# NO. 12-11-00162-CV

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

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| ***HOMER NEAL, APPELLANT*** | ***§*** | ***APPEAL FROM THE 321ST*** |
| ***V.*** | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***SHAUNA R. NEAL, APPELLEE*** | ***§*** | ***SMITH COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

Homer Neal appeals the trial court's final decree of divorce. On appeal, Homer contends that the trial court abused its discretion in ordering him to pay child support and retroactive child support. We affirm.

## BACKGROUND

Homer and Shauna R. Neal are the parents of one child, S.N., born April 22, 2005. On November 23, 2010, Shauna filed an original petition for divorce, requesting that she be appointed sole managing conservator, that Homer be ordered to make payments for child support and for retroactive child support, and that Homer be denied access to the child. Homer, an inmate appearing pro se, responded that he did not "mind the child support," and requested that he be awarded one of the vehicles and his clothes.

At the hearing, Homer, appearing pro se and by telephone, stated that he would be in prison until at least 2016. He and Shauna agreed on a division of their two vehicles, and Shauna agreed to box up his clothing and arrange for his relatives to pick up the boxes. Shauna testified that Homer was convicted of an act of domestic violence against her, i.e., aggravated assault with a deadly weapon, that Homer would not be eligible for parole until 2016, and that his projected release date was 2025. She believed it was in the child's best interest that the child not have

access to Homer if he were to be released from prison, and requested that she be appointed sole managing conservator of the child. Shauna also requested that Homer pay child support in an amount to be based on the minimum wage, and retroactive child support since the date of his arrest. According to Shauna, she did not believe that either she or Homer had any debts or retirement. Homer testified that he wanted the "[least] possible" child support because he would be in debt as soon as he left prison.

On April 21, 2011, the trial court entered a final decree of divorce, granting Shauna and Homer a divorce and appointing Shauna as sole managing conservator of the child with the exclusive right to designate the primary residence of the child. The trial court appointed Homer possessory conservator of the child, found that he had a history or pattern of committing family violence, and ordered that he be granted no visitation with or periods of access to the child. Further, the trial court ordered Homer to pay child support in the amount of $227.82 each month and retroactive child support in the amount of $50.00 each month.

Homer filed a motion for new trial, which was denied. He also filed a request for findings of fact and conclusions of law. In its findings of fact, the trial court found that it was in the best interest of the child that Homer be ordered to pay child support based on the current federal minimum wage for a forty hour week, and that it was in the best interest of the child that Homer be ordered to pay retroactive child support, based on the then current federal minimum wage for a forty hour week, back to the date of separation. In its conclusions of law, the trial court concluded that Homer did not rebut the presumption that the amount of child support and retroactive child support should be set on a calculation based on the federal minimum wage for a forty hour week. This appeal followed.

## CHILD SUPPORT

In his first and second issues, Homer argues that the trial court abused its discretion in ordering him to pay child support and retroactive child support.

### Standard of Review

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict. ***In re K.R.P.***, 80 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Findings may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. ***Ortiz v.***

***Jones***, 917 S.W.2d 770, 772 (Tex. 1996). We review the trial court's conclusions of law de novo. ***Material P'ships, Inc. v. Ventura***, 102 S.W.3d 252, 257 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). The standard of review for conclusions of law is whether they are correct. ***Id***. We will uphold conclusions of law on appeal if the judgment can be sustained on any legal theory the evidence supports. ***Id***.

A court's order of child support will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. ***Worford v. Stamper***, 801 S.W.2d 108, 109 (Tex. 1990); ***In re L.R.P.***, 98 S.W.3d 312, 313 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). Under an abuse of discretion standard, the legal and factual sufficiency of the evidence are not independent issues, but are relevant facts in assessing whether the trial court abused its discretion. ***In re Ferguson***, 927 S.W.2d 766, 769 (Tex. App.–Texarkana 1996, no writ). To determine whether the trial court abused its discretion because the evidence is legally or factually insufficient, we engage in a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? ***In re T.D.C.***, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g). The traditional sufficiency review comes into play with regard to the first question. ***Lindsey v. Lindsey***, 965 S.W.2d 589, 592 (Tex. App.—El Paso 1998, no pet.). We then determine whether, based on the elicited evidence, the trial court made a reasonable decision—one that was neither arbitrary nor unreasonable. ***Id***. In the absence of such a clear abuse of discretion, an appellate court should not substitute its judgment for that of the trial court. ***In re Ferguson***, 927 S.W.2d at 769.

**Applicable Law**

The court may order either or both parents to support a child in the manner specified by the order. TEX. FAM. CODE ANN. § 154.001 (Vernon 2008). In other words, each party has a duty to support his or her minor child. ***Villasenor v. Villasenor***, 911 S.W.2d 411, 419 (Tex. App.—San Antonio 1995, no writ). The duty to support a child is not limited to a parent's ability to pay from current earnings, but also extends to his or her financial ability to pay from any and all sources that might be available. ***In re Striegler***, 915 S.W.2d 629, 638 (Tex. App.—Amarillo 1996, writ denied); ***Roosth v. Roosth***, 889 S.W.2d 445, 455 (Tex. App.—Houston [14th Dist.] 1994, writ denied); ***Musick v. Musick***, 590 S.W.2d 582, 586 (Tex. Civ. App.—Tyler 1979, no writ).

In assessing child support, the trial court must calculate net resources for the purposes of determining child support liability. TEX. FAM. CODE ANN. § 154.062(a), (b) (Vernon Supp. 2011); ***Newberry v. Bohn-Newberry***, 146 S.W.3d 233, 236 (Tex. App.–Houston [14th Dist.] 2004, no pet.). In the absence of evidence of the wage and salary income of a party, the court shall presume that the party has wages or salary equal to the federal minimum wage for a forty hour week. TEX. FAM. CODE ANN. § 154.068 (Vernon 2008). A trial court may also order a parent to pay retroactive child support if the parent has not previously been ordered to pay support for the child. TEX. FAM. CODE ANN. § 154.009(a) (Vernon 2008). In ordering retroactive child support, the trial court shall apply the child support guidelines provided by Chapter 154 of the Texas Family Code. TEX. FAM. CODE ANN. § 154.009(b) (Vernon 2008).

**Analysis**

Here, the record is devoid of evidence concerning Homer's past employment, wages, salary, income, or financial resources—evidence that is necessary for the trial court to apply the child support guidelines. *See* ***Newberry***, 146 S.W.3d at 236. Homer contends that the record shows "it was obvious" that his total assets at the time he was incarcerated consisted of two cars and clothing, and that he had no income or assets that could produce income. However, he did not present any evidence that he is without financial resources. *See* ***In re M.M.***, 980 S.W.2d 699, 700 (Tex. App.—San Antonio 1998, no pet.). When the evidence is insufficient to establish an obligor parent's net resources, the trial court must apply a presumption "that the party has wages or salary equal to the federal minimum wage for a 40-hour week." *See* TEX. FAM. CODE ANN. § 154.068; ***Reyes v. Reyes***, 946 S.W.2d 627, 630 (Tex. App.—Waco 1997, no writ). Incarceration alone will not rebut the minimum wage presumption, and there is no legal presumption that an inmate has no assets. *See* ***In re B.R.G.***, 48 S.W.3d 812, 819 (Tex. App.—El Paso 2001, no pet.); ***In re M.M.***, 980 S.W.2d at 700-01.

In the absence of proof to the contrary, the trial court was authorized to presume that Homer earned the minimum wage and that he earned that wage from the time he and Shauna separated. *See* ***In re B.R.G.***, 48 S.W.3d at 819**.** Therefore, because Homer presented no evidence at trial on the value of his net resources and his alleged inability to earn any income while incarcerated, the trial court did not abuse its discretion in ordering him to pay current and retroactive child support in accordance with the federal minimum wage. *See* ***Reyes***, 946 S.W.2d at 630.

Homer also appears to complain that the trial court misstated the law regarding the imposition of current and retroactive child support, contending that the trial court stated that it had "no choice but to set child support on minimum wage." As such, Homer argues, the trial court acted without reference to any guiding rules or principles, and the award of current and retroactive child support is "arbitrary and unreasonable." *See* ***Worford***, 801 S.W.2d at 109. Homer did not complain to the trial court that it misstated the law regarding the imposition of child support. As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion stating the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A). Because Homer never complained to the trial court by a request, objection, or motion regarding this issue, he has waived the issue on appeal. *See* ***id***.

We overrule Homer's first and second issues.

## DISPOSITION

The ***judgment*** of the trial court is ***affirmed***.

**JAMES T. WORTHEN**
Chief Justice

Opinion delivered June 13, 2012.
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)

# COURT OF APPEALS
# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
# JUDGMENT

**JUNE 13, 2012**

**NO. 12-11-00162-CV**

**HOMER NEAL,**
Appellant
V.
**SHAUNA R. NEAL,**
Appellee

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Appeal from the 321st Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 10-3315-D)

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THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **HOMER NEAL**, for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*