

Affirmed as Modified and Memorandum Opinion filed December 28, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-01000-CV

ROSWALD OLIVER HAWKINS, Appellant

V.

RUBY FRANCIS HAWKINS, Appellee

**On Appeal from the 247th District Court
Harris County, Texas
Trial Court Cause No. 2007-43598**

MEMORANDUM OPINION

Appellant, Roswald Oliver Hawkins, appeals from the trial court's order clarifying its prior final decree of divorce, which dissolved the marriage between appellant and appellee, Ruby Francis Hawkins. This is a restricted appeal, as appellant did not participate in the proceedings resulting in the clarification order and a default was taken against him in those proceedings. In five issues, appellant contends that in its clarifying order, the trial court erred in (1) ordering him to execute a warranty deed in favor of appellee; (2) ordering him to execute insurance documents in favor of appellee; (3) ordering him to pay attorney's fees to appellee's attorney; (4) granting appellee's attorney

a judgment for attorney's fees, expenses, and costs; and (5) taxing court costs against him. We modify the trial court's order and, as modified, affirm.

Background

In the final decree, signed May 28, 2008, the trial court dissolved the Hawkins' marriage and divided their marital estate. In regards to certain real property, described as the "Laurel Mist Way Property," the court ordered that after a certain date, appellee was to have exclusive possession of the property. It further ordered appellee to "promptly take any and all measures reasonably necessary to contract for the sale of the Property," and to facilitate her efforts, it ordered appellant "[w]ithout limitation" to "execute any and all documents reasonably required to close the sale of the Laurel Mist Property." The net proceeds from the sale were to be distributed as follows: first, to reimburse appellee for any payments she made on the mortgage or any other debt secured by the property; second, to pay \$12,000 to appellee for attorney's fees she incurred in the divorce proceedings; and third, the remainder was to be split evenly between appellant and appellee. The trial court further assessed all costs of court against appellant.

On October 28, 2008, appellee filed a "Petition for Enforcement and/or Clarify Order of Property Division." In this pleading, appellee asserted that several disputes had arisen between the parties regarding construction of the decree. Consequently, appellee requested that the court enter a clarifying order, which could be enforced by contempt if not complied with, for any part of the decree that the court found was not specific enough to be enforced by contempt.¹ Appellee further requested that appellant be required to pay appellee's attorney's fees incurred in the enforcement/clarification proceeding.

¹ Appellee's pleading only generally stated that disputes had arisen and requested general clarification of the decree. Appellant, however, makes no complaint regarding the lack of specificity in the pleading. *See generally McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 131-32 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (explaining that a default must be supported by pleadings that provided fair notice of the relief sought).

A brief hearing on the clarification request was held following a one-hour postponement due to appellant's non-appearance. The trial judge began by noting that appellant had not filed an answer to appellee's pleading and had not appeared for the hearing. Appellee's counsel then reported to the court that the final decree awarded appellee half of the proceeds from the sale of the property and that it ordered appellant "to execute a deed over to" appellee. Counsel requested that the court clarify the decree by ordering appellant to appear at counsel's office "on or before 10 days" to execute the deed. Counsel additionally requested that the court "execute a judgment for [appellee] in the event . . . there are not enough proceeds from the sale of the house" to pay her attorney's fees of \$12,000. Further, counsel requested appellant be ordered to "execute any and all documents necessary" regarding insurance reimbursements that appellee may have received based on damage from Hurricane Ike.

In the subsequent clarification order, the court specifically found that the final decree "should be clarified." The court then ordered appellant to appear at counsel's office on or before July 15, 2009 to (1) execute a warranty deed to appellee; (2) execute all necessary insurance documents for appellee; and (3) pay appellee's counsel \$2,965 for attorney's fees and costs of court. The court further specifically awarded a judgment to appellee's counsel for \$2,500 in attorney's fees and taxed court costs in the amount of \$465 against appellant.

Standards of Review

To be successful in this restricted appeal under Rule 30 of the Texas Rules of Appellate Procedure, appellant must demonstrate that he: (1) initiated the appeal within six months of the order complained of; (2) was a party to the suit below; (3) did not participate in the proceeding that resulted in the order complained of; and (4) did not timely file a post-judgment motion, request for findings of fact and conclusions of law, or file a regular notice of appeal; and that (5) error appears on the face of the record. Tex. R. App. P. 30; *Vazquez v. Vazquez*, 292 S.W.3d 80, 83 (Tex. App.—Houston [14th Dist.]

2007, no pet.). The record in this context consists of all the papers on file in the appeal, including the reporter's record. *Vazquez*, 292 S.W.3d at 83. The only issue in this case is whether error appears on the face of the record as argued by appellant; appellant has fulfilled the other requirements for a restricted appeal.²

A trial court's authority to clarify a divorce decree that it issued is principally governed by sections 9.006 through 9.008 of the Texas Family Code. Tex. Fam. Code §§ 9.006–.008. Section 9.006(a) authorizes trial courts to issue orders “to enforce the division of property made in the decree . . . to assist in the implementation of or to clarify the prior order.” *Id.* § 9.006(a). Section 9.006(b) states that a court “may specify more precisely the manner of effecting the property division previously made if the substantive division of property is not altered or changed.” *Id.* § 9.006(b). Section 9.007 further emphasizes that courts may not “amend, modify, alter, or change the division of property” as established in the final decree. *Id.* § 9.007(a). And section 9.008 provides that if a court determines that the division of property is not specific enough to be enforceable by contempt, the court can issue a clarifying order “setting forth specific terms to enforce compliance.” *Id.* § 9.008(b).

A party's request for an order altering or modifying a property division in a final decree constitutes an impermissible collateral attack. *See Hagen v. Hagen*, 282 S.W.3d 899, 902 (Tex. 2009). To be valid, a clarification order must remain consistent with the divorce decree and merely enforce its provisions by appropriate means. *See McKnight v. Trogdon-McKnight*, 132 S.W.3d 126, 130 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

² Appellee has not filed an appellate brief in this case. Thus, appellee has not made any arguments regarding any of the elements appellant must establish, including whether error is shown on the face of the record.

Warranty Deed

In his first issue, appellant contends that the trial court erred in ordering him to appear at appellee's counsel's office, on or before July 15, 2009, to execute a warranty deed to appellee regarding the Laurel Mist Way Property. Appellant insists that by ordering him to sign a deed, the court, in its clarification order, gave all interest in the property to appellee, thus improperly effecting a substantial change in the property division contained in the final decree. In the decree, the trial court expressly mandated that after certain reimbursements, net proceeds were to be split evenly between the parties. In making his argument, however, appellant misconstrues the scope of the trial court's order.

The clarification order must be read in conjunction with the decree. As explained above, in the decree, the court ordered appellant "[w]ithout limitation" to "execute any and all documents reasonably required to close the sale of the Laurel Mist Property." In this context, the directive in the clarification order for appellant to sign the deed should be viewed as a method of enforcing or implementing the decree's division of property by specifying more precisely the manner of effecting the division. *See* Tex. Fam. Code § 9.006. In other words, the court ordered appellant to sign the deed in order to facilitate the sale of and closing on the property and not to award the property to appellee. This was a proper use of a clarification order under section 9.006 of the Family Code and did not affect the substantive division of the property, as prohibited by section 9.007. *Id.* § 9.006–.007.³ Because appellant has failed to demonstrate error on the face of the record regarding the portion of the clarification order requiring execution of the deed, we overrule his first issue and affirm that portion of the order.

³ Appellant offers no argument regarding whether the signing of the deed was a document reasonably required to close the sale of the property. Moreover, the face of the record does not reveal any error in this regard.

Insurance Documents

In his second issue, appellant contends that the court below erred in ordering him to appear at appellee's counsel's office and execute insurance documents favoring appellee. The clarification order does indeed require appellant to so appear and "execute all necessary insurance documents to [appellee]" for the Laurel Mist Way Property. Although the order itself does not mention insurance proceeds, appellee's counsel represented to the court that the reason for his request regarding insurance documents was the receipt or expected receipt of insurance proceeds. The final decree, however, made no mention of any insurance documents, claims, or proceeds. It definitely did not make any assignment of any expected or received insurance proceeds. Consequently, the trial court was not authorized to issue a clarification order regarding insurance documents, claims, or proceeds. Such order did not clarify anything in the final decree and appears to have impermissibly effected a change in the substantive division of the property. *See McKnight*, 132 S.W.3d at 130 (explaining that a valid clarification order must remain consistent with the divorce decree and merely enforce its provisions by appropriate means). Accordingly, we sustain appellant's second issue.

Attorney's Fees and Costs of Court

In his third and fourth issues, appellant contends that the court erred, respectively, in (1) ordering him to appear at appellee's counsel's office and pay attorney's fees, and (2) awarding a judgment for attorney's fees to appellee's counsel.⁴ Among his specific arguments, appellant asserts that the record contains no evidence concerning the reasonableness or the necessity of the fees awarded for the clarification proceedings (\$2,500). Appellant is correct that before a party can be awarded its attorney's fees, it

⁴ Also in issue three, appellant challenges the trial court's award of costs of court (\$465). However, beyond stating the issue, appellant provides no argument or relevant citation to authority or the record in support of his contention. Consequently, this portion of issue three is insufficiently briefed. *See* Tex. R. App. P. 38.1(i) (stating that an appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). The question of court costs is also addressed in issue five below.

must demonstrate that the fees were reasonable and necessary. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Moreover, it is well-settled that an award of attorney’s fees can be challenged on appeal for the sufficiency of the evidence. *E.g., Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307, 320 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). Appellant is further correct that the record does not reveal any evidence supporting the award of fees in this case.

In the brief hearing on the request for a clarification order, appellee’s counsel did not renew his request for, much less provide any evidence supporting, an award of fees for the clarification proceedings.⁵ Consequently, error is shown on the face of the record regarding the award of fees for the clarification proceedings. *See Vazquez v. Vazquez*, 292 S.W.3d 80, 86 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (sustaining issue challenging sufficiency of the evidence to support reasonableness of attorney’s fees in restricted appeal context). We sustain appellant’s third and fourth issues as they pertain to the award of attorney’s fees.

In his fifth issue, appellant contends that the trial court erred in assessing court costs against him. Generally, a successful party in a suit is entitled to its court costs. Tex. R. Civ. P. 131. A party seeking affirmative relief who prevails on one claim but not others in the same proceeding is still considered a successful party. *See Williamson v. Roberts*, 52 S.W.3d 354, 356 (Tex. App.—Texarkana 2001), *aff’d*, 111 S.W.3d 113 (Tex. 2003). In apparent recognition of this rule, appellant specifically argues that the award of costs should be overturned because the entire clarification order should be reversed. However, because we are affirming at least a portion of the clarification order (that

⁵ During the hearing, appellee’s counsel did request a judgment from the court for the entire amount of the fees awarded in the final decree (\$12,000), which the court had ordered to be paid from the net proceeds of the sale of the property. Although the court orally granted this request, it was not made part of the written order and is not part of this appeal. In the event the trial judge intended the \$2,500 award to appellee’s counsel in the clarification order to be a judgment for part of the \$12,000 awarded in the final decree, this was in direct contradiction of the final decree and thus not a proper use of a clarification order. *See McKnight*, 132 S.W.3d at 130.

requiring execution of the deed), appellant's argument is rendered moot. Accordingly, we overrule his fifth issue.

Conclusion

We modify the trial court's clarification order to remove the entire paragraphs in which the court (1) ordered appellant to appear and sign insurance documents; (2) ordered appellant to appear and pay attorney's fees and costs; and (3) granted judgment to appellee's attorney. As so modified, we affirm the remainder of the court's order, including the taxation of costs of court against appellant.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Hudson.⁶

⁶ Senior Justice J. Harvey Hudson sitting by assignment.