Dissenting and Opinion April 19, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00213-CV

IN THE INTEREST OF T.W.G., ADULT DISABLED CHILD AND E.A.G., MINOR CHILD

On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-15-00621

DISSENTING OPINION

Before Justices Francis, Lang-Miers, and Whitehill
Dissenting Opinion by Justice Whitehill

Two controlling issues in this divorce decree appeal are whether the trial court abused its discretion by ordering and setting the amount of child support for an adult disabled child. The trial court found that T.W.G., an adult disabled child, (i) requires substantial care and supervision because of a mental or physical disability that existed on or before his eighteenth birthday and (ii) that T.W.G. will not be capable of self-support. Accordingly, the court ordered Father to pay adult child support and arrearage for him. Father's first two issues argue that the trial court abused its discretion in doing so.

The majority opinion holds that the trial court did not abuse its discretion by (i) concluding that T.W.G. has a disability requiring substantial care and supervision and (ii) ordering that Father pay adult child support for him. Because the evidence supporting the predicate factors for disabled adult child support is conclusory at best, and because there is no

connection between this evidence and T.W.G.'s condition, I respectfully dissent from the majority opinion concerning Father's first and second issues.

We review a child support award under an abuse of discretion standard. *See Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). In family law cases, that review overlaps with traditional sufficiency standards of review. Legal and factual sufficiency are not independent grounds of error, but instead are factors relevant to assessing whether the trial court abused its discretion. *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). Thus, we consider whether the trial court (i) had sufficient evidence upon which to exercise its discretion and (ii) erred in exercising that discretion. *In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). A trial court has no discretion to determine the law improperly or misapply the law to the fact. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

Awarding Adult Child Support

Here, the trial court did not have sufficient evidence upon which to award adult child support. A trial court can order support for an adult disabled child only if it finds that:

> (1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and
>
> (2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child.

TEX. FAM. CODE § 154.302(a).

It is undisputed that T.W.G. has a disability that existed before his eighteenth birthday. Rather, the issue is whether the evidence establishes that he requires substantial care and supervision as a result of that disability and, as a result, will not be capable of self-support. As discussed below, neither factor is supported by the evidence because Mother's evidence regarding these factors rests on conclusory statements which have no probative value and are no evidence. *See Natural Gas Pipeline Co. of Am.* v. *Justiss*, 397 S.W.3d 150, 156-57 (Tex. 2012)*;*

Dallas Ry. & Terminal Co. v. Gossett, 294 S.W.2d 377, 380 (Tex. 1956). Thus, the trial court did not have sufficient information to exercise its discretion. *Natural Gas Pipeline*, 397 S.W.3d at 156–57.

Mother testified that T.W.G. has a congenital disability; the fibers connecting the right side of his brain to the left did not develop. But there was no testimony about that condition's manifestation or how it impairs T.W.G. For example, there is no evidence describing the nature or extent of any physical or mental deficit T.W.G. suffers from that disability.

Although Mother testified that T.W.G. lives with her, is not employed, and does not attend college, she did not say that, how, or why any of these circumstances resulted from the condition, and there is no testimony or other evidence that T.W.G. is incapable of living on his own, maintaining gainful employment, or attending college. There is no non-conclusory evidence that T.W.G. is unable to care for himself or requires supervision or assistance. Instead, Mother's counsel tracked the statutory language and conclusorily asked Mother whether she was "asking [the] court to find that [T.W.G.] has a disability, whether institutionalized or not, that requires substantial care now and personal supervision because of a mental or physical disability which would not be capable of self-support and that disability existed at his 18th birthday." Mother simply replied, "Yes." Requesting a finding, however, does not equate to evidentiary support for that request.

Likewise, Mother's affirmative response to the question concerning T.W.G.'s need for support for the rest of his life does not establish that T.W.G. is incapable of self-support. In the absence of explanation or detail, Mother's testimony is conclusory. *See LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294, 301 (Tex. App.—Beaumont 2007, no pet.) ("Statements are conclusory if they fail to provide underlying facts to support their conclusions.").

Although Mother introduced a handwritten list of T.W.G.'s expenses, that list does not inform the analysis, and she provided no testimony regarding the items or amounts on that list. In fact, Mother only identified the document as "expenses for [the daughter's] . . . competitive cheer expenses and expenses to care for [T.W.G.]." As the majority opinion notes, there is a line item for "adult care" and "125 for 3 days." But Mother did not testify that T.W.G. is in fact receiving or requires adult care. There is nothing to indicate what the "125" stands for. And even if the trial court surmised that T.W.G. is currently receiving such care, there is no description of what such care entails, who provides it, or that such care is required, either currently or in the indefinite future.

The majority opinion concludes that the notations "SSI 733.00," and "SNAP 180.00" on the expense summary means that the evidence shows that T.W.G. is actually receiving SSI and SNAP benefits. But because there is no testimony or other evidence explaining these line items, they have no evidentiary value in determining whether Mother proved the statutory prerequisites for adult child support. *See Natural Gas Pipeline Co., 397 S.W.3d at 156-57; Dallas Ry. & Terminal Co.*, 294 S.W.2d at 380; *Anderson v. Carranza*, No. 14-10-00600-CV, 2011 WL 1631792, at *6 (Tex. App.—Houston [14th Dis.] Apr. 28, 2011, no pet.) (mem. op.) (Mother's statement that she was "an excellent mother" was conclusory and not competent evidence of changed circumstances or best interests).

Mother relies on *Thompson v. Smith*, 483 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2015, no pet.) to support her argument. *Thompson* is instructive, but only to highlight the quantum of proof absent here.

In *Thompson*, four witnesses testified that the adult child suffered from motor, intellectual, and emotional impairments. *Id.* Even with medication, the child had severe and unpredictable mood swings, was unguarded with strangers, engaged in physical altercations and

destructive behavior when angry, and lacked the ability to independently perform basic activities such as bathing. *Id*. The evidence also showed that she could not obtain employment, and a letter from the social security administration established that she was eligible for disability benefits. *Id*. at 94.

In addition, there was caretaker testimony in that case explaining why the child could not be left alone and providing specific instances to demonstrate that fact. There was testimony about the child's ongoing psychiatric care, as well as her medical records and unpaid medical bills. *Id*. at 95–96. Thus, the evidence in *Thompson* was detailed and specific. There is no such evidence here.

Because there is no evidence to establish that T.W.G. (i) requires substantial care and supervision because of his disability and (ii) will not be capable of self-support, I would sustain Father's first issue, conclude that the trial court abused its discretion in awarding adult child care, and render judgment denying Mother's requested relief.

Setting The Amount of Adult Child Support

Alternatively, for similar reasons, I would sustain Father's second issue. The family code lists four factors that the trial court "shall determine and give special consideration to" in setting the amount of adult child support:

> (1) any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
>
> (2) whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
>
> (3) the financial resources available to both parents for the support, care, and supervision of the adult child; and
>
> (4) any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

TEX. FAM. CODE § 154.306. The majority opinion concludes that there was sufficient evidence of these factors to guide the trial court in setting the amount of adult child support. I respectfully disagree.

Although there is evidence of Mother's and Father's resources, there is no evidence of the child's need for substantial care and supervision as related to his disability. There is no explanation of the line items on Mother's expense sheet for "adult care," "SSI," and "SNAP." In short, nothing establishes what adult care currently costs or will cost in the future or connects the need for such care to T.W.G.'s disability. Therefore, the trial court did not have sufficient information "to determine and give special consideration" to the statutory factors. *See Wolk v. Wolk*, No. 03-06-00595-CV, 2007 WL 2682173, at *4 (Tex. App.—Austin Sept. 12, 2007, no pet.). I would thus sustain Father's second issue.

Conclusion

For the foregoing reasons, I would reverse that part of the trial court's final decree awarding adult child support and render judgment that Mother take nothing for adult child support. Alternatively, I would reverse the decree to the extent it determined the amount of Father's obligation and remand the case for further proceedings. Because the majority opinion does not do so, I respectfully dissent.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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