Affirm in part; Reverse in part; and Remand; Opinion Filed July 18, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00504-CV

IN THE INTEREST OF J.D.H., A CHILD

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-56446-2010

MEMORANDUM OPINION

Before Justices Lang, Brown, and Richter[1]
Opinion by Justice Richter

This is an appeal from a final divorce decree that included property division and orders regarding support for and possession of the divorcing couple's teenage son, J.D.H. Appellant D.S.H. is the teen's father (Husband); appellee S.D.H. is his mother (Wife). Husband raises six issues in this Court, challenging the trial court's failure to make findings of fact and conclusions of law and challenging various aspects of its division of property, support award, and possession schedule. For the reasons discussed below, we affirm the trial court's judgment in part and reverse and remand it in part.

Background

Husband and Wife were married more than twenty years ago. Wife had three sons from an earlier marriage; two of those boys lived with Husband and Wife. The couple had one child

[1] The Hon. Martin Richter, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

together, J.D.H., who was approximately fifteen at the time of trial. The parties both testified to a very troubled marriage for many years.

Wife testified Husband assaulted her early in the marriage. She also described strained relationships between Husband and the three boys in the house. There was testimony that the oldest boy and Husband engaged in one physical altercation and that the middle boy was "bullied" by Husband. The youngest, according to Wife, was largely ignored by his father. During the course of litigation, the presiding judge—the Honorable Robert T. Dry—ordered Husband and J.D.H. to undergo counseling together. Wife's testimony indicated that weekly sessions for a year had made no progress in that relationship.

Husband testified, in turn, that Wife had assaulted him. He opined that the oldest boy living with them was a danger to the younger children; he had no specific recollection of violent encounters with either step-son. He described his efforts to communicate with J.H.D., who he explained was failing classes and getting into trouble at school. Husband testified their counseling sessions were improving although Wife too often canceled the sessions without explanation.

Evidence indicated that during the marriage Husband worked for Verizon, earning more than $100,000 yearly. He went to law school during those years but maintained his same employment with Verizon. Wife was on disability from an injury incurred while working for the United States Post Office before the marriage. During the marriage she went to graduate school—ultimately earning her doctorate—and worked part-time while collecting disability until her doctorate allowed her to earn enough to be removed from disability status. The parties had many disagreements concerning what constituted the community estate, and how it should be divided. For example, they disagreed about whether Wife would receive a pension from the Post Office and who owned the rental house Husband was living in at the time of trial. Each

professed not to know what the other's current income was, and they argued concerning performance of obligations on their family home.

Judge Dry retired the day after trial of this case ended, and four days later he sent a letter to the parties stating his rulings. After a number of post-trial proceedings, Judge Dry's successor—the Honorable Angela Tucker—signed the Final Decree of Divorce, which incorporated Judge Dry's rulings among the necessary provisions of a judgment in a suit affecting the parent-child relationship judgment. The decree granted the divorce, and neither party challenges the dissolution of the marriage. The parties agree the decree's property award was made disproportionally in favor of Wife and that Husband's child support award exceeded the statutory guidelines. Although the parties were named joint managing conservators of J.D.H., Wife was granted primary custody. Under the trial court's orders, J.D.H. will determine if, when, and how often he will see Husband, pursuant to a provision the trial court called the Henderson Clause.[2]

Husband appeals.

Appellate Jurisdiction

At oral submission of this case, counsel for Wife argued that Husband's notice of appeal was not timely filed, raising a challenge to this Court's jurisdiction. The post-trial procedure in this case was quite involved, but a chronology establishes that the notice was timely filed.

Judge Tucker signed the original divorce decree on December 3, 2013. This decree became the trial court's judgment in the divorce and SAPCR. *See Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990). Judge Tucker then had plenary power to grant a new trial or to vacate, modify, correct, or reform that judgment for thirty days; her plenary power would have expired on January 2, 2014. *See* TEX. R. CIV. P. 329b(d). Within that thirty-day period, any party could

[2] The "Henderson Clause" is a fictitious clause utilized in Collin County, Texas and is of no legal consequence in Texas jurisprudence.

file a motion for new trial or a motion to modify, correct, or reform the judgment. TEX. R. CIV. P. 329b(a). Filing such a motion would extend the court's plenary power until thirty days after the motion was overruled. TEX. R. CIV. P. 329b(e). Husband filed his Motion to Modify, Correct, or Reform Judgment on December 18, 2013; he also filed a Post-Judgment Motion for Partial New Trial on December 31, 2013. Both motions were timely filed within the thirty-day window following the signing of the decree. The trial court did not sign a written order on either motion, so each motion would have been overruled by operation of law seventy-five days after the judgment was signed, on February 18, 2014.[3] *See* TEX. R. CIV. P. 329b(c). The trial court's plenary power—having been extended by the filing of the motions—would then have expired thirty days after the motions were overruled, on March 20, 2014. *See* TEX. R. CIV. P. 329b(e).

However, before the motions were overruled by operation of law, Judge Tucker signed a Nunc Pro Tunc Decree of Divorce on February 12, 2014, implicitly granting Husband's Motion to Modify, Correct or Reform the Judgment. Because this new judgment was signed within the court's plenary power, it restarted the post-judgment timetables. *See* TEX. R. CIV. P. 329b(h); *see also Brighton v. Koss*, 415 S.W.3d 864, 866 (Tex. 2013). Thus when Husband timely filed his Second Post-Judgment Motion for Partial New Trial on March 13, 2014, the court's plenary power was extended again until thirty days after this new motion was overruled. *See* TEX. R. CIV. P. 329b(e).

Significantly, Husband's Second Post-Judgment Motion for Partial New Trial also restarted the parties' timetable for appeal. When a party timely files a motion for new trial, the notice of appeal must be filed within ninety days after the judgment is signed. TEX. R. APP. P. 26.1(a)(1). In this case, the nunc pro tunc judgment extended the deadline for filing a notice of

[3] The seventy-fifth day after December 31, 2014 was Sunday, February 16, 2015. The following day, Monday, February 17, was President's Day, a legal holiday. Thus, the motions would have been overruled on the following day, Tuesday, February 18.

appeal until May 13, 2014. Husband filed his notice of appeal on April 24, 2014, well within the ninety-day period.

We conclude that Husband's notice of appeal was timely filed and that we may properly exercise our jurisdiction over his appeal.

Findings of Fact and Conclusions of Law

In his first issue, Husband contends the trial court reversibly erred by failing to file Findings of Fact and Conclusions of Law despite Husband's timely request. Husband actually requested three types of findings. We will address each in turn.

Findings Regarding Possession of J.D.H.

The family code provides that when possession of a child is contested and the possession of the child varies from the standard possession order, a party may make a written request within ten days of the hearing and "the court shall state in the order the specific reasons for the variance from the standard order." TEX. FAM. CODE ANN. § 153.258 (West 2014). On May 4, 2012—eight days after the end of the trial and four days after Judge Dry's letter to the parties—Husband filed his Request for Findings in Possession Order, asking the court to state "the specific reasons for all deviations from the standard possession order." On May 10, Judge Dry signed findings in response to Husband's request. The Possession Finding explained the so-called "Henderson Clause" as a provision used by judges in Collin County when a teenager has a poor relationship with the possessory parent. Judge Dry found J.D.H. and Husband had "a very poor relationship," that there was testimony that Husband bullied J.D.H. during the marriage, that counseling had made little progress, and that it was in the best interest of J.D.H. that the Henderson Clause modify the standard possession order.

Because the trial court did make these findings, Husband's challenge to the possession order is limited to whether application of the Henderson Clause violates his rights as a parent and

is in the best interest of J.D.H. Counsel agreed at submission of this case that possession issues were moot because J.D.H., who was born in 1997, is no longer subject to the possession order. We agree the issue is moot. We need not address Husband's sixth issue challenging that order.

Findings Regarding Child Support

The family code likewise provides that if a party makes a written request not later than ten days after the hearing, the court shall make findings within fifteen days concerning the court's ordered child support. *Id.* § 154.130(a), (a-1). The statute states:

> If findings are required by this section, the court shall state whether the application of the guidelines would be unjust or inappropriate and shall state the following in the child support order:
>
> "(1) the net resources of the obligor per month are $_____;
>
> "(2) the net resources of the obligee per month are $_____;
>
> "(3) the percentage applied to the obligor's net resources for child support is _____%; and
>
> "(4) if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount computed by applying the percentage guidelines under Section 154.125 or 154.129, as applicable ."

TEX. FAM. CODE ANN. § 154.130(b). Husband timely requested these findings in writing three days after the hearing, but Judge Dry did not respond to this request as he had the request concerning possession findings. Husband subsequently filed what he called his Supplemental Request for Findings in Child Support Order, although there was no statutory requirement that he do so. Still, the trial court did not make the statutory findings, and they were not incorporated into the divorce decree.

Moreover, there is no dispute the trial court's monthly child support award of $1670 was above the guideline's $1500, which was also the amount Wife requested. Because the amount varied from the statutory guidelines, the trial court was required to make the above findings even if Husband had not requested them as he did. TEX. FAM. CODE ANN. § 154.130(a)(3). Indeed,

our supreme court has stated that failure to make these findings when the support award deviates from the guidelines is reversible error. See *Tenery v. Tenery*, 932 S.W.2d 29, 29 (Tex. 1996).

Given that Wife requested only $1500 as a monthly award, she did not offer evidence at trial on the specific issue of why the award should be greater. However, a trial court may order child support payments that vary from the guidelines "if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines." TEX. FAM. CODE ANN. § 154.123(a). The family code instructs that the court "shall consider evidence of all relevant factors" in determining whether applying the guidelines would be "unjust or inappropriate under the circumstances." *Id.* § 154.123(b). The code then identifies seventeen such factors that should be considered in the court's analysis. *See id.* Among those factors are a number that were hotly contested in this case, including the financial resources available for the support of the child and the amount of time of possession of and access to the child. *Id*. § 154.123(b)(3), (4). The general rule is that an appellant has been harmed if, under the circumstances of the case, he has to guess at the reason the trial court ruled against him. *Willms v. Americas Tire Co.*, 190 S.W.3d 796, 801–02 (Tex. App.—Dallas 2006, pet. denied). Given the range of evidence that could be considered relevant to the trial court's decision in this case, we conclude Husband is forced to guess on appeal as to the reason why the trial court's monthly award exceeded $1500.

We sustain Husband's first issue insofar as it complains of the trial court's failure to make findings under section 154.130 of the family code.

Rule 296 Findings of Fact and Conclusions of Law

As we have discussed, the family code provides vehicles for obtaining findings on issues of child possession and support. Husband also sought general findings of fact and conclusions of law pursuant to rule 296. TEX. R. CIV. P. 296. That rule allows any party to request findings of

fact and conclusions of law within twenty days after judgment is signed. *Id.* Husband timely filed his request on December 17, 2013, fourteen days after Judge Tucker signed the original divorce decree.[4] The trial court was then required to file its findings of fact and conclusions of law within twenty days. TEX. R. CIV. P. 297. When no findings and conclusions were filed by the court within thirty days, Husband filed his Notice of Past Due Findings of Fact and Conclusions of Law as the rules require, extending the trial court's time to respond to forty days from the original request. *Id.* Still, no response was filed.

A trial court's failure to respond to a timely request for findings of fact and conclusions of law is error and is presumed harmful unless the record before the appellate court affirmatively shows that the complaining party has suffered no harm. *Larry F. Smith, Inc. v. The Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied). Again, an appellant has been harmed when he must guess at the reason the trial court ruled against him. *Willms*, 190 S.W.3d at 801–02.

As we addressed above, Husband was entitled to findings of fact on the issue of child support under section 154.130 of the family code. Given his request pursuant to rule 296, he was also entitled to any relevant findings of fact on the issue of child support that were not specifically included in the family code request. Husband was entitled to the trial court's conclusions of law on this topic as well.

The divorce decree incorporated the division of the marital community. Again, the parties do not disagree that Wife received a significantly larger portion of the property. The family code's general rule of property division instructs the trial court to "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the

[4] Wife argues that Husband's request was untimely because he should have made it after Judge Dry's letter to the parties. Judge Dry's letter represented his initial rulings, but no judgment was signed in this case until Judge Tucker signed the original divorce decree. Rule 296 speaks specifically to the date the judgment is signed.

rights of each party and any children of the marriage." TEX. FAM. CODE ANN. § 7.001. The trial court has wide latitude in dividing the marital estate. *See LaFrensen v. LaFrensen*, 106 S.W.3d 876, 878 (Tex. App.—Dallas 2003, no pet.). The division does not need to be equal to be "just and right." *Id.* However, the court must have a reasonable basis for ordering an unequal division. *Walter v. Walter*, 127 S.W.3d 396, 399 (Tex. App.—Dallas 2004, no pet.). It may consider such factors as "education, respective earning power, business and employment opportunities, physical health, probable future need for support, the size of the parties' separate estates, the length of the marriage, and fault in its breakup." *Id.* A number of these factors are implicated in this case. However, most factors that are implicated are subject to controverting or mitigating evidence. In the absence of findings on the issues of property division, neither Husband nor this Court can adjudge whether the unequal property division is based on a reasonable foundation.

It is apparent that—in the absence of findings of fact and conclusions of law—Husband must guess the reasons for the trial court's child support award and property division. Nor is this Court able to adjudge the reasonableness of the trial court's orders without knowing the reasons for them. We conclude that both the failure to make findings under the family code concerning the amount of child support awarded and the failure to make findings of fact and conclusions of law under the rules of civil procedure concerning the amount of child support and the division of the community property were harmful to Husband. *See Larry F. Smith, Inc.*, 110 S.W.3d at 614.

We further sustain Husband's first issue insofar as it complains of the trial court's failure to make findings of fact and conclusions of law under rule 297.

Disposition of the Appeal

Having concluded the lack of findings of fact and conclusions of law was harmful to Husband, we must determine the proper disposition of this appeal. Husband prefers that we reverse and remand the case; he seeks abatement to obtain findings from the current trial court only if we will not remand for further proceedings on these issues. Abatement for findings from the judge who tried the case is the preferred remedy. *See Larry F. Smith, Inc.*, 110 S.W.3d at 616. In this case, however, that remedy is not available because the judge who tried the case retired after the trial.

The Legislature has created a statute and the supreme court has promulgated a rule, both of which speak to the continuation of a trial court's business after a judge has been replaced. Section 30.002 of the Texas Civil Practice and Remedies Code addresses the situation in which a trial judge dies before completing certain work of a trial. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.002 (West 2015).[5] If the trial judge dies before filing findings of fact and conclusions of law in a case pending at his death, then the judge's successor may file them. *Id.* § 30.002(b). Clearly, section 30.002 does not allow a successor judge to make findings of fact or conclusions of law based on the trial Judge Dry conducted.

Rule 18 of the Texas Rules of Civil Procedure allows a successor judge to make findings of fact and conclusions of law when the preceding judge has died, resigned, or become disabled during his term of office. *See* TEX. R. CIV. P. 18.[6] None of those circumstances are presented here: Judge Dry did not die, resign, or become disabled during his term on the bench. He

[5] Section 30.002(a) also speaks to the circumstance where a judge's term of office expires before the time period expires for certain tasks, including filing findings of fact and conclusions of law. Judge Dry's term of office did not expire until the end of 2012, more than a year after the period for filing findings of fact and conclusions of law ended.

[6] We have observed that the court in *Lykes Brothers Steamship Co. v. Benben*, 601 S.W.2d 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) mistakenly stated rule 18 allowed the "successor to a *retired* or deceased judge" to hear and determine undisposed motions and to approve statements of fact. *See Pak v. Villari, LLC*, No. 05-14-01312-CV, 2016 WL 637736, at *3, n.3 (Tex. App.—Dallas Feb. 16, 2016, no pet.) (emphasis added). The rule speaks to circumstances when the trial judge "dies, resigns, or becomes unable to hold court." TEX. R. CIV. P. 18.

retired. And Texas law differentiates between a retired judge and a judge who leaves office in another fashion. The government code defines "retired judge" to mean a person who has retired under either one of the judicial retirement systems of Texas (i.e., a "retiree") or a county and district retirement system. TEX. GOV'T CODE ANN. § 74.041(6), (3) (West 2013). A "former judge," on the other hand, is a person who has served as an active judge in Texas but is *not* a retired judge. *Id.* § 74.041(5). Any retiree may elect to be a judicial officer; he is then designated a "senior judge." *Id*. § 75.001. A former appellate judge may also elect to serve as a judicial officer, but a senior appellate judge can be assigned to more courts in a broader geographic area. *Compare id.* § 75.002 (assignment of retiree) *and id.* § 75.003 (assignment of former judge).[7] We note as well that a judge's status is fixed when he leaves office. *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex. 1997). Thus, even if a former judge subsequently becomes eligible for judicial retirement, he does not thereby become a retired judge under Texas law. *See id.* We conclude a judge who retires—rather than resigns—does not fall within the purview of rule 18.

We have consistently concluded that if neither article 30.002 nor rule 18 applies to a case that requires findings of fact and conclusions of law, then the case must be remanded. *See, e.g., Larry F. Smith, Inc.*, 110 S.W.3d at 616; *Pak v. AD Villarai, LLC*, No. 05-14-01312-CV, 2016 WL 637736, at *3–4 (Tex. App.—Dallas Feb. 16, 2016, no pet.). We understand Wife's concerns involving judicial efficiency. However, it is not for us to create exceptions to the system devised by the legislature and the supreme court for the continuation of a trial judge's work after he leaves office. We have no choice but to reverse the relevant portions of the trial

[7] A retired judge, vested in the state judicial retirement system, is also authorized to conduct a marriage ceremony. TEX. FAM. CODE ANN. § 2.202(a)(4) (West Supp. 2015). A former judge is only granted that authority if he "has an aggregate of at least 12 years of service." *Id.* § 2.202(b).

court's judgment and remand those issue for further proceedings. *See Larry F. Smith, Inc.*, 110 S.W.3d at 616.

We stress that Judge Tucker was authorized to reduce Judge Dry's rulings to the proper form of the judgment and to sign that judgment. *See In re Nixon*, No. 05-15-00263-CV, 2015 WL 1346137, at *2 (Tex. App.—Dallas Mar. 25, 2015, orig. proceeding) (once trial court declares content of its order, act of committing judgment to writing and signing it is ministerial act). Making findings of fact, however, is not a ministerial duty: it requires hearing evidence, resolving conflicts in that evidence, and evaluating the credibility of witnesses.[8] This Court may not perform those functions and, unless authorized by statute or rule, neither may a judge who has not presided over the taking of evidence.

Neither party has challenged the trial court's judgment insofar as it grants their divorce. As to Husband's remaining issues, we have concluded the issue of possession of J.D.H. (and thus issue 6) is moot. We are unable to address Husband's remaining issues concerning the division of property (issues 3, 4, and 5) or the amount of child support (issue 2) given the record before us.

[8] As the Texas Supreme Court has explained:

> Ministerial acts are those for which "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." . . . If the public official must obey an order, without having any choice in complying, the act is ministerial. . . . If an action involves personal deliberation, decision, and judgment, however, it is discretionary.

Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 425 (Tex. 2004) (internal citations omitted).

Conclusion

We reverse the portions of the trial court judgment that divide the parties' community estate and award child support. We remand only those matters for new trial. In all other respects, we affirm the trial court's judgment.

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/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF: J.D.H., A CHILD

No. 05-14-00504-CV

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. 199-56446-2010.
Opinion delivered by Justice Richter, Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part.

We **REVERSE** those portions of the trial court's judgment that divide the parties' community estate and award child support. We remand only those matters for new trial.

In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 18th day of July, 2016.