



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-14-00158-CV

JOHNNY BAILEY, APPELLANT

V.

BRANDY BAILEY, APPELLEE

**On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2011-555,686; Honorable Les Hatch, Presiding**

February 5, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

This is an appeal from an income withholding order for spousal maintenance that was agreed to by the parties and incorporated into a final decree of divorce. At issue is whether the withholding order violates the Texas Constitution's prohibition against the garnishment of current wages for personal services. Finding the withholding order in question does not violate the Constitution, we affirm that order.

BACKGROUND

After eighteen years of marriage, Appellant, Johnny Bailey, and Appellee, Brandy Bailey, were divorced on February 3, 2012. In the *Final Decree of Divorce* the trial court stated:

[T]he parties have entered into a written agreement contained in this decree by virtue of having approved this decree as to both form and substance. To the extent permitted by law, the parties stipulate the agreement is enforceable as a contract. The Court approves the agreement of the parties as contained in this Final Decree of Divorce.

The decree further provided:

Spousal Maintenance

It is the mutual desire of the parties to provide a continuing measure of support for BRANDY BAILEY, Receiving Party, after divorce. These support payments undertaken by JOHNNY BAILEY, Paying Party, are intended to qualify as contractual alimony as that term is defined in section 71(a) of the Internal Revenue Code of 1986 (“the Code”), as amended, and are intended to be includable in the gross income of Receiving Party under section 71(a) of the Code and deductible by Paying Party under section 215(a) of the Code. All provisions of this article will be interpreted in a manner consistent with that intention.

Terms, Conditions, and Contingencies

Amount—JOHNNY BAILEY will pay to BRANDY BAILEY \$3500.00 per month as alimony. These payments will be payable by cash, cashier’s check, or money order at the last known address provided to JOHNNY BAILEY by BRANDY BAILEY, on or before the 1st day of each month, beginning on January 1, 2012.

Term—The payments will end on December 31, 2018, with the last payment being due on December 31, 2018, providing all payments have been made.

* * *

Withholding

IT IS ORDERED that any employer of JOHNNY BAILEY shall be ordered to withhold from the disposable earnings of JOHNNY BAILEY for spousal maintenance for BRANDY BAILEY.

IT IS FURTHER ORDERED that all amounts withheld from the disposable earnings of JOHNNY BAILEY by the employer and paid in accordance with the order to that employer shall constitute a credit against the spousal maintenance obligation. Payment of the full amount of maintenance ordered paid by this decree through the means of withholding from earnings shall discharge the spousal maintenance obligation. If the amount withheld from earnings and credited against the spousal maintenance obligation is less than 100 percent of the amount ordered to be paid by this decree, the balance due remains an obligation of JOHNNY BAILEY, and it is hereby ORDERED that JOHNNY BAILEY pay the balance due directly to BRANDY BAILEY by cash, cashier's check, or money order at the last known address provided to JOHNNY BAILEY by BRANDY BAILEY.

On this date the Court signed an Order of Income Withholding for Spousal Maintenance. IT IS ORDERED that all payments shall be promptly remitted to BRANDY BAILEY.

* * *

IT IS ORDERED that, on the request of JOHNNY BAILEY or BRANDY BAILEY, the clerk of this Court shall cause a certified copy of the Order of Income Withholding for Spousal Maintenance to be delivered to any employer.

IT IS FURTHER ORDERED that the clerk of this Court shall attach a copy of subchapter E of chapter 8 of the Texas Family Code for the information of any employer. IT IS FURTHER ORDERED that the clerk of this Court shall attach a copy of subchapter E of Chapter 8 of the Texas Family Code for the information of any employer.

On May 13, 2013, an *Order of Income Withholding for Spousal Maintenance* was entered by the court. On November 4, 2013, Bailey filed a petition for enforcement of the spousal maintenance provisions contained in the decree of divorce, alleging that Johnny had failed to pay the full amount of spousal maintenance due. Johnny responded by alleging that while there was a contractual obligation for the payment of alimony, there was no court order compelling him to pay spousal maintenance. Based

upon this distinction, Johnny reasoned that he was not subject to punishment by contempt, nor was he subject to garnishment of his wages.

On February 18, 2014, Bailey dismissed her petition for enforcement and on March 25, 2014, an *Amended Order of Income Withholding* was entered. The amended order provided for the withholding from Johnny's disposable earnings the sum of \$3,500 per month for "*Spousal Maintenance/Contractual Alimony.*" It is from this order that Johnny appeals.

By three issues, Johnny contends the following: (1) the obligation being enforced is not "court-ordered" spousal maintenance, (2) a court-approved obligation for contractual alimony is not subject to income withholding, and (3) the provisions of section 8.101 of the Texas Family Code, as amended effective September 1, 2013, are unconstitutional.

ANALYSIS

The Texas Constitution prohibits the garnishment of current wages for personal service, except for the enforcement of court-ordered child support payments or spousal maintenance.¹ See TEX. CONST. art. XVI, § 28. Because the order in question orders Johnny's employer to withhold from his earning sums sufficient to pay his agreed-upon spousal support obligation, he contends it is not for "court-ordered spousal

¹ The Texas prohibition against garnishment first appeared in the Texas Constitution of 1876 wherein it provided "No current wages for personal service shall ever be subject to garnishment." See TEX. CONST. of 1876, art. XVI, § 28. This provision was changed in 1983 to read "No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments." See Act of May 19, 1983, 68th Leg., H.R.J. Res. No. 1, 1983 Tex. Gen. Laws 6693. Changes were again adopted in 1999 so that the current provision now reads "No current wages for personal service shall ever be subject to garnishment, except for the enforcement of court-ordered (1) child support payments; or (2) spousal maintenance." TEX. CONST. art. XVI, § 28.

maintenance” and, therefore, constitutes an illegal garnishment. Johnny argues that contractual maintenance or alimony, even if incorporated into a decree of the court, cannot be enforced by wage withholding because such a provision creates only a contractual obligation or debt and is not court-ordered spousal maintenance under the provisions of section 8.101 of the Texas Family Code. See TEX. FAM. CODE ANN. § 8.101 (West Supp. 2015).

In pertinent part, section 8.101 of the Texas Family Code provides as follows:

- (a) In a proceeding in which periodic payments of *spousal maintenance* are ordered, modified, or enforced, the court may order that income be withheld from the disposable earnings of the obligor as provided by this Chapter.
- (a-1) The court may order that income be withheld from the disposable earnings of the obligor in a proceeding in which there is an *agreement for periodic payments of spousal maintenance* under the terms of this Chapter voluntarily entered into between the parties and approved by the court.

See TEX. FAM. CODE ANN. § 8.101(a), (a-1) (West Supp. 2015) (emphasis added).

Johnny contends the decisive issue in this case is whether the order in question involves “court-ordered spousal maintenance,” as opposed to simply contractual support or alimony. While the Texas Constitution does not define the term “spousal maintenance,” the Family Code defines “maintenance” to mean “an award in a suit for dissolution of a marriage of periodic payments from the future income of one spouse for the support of the other spouse.” See TEX. FAMILY CODE ANN. § 8.001(1) (West 2006). As such, Johnny’s contractual obligation to Brandy clearly meets this definition. In a decree of divorce, following the dissolution of their marriage relationship, the trial court ordered Johnny to pay Brandy a periodic sum “from the disposable earnings of

JOHNNY BAILEY for spousal maintenance for BRANDY BAILEY.” The language of this court order clearly contemplates a payment from the future income of one spouse (Johnny) for the support of the other spouse (Brandy). The only possible distinction is the contention that an “order” is not an “award” because it was granted by agreement of the parties rather than at the discretion of the trial court pursuant to the provisions of Subchapter B of Chapter 8 of the Texas Family Code. See TEX. FAMILY CODE ANN. §§ 8.051 – 8.061 (West 2006 & West Supp. 2015). There is nothing contained in that subchapter that mandates that spousal maintenance be something ordered at the discretion of the trial court after a contested hearing. When the parties to this proceeding approved the terms and conditions of the *Final Decree of Divorce*, they implicitly represented to the court that spousal maintenance was appropriate under the facts of their case. In order to constitute “spousal maintenance,” there need not be a contested hearing culminating in a discretionary “award” by the trial court. Spousal maintenance can be agreed to by the parties. Accordingly, under the facts of this case, we find the order constitutes “court-ordered spousal maintenance.” Issue one is overruled.

By his second issue, Johnny maintains a *court-approved* obligation for contractual alimony is not subject to income withholding. Relying upon *In re Green*, 221 S.W.3d 645 (Tex. 2007) (an action involving the enforcement of a spousal maintenance agreement by contempt), Johnny contends that because an agreement of the parties pertaining to spousal maintenance, merely incorporated into a decree of divorce, was enforceable by contempt only if it was entered under the authority of Subchapter B of Chapter 8 of the Texas Family Code, then a similarly situated agreement should only be

enforceable by income withholding if it meets the same requirements. *Id.* at 647. Specifically, Johnny contends the Supreme Court held that court-ordered spousal maintenance must meet the eligibility requirements of section 8.051 of the Texas Family Code in order to be enforceable by either contempt or income withholding.

While *Green* is easily distinguishable from the case at hand (*Green* involves enforcement by contempt, whereas this case involves enforcement by wage withholding), Johnny does not begin to address the Legislative changes to section 8.059, pertaining to the enforcement of a maintenance order by contempt. See Act of May 15, 2013, 83rd Leg., R.S., ch. 242, § 3, Tex. Gen. Laws 981. Since *Green* was issued, the Texas Legislature radically changed that section to specifically provide that spousal maintenance agreements “entered into by the parties and approved by the court” are enforceable by contempt. *Id.* Accordingly, we find *Green* to be of little precedential value in the interpretation of the current version of section 8.101.

As stated above, subject to limitations not raised in this appeal, spousal maintenance agreements “voluntarily entered into between the parties and approved by the court” are enforceable by income withholding.² See TEX. FAM. CODE ANN. § 8.101 (a-1) (West Supp. 2015). Accordingly, Johnny’s second issue is overruled.

Finally, by his third issue Johnny does not specifically attack the constitutionality of section 8.101 of the Texas Family Code. Instead, he contends that we need not

² To the extent that Johnny argues that the provisions of section 8.101 only apply to maintenance agreements that would otherwise meet the requirements for eligibility under Subchapter B of Chapter 8 of the Texas Family Code, we find he waived that requirement by originally presenting to the trial court an agreement for spousal maintenance and by failing to contest the first withholding order entered on May 13, 2013. By agreeing to spousal maintenance, Johnny implicitly represented to the court that Brandy was entitled to that maintenance and he is bound by that representation.

address that issue because this court can construe that statute as not addressing the question of whether an agreement of the parties for spousal maintenance must meet the eligibility requirements of Chapter 8 of the Texas Family Code. Johnny presents no argument, analysis, or authority to support his third issue. See *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010) (holding that issues lacking substantive analysis are waived). Because Johnny has failed to provide any argument or analysis regarding the constitutionality of section 8.101, we overrule the third issue.

CONCLUSION

The trial court's amended order is affirmed.

Patrick A. Pirtle
Justice