case is readily distinguishable because it concerned the meaning of "compensation" under a city charter, not under Section 154.062(b)(1).

We conclude that the trial court erred by calculating Father's net resources by including the amount of insurance premiums paid by his employer. Because the trial court expressly stated in its judgment that its calculation of Father's child support obligation was done in accordance with the guidelines, rather than in deviation therefrom, we further conclude that the trial court's error probably caused the

rendition of an improper judgment, and that the child support portion of the trial court's judgment must be reversed. *See* Tex. R. App. P. 44.1(a)(1).

ATTORNEY'S FEES

For the costs incurred in pursuing her motion to enforce, Mother requested a judgment against Father for $30,000 in attorney's fees. Mother also requested that the trial court characterize these attorney's fees as child support, meaning that the judgment would be enforceable by any means available for the enforcement of child support, including contempt. *See* Tex. Fam. Code § 157.167(a); *Tucker v. Thomas*, 419 S.W.3d 292, 297 (Tex. 2013). Father objected on the sole ground that the attorney's fees should be treated as a debt, rather than as child support. The trial court overruled Father's objection and granted Mother her requested relief.

Father acknowledges on appeal that attorney's fees incurred in enforcement proceedings can be treated as additional child support. However, he contends that the trial court's award was unreasonable because the trial court only found that his arrearage for unpaid medical expenses was $1,575, which is significantly lower than the $30,000 award of attorney's fees. Given the disparity between those two figures, and his history of dutifully paying his child support, Father argues that the award of attorney's fees should be reversed because it is "thoroughly punitive and disproportionate."

We review a trial court's award of attorney's fees for an abuse of discretion. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's decision. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Rather, the test is whether the trial court acted without reference to any guiding rules and principles, or whether its decision was arbitrary or unreasonable. *Id.* at 241–42.

Mother supported her request for attorney's fees with an affidavit from her attorney, wherein her attorney described her experience, her hourly rate, and the work she performed. The attorney further segregated her fees based on Mother's various petitions for modification, enforcement, and fraud.

Father has not challenged any of that evidence. He has not argued, for instance, that the attorney's hourly rate was too high, that the attorney did not perform the work that she claimed, or that there was insufficient evidence of segregation. Instead, his sole argument focuses on the excessiveness of the award of attorney's fees.

Father had an opportunity to show "good cause" for why attorney's fees should not be awarded in this case. *See* Tex. Fam. Code § 157.167(c). But he presented no such grounds to the trial court. The mere fact that the award here was nearly twenty times greater than the arrearage is no reason for setting aside the award, because the determination of reasonableness cannot be made by the application of a mechanical formula. *See Star Houston, Inc. v. Kundak*, 843 S.W.2d 294, 299 (Tex. App.—Houston [14th Dist.] 1992, no writ). Indeed, larger and even more disparate awards have been affirmed before. *E.g.*, *Jetall Cos. v. Plummer*, No. 01-18-01091-CV, 2020 WL 5900577, at *11 (Tex. App.—Houston [1st Dist.] Oct. 6, 2020, no pet.) (mem. op.) (upholding an award of $61,662 in attorney's fees, which was nearly twenty-seven times greater than the damages amount of $2,285).

The amount of the arrearage was just a single factor for the trial court to consider when deciding the appropriate amount of attorney's fees to award. In addition to that factor, the trial court had other evidence to consider, including Father's conduct. *See Barry v. Jackson*, No. 03-1-00549-CV, 2013 WL 6464966, at *2 (Tex. App.—Austin Nov. 26, 2013, no pet.) (mem. op.) ("The trial court was

entitled to consider the entire record, the Jacksons' evidence, the amount in controversy, and Barry's conduct throughout the case.").

Mother produced evidence that she notified Father about unpaid medical expenses on a dozen separate occasions, and the trial court found that Father had failed to reimburse her "for approximately two years . . . despite the fact that he had received the documentation of such medical expenses." Father apparently believed that he was not responsible for these reimbursements because the notifications were untimely. The trial court did not hold Father in contempt, but it did chastise him at the end of the trial for his faulty belief: "If you get a receipt for a medical expense that she paid, you are to pay her your portion within 30 days, period. No ifs, ands, or buts. That is your obligation, and violation of a court order is what brings you into the courthouse again and what causes you to incur additional attorney's fees and what causes her to incur additional attorney's fees."

Mother produced additional evidence that Father violated the decree by failing to provide adequate health insurance coverage for certain periods of time. The trial court remarked that Father was "lucky" that the children did not require health care during the periods in which they lacked coverage, but again, the trial court's criticism of Father was stern: "There's no harm, but there is a foul."

Father has not cited to any authority in his brief showing that the award here was disproportionate, even though that was his burden. *See* Tex. R. App. P. 38.1(i). Considering the record as a whole, and the absence of any authority to the contrary, we cannot say that the trial court abused its discretion by ordering Father to pay $30,000 in attorney's fees as additional child support.

FRAUD

As part of the mediation leading up to the divorce, Father disclosed that he had contributed to the following three retirement accounts: (1) Ascension Health 403(b) Retirement Savings Plan; (2) Ascension Health Employer Contribution Account; and (3) HCA 401(k) Plan. Father produced documents showing that he had liquidated the first two accounts, and he produced another document showing that the third account had a "total" balance of roughly $14,000. The parties mutually understood that Father would liquidate this account as well to pay off his debts. The parties agreed that Father should be awarded all three accounts in the divorce, and the trial court adopted that agreement in the final decree of divorce.

As part of the modification petition that followed the divorce, Mother obtained a tax document showing that Father had received a distribution of roughly $14,000 from one of his retirement accounts. Consistent with the parties' mutual understanding during mediation, the distribution occurred in the same year as the divorce, and the payer of the account was identified as "Transamerica HCA."

A tax document from the very next year after the divorce showed that Father had received a much larger distribution of $27,355, and the payer of that account was identified as "The Northern Trust Company Benefit Payment Services C-2N for HCA Inc." Other documents indicated that this account had not been recently funded: Father made no contributions during the year of the divorce, or during the year after the divorce.

After seeing these tax documents, Mother alleged that Father had falsely represented the extent of his retirement assets, or that he had failed to disclose the existence of a fourth retirement account. She requested that the trial court find that Father had committed fraud and that there be a just and right division of the undivided $27,355.

Father denied the allegations of fraud. He testified that he did not possess an undisclosed fourth retirement account. He claimed that the two distributions came from the same HCA 401(k) account, which had two different managers. However, he did not explain why the document he produced during mediation showed that the account had a "total" balance of roughly $14,000. He merely suggested that this figure represented the maximum amount that he was allowed to withdraw.

The trial court implicitly rejected Father's testimony. In its final judgment, the trial court found "that [Father] committed fraud against [Mother] by intentionally making false representations of the amount of his retirement funds and failing to disclose $27,355 in his retirement funds to her at the time the parties mediated the property division in their divorce." The trial court then awarded Mother a money judgment against Father for the entire balance of $27,355.

Father now contends that this portion of the trial court's judgment must be reversed, and the primary argument in his brief is that Mother failed to produce legally sufficient evidence that he made a false representation of material fact. But a false representation was not required for Mother to recover on a theory of fraud by non-disclosure. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219–20 (Tex. 2019) (stating that fraud by non-disclosure is a subcategory of fraud, and listing the elements of the cause of action). And because the trial court affirmatively found both that Father made a false representation and that he committed fraud by non-disclosure, Father can only set aside Mother's money judgment if he successfully challenges both theories of her recovery. *See England v. Kolbe*, No. 03-15-00409-CV, 2017 WL 1228884, at *4 n.4 (Tex. App.—Austin Mar. 30, 2017, no pet.) (mem. op.) ("An appellant must challenge all independent grounds supporting a complained-of ruling or judgment.").

Unlike his challenge to Mother's theory of fraud by misrepresentation, which spans several pages in his brief, Father dedicates only a single sentence to challenging Mother's alternative theory of fraud by non-disclosure. He writes: "Assuming arguendo that there was an undisclosed account, no evidence shows what portion of the 2016 distribution accrued before the mediated settlement agreement."

This challenge lacks merit. Mother produced tax documents showing that Father made no retirement contributions during the year of the divorce or during the year after the divorce. When viewed in the light most favorable to the trial court's judgment, this evidence supports a reasonable inference that the balance of $27,355 must have accrued before the divorce. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005) (instructing that in a legal sufficiency challenge a reviewing court must consider all evidence and indulge all reasonable inferences in the light most favorable to the judgment). Because that inference fully supports the trial court's judgment that Father committed a fraud by non-disclosure, we need not consider Father's additional argument that there is insufficient evidence of a false representation.

CONCLUSION

We reverse the portion of the trial court's judgment dealing with the issue of Father's child support obligation and remand the case back to the trial court for further consideration of that issue. In all other respects, we affirm the trial court's judgment.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.