In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00020-CV

IN THE INTEREST OF J.A.F., T.A.F., AND H.S.F.

On Appeal from the County Court at Law No. 3
Montgomery County, Texas
Trial Cause No. 13-10-10909-CV

MEMORANDUM OPINION

Jerad Weston Forcier (Father) appeals from the trial court's Order Holding Respondent in Contempt for Failure to Pay Child Support, Granting Judgment for Arrearages, and Suspending Commitment, dated December 16, 2014. In five issues, Father contends the trial court erred when it: 1) entered an order modifying the Final Decree of Divorce regarding the children's 529 accounts; 2) found that Father had the ability and intentionally failed to pay child support on July 1, 2014; 3) found that Father failed to pay any support through the State Disbursement Unit

on July 15, 2014; 4) found Father in contempt of court for intentionally failing to pay child support payments on July 1 and July 15, 2014; and 5) ordered Father to pay attorney's fees to Julie Anne Forcier (Mother). We affirm.

I. Background

This matter originates from a divorce action involving conservatorship, possession, and support of minor children, as well as division of the parties' marital estate. The original petition for divorce was filed on October 10, 2013. An Agreed Final Decree of Divorce was entered on June 26, 2014. On September 24, 2014, Mother filed a Petition for Enforcement by Contempt of Child Support and Spousal Support and Order to Appear, asking the court to determine an arrearage owed for child support and to hold Father in contempt of court for, among other things, failing to timely pay child support and for failing to fund 529 accounts for the children as agreed in the final decree. Father filed, among other pleadings, a response to Mother's petition for enforcement and asserted affirmative defenses of impossibility and inability to pay.[1] The trial court granted Mother's petition for enforcement and entered an order, among other things, determining an arrearage in child support payments owed by Father; finding that Father had the ability to pay

[1] Father first filed several of his own motions to enforce and clarify various matters, including a motion for enforcement and for contempt against Mother for unpaid medical expense reimbursements. Those motions were not included in the record before us and are not made a part of this appeal.

and intentionally failed to pay child support on July 1, 2014 and July 15, 2014, and holding Father in contempt of court therefore; clarifying the provisions of the Agreed Final Decree of Divorce regarding the 529 accounts for the children; and awarding attorney's fees to Mother.

II. Clarification Order

In issue one, Father contends that the trial court's order of December 16, 2014, goes beyond a mere clarification of the provisions of the Agreed Final Decree of Divorce regarding the 529 accounts, that it instead constitutes "an alteration, modification and/or amendment" to certain property division provisions of the Agreed Final Decree of Divorce of June 24, 2014, and that the trial court was without jurisdiction to enter such an order. Relying upon § 9.007(a)–(b) of the Texas Family Code[2], Father contends the trial court's order amends, modifies,

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[2] The Texas Family Code provides:

> (a) [a] court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment. An order to enforce the division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property[; and] (b) [a]n order under this section that amends, modifies, alters or changes the actual, substantive division of property made or approved in a final decree of divorce or annulment is beyond the power of the divorce court and is unenforceable.

Tex. Fam. Code Ann. § 9.007(a)–(b) (West 2006).

alters or changes the actual, substantive division of property made or approved in the Agreed Final Decree of Divorce.

A property division in a final decree of divorce becomes final the same as other judgments; thus, an appeal or a motion to modify, correct, or reform the decree must be filed within the time prescribed by the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure. *See Schwartz v. Jefferson*, 520 S.W.2d 881, 887 (Tex. 1975); *DeGroot v. DeGroot*, 260 S.W.3d 658, 662 (Tex. App.—Dallas 2008, no pet.); *In re Garza*, 153 S.W.3d 97, 102 (Tex. App.—San Antonio 2004, orig. proceeding). After a trial court's plenary power has expired, the proper way for a party to directly attack a decree is to file a bill of review in the trial court. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990).

A trial court does, however, retain continuing jurisdiction to render some further orders regarding a final decree of divorce. *See* Tex. Fam. Code Ann. §§ 9.002, 9.006 (West Supp. 2016), § 9.007 (West 2006). Such orders include those to "enforce the division of property[,]" "assist in the implementation of or to clarify the prior order[,]" or "specify more precisely the manner of effecting the property division previously made or approved[.]" *Id.* § 9.006(a), (b). "On a finding by the court that the original form of the division of property is not specific enough to be

enforceable by contempt, the court may render a clarifying order setting forth specific terms to enforce compliance with the original division of property." *Id.* § 9.008(b) (West 2006); *accord In re Marriage of McDonald*, 118 S.W.3d 829, 832 (Tex. App.—Texarkana 2003, pet. denied). These orders may more precisely specify how the previously ordered property division will be implemented so long as the substantive division of the property is not altered. *See* Tex. Fam. Code Ann. § 9.006(b); *see also McPherren v. McPherren*, 967 S.W.2d 485, 490 (Tex. App.—El Paso 1998, no pet.); *Dechon v. Dechon*, 909 S.W.2d 950, 956 (Tex. App.—El Paso 1995, no writ). However, if the order "amends, modifies, alters, or changes the actual, substantive division of property made or approved in a final decree of divorce[,]" the order is "beyond the power of the divorce court and is unenforceable." Tex. Fam. Code Ann. § 9.007(b).

"[T]he remedy of clarification applies not only to property divisions specifically set forth in the decree but to those divisions which are merely approved and incorporated by reference in the decree." *Dechon*, 909 S.W.2d at 956. A trial court may also enter a clarifying order regarding a motion for contempt when it finds the original order is not specific enough to be enforceable by contempt. Tex. Fam. Code Ann. § 9.008(b). Most importantly, a proper clarification is consistent with the prior divorce decree and merely serves to

enforce by appropriate order the prior judgment or settlement agreement. *Karigan v. Karigan*, 239 S.W.3d 436, 439 (Tex. App.—Dallas 2007, no pet.); *Young v. Young*, 810 S.W.2d 850, 851 (Tex. App.—Dallas 1991, writ denied). Clarification orders, thus, cannot be used to make a substantive change to the division of property in a divorce decree after it becomes final. *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003); *Brown v. Brown*, 236 S.W.3d 343, 347 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

The Agreed Final Decree of Divorce provided:

> **<u>Custodial Accounts</u>**
>
> IT IS ORDERED AND DECREED that [Mother] shall open a 529 account for each child within 30 days from the date of entry of this Agreed Final Decree of Divorce. IT IS FURTHER ORDERED AND DECREED that [Mother] shall provide [Father] written documentation of any and all information pertaining to said 529 accounts within ten days from opening said accounts.
>
> IT IS ORDERED AND DECREED that [Father] shall deposit the sum of $5,000.00 into each 529 account (for a total deposit of $15,000.00) within 30 days from receiving written documentation of any and all information pertaining to said 529 accounts from [Mother].

At the hearing on Mother's petition for enforcement, she testified that she had opened the 529 accounts on July 29, 2014. That date is outside of the 30 days set forth in the decree. However, as Father concedes in his appellate brief, it appears from the exhibit entered that Mother's testimony on this issue was erroneous

because the date stamp on the email to Father alerting him to the opening of the 529 accounts is July 25, 2014, which is timely. Mother also testified that she sent screen shots of the electronic confirmation she received from the financial account provider for each account to Father, which was admitted into evidence, and she believed that that was in compliance with the decree and would allow Father to fund the accounts.

Father argued that the subject provision was not part of a property division but was simply an agreement between the parties, that Mother failed to keep her part of the bargain, and that the condition for Father's required action was therefore never triggered in the time allotted. Father further argued that even if she timely opened such accounts, Mother failed to provide Father "written documentation of any and all information pertaining to said 529 accounts . . . [.]" Father contended that with the limited documentation provided to him by Mother, he was not given sufficient information to review, access or fund the accounts.

In its rendition after the hearing, the trial court stated that the terms of the Agreed Final Decree of Divorce regarding the creation of the 529 accounts were too vague to be enforced by contempt and that the Court would issue a clarification order. The Court then signed its order on December 16, 2014, which contained the following language:

Clarification of Prior Order

The Court finds that certain terms of the prior order of the Court are not specific enough to be enforced by contempt, that the prior order should be clarified, and that Respondent should be ordered to comply with the terms of the clarifying order no later than as set forth hereinbelow, which the Court specifically finds is a reasonable time for compliance.

IT IS ORDERED that the prior order of the Court is clarified as follows:

> 1. On or before January 1, 2015, IT IS ORDERED that [Mother] shall forward to [Father] through Our Family Wizard the following:
>
>   a. A copy of each 529 financial account statement opened in the name of each child established by [Mother] with Fidelity on or after June 26, 2014.
>   b. IT IS ORDERED that if the account numbers by Fidelity are redacted on the financial statements being ordered to be provided by [Mother] TO [Father] herein above, then [Mother] shall forward to [Father] through Our Family Wizard, the full account numbers for each 529 account established in the name of each child.
>
> 2. On or before February 1, 2015, [Father] is ORDERED to deposit the sum of $5,000.00 into each Fidelity 529 account for each child.
>
> 3. IT IS ORDERED that [Mother] shall provide [Father] through Our Family Wizard, copies of all bank statements for the 529 accounts showing the deposits made between February 1, 2015[,] and March 1, 2015.

Father argues in his first issue that the Court erred when it entered a clarification order with regard to the 529 accounts because the clarification order works as "an alteration, modification and/or amendment to that provision of the Agreed Final Decree of Divorce[,]" and the Court was without jurisdiction to do so. Father contends the "clarification" entered by the trial court acts as a substantive modification of the final decree by "basically hitting the reset button and giving [Mother] a 'second bite at the apple' in order to properly complete the condition she failed to complete the first time around." A review of the Agreed Final Decree of Divorce shows that the time limits for opening the 529 accounts for the children are not such that failure to abide by such limits waives or voids the provision but instead, are intended to bring certainty and finality to the property division and divorce action.

An order clarifying a final decree of divorce is consistent if it merely enforces by appropriate order the prior judgment. *Young*, 810 S.W.2d at 851. Further, a trial court may enforce a property division by ordering the delivery of existing personal property from one party affected by the divorce decree to another party. *See* Tex. Fam. Code Ann. § 9.009 (West Supp. 2016); *Burton v. Burton*, 734 S.W.2d 727, 728–29 (Tex. App.—Waco 1987, no writ).

A clarification order may more precisely specify how the previously ordered property division will be implemented so long as the substantive division of the property is not altered. *In re Marriage of McDonald*, 118 S.W.3d at 832. Father has failed to show how the trial court's clarification order alters either the substantive division of the property or Father's obligation under the provision. We overrule Father's first issue.

III. Child Support Payments

In Father's second, third and fourth issues, he contends the trial court erred in its findings that he failed to pay certain child support payments when due. Specifically, in issue two, Father complains that the trial court erred when it found that Father had the ability to pay child support in the manner prescribed by the Agreed Final Decree of Divorce on July 1, 2014, and intentionally failed to pay such child support. In issue three, Father contends the trial court abused its discretion when it found that he intentionally failed to make the support payment on July 15, 2014, when the evidence showed that his employer withheld the payment amount from his paycheck for that time period. Finally, in issue four, Father asserts globally that the trial court abused its discretion by finding that Father had the ability to pay but intentionally failed to pay the support payments

for July 1, 2014, and July 15, 2014. As all three issues are related, we address them together.

A. Standard of Review

"Issues regarding the payment of child support, including confirmation of child support arrearages as well as payment of attorney's fees, are reviewed under an abuse of discretion standard." *In re M.K.R.*, 216 S.W.3d 58, 61 (Tex. App.—Fort Worth 2007, no pet.); s*ee also Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). "In the child-support context, sufficiency challenges are not independent points of error, but are incorporated into an abuse of discretion determination." *McGuire v. McGuire*, 4 S.W.3d 382, 387 n.2 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *see also Burney v. Burney*, 225 S.W.3d 208, 214 (Tex. App.—El Paso 2006, no pet.); *London v. London*, 94 S.W.3d 139, 143–44 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles; in other words, if it acts arbitrarily or unreasonably. *Worford*, 801 S.W.2d at 109. A trial court does not abuse its discretion when there is some evidence of a substantive and probative character to support its order. *Newberry v. Bohn-Newberry*, 146 S.W.3d 233, 235 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

B. Application

1. July 1, 2014 Payment

Father admitted in his testimony and the trial court found that Father failed to make any child support payment on July 1, 2014, while Father acknowledged that a child support payment in the amount of $1,191 was due and payable on that day. Father contends the Agreed Final Decree of Divorce provides that "all payments shall be made through the state disbursement unit . . . ." Father testified that he wanted to pay the child support payment on July 1, 2014, but was unable to make the payment because no account had been set up for Mother to receive the funds through the state disbursement unit as of that date. Mother testified that Father had been making child support payments directly to her during the pendency of the divorce until the divorce decree was signed by the trial court, totaling over $16,000, for which proper credit was given Father.

In response to the allegations in Mother's petition for enforcement that Father failed to pay child support on July 1, 2014, Father asserted the affirmative defense of impossibility. However, the Texas Supreme Court has held the Texas Family Code now, post 1995 amendments,

> limits obligors to a single affirmative defense, and a court may not adjust arrearage amounts outside of the statutorily mandated exceptions, offsets, and counterclaims. Because courts are prohibited from making additional adjustments, affirmative defenses that are not

> included in the statute, like estoppel, are also prohibited because they would require courts to make discretionary determinations.

Office of Atty. Gen. of Tex. v. Scholer, 403 S.W.3d 859, 865 (Tex. 2013).

When a party is charged with contempt for nonpayment of child support, he can only establish the defense of financial inability if he conclusively proves: 1) that he lacks the ability to provide support in the amount ordered; 2) that he does not possess sufficient personal or real property that can be sold or mortgaged to raise the sum; 3) that he has unsuccessfully attempted to borrow the sum from financial institutions; and, 4) that he knows of no other source, including relatives, from whom the sum might be borrowed or otherwise secured. *See* Tex. Fam. Code Ann. § 157.008(c) (West 2014); *see also Ex parte Bregenzer*, 802 S.W.2d 884, 887 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding); *Ex parte Papageorgiou*, 685 S.W.2d 776, 778 (Tex. App.—Houston [1st Dist.] 1985, orig. proceeding). However, the party charged with contempt for nonpayment of child support must prove his involuntary inability to perform. *See In re Corder*, 332 S.W.3d 498, 502 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding). To establish the affirmative defense, the obligor must prove that he was unable to pay each child support payment as it accrued. *See Ex parte Papageorgiou*, 685 S.W.2d at 778.

Father does not contend that he was financially unable to make the July 1 payment. Instead, he contends that because the Agreed Final Decree of Divorce

required him to make all child support payments through the state disbursement unit and no account was set up through the disbursement unit for Mother on July 1, it was impossible for him to make any payment of child support on that date. However, the Texas Supreme Court has recently confirmed that, in an enforcement proceeding, the trial court has discretion to consider direct payments to the other parent in deciding whether an arrearage exists, regardless of whether the final decree requires payments through the state disbursement unit. *See Ochsner v. Ochsner*, No. 14-0638, 2016 WL 3537255, at *3–4 (Tex. June 24, 2016). As Justice Guzman points out in a concurring opinion, even though the court shall order the payment of child support to the state disbursement unit as provided by Chapter 234, "a payment is not delinquent even 'if payments are not made through a registry' so long as the payment is timely received by 'the obligee or entity specified in the order.'" *Id.*, at *11 (Guzman, J., concurring) (quoting Tex. Fam. Code Ann. § 157.266(a)(2) (West 2014)).

Child support is not a debt owed by one parent to the other. *Scholer*, 403 S.W.3d at 866. Child support is a duty owed by a parent to a child. *See Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991). "[P]arents, regardless of their quarrels, iniquities, or mutual agreements, must nevertheless satisfy their duty to the child." *Scholer*, 403 S.W.3d at 866. Where a parent fails to support a child, we do not

"compromise the welfare of a child who is at the mercy of his parents' choices." *Id.* "Navigating divorce is an adult responsibility, and Texas family law laudably aims to reduce marital strife." *Ochsner*, 2016 WL 3537255, at *8. Father and Mother want to cavil over the details of the Agreed Final Decree of Divorce while feigning compliance, all the while showing little regard for the welfare and well-being of the minor children. If Father wanted to make the payment to Mother, Father could have made direct payment to Mother or set up the account for Mother with the disbursement unit himself so that she would timely receive child support payments going forward. Father had been making direct payments of child support to Mother during the pendency of the divorce and received proper credit for all such payments. The trial court did not abuse its discretion by finding that Father had the ability to pay the child support payment on July 1, 2014, and intentionally failed to do so. We overrule issue number two and issue four, as it relates to the July 1 payment.

2. July 15, 2014 Payment

In issue three, Father disputes the trial court's finding that Father failed to pay any support on July 15, 2014. He relies upon an employer withholding order showing that the amount of $1,288.50 was withheld from his paycheck for the pay period of July 1–31, 2014. However, the payment record introduced into evidence

showed that such payment was paid to Mother on August 5. The trial court could have reasonably attributed the $1,288 payment to the August 1 support payment, given the timing of the receipt of the payment by the OAG's office. Father admitted that no child support payment was made on July 15, 2014. Again, it was Father's duty to ensure timely payment of the support amount for each child support payment as it accrued. From the record before us, the trial court could reasonably find that Father had the ability but failed to make the payment due on July 15, 2014. We overrule issue three and issue four, as it relates to the July 15 payment.

IV. Attorney's Fees

In issue five, Father asserts that the trial court abused its discretion by ordering him to reimburse Mother's attorney's fees. Father, in relying upon his previous assertions of error by the trial court, contends that if such issues were meritorious, Mother would not be a prevailing party as contemplated by the Family Code, and thus, any award of attorney's fees to Mother would, in turn, be in error. When, however, as here, "the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages." Tex. Fam. Code Ann. § 157.167(a) (West 2014). Because we have found no error by the

trial court in its findings that Father failed to timely make child support payments as they accrued, awarding of reasonable attorney's fees is mandated by the Texas Family Code. *See In re Villanueva*, 56 S.W.3d 905, 909 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding). We overrule issue five.

Having overruled all of Father's issues on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 14, 2016
Opinion Delivered March 23, 2017

Before McKeithen, C.J., Kreger, and Johnson, JJ.

CONCURRING OPINION

I agree with and join the majority with respect to section II of the opinion pertaining to the clarification of the divorce decree and overruling Father's first issue. I respectfully disagree with the majority in reaching issues two, three, and four. I would conclude that the contempt order and related issues are not reviewable by appeal. *See In the Interest of E.H.G.*, No. 04-08-00579-CV, 2009 Tex. App. LEXIS 3431, at **12-14 (Tex. App.—San Antonio May 20, 2009, no pet.) (citing *In re Atty. Gen. of Tex.*, 215 S.W.3d 913, 916 (Tex. App.—Fort Worth 2007, orig. proceeding); *Pedregon v. Pedregon*, No. 08-05-00236-CV, 2005 Tex. App. LEXIS 8459, at **1-2 (Tex. App.—El Paso Oct. 13, 2005, no pet.) (mem. op.)). Generally, appellate courts do not have jurisdiction to review contempt orders by way of direct appeal. *In re Braden*, 483 S.W.3d 659, 662 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Tracy v. Tracy*, 219 S.W.3d 527, 530 (Tex. App.—Dallas 2007, no pet.). Rather, they are reviewable by original proceeding.

This is true even when the contempt order is appealed along with an appealable judgment. *See In re Gonzalez*, 993 S.W.2d 147, 157 (Tex. App.—San Antonio 1999, no pet.); *Metzger v. Sebek*, 892 S.W.2d 20, 54 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Contempt orders are reviewable only by original proceedings. If a contempt order does not involve confinement, it is reviewable by

petition for writ of mandamus; if it does involve confinement, it is reviewable by petition for writ of habeas corpus. *See In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (per curiam on reh'g). Accordingly, this Court lacks jurisdiction to consider issues attacking the contempt order.

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LEANNE JOHNSON
Justice

Concurrence Delivered March 23, 2017