NUMBER 13-15-00094-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

FADI ALFAYOUMI, Appellant,

v.

THARWAH ALZOUBI, Appellee.

On appeal from the 197th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Chief Justice Valdez

After a marriage that lasted fourteen years, appellant Fadi Alfayoumi and appellee Tharwah Alzoubi filed cross petitions for divorce. Following a bench trial, the trial court entered a final decree of divorce. By one issue, Alfayoumi contends the trial court erred in awarding Alzoubi $5,000 per month in spousal maintenance. *See* TEX. FAM. CODE ANN. § 8.001(1) (West, Westlaw through 2015 R.S.). By three cross issues, Alzoubi contends

the trial court erred in: (1) failing to appoint her as managing conservator of two children born of the marriage, *see* TEX. FAM. CODE ANN. § 153.131; (2) failing to grant the divorce based on cruel treatment, *see* TEX. FAM. CODE ANN. § 6.002; and (3) failing to reconstitute the community estate based on fraud, *see* TEX. FAM. CODE ANN. § 7.009. We affirm.[1]

I. SPOUSAL MAINTENANCE

Alfayoumi's sole issue on appeal challenges the trial court's decision to award Alzoubi spousal maintenance. *See* TEX. FAM. CODE ANN. § 8.001(1).

A. Standard of Review and Applicable Law

We review the trial court's decision to award spousal maintenance for an abuse of discretion. *See Lopez v. Lopez*, 55 S.W.3d 194, 198 (Tex. App.—Corpus Christi 2001, no pet.). A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Id.*

Spousal maintenance is an award of "periodic payments from the future income of one spouse for the support of the other spouse." *See* TEX. FAM. CODE ANN. § 8.001(1). The purpose of spousal maintenance is "to provide temporary and rehabilitative support for a spouse whose ability for self-support is lacking or has deteriorated over time while engaged in homemaking activities and whose capital assets are insufficient to provide support." *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.—Austin 2002, no pet.).

Family code section 8.051(2)(B) provides that a spouse is eligible to receive spousal maintenance if the spouse "lacks the ability to earn sufficient income to provide for the spouse's minimum reasonable needs[.]" *Id.* § 8.051(2)(B). There is a rebuttable

[1] As this is a memorandum opinion and the parties are familiar with the facts of the case, we will not recite them here except as necessary to advise the parties of this Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

presumption that maintenance under section 8.051(2)(B) is not warranted unless the spouse seeking maintenance has exercised diligence in developing the necessary skills to provide for the spouse's minimum reasonable needs during a period of separation and during the time the suit for dissolution of the marriage is pending. *Id.* § 8.053(a)(2). The term "minimum reasonable needs" is not statutorily defined. *Slicker v. Slicker*, 464 S.W.3d 850, 860 (Tex. App.—Dallas 2015, no pet.) (citing *Cooper v. Cooper*, 176 S.W.3d 62, 64 (Tex. App.—Houston [1st Dist.] 2004, no pet.)). Instead, minimum reasonable need is a fact-specific inquiry, which courts determine on a case-by-case basis. *Slicker*, 464 S.W.3d at 860 (citing *Amos v. Amos*, 79 S.W.3d 747, 749 (Tex. App.—Corpus Christi 2002, no pet.)).

Courts consider several factors in determining spousal maintenance. *See* TEX. FAM. CODE ANN. § 8.052. These factors include: the financial resources, age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance; the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to earn sufficient income; the contribution by one spouse to the education, training, or increased earning power of the other spouse; the contribution of a spouse as homemaker; any history or pattern of family violence; and the comparative financial resources of the spouses. *Id.*

B. Analysis

The record shows that after Alzoubi and Alfayoumi separated from each other, Alzoubi resumed her pursuit of a career in the medical profession by returning to college for the purpose of obtaining a master's degree in nursing. Based on this evidence, the trial court could have found that Alzoubi overcame the presumption disfavoring spousal

maintenance on the basis that she demonstrated diligence in developing the necessary skills to provide for her minimum reasonable needs by returning to college. *See* TEX. FAM. CODE ANN. § 8.053(a)(2).

The record further shows that Alzoubi put her professional career on hold during her fourteen-year marriage and became a homemaker for Alfayoumi and their two children. *See id.* § 8.052. While Alzoubi labored in this role for many years, Alfayoumi had the opportunity to attend and graduate from medical school. *See id.* At the time of trial, Alfayoumi reported a yearly salary of approximately $500,000 working as a medical doctor. Moreover, although Alfayoumi denied a history of family violence, Alzoubi maintained that Alfayoumi beat her several times during the marriage but that she never reported him to authorities out of a fear that his professional career and reputation would be tarnished. *See id.*

Alfayoumi argues that spousal maintenance was not warranted because Alzoubi obtained a bachelor's degree in nursing before she got married and that she could now use this degree to meet her minimum reasonable needs.[2] However, the trial court heard evidence that Alzoubi never became a licensed nurse because she got married and became pregnant with Alfayoumi's first son. Based on this evidence, the trial court could have determined that the nursing degree Alzoubi obtained over fourteen years prior to the time of trial did not disqualify her from receiving spousal maintenance for the purpose of developing the skills necessary to apply her degree in a meaningful way.

Nevertheless, Alfayoumi maintains that spousal maintenance was not warranted because Alzoubi received a share of the community estate that was sufficient to meet her

[2] The evidence also indicates that Alzoubi obtained a degree of some sort in the area of cosmetology.

minimum reasonable needs. Principally, Alfayoumi points out that Alzoubi received gold estimated at $250,000. However, the law did not require Alzoubi to spend down long-term assets or liquidate all available assets of the community estate in order to meet her needs in the short term. *See Amos v. Amos*, 79 S.W.3d 747, 749–50 (Tex. App.—Corpus Christi 2002, no pet.); *see also Trueheart v. Trueheart*, No. 14-02-01256-CV, 2003 WL 22176626, at *3 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet.) (mem. op.). Here, the trial court heard evidence that Alzoubi will require three to four years of college to complete her master's degree in nursing. In determining whether Alzoubi's share of the community estate was sufficient to meet her needs during that time, the trial court could have considered the cost of college tuition and living expenses. Additionally, the trial court heard evidence that Alzoubi suffered significant depressive episodes in the concluding years of her marriage, that she received mental health counseling to address her depression, and that she had to be temporarily committed to a psychiatric facility in Houston. The trial court could have also considered the potential on-going cost of mental health counseling in determining whether Alzoubi's share of the community estate was sufficient to meet her needs while she pursued a master's degree.

After reviewing all the evidence, we cannot say that the trial court abused its discretion in awarding Alzoubi spousal maintenance. *See* TEX. FAM. CODE ANN. § 8.051(2)(B). We overrule Alfayoumi's sole issue.

II. CUSTODY

The trial court appointed Alfayoumi as the sole managing conservator of the children and appointed Alzoubi as possessory conservator. By her first cross issue,

Alzoubi contends that the trial court erred in failing to appoint her as managing conservator.

We review the trial court's determination regarding conservatorship under the abuse-of-discretion standard set out above. *See Gray v. Shook*, 329 S.W.3d 186, 195 (Tex. App.—Corpus Christi 2010), *aff'd in part and rev'd in part*, 381 S.W.3d 540 (Tex. 2012); *see also Lopez*, 55 S.W.3d at 198.

"The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship[.]" TEX. FAM. CODE ANN. § 153.002. The trial court is given wide latitude in determining the best interest of the children. *See Vazquez v. Vazquez*, 292 S.W.3d 80, 85 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).[3] There is a rebuttable presumption that appointing parents as joint managing conservators is in the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.131(b). However, a history of family violence involving the parents of the children removes the presumption. *See id.* The party seeking appointment as sole managing conservator has the burden to rebut the statutory presumption favoring joint managing conservatorship. *See Hinkle v. Hinkle*, 223 S.W.3d 773, 779 (Tex. App.—Dallas 2007, no pet.).

The evidence in this case shows that Alzoubi had a history of family violence directed against Alfayoumi and the children. The evidence showed that less than a year before trial, Alzoubi was arrested for allegedly committing a felony family violence offense

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[3] Factors which courts may considered in deciding what is in the best interest of the children include: (1) desires of the children, (2) emotional and physical needs of the children now and in the future, (3) emotional and physical danger to the children now and in the future, (4) parental abilities of the individuals involved, (5) programs available to those individuals to promote the best interest of the children, (6) plans for the children by these individuals, (7) stability of the home, (8) acts or omissions of the parent which may indicate that the existing parent-child relationship is not proper, and (9) any excuse for the acts or omission of the parent. *Vazquez v. Vazquez*, 292 S.W.3d 80, 85 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

against Alfayoumi, and that a magistrate judge issued an emergency protective order for the safety of Alfayoumi and the children.[4] Moreover, Alzoubi admitted at trial that she threw a water bottle at one of the children out of anger. Furthermore, a court-appointed parent facilitator, who observed the children while the divorce was pending, testified that the children were angry at their mother and that they did not have a good relationship with her because "there was a lot of violence, the mother to them [the children]." When asked to describe the relationship between Alzoubi and the children at the time of trial, the parent facilitator testified: "It's very bad, very bad. It's very dysfunctional. The kids don't even want for mom [Alzoubi] to touch them or to get near them."

Additionally, the trial court admitted a report prepared by the children's counselor. In the counselor's report, the older of the two children stated that he noticed a change in Alzoubi's behavior beginning two years prior to the divorce. The child elaborated that Alzoubi became angry and began hitting his younger brother and Alfayoumi and that the physical abuse occurred on various occasions. According to the counselor's report, interviews with the younger child confirm the repeated occurrence of physical abuse in the household; specifically, the younger child stated that his mother "raises her hand on me" and "pushes me around to the ground . . . every now and then."

In contrast to Alzoubi's behavior, the older child reported that Alfayoumi has never been physically abusive toward them and that he has never witnessed Alfayoumi hurt Alzoubi. According to the counselor's report:

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[4] A magistrate judge issued an emergency protective order for the safety of Alfayoumi and the children as a result of the arrest. However, there is no indication in the record that Alzoubi was ever convicted for the offense. The emergency protective order prohibited Alzoubi from communicating directly with Alfayoumi or the children and from coming within 200 feet of the family residence, the children's school, or Alfayoumi's workplace.

> [The child] states they feel safe when [they] are with [Alfayoumi]. He states that although [Alfayoumi] is physically away more because of work, he knows his father is watching over them. [Alfayoumi] will call them frequently and when they are together, it is about doing things together. [The child] affirms he knows [Alfayoumi] has "unconditional love for him and his brother" because [Alfayoumi] will sit and talk with them. He admires the fact [that Alfayoumi] "never thinks about himself." He states his father is always thinking about him and his brother. [The child] also stated [Alfayoumi] thinks about ways to help [Alzoubi] despite the fact [that] she "lies about him and tries to hurt him."

Moreover, the record reflects that the trial judge, prior to deciding the conservatorship issue in Alfayoumi's favor, interviewed the children in chambers to determine their wishes.

Alzoubi maintains on appeal that the trial court erred in appointing Alfayoumi as sole managing conservator because Alfayoumi exhibited a violent temper during the marriage, abused prescription drugs, and physically abused her—sometimes in front of the children. However, Alfayoumi testified that he never abused Alzoubi and never abused prescription drugs. Furthermore, the older child reported to the counselor that he never witnessed Alfayoumi hurt Alzoubi. In accordance with our abuse-of-discretion standard of review, we will defer to the trial court's resolution regarding conflicts in the evidence. See *George v. Jeppeson*, 238 S.W.3d 463, 474 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (observing that a court applying an abuse-of-discretion standard must defer to factual resolutions by the trial court that derive from conflicting evidence, as well as any credibility determinations that may have affected those resolutions).

We conclude that Alzoubi's history of family violence is supported by the record and that Alfayoumi rebutted the presumption that joint conservatorship is in the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.131(b). We further conclude that the trial court did not abuse its discretion in determining that appointing Alfayoumi as the

sole managing conservator was in the best interest of the children. TEX. FAM. CODE ANN. § 153.002. Therefore, we overrule Alzoubi's first cross issue.

III. CRUEL TREATMENT

By her second cross issue, Alzoubi contends that the trial court erred in failing to grant the divorce based on alleged cruel treatment.

We review a trial court's determination regarding the grounds for granting a divorce under the abuse-of-discretion standard set out above. *See Newberry v. Newberry*, 351 S.W.3d 552, 556 (Tex. App.—El Paso 2011, no pet.). Although not frequently used since the advent of no-fault divorce, it is still possible for a trial court to grant a divorce based on cruel treatment. *See Henry v. Henry*, 48 S.W.3d 468, 473 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Specifically, family code section 6.002 provides that the trial court "*may* grant a divorce in favor of one spouse if the other spouse is guilty of cruel treatment toward the complaining spouse of a nature that renders further living together insupportable." TEX. FAM. CODE ANN. § 6.002 (emphasis added). "Insupportable" in this context means "incapable of being borne, unendurable, insufferable, intolerable." *Henry*, 48 S.W.3d at 473 (quoting *Cantwell v. Cantwell*, 217 S.W.2d 450, 453 (Tex. Civ. App.—El Paso 1948, writ. dism'd)).

Alzoubi argues that cruel treatment occurred because there was evidence that Alfayoumi abused her physically and emotionally during the marriage. However, Alfayoumi denied that such abuse occurred. We must defer to the trial court's assessment regarding the weight and credibility of Alfayoumi's testimony, particularly because the evidence was in conflict regarding whether Alfayoumi committed abuse. *See Stallworth v. Stallworth*, 201 S.W.3d 338, 347 (Tex. App.—Dallas 2006, no pet.)

(observing that in a bench trial, the trial court is the sole judge of the weight and credibility of witness testimony and may choose to believe one witness's version of the events over another). We conclude that the trial court did not abuse its discretion in refusing to grant the divorce based on cruel treatment. *See* TEX. FAM. CODE ANN. § 6.002; *see also* V*illalpando v. Villalpando*, 480 S.W.3d 801, 805 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Baker v. Baker*, 469 S.W.3d 269, 279 (Tex. App.—Houston [14th Dist.] Jun. 25, 2015, no pet.); *Clay v. Clay*, 550 S.W.2d 730, 734 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). Accordingly, we overrule Alzoubi's second cross issue.

IV. RECONSTITUTION OF THE COMMUNITY ESTATE

By her third cross issue, Alzoubi contends that the trial court erred in failing to reconstitute the community estate based on Alfayoumi's alleged fraudulent depletion of certain community property pursuant to family code section 7.009. TEX. FAM. CODE ANN. § 7.009.

Section 7.009 provides that if the trial court determines that a spouse has committed actual or constructive fraud on the community estate, the court shall: (1) calculate the value by which the community estate was depleted as a result of the fraud on the community and calculate the amount of the reconstituted estate; and (2) divide the value of the reconstituted estate between the parties in a manner the court deems just and right. *Id*. This statute "provides a vehicle for a trial court to reconstitute a marital estate upon a finding by the trial court that a spouse has committed actual or constructive fraud on the community [estate]." *See In re Marriage of Ford*, 435 S.W.3d 347, 349 (Tex. App.—Texarkana 2014, no pet.). A party relying on section 7.009 must request that the

trial court reconstitute the community estate in order to complain about the trial court's failure to do so on appeal. *See id.*

The record in this case shows that the trial court did not make a finding regarding Alfayoumi's alleged fraud on the community estate because Alzoubi never requested that the community estate be reconstituted pursuant to section 7.009, either in her pleadings or in her argument to the trial court at the time of trial. Accordingly, we determine that this issue was not properly presented to the trial court and is therefore not preserved for appellate review. *See* TEX. R. APP. P. 33.1; *see also In re Marriage of Ford*, 435 S.W.3d at 349. Additionally, we observe that Alzoubi's appellate brief with respect to her third cross issue contains no citation to the appellate record and is therefore not adequately briefed. *See* TEX. R. APP. P. 38.1(i) (providing that an appellate brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *see also Flores v. United Freedom Associates, Inc.*, 314 S.W.3d 113, 115 (Tex. App.—El Paso 2010, no pet.) (observing that when the appellate issue is unsupported by argument or lacks citation to the record or legal authority, nothing is presented for review). We overrule Alzoubi's third cross issue.

V. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
9th day of March, 2017.