Affirmed and Memorandum Opinion filed May 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00652-CV

JUAN ANTONIO GUAJARDO, Appellant

V.

NORMA OLVERA, Appellee

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2005-81473

MEMORANDUM OPINION

In this divorce case, appellant Juan Antonio Guajardo appeals the trial court's division of property between him and his former wife, Norma Olvera. Because the trial court found that under the terms of the couple's valid marital agreement they owned no community property, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Olvera filed for divorce and sought judgment in accordance with a marital agreement. While the case was pending, Olvera and Guajardo entered into a partial settlement addressing many of the issues concerning their minor child. The trial proceedings therefore focused primarily on property issues.

Before trial, Guajardo stated in his deposition that the signed marital agreement was in his possession, but when he failed to produce it, Olvera moved the trial court to accept an unsigned agreement as a substantial copy of the original.[1] At the combined hearing on the motion and the divorce trial, Olvera presented evidence that Guajardo previously had conceded that the two of them executed the agreement at the home of notary public Susan Ree on September 1, 2001, and that he had possession of the signed document. Both Olvera and the notary testified that the unexecuted document offered by Olvera was the same as the marital agreement she and Guajardo signed. Although Guajardo testified at trial that the unexecuted agreement was not the same as the one he signed at Ree's residence and that he did not recall signing this document, he could identify no differences between the agreement Olvera produced and the one he admittedly signed.

The trial court admitted the document as a substantial copy of the original signed marital agreement and signed a final decree of divorce on April 22, 2008. Guajardo filed a request for findings of fact and conclusions of law, an original and an amended motion for new trial, and a notice of past due findings of fact and conclusions of law. The trial court signed initial findings of fact on July 16, 2008, and pursuant to an order of this court, signed and filed additional findings of fact and conclusions of law on November 23, 2009.

[1] *See* TEX. R. CIV. P. 77; TEX. R. EVID. 1004.

II. ISSUES PRESENTED

Guajardo initially presented three issues on appeal. In his first issue, he argues that the trial court's division of the community estate was manifestly unjust and unfair because the community property was divided "+125.25% in favor of the wife and . . . -25.25% division for the husband." In his second issue, Guajardo contends that the trial court clearly abused its discretion in finding that "the division of the estate is just and right especially in view of the child's autism problem, the expense of dealing with it and the failure of Respondent (and the likelihood this will continue) to make any significant contribution towards those expenses." Guajardo argues in his third issue that the trial court's failure to make specific findings as to the property and debt values of the community estate as required by Texas Family Code section 6.711 prevented him from properly presenting his case on appeal.

In his amended reply brief, Guajardo raised the additional argument that the trial court's findings of fact did not include any element of a contractual ground of recovery, and thus, no findings supporting the validity of the marital agreement can be implied.[2] Although we normally do not consider issues raised for the first time in a reply brief,[3] the trial court made additional findings of fact and conclusions of law after Guajardo filed his opening brief. Thus, in the interest of justice, we consider this issue as well. *See* TEX. R. APP. P. 2; TEX. R. APP. P. 38.7.

III. STANDARD OF REVIEW

All property possessed by either spouse during or on dissolution of marriage is presumed to be community property. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 2006).

[2] A second issue presented in Guajardo's reply brief is simply a restatement of the first issue in his original brief.

[3] *See* TEX. R. APP. P. 38.3.

The burden of overcoming this presumption is on the party asserting otherwise, and the standard of proof is by clear and convincing evidence. *Id.* § 3.003(b). "Clear and convincing" evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002).

In a divorce decree, the trial court "shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." TEX. FAM. CODE ANN. § 7.001. The trial court's ruling will not be disturbed on appeal unless the appellant demonstrates that the trial court clearly abused its discretion by a division or an order that is manifestly unjust and unfair. *See Stavinoha v. Stavinoha*, 126 S.W.3d 604, 607 (Tex. App.—Houston [14th Dist.] 2004, no pet.). Under this standard, neither legal nor factual insufficiency of the evidence is an independent ground of error, but each instead is a relevant factor in assessing whether the trial court abused its discretion. *Id.* at 608.

IV. ANALYSIS

A. Division of Community Property

Guajardo's first issue is based on a misreading of the findings of fact signed by the trial court on July 16, 2008. According to Guajardo, the trial court characterized all of the parties' property as community property and stated in its findings, "[t]he Post Nuptial Agreement of the parties is not valid and enforceable." In fact, the trial court found that "[t]he Post Nuptial Agreement of the parties is valid and enforceable." In that agreement, the parties unambiguously stated their intent: "It is our intent that, during our marriage, we will not own any community property." Although Guajardo argues in his first issue that the trial court's division of community property was unfair, the trial court stated in its additional findings of fact, "The parties do not own any community property."

Because Guajardo's first issue is not supported by the record, we overrule it.

B. Child's Special Needs

In his second issue, Guajardo challenges the trial court's finding that the property division is just and right in view of his child's autism. Guajardo argues that there was (1) no medical testimony or documentary evidence that the child has been diagnosed with autism, (2) no testimony that the child's attendance at a particular school is medically necessary and appropriate for a child of her age and special needs, and (3) no testimony about whether a public school could meet the child's needs at no cost to the parties.

Guajardo cites no authority that such evidence was required at trial. Moreover, Olvera's testimony about the child's diagnosis was uncontroverted, and Guajardo's arguments concerning his daughter's educational needs were actually resolved by agreement, and thus, were not disputed issues to be resolved by the trial court. Specifically, Guajardo and Olvera reached a partial settlement in which they agreed that their daughter "is a special needs child who need [sic] assistance and support from her parents her entire life." They further agreed that both parents are enjoined from "interfering with [the child's] school or programs at the Arbor School or any school she attends in the future." In addition, they agreed that "[t]he child's education plan shall be reviewed every six (6) months by the current employed child education specialist along with the child's counselor at the school she is then attending to determine whether the school is appropriate or whether she should move to another school based on educational progress." Finally, the parties agreed that decisions regarding their daughter's education, health care, and psychological care would be made jointly, and in the event of disagreement, the disputed issue would be submitted to binding arbitration. We therefore overrule Guajardo's second issue.

C. Statutory Findings of Fact

Guajardo also argued in his original brief that the trial court's failure to make specific findings as to the property and debt values of the community estate as required by Texas Family Code section 6.711 prevented him from properly presenting his case on appeal. This issue became moot when the trial court filed additional findings of fact and conclusions of law on November 23, 2009. We accordingly overrule Guajardo's third issue.

D. Absence of Finding That Guajardo Signed the Agreement

Lastly, Guajardo contends that the trial court failed to make a factual finding "on an element of a contractual ground of recovery, the existence of a postnuptial agreement between the parties."[4] Citing Texas Rule of Civil Procedure 299, Guajardo argues that absent a finding that he signed the marital agreement, we cannot imply any finding in support of its existence, and thus, Olvera cannot rely on such an agreement to support the award of certain assets as her separate property.

But it is undisputed that Guajardo and Olvera signed an agreement at the home of notary Susan Ree on September 1, 2001 as all three witnesses testified; the disputed issue was whether the unsigned document Olvera produced at trial was a substantial copy of that agreement. *See* TEX. R. CIV. P. 77. The trial court agreed that the unsigned document was a substantial copy of the signed marital agreement, and admitted it in evidence as such. As a result of that evidentiary ruling—which Guajardo has not challenged—the unexecuted copy has the same force and effect as the signed original. *See id.* Consistent

[4] *See* Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 4.102, 1997 Tex. Gen. Laws 8, 21. (amended 2003 & 2005) (current version at TEX. FAM. CODE ANN. § 4.102 (Vernon 2006)) (spouses may partition community property into separate property); TEX. FAM. CODE ANN. § 4.103 (spouses may agree that income from separate property is separate property); Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 4.104, 1997 Tex. Gen. Laws 8, 21 (amended 2005) (current version at TEX. FAM. CODE ANN. § 4.104 (Vernon 2006)) (such agreements must be in writing and signed by both parties).

with that ruling, the trial court (1) found that the parties entered into a marital agreement, (2) identified the separate property of each, and (3) held that "the parties do not own any community property." There was no need for a separate evidentiary finding that Guajardo signed the original of the admitted document. Guajardo could have appealed the court's ruling admitting the document into evidence, but he did not.

In sum, no specific finding that Guajardo signed the agreement was required. We therefore overrule the issue raised in Guajardo's amended reply brief.

V. CONCLUSION

Because the issues presented by Guajardo are inconsistent with the trial court's rulings and factual findings and fail to take into account the parties' marital agreement and partial settlement, we overrule each of his issues and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.