IN THE SUPREME COURT OF TEXAS

No. 14-0638

PRESTON A. OCHSNER, PETITIONER,

v.

VICTORIA V. OCHSNER, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUSTICE BOYD, joined by JUSTICE JOHNSON, dissenting.

This is a messy case. Victoria Ochsner contends that her ex-husband, Preston Ochsner, failed to pay more than $55,000 that an agreed child-support order required him to pay to her through the Harris County Child Support Office. Although Preston admits that he did not make those payments, he contends that he complied with the child-support order by paying tuition to their daughter's private schools. The order did not permit Preston to satisfy his child-support obligation by making tuition payments, but he claims that Victoria agreed that he could make those payments instead of making the child-support payments to the Child Support Office as the order required. Victoria denies that they had any such agreement. She contends that although she could not afford to send their daughter to private school, she agreed to send her because Preston agreed to pay the tuition. But she claims she did not agree that he could pay the tuition *instead of* making the child-support payments as the order required. If Victoria is telling the truth, it would seem terribly unjust to allow Preston to avoid his child-support obligations. But if Preston is telling the

truth, it would seem terribly unjust to make him pay the child support in addition to the tuition he has already paid.

The Court's opposing opinions identify two alternative ways the law could deal with these types of situations. The Court's approach, which allows courts hearing a motion to enforce a child-support order to give credit for payments that do not comply with the order, might permit parents to amicably and efficiently revise their court-ordered child-support obligations, but it would undoubtedly also foster more difficult swearing matches like this one. JUSTICE JOHNSON'S approach, which would require courts hearing an enforcement motion to enforce the child-support order's terms as written, might avoid these kinds of messy cases, but it would also be less efficient and could result in unjust outcomes for parents who rely on an agreement they believed was best for their children.

Which alternative we might prefer, however, is irrelevant. The question before us is which alternative the Legislature has chosen. Based on the Texas Family Code's language and this Court's precedent construing that language, I agree with JUSTICE JOHNSON that the Legislature has chosen the second approach. With regard to the statute's language, I reach this conclusion because the Family Code:

- permits motions to enforce *provisions of a child-support order*, TEX. FAM. CODE § 154.001(a), (b), but does not permit motions to enforce a general obligation to support a child in a way the court hearing the enforcement motion may think best;

- neither requires nor permits the court hearing an enforcement motion to exercise "discretion" or to reconsider the child's "best interests," and in fact—in contrast to the provisions that govern the entry and modification of child-support orders—never mentions "discretion" or "best interests" in connection with enforcement proceedings at all, *id.* §§ 157.001–.426;

- requires parents to support their children "*in the manner specified* by the [child-support] order," *id.* § 154.001(a) (emphasis added);

- requires courts that hear child-support enforcement motions to determine arrearages based on the "amount owed *as provided in* the [child-support] order," *id.* § 157.002(b)(1) (emphasis added);

- requires a judgment for unpaid child support to include "interest on the arrearages," *id.* § 157.263(b)(3), and provides that such interest accrues when the obligor fails to timely make the payment to "the obligee or entity *specified in the order*, if payments are not made through a registry," *id.* § 157.266(a) (emphasis added);

- limits reimbursements for any overpayments to amounts based on payments "*previously ordered* by the court," *id.* § 157.008(e) (emphasis added); and

- permits a court or the Title IV-D agency to suspend government-issued licenses of an obligor who is three or more months' behind on payments, based on "the amount of arrearages owed *under the child support order*," *id.* §§ 232.004, .005(a)(3) (emphasis added).

In short, the Code repeatedly and consistently recognizes that a court hearing a child-support enforcement motion must *enforce provisions of the child-support order*, not some alternative obligation that the parties agreed to or the enforcing court may find appropriate. Consistent with these provisions, this Court recently held that:

- a court hearing a motion to enforce a child-support order "may not *adjust arrearage amounts* outside of the statutorily mandated exceptions, offsets, and counterclaims," but "may evaluate evidence only to consider the listed factors and defenses, and nothing more," *Office of Attorney Gen. of Tex. v. Scholer*, 403 S.W.3d 859, 865–66 (Tex. 2013) (emphasis added);

- "affirmative defenses that are not included in the statute, like estoppel, are . . . prohibited because they would require courts [hearing child-support enforcement motions] *to make discretionary determinations*," *id.* at 865 (emphasis added); and

- "except for the very narrow circumstance recognized by law—the obligee's relinquishment of possession and the obligor's provision of support—[the obligor] may not rely on the other parent's actions to extinguish his support duty," *id.* at 867 (footnote omitted).

In light of the statute's language and our precedent construing that language, I join JUSTICE JOHNSON's dissenting opinion and add these additional remarks.

I.
The Family Code

Numerous detailed provisions of the Texas Family Code address the requirements for the entry, modification, and enforcement of a child-support order. These provisions describe the Legislature's chosen method for addressing disputes like the Ochsners', and whether we agree with the Legislature's choice or not, our only role is to apply that method. I conclude that the Family Code's provisions expressly and plainly prohibited the trial court from considering and counting Preston's tuition payments as child-support payments in this case, even if Victoria agreed that he could make those payments instead of the court-ordered child-support payments.

A. Chapter 154: *Entry* of Child-Support Orders

The Family Code authorizes courts to "order either or both parents to support a child *in the manner specified by the order*." TEX. FAM. CODE § 154.001(a) (emphasis added). When a court order specifies "the manner" in which a parent must support a child, the order is binding on that parent like any other court order, and the court "shall cause" that order to be "carried into execution." TEX. R. CIV. P. 308, 308a. Parents may agree on their respective child-support obligations, but their agreements are not controlling because the order protects the child's interests, not the interests of either parent. *See* TEX. FAM. CODE § 154.124(b), (d). Before entering an agreed child-support order, the court must determine whether the parents' agreement "is in the child's best interest," and if it is not, the court must either ask the parents to submit a revised agreement or render its own order that protects the child's best interests. *Id.* § 154.124(d).

Here, the trial court entered a child-support order in accordance with the Ochsners' agreement only after finding that the order was in their daughter's best interests. The order requires Preston to make child-support payments, and as the Court acknowledges, "specifies *how* [Preston]

is to provide financial support" by requiring him to "make payments through a registry." *Ante* at ___ (emphasis added). That order was binding on both Preston and Victoria, and they could not simply agree that one or both of them could ignore that order any more than their agreement could have dictated the order's requirements in the first place. With or without the parents' agreement, the order represented the trial court's findings of what was required to protect their daughter's best interests.

B. Chapter 156: *Modification* of Child-Support Orders

The Code carefully protects a child-support order's substantive provisions, and permits changes only through a proper modification order. If one or both parents decide that a child-support order should be modified, they may file suit to modify the order. TEX. FAM. CODE § 156.002(a). Only the court that has continuing, exclusive jurisdiction over matters involving the child—which is usually the same court that entered the final child-support order—may modify the child-support order. *Id.* §§ 155.001–.003. Here, neither Preston nor Victoria sought to modify the order that required Preston to pay child support through the Harris County Child Support Office. Instead, according to Preston, they simply agreed that he could pay their daughter's private-school tuition instead of paying child support "in the manner specified by the order." *Id.* § 154.001(a). But even if Preston's description of their agreement is true, the Family Code does not permit them to modify the order by agreement. Only the "court with continuing, exclusive jurisdiction" can modify a child-support order. *Id.* § 156.001.

The Court appears to agree that parents cannot modify a child-support order by agreement and that a court hearing an enforcement motion cannot enforce such an agreement, but contends

that "[t]oday's case is not [such a] suit." *Ante* at ___.[1] Instead, according to the Court, this is merely "a child-support enforcement action," *ante* at ___, and the court that heard the enforcement motion merely and permissibly considered Preston's tuition payments "in confirming the amount of arrearages," *ante* at ___. I agree this is indeed a "child support enforcement action," but an action to enforce what? Under the Code, it must be and is an action to enforce the child-support *order*. TEX. FAM. CODE §§ 157.001(a) (permitting motion "to enforce any provision of a temporary or final order rendered in a suit"), 157.001(b) (permitting court hearing enforcement motion to "enforce by contempt any provision of a temporary or final order"). And the order that Victoria asked the court to enforce here did not require or permit Preston to support his child by making private-school tuition payments. By holding that the enforcement court could treat Preston's tuition payments as satisfaction of the child-support order's requirement that he make payments to Victoria through the Child Support Office, the Court necessarily holds that the enforcement court can either enforce a modified version of the child-support order or simply ignore the order's payment requirements. As discussed in the following section, a court hearing a motion to enforce

[1] The Court actually appears to be of two minds as to whether a court that hears an enforcement motion can honor and enforce the parents' agreement to modify a child-support order. Responding to JUSTICE JOHNSON's concern that the Court's construction will promote "gamesmanship" between parents, the Court suggests that a court hearing an enforcement motion can consider the parents' "agreed arrangement" and conclude either that it should not be enforced because it "forced a struggling parent's hand and diminished the support benefiting the child, or otherwise harmed the child's best interest," or conclude that it should be enforced and "decide the opposite." *Ante* at ___. According to the Court, whether a court hearing a motion to enforce a child-support order should enforce the parents' agreement to modify that order presents "fact-bound inquiries, and trial courts are competent to make case-by-case findings." *Ante* at ___. The Court's reasoning thus ultimately concedes that an enforcing court can credit payments that do not comply with a child-support order only by either modifying or ignoring the order it is required to enforce. In any event, the Family Code directly contradicts the Court's suggestion that an enforcing court can choose to enforce or not enforce an agreement to modify a child-support order on a "case-by-case" basis. Only the court that has continuing, exclusive jurisdiction can modify a child-support order, TEX. FAM. CODE § 156.001, and it may do so only in response to a proper motion to modify under section 156.002, only if the statutorily required grounds for modification are met, *id.* §§ 156.101(a), 156.401, and only after determining that "the modification is in the best interest of the child," *id.* § 156.402(a).

a child-support order must measure the obligor's performance against the order's requirements, not against the court's or the parents' view of what the order should have required.

C. Chapter 157: *Enforcement* of Child-Support Orders

An agreed child-support order is a court order and not merely an agreement between the parents. As a result, only the "court of continuing, exclusive jurisdiction" has authority to enforce it. TEX. FAM. CODE § 157.001(d).[2] Even though it reflects the parents' agreement, it is enforceable only as a judgment, and is "not enforceable as a contract." *Id.* § 154.124(c).

A motion for enforcement "must include the amount owed *as provided in the order*," because that amount provides the basis for determining the amount of arrearage. *Id.* § 157.002(b)(1) (emphasis added). The parent obligated to make the child-support payments can assert a variety of affirmative defenses, but the fact that the parents agreed to modify the child-support order—as Preston alleges here—is not one of them. *Id.* § 157.008(a) (permitting defense "that the obligee voluntarily relinquished to the obligor actual possession and control of a child"), (c) (permitting evidence that the obligor was unable to make the payments as a defense to contempt allegation). The parent who files the enforcement motion may attach a copy of a payment record to prove the dates and amounts of any payments, the amount of any accrued interest, the "cumulative arrearage over time," and "the cumulative arrearage as of the final date of the record." *Id.* § 157.162(c). The official payment records are those maintained by the local registry and the

[2] The Court notes that the enforcement motion in this case was "presided over by the same able judge who rendered the divorce decree," *ante* at ___, as if that somehow means the judge had greater discretion when deciding the enforcement motion. Under the Code, however, the judge who rendered the divorce decree is typically the only judge who can hear the enforcement motion. *See* TEX. FAM. CODE § 157.001(d) (noting that the "court of continuing, exclusive jurisdiction" has authority). Chapter 157's requirements governing enforcement motions and orders apply equally to those judges as to any other judge to whom continuing, exclusive jurisdiction may have been transferred.

state disbursement unit. *Id.* § 234.009; *see id.* § 101.018 (defining "Local registry" as the "agency or public entity" that "maintains records of child support payments" and "maintains custody of official child support payment records"). The parent who is obligated to make the payments "may offer evidence controverting the contents of a payment record." *Id.* § 157.162(c-1).

The Court relies on these provisions to conclude that the court hearing the enforcement motion "has *discretion* to consider a range of evidence" to "determine the quantity of the child support obligation that is unmet—a fresh factual finding," *ante* at ___ (emphasis added). Similarly, the Court asserts that "nowhere does the Code indicate that the discretion of the court in a *Chapter 154* proceeding supplants the discretion of the court presiding over a *Chapter 157* proceeding." *Ante* at ___. The problem with the Court's conclusion, however, is that nothing in the Code indicates that the court presiding over a Chapter 157 proceeding has any such "discretion" at all. To the contrary, unlike Chapter 154, Chapter 157 never mentions the word "discretion." As the Court itself explains, "Where statutes are concerned, courts must be attentive to, and give effect to, purposeful statutory distinctions." *Ante* at n.19. Yet the Court pays no attention to, and gives no effect to, the distinction between Chapter 154, which grants courts discretion when entering a child-support order, and Chapter 157, which never mentions the word discretion at all.

Thus, contrary to the Court's majority and concurring opinions, the Code does not grant courts hearing an enforcement motion "discretion to accept proof of . . . direct payments" when those payments do not comply with the child-support order. *See ante* at ___ (GUZMAN, J., concurring). Relying on *In re A.S.G.*, 345 S.W.3d 443, 449 (Tex. App.—San Antonio 2011, no pet.), and *In re R.J.P.*, 179 S.W.3d 181, 184 (Tex. App.—Houston [14th Dist.] 2005, no pet.), JUSTICE GUZMAN contends that the trial court's consideration of such "direct payments" is merely

an evidentiary assessment that we must review under the abuse-of-discretion standard. *Ante* at ___ (GUZMAN, J., concurring). But no one here disputes that Preston made the tuition payments or the amount of such payments. With regard to the tuition payments, the trial court did not engage in "reconciling the evidence and weighing the credibility of the witnesses," *ante* at ___ (GUZMAN, J., concurring), because Victoria did not dispute that Preston made the tuition payments. Instead, Victoria disputed that the tuition payments satisfied the order's requirements. That dispute presents a legal issue, and a trial court abuses its discretion "*as to legal matters* when it acts without reference to guiding rules." *A.S.G.*, 345 S.W.3d at 449 (emphasis added) (citing *In re A.L.G.*, 229 S.W.3d 783, 784–85 (Tex. App.—San Antonio 2007, no pet.)). The "guiding rules" here are the Code's provisions, which permit motions to enforce the provisions of a child-support order.

Under Chapter 157, it is the child-support order, and not the parents' agreement or the court's discretionary view of what the order should have required, that defines the "child-support obligation." The enforcement court, in other words, must determine the "cumulative arrearage" based on "the amount owed *as provided in the order*." TEX. FAM. CODE § 157.002(b)(1) (emphasis added).[3] And although the Code permits evidence "controverting the *contents* of a payment record," *id.* § 157.162(c-1) (emphasis added), it does not permit evidence controverting "the

[3] JUSTICE GUZMAN suggests that the "amount owed as provided in the order" is not "germane to confirmation of an arrearage" and instead only "implicates the penalty of contempt." *Ante* at ___ (GUZMAN, J., concurring). Section 157.002(b)(1), however, applies to all motions for enforcement of child support, regardless of whether the motion requests the penalty of contempt. *Compare* TEX. FAM. CODE § 157.002(b)(1) (requiring all enforcement motions to "include the amount owed as provided in the order"), *with id.* § 157.002(b)(2) (requiring enforcement motions, "if contempt is requested," to "include the portion of the order allegedly violated"). More importantly, if the obligor's failure to "satisf[y] the child-support order's requirements," *ante* at ___ (GUZMAN, J., concurring), is enforceable by contempt, it is also necessarily a failure to pay that gives rise to the arrearages the court must calculate. *See id.* §§ 157.002(b)(1) (requiring enforcement motion to include "the amount owed as provided in the order, the amount paid, and the amount of arrearages"), 157.263(a), (b) (requiring enforcing court to "confirm the amount of arrearages and render one cumulative judgment" that includes "unpaid child support no previously confirmed").

manner specified by the order," *id.* § 154.001(a) (emphasis added).[4] If Preston had made payments to the Child Support Office as ordered but the Office's payment record did not correctly reflect those payments, he could submit evidence "controverting the contents of [the] payment record." *Id.* § 157.162(c-1); *see id.* § 234.0091(b) (allowing for administrative review of "an alleged discrepancy between the child support payment record provided by the state disbursement unit . . . and the payment records maintained by the obligor or obligee," and requiring "documentation of the alleged discrepancy, including a canceled check or other evidence of a payment or disbursement at issue"). But the Family Code does not permit him to controvert the child-support order itself.

Here, the trial court *ordered* Preston to make the payments to a registry, the Harris County Child Support Office. The trial court did not "merely think it appropriate" that Preston make the payments to Victoria through the Child Support Office, *ante* at ___; to the contrary, consistent with Preston's and Victoria's agreement, the court concluded that it was in the child's best interests to require Preston to make the payments in that manner, and it expressly ordered him to do so.

[4] The Court cites section 154.003 and suggests that the "manner of payment" refers only to whether the order requires periodic payments, a lump-sum payment, annuity payments, or the distribution of property. *Ante* at n.20. Similarly, JUSTICE GUZMAN cites section 154.003 and suggests that the Code's reference to "the manner specified by the order" refers only to the "manner and timeliness" and not to the designated recipient. *Ante* at n.23 (GUZMAN, J., concurring). Reading section 154.003 with section 157.266, JUSTICE GUZMAN goes on to assert that the "manner and timeliness of payment may affect the calculation of interest, but do not alter the fact of payment." *Id.* This attempt to separate the "calculation of interest" from the "fact of payment" is illogical, however, because the two are necessarily intertwined: the Code requires an award of interest only on "arrearages." TEX. FAM. CODE § 157.263(b)(3) (requiring that judgment include "interest on the arrearages"). If the "manner specified by the order" governs the calculation of interest, it must also govern the determination of arrearages because interest only accrues on arrearages. If in fact the payments were timely made, no interest is due at all. Section 157.266 only further confirms that the child-support order's requirements as to whom the obligor must pay governs the enforcing court's determination of arrearages by providing that a "child support payment is delinquent for the purpose of accrual of interest" if the obligor fails to timely make the payment to "the obligee or entity *specified in the order*, if payments are not made through the registry." *Id.* § 157.266(a) (emphasis added). Because the Code requires an award of interest when the obligor fails to timely make the payments to the "obligee or entity specified in the order," an enforcing court cannot count a payment that is not made to the "obligee or entity specified in the order" when determining arrearages.

"[A]s provided in the order," TEX. FAM. CODE § 157.002(b)(1), Preston was required to make child-support payments to Victoria through the Harris County Child Support Office, and the Code provides that the court hearing the enforcement motion must calculate the amount owed based on those payments. Thus, while the "structure of the enforcement statute" may indeed confirm "the view that a trial court may consider direct payments that discharge the obligee's own obligation to provide the funds," *ante* at ___, it confirms that view only if those payments were made "as provided in the order," TEX. FAM. CODE § 157.002(b)(1). Otherwise, the payments that discharge the obligee's obligation do not discharge the obligor's obligation under the child-support order that is being enforced. The Court hearing the enforcement motion cannot consider payments that the obligor makes in a manner not "provided by the order" unless it either modifies or ignores the order, and the Code permits it to do neither.

The Court's construction to the contrary is unconvincing, primarily because the court that "issued the child support order in the first instance" did much more than simply "determine[] the total dollar value of the child support obligation." *Ante* at ___. Consistent with its duties under the Family Code, that court also found that Preston's agreement to support his daughter in a specific manner was in her best interests, and it ordered Preston to support her in that manner. *See* TEX. FAM. CODE §§ 154.001, .124(a)–(b). To "determine the *quantity* of the child support obligation that the obligor has failed to meet" (and thus "confirm the amount of arrearages"), *ante* at ___, the court hearing the enforcement motion could only consider the support Preston provided "in the manner specified" by the original order. And the court could "confirm the amount of arrearages" based only on "the amount owed as provided in the order." TEX. FAM. CODE § 157.002(b)(1). The

Code permits the enforcement court to "confirm the amount" by which Preston "failed to meet" his obligation, but does not permit it to modify or alter the obligation itself.

I am also unconvinced because the very same section of the Code provides, "In rendering a money judgment under this section, the court may not *reduce or modify* the amount of child support arrearages . . . ." *Id.* § 157.263(b-1) (emphasis added). And although the Code expressly permits the court to "allow a counterclaim or offset as provided by this title," *id.*, as the Court agrees, none of the counterclaims and offsets that the Code provides are applicable here. [5]

Ultimately, there is nothing in the Family Code that supports the Court's conclusion that the Code permits the court hearing the enforcement motion to enforce or reject the parents' agreement modifying the child-support order, or to consider payments not made "as provided by" the order in the absence of such an agreement, *even if the modification or the payments were in the child's best interests*. As mentioned, Chapter 154 of the Family Code requires the trial court that enters a child-support order to consider the child's "best interests." TEX. FAM. CODE § 154.124(b), (d). Similarly, Chapter 156, which governs suits to modify a child-support order, requires the court to consider whether "the modification is in the best interest of the child." *Id.* § 156.402(a). And Chapter 153, governing conservatorship, possession, and access, also states, "The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *Id.* § 153.002. But Chapter 157, which governs motions to enforce a child-support order, neither requires nor permits the court to consider the child's best interest. In fact, Chapter 157 never once uses the phrase "best interests"

[5] An obligor "who has provided actual support to the child during a time subject to an affirmative defense . . . may request reimbursement for that support," but any such reimbursement is "limited to the amount of periodic payments *previously ordered by the court*." *Id.* § 157.008(d)–(e) (emphasis added).

at all.[6] Instead, it requires the court to confirm the amount of arrearages based on the amount owed "as provided" in the child-support order, and enter a judgment based on that amount.

This does not mean that the Code ignores the child's best interests when a parent moves to enforce a child-support order. To the contrary, it protects the child's interests by requiring a court that enters or modifies a child-support order to weigh the best-interests evidence, by prohibiting the parents or any other court from altering the order except through the modification process, and by requiring an enforcement court to determine the arrearage based solely on "the amount owed as provided in the order," *id.* § 157.002(b)(1), and the payments made "in the manner specified by the order," *id.* § 154.001. The Legislature certainly could have authorized the enforcement court to retroactively approve the parents' agreement modifying the order or credit payments that failed to comply with the order when doing so is in the child's best interests. But it did not, and we overstep the limits of our authority when we judicially grant authority the Legislature has not granted.

II.
Precedents

Finally, I address the other Texas court decisions addressing this issue. As the Court notes, a few Texas courts of appeals have held that a trial court hearing an enforcement motion can count payments the obligor made directly to the obligee or to a third party even though the order required payments to the court's registry or clerk. The Court only briefly describes the facts and holding in

[6] Again, as the Court itself asserts, "Where statutes are concerned, courts must be attentive to, and give effect to, purposeful statutory distinctions." *Ante* at ___. Yet the Court ignores the fact that Chapter 157, unlike Chapters 153, 154, and 156, never refers to the child's "best interests."

one of those cases, however, and never mentions the basis for that holding. What the Court does not explain is that these cases did not consider any of the Family Code's provisions at all, and instead relied solely on each other and on a "waiver" defense that we have since rejected.[7] These court of appeals decisions demonstrate how easily one incorrect decision can result in a string of incorrect decisions when this Court allows the first one to go uncorrected.

Although we have not expressly disapproved of these cases, we expressly rejected their reasoning in *Scholer*. Properly relying on the Family Code's provisions, we held in *Scholer* that "affirmative defenses that are not included in the statute, like estoppel, are . . . prohibited because they would require courts [hearing child-support enforcement motions] to make *discretionary determinations*." *Id.* at 865 (emphasis added). We explained that the Code "limits obligors to a single affirmative defense [against a child-support enforcement motion], and a court *may not*

[7] This line of cases appears to begin with *Niles v. Rothwell*, 793 S.W.2d 77 (Tex. App.—Eastland 1990, no writ), in which the Eastland Court held that a court hearing an enforcement motion could count payments made directly to the obligee instead of to the court's registry as the child-support order required. *Id.* at 79. The *Niles* court never cited the Family Code to support its holding; instead, it simply reasoned that the obligee had waived her right to enforce the order by accepting the payments and that it would "be unfair" to hold otherwise. *Id.* Without considering the Code's provisions at all, the court simply concluded that the enforcement court "had the power to do what is in the best interest of the child and can do what is right, fair, and equitable." *Id.*

A few years later, the Waco Court again ignored the statute's language and relied only on *Niles* to hold that an enforcement court "was not limited to the registry record in determining how much child support [the obligor] had actually paid." *Buzbee v. Buzbee*, 870 S.W.2d 335, 339 (Tex. App.—Waco 1994, no writ) (citing *Niles*, 793 S.W.2d at 79). In 2000, again ignoring the statute's language and relying only on *Niles*, the Dallas Court held that the obligee's "acceptance of payments . . . waived her right to have these payments made through the Dallas County Child Support Office." *Higgins v. Higgins*, No. 05-98-02014-CV, 2000 WL 1264636, at *4 (Tex. App.—Dallas Sept. 7, 2000, no pet.) (not designated for publication) (citing *Niles*, 793 S.W.2d at 79). Then, in 2014, the Eastland Court held that the trial court "may consider evidence of direct payments from the obligor to the obligee even when the divorce decree provides for the obligor to make payments through the court's registry." *In re C.S.*, No. 11-12-00294-CV, 2014 WL 972310, at *3 (Tex. App.—Eastland Mar. 6, 2014, no pet.) (mem. op.). Again, as support for this holding, the court cited not to the Family Code but solely to *Buzbee* and *Niles*. *Id.* (citing *Buzbee*, 870 S.W.2d at 339–40, and *Niles*, 793 S.W.2d at 79). And most recently, the Dallas Court again ignored the statute and relied solely on *C.S.* to hold that a "trial court may consider evidence of direct payments from the obligor to the obligee even when the divorce decree provides for the obligor to make payments through the court's registry." *In re J.C.T*, No. 05-12-01290-CV, 2014 WL 3778909, at *4 (Tex. App.—Dallas 2014, pet. denied) (mem. op.) (citing *C.S.*, 2014 WL 972310, at *4).

adjust arrearage amounts outside of the statutorily mandated exceptions, offsets, and counterclaims," but instead "may evaluate evidence only to consider the listed factors and defenses, and nothing more." *Id.* at 865–66 (emphasis added). Further, we explained that a "parent's duty of support" is an obligation to benefit the child and not "a debt owed to the other parent," and thus "estoppel would be inappropriate." *Id.* at 866. We ultimately concluded, "But except for the very narrow circumstance recognized by law—the obligee's relinquishment of possession and the obligor's provision of support—[the obligor] may not rely on the other parent's actions to extinguish his support duty." *Id.* at 867 (footnote omitted).

The Court attempts to limit our holding in *Scholer* by asserting that our "concern" in that case was that "private parental agreements, executed or otherwise, to *reduce* child support obligations will result in children being harmed." *Ante* at ___ (emphasis added). The Court thus announces a new rule permitting enforcement courts to consider payments not made "in the manner specified by" or "as provided in" a child-support order as long as the obligor relies on those payments to prove that the noncompliant payments met or exceeded the total child-support obligation but not to reduce or modify the total obligation. *Ante* at ___. While this new rule may promote the Court's view of justice on a case-by-case basis, it will also effectively discourage obligors from ever doing more to support their children than a child-support order requires them to do. Under this rule, all obligors who have financially supported their children in any manner that the child-support order does not require can now claim a credit for child-support payments up to the amount of the unrequired support, and thus ensure that they never have to pay a penny more than the total amount the child-support order required. Maybe that is a good rule, or maybe it is a

bad rule, but in either case it is not a rule that the Family Code's language or our decision in *Scholer* supports.

III.
Conclusion

If Preston and Victoria agreed that Preston would pay their daughter's private-school tuition instead of making child-support payments as their agreed court order required, the court of appeals' judgment would seem to impose an unfair result on Preston. On the other hand, if Preston and Victoria did not reach such an agreement, the Court's judgment would seem to impose an unfair result on Victoria. But our view of fairness cannot dictate our decision here. Because the child-support order required Preston to make payments to Victoria through the Child Support Office, the court hearing the enforcement motion could not count his tuition payments towards his child-support obligation without either ignoring the order's requirements or enforcing an agreed modification of the order. The Texas Family Code expressly and plainly prohibits parents from modifying the child-support order by agreement and prohibits the court hearing the enforcement motion from modifying it by court order. Because I believe the Court errs by reversing the court of appeals' judgment, I respectfully dissent.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: June 24, 2016