Opinion issued June 2, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00224-CV

TODD DAVID ROGERS, Appellant

V.

GINA MARIE ROGERS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Case No. 12-DCV-199022

MEMORANDUM OPINION

Todd David Rogers appeals the trial court's final divorce decree, which dissolves his marriage to Gina Marie Rogers, governs issues related to conservatorship, visitation, and support of their two minor children, and divides their marital estate. Todd raises two issues on appeal. Todd contends that the trial

court abused its discretion by giving Gina the right to make decisions regarding the children's education, and he challenges a provision in the decree, affecting Gina's obligation to pay child support.[1]

We affirm.

Background

On June 25, 2012, Gina filed suit, seeking a divorce from Todd. Gina's petition stated that the couple had two children: five-year-old V.R. and three-year-old A.R. Todd filed a counter-petition for divorce. Both petitions requested that Gina and Todd be appointed as the children's joint managing conservators. Gina and Todd each requested that he or she be appointed the conservator with the right to designate the primary residence of the children.

The trial court signed temporary orders, naming Gina and Todd temporary joint managing conservators of their two children. In a temporary order signed March 26, 2013, Todd was given the right to designate the primary residence of the children within Fort Bend County, Texas.

The case went to trial before a jury in August 2014. The jury was asked to determine which parent should have the exclusive right to designate the primary residence of the children. The jury answered that Todd should have that right.

[1] Gina has not filed a responsive brief.

The remaining issues in the case, relating to child support, possession and access to the children, and division of the marital estate were argued and submitted to the trial court in September and October 2014. The court signed a document entitled "Court's Ruling" on January 13, 2015, in which the trial court divided the couple's property, set the amount of child support Gina would pay Todd, and determined issues relating to possession and access of the children. The document also stated that the trial court "granted judgment against Todd David Rogers in the amount of $25,000.00." It stated that "[s]uch amount [$25,000.00] shall be paid on or before February 1, 2015, or is susceptible to offset against the child support of Gina Marie Rogers until paid in full."

The trial court also signed an "Order of January 28, 2015 on Motion for Clarification," finding that its "ruling signed on January 13, 2015 should be clarified and/or modified, corrected or reformed[.]" Included in the order was a clarification of the $25,000.00 judgment awarded to Gina against Todd in the January 13, 2015 ruling. The January 28, 2015 order included the following clarification of its earlier ruling:

> $25,000.00 to be paid by Todd[] to Gina[] on or before February 9, 2015. If Gina[] has not yet received the $25,000.00 from Todd[] by February 9, 2015, then her child support payments are abated beginning March 1, 2015[,] and each month thereafter until such child support payments would equal the totality of the amount.

The trial court signed the final divorce decree on September 14, 2015. In the decree, Todd and Gina were appointed joint managing conservators of their two minor children. Pertinent to this appeal, the decree also contains the following provisions:

> ***Conservatorship***
>
> IT IS ORDERED that Todd[], as a parent joint managing conservator, shall have the following rights and duty:
>
> > 1. the exclusive right to designate the primary residence of the children within Fort Bend and contiguous counties as per the jury finding;
>
> . . . .
>
> > 4. the exclusive right to receive and give receipt for periodic payments for the support of the children and to hold or disburse these funds for the benefit of the children;
>
> . . . .
>
> > 7. the independent right to make decisions concerning the children's education;
>
> . . . .
>
> IT IS ORDERED that Gina[], as a parent joint managing conservator, shall have the following rights and duty:
>
> . . . .
>
> > 5. the independent right to make decisions concerning the children's education;
>
> . . . .

Child Support

IT IS ORDERED that Gina[] is obligated to pay and shall pay to Todd[] child support of one thousand two hundred eighty-five dollars and fifty-three cents ($1,285.53) per month, with the first payment being due and payable on October 1, 2015[,] and a like payment being due and payable on the 1st day of each month thereafter . . . .

. . . .

Abatement of Child Support

In the Court's order of January 28, 2015 on the Motion for Clarification, the Court granted a judgment award in the amount of $25,000.00 to Gina[] and against Todd[], and ordered that said judgment amount is to be paid by Todd[]. The court stated that if Gina[] has not received the judgment amount of $25,000.00 from Todd[]by a date certain, then her child support payments shall be abated each month thereafter until such child support payments equal the totality of the judgment amount awarded.

The court therefore orders that Todd[] shall pay the judgment amount of $25,000.00 to Gina[] on or before September 15, 2015. The Court further orders that should Todd[] fail to provide the judgment amount of $25,000.00 as ordered in the property division of the parties to Gina[] by September 15, 2015, then Gina['s] child support obligation shall be abated beginning October 1, 2015[,] and shall remain abated each month thereafter until the accumulation of child support payment equals $25,000.00. After the child support payment amounts due equal $25,000.00 and a like payment being due and payable on the 1st day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified above herein.

. . . .

Judgment

In satisfaction of Gina['s] claims for fraud on the community, it is further ordered and decreed that [Gina] is awarded judgment in the

> amount of twenty-five thousand dollars ($25,000) against [Todd] to be paid by Todd[] to Gina[] on or before September 15, 2015. If Gina[] has not received the $25,000 from Todd[] by September 15, 2015, then her child support payments are abated beginning October 1, 2015[,] and each month thereafter until such child support payments would equal the totality of the amount.

Todd appeals the final divorce decree, raising two issues. Todd first contends that the provision in the decree giving both parents the right to make educational decisions for the children conflicts with his right, as found by the jury, to designate the children's primary residence. Todd also contends that the provision in the decree, abating Gina's child support payments in the event that Todd does not pay her the $25,000.00 awarded to her "[i]n satisfaction of [her] claims for fraud on the community," violates "provisions of the Texas Family Code and [is] contrary to guiding principles of law."

No Reporter's Record

"The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record." TEX. R. APP. P. 34.1. Although notice was sent by this Court, Todd—who is not entitled to proceed without payment of costs—failed to pay for the reporter's record, and it was never filed. *See* TEX. R. APP. P. 37.3(c) (providing that appellate court "may—after first giving the appellant notice and a reasonable opportunity to cure—consider and decide those issues or points that do not require a reporter's record for a decision").

"Generally, the appellant bears the burden to present a sufficient record to show error requiring reversal." *Curry v. Tex. Dep't of Pub. Safety*, 472 S.W.3d 346, 349 (Tex. App.—Houston [1st Dist.] 2015, no pet.). When no reporter's record is filed, we indulge every presumption in favor of the trial court's findings. *Id.* at 350 (citing *Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 972 S.W.2d 26, 31 (Tex. 1998)). In addition, "without a complete record brought forward by the appellant, the court will conclude that the appellant has waived the points of error dependent on the state of the evidence." *Id.* (citing *Favaloro v. Comm'n for Lawyer Discipline*, 994 S.W.2d 815, 820 (Tex. App.—Dallas 1999, pet. struck)).

Here, Todd avers in his brief that "[t]he appeal is being prosecuted without the benefit of the Reporter's Record because . . . the error of the Trial Court can be established based upon the Clerks record alone." We are mindful that we "must hand down a written opinion that . . . addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. Todd correctly implies that we may consider and decide those issues or points that do not require a reporter's record for a decision. *See* TEX. R. APP. P. 37.3(c). The resolution of some issues necessarily require a reporter's record while the resolution of other issues do not. *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 878 S.W.2d 598, 599–600 (Tex. 1994). "[The requirement of a reporter's record] applies to issues which

require reference to the evidence and not to matters which are strictly questions of law." *Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex. 1983). For this reason, we may still consider issues involving questions of law even in the absence of a reporter's record. *See Office of Pub. Util. Counsel*, 878 S.W.2d at 599 (recognizing that courts may address issues involving legal error without a reporter's record). Thus, to the extent that Todd's issues do not require reference to the evidence, and turn on question of law or purely legal error, we may consider them.

Right to Make Educational Decisions

Todd frames his first issue as follows: "The trial court erred in its allocation of rights and duties as a matter of law by giving both parents the right to make educational decisions for the children." Todd asserts that, by giving Gina the right to make independent educational decisions for the children, the trial court contravened his statutory right to have the jury determine that he should be the conservator who designates the children's primary residence.

A. Applicable Legal Principles

The Family Code presumes the appointment of the parents as joint managing conservators to be in the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.131(b) (Vernon 2014). When a court appoints both parents as joint managing conservators, it must designate one of them as the conservator who has

the exclusive right to determine the child's primary residence. *Id.* § 153.134(b)(1) (Vernon 2014). A party may demand that a jury determine this issue. *Id.* § 105.002(c)(1)(D) (Vernon 2014). A trial court may not contravene a jury verdict that determines which joint managing conservator has the exclusive right to designate the primary residence of the child. *Id.*; *see Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002).

When parents have been appointed joint managing conservators, the trial court must also allocate power between the parents either independently, jointly, or exclusively. *MacGillivray v. MacGillivray*, No. 04–10–00109–CV, 2011 WL 2150352, at *6 (Tex. App.—San Antonio June 1, 2011, pet. denied) (mem. op.) (citing TEX. FAM. CODE ANN. § 153.134(b)(2)–(4)). The powers of the parent include the right to make decisions concerning the children's education, medical and dental care, as well as psychological and psychiatric treatment. *Id.* (citing TEX. FAM. CODE ANN. § 151.001(a)(6),(10). To effectuate the best interest of the children, the trial court retains broad discretion in crafting the rights and duties of each conservator. *Id.* (citing *Swaab v. Swaab*, 282 S.W.3d 519, 532 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd w.o.j.)).

B. Analysis

The decree appoints Todd and Gina as the children's joint managing conservators. The issue of which parent should have the right to designate the

children's primary residence was submitted to the jury. The jury answered that Todd should have that right. In the decree, the trial court ordered that Todd has "the exclusive right to designate the primary residence of the children within Fort Bend and contiguous counties as per the jury finding." The trial court also ordered in the decree that Gina and Todd each have "the independent right to make decisions concerning the children's education."

On appeal, Todd indicates that, by giving Gina the right to make educational decisions for the children, the trial court has failed to follow Family Code section 105.002(c)(1)(D)'s requirement that a court may not contravene a jury's verdict determining which joint managing conservator has the exclusive right to designate the primary residence of the children. *See* TEX. FAM. CODE ANN. § 105.002(c)(1)(D). Todd asserts that the trial court is "allowing [Gina] to make the decision where the children will attend school, setting up a direct conflict with the right of [Todd] to establish the primary residence of the children." Todd warns that, by giving Gina the right to make educational decisions, the decree gives Gina the right "to select a school district beyond the living area where the custodial parent has established the primary physical residence of the children," thereby conflicting with the right of the parent with primary custody to designate the children's residence.

When interpreting a divorce decree, courts apply the general rules regarding construction of judgments. *Wilde v. Murchie*, 949 S.W.2d 331, 332 (Tex. 1997). Judgments should be construed as a whole to harmonize and give effect to the entire decree. *Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976). If the decree, when read as a whole, is unambiguous, the court must effectuate the order in light of the literal language used. *Shanks v. Treadway*, 110 S.W.3d 444, 447 (Tex. 2003).

Here, the provision in the decree giving Todd the right to designate the children's primary residence can be harmonized with the provision giving Gina the right to make educational decisions for the children. In short, giving Gina the right to make educational decisions for the children does not affect Todd's right to designate the children's primary residence. Nothing in the order gives Gina the right to force Todd to move the children should Gina enroll them in a school in a different area. To the contrary, Todd's right to determine the children's primary residence will naturally serve as a limitation on the area in which the children may be enrolled in school. Moreover, Gina's right to make educational decisions for the children is tempered by the provision in the decree giving Todd this same right.

We hold that Todd has not shown that the decree conflicts with section 105.002(c)(1)(D)'s requirement that the trial court not contravene the jury's

decision naming Todd as the parent who may designate the children's primary residence. We overrule Todd's first issue.

Abatement of Child Support

In his second issue, Todd assails the provision in the decree, permitting the abatement of Gina's monthly child support obligations if Todd failed to pay her the $25,000.00 awarded to her "[i]n satisfaction of [her] claims for fraud on the community." The trial court ordered that, should Todd fail to pay Gina the $25,000.00 he has been ordered to pay her, Gina's child-support payments of $1,285.53 would be abated until they equal the total of the sum owed.

The standard of review for a trial court's ruling on child support is abuse of discretion. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Brejon v. Johnson*, 314 S.W.3d 26, 29 (Tex. App.—Houston [1st Dist.] 2009, no pet.). The test is whether the trial court acted arbitrarily, unreasonably, or without reference to guiding rules or principles. *See Brejon*, 314 S.W.3d at 29. Todd asserts that the decree's provision, permitting the abatement of Gina's child-support payments, is contrary to certain guiding principles of law governing child support.

Pursuant to the Family Code, the trial 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 2014). As Todd correctly points out, each party has a duty to support his or her minor child. *Id.* § 151.001(b); *Villasenor v. Villasenor*, 911

S.W.2d 411, 419 (Tex. App.—San Antonio 1995, no writ). In his brief, Todd makes the following argument:

> The trial court gives [Gina] an opportunity to opt out of paying periodic support for the children by giving her a credit or sums of money that were part and parcel of the division of the community estate at the time of the divorce. If this type of arrangement is allowed to discharge an obligation for support carried to its logical wrong conclusion a party in a divorce action would be able to negate their entire support obligation by claiming that the other party owed them money as a result of the court prior property division. In fact, if this methodology for payment is allowed to exist[,] one of the litigants could take the position that[,] at the time of the property division[,] the court allocated certain [debt] to each of the parties[,] and because the custodial parent didn't pay the child support obligat[ion,] . . . the noncustodial parent could avoid paying child support by paying other creditors. This type of an arrangement is contrary to guiding principles of law because it enables parents to avoid providing periodic support for children to the custodial parent.

On this record, we disagree with Todd. Contrary to his characterization of the child-support provisions, Gina is ordered to pay monthly child support to Todd. Her child-support payments are only abated in the event that Todd fails to do as he is ordered in the decree.

More importantly, without a reporter's record, we know little about the basis for the $25,000.00 award or the trial court's reasoning for structuring the child-support provisions as it did. Nothing in the record indicates that the $25,000.00 was awarded to Gina as a division of the community estate, as characterized by Todd. To contrary, the decree indicates that sum was awarded to Gina for fraud on the community estate. We note that the decree indicates that Todd had improperly

withdrawn money from, or liquidated, several financial accounts during the pendency of the divorce proceedings in violation of the trial court's injunctive orders. For this activity, Todd was ordered to pay Gina $65,014.00 out of his portion of one the couple's accounts. It is unclear whether the $25,000.00 award for fraud on the community estate is related to this violative activity. In any event, without a reporter's record, we must presume the evidence presented was sufficient to support the trial court's order. *See Willms v. Ams. Auto & Tire Co.*, 190 S.W.3d 796, 803 (Tex. App.—Dallas 2006, pet. denied); *see also Sandoval v. Comm'n for Lawyer Discipline*, 25 S.W.3d 720, 722 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that court could not determine whether trial court abused its discretion in sanctions ruling because it did not receive reporter's record of hearing and that courts "must presume the omitted evidence would support the trial court's sanction decision"). Todd has failed to meet his burden to show that the trial court abused its discretion in crafting the child-support provisions in the decree. [2]

We overrule Todd's second issue.

[2] We note that Todd makes no specific argument that the complained-of child-support provision violates the Family Code's child support guidelines. *See* TEX. FAM. CODE ANN. §§ 154.121–.133 (Vernon 2014). Even if he had, without a reporter's record, it is unlikely that such a claim would successful.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Bland, and Massengale.