Reverse and Render in part; Remand in part; Opinion Filed February 29, 2016.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01279-CV

IN THE MATTER OF THE MARRIAGE OF
KEVIN W. WOLFE AND KATHERINE G. WOLFE
AND
IN THE INTEREST OF G.C.W., A CHILD

On Appeal from the 302nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-12-20658

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Lang, and Justice Brown
Opinion by Justice Lang

Appellant Katherine G. Wolfe ("Mother") appeals the trial court's "Final Decree of Divorce" respecting her marriage to Kevin W. Wolfe ("Father"). In her sole issue on appeal, Mother contends the trial court erred "in awarding [Father] the right to determine the residence of the child [G.C.W.] along with child support to be assessed against [Mother] despite the mediated settlement entered into by the parties."[1]

We decide Mother's issue in her favor. We (1) reverse the trial court's judgment, in part; (2) render judgment enforcing the terms of the mediated settlement agreement signed by Mother and Father; and (3) remand this case to the trial court for further proceedings in accordance with

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[1] Father has not filed an appellate brief in this Court.

this opinion. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a), 47.4.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 16, 2012, Father filed a pro se petition for divorce in the trial court. In his petition, he requested, among other things, that the trial court (1) name him and Mother joint managing conservators of their ten-year-old daughter, G.C.W.; (2) give him the exclusive right to designate the residence of G.C.W.; and (3) order Mother to pay child support. A January 2, 2013 "Associate Judge's Report," which was designated as "temporary," contained "findings and recommendations" (1) naming Mother "temporary sole managing conservator" and Father "temporary possessory conservator" of G.C.W. and (2) stating Father shall pay child support and have monthly supervised possession periods at "either Hannah's House or FLP Center" and "Mother to transport child for visits."

Mother filed a pro se answer on January 18, 2013, in which she requested "full custody" and the exclusive right to designate the residence of G.C.W. On June 25, 2013, the trial court ordered mediation as to "possession/access" and "custody."

A July 23, 2013 mediated settlement agreement (the "MSA") was signed by Mother and Father. The MSA stated at the top of the signature page in underlined capital letters in boldfaced type, "**THIS AGREEMENT IS NOT SUBJECT TO REVOCATION**." In the MSA, Mother and Father (1) stated the MSA was made "voluntarily" and (2) agreed "to settle all claims and controversies between them, asserted in this case" as follows:

> The parties agreed to joint managing conservatorship with [Mother] to determine resident [sic] [.] Visitation: Father will keep supervised visits but parents agreed to change from Hannah House or FLP to mother/grandmother home located at 375 Oakland, Vidor, Texas 77662, home of Barbara Lyle. The parents agreed to open visit times of Skyp [sic]. Supervised visits will be first, third and fifth weekends. Father will drive to resident for visits. . . . Father will also start and complete and provide court proof of drug classes and anger management classes./ Upon proof of classes or starting Jan. 2014 Father visitation will be first, third,

> fifth in Dallas. . . . Parent will have split summer 2014—2 weeks on 2 weeks off. . . . Mother will have child on odd years holidays, Father for even years start [sic] 2013.

Also, in a handwritten portion of the MSA that is difficult to read due to the quality of the copy in the record, there is a statement crossed out that appears to have originally stated Father would provide an airline ticket for G.C.W.'s visits with him in Dallas. Above the crossed-out statement is a handwritten provision that the parties will each drive to a "halfway point" to transport G.C.W. for those visits. There is no mention of child support or medical support in the MSA.

On November 14, 2013, Mother filed a pro se "Motion to Modify the Parent-Child Relationship" using a form copyrighted by "Texas Partnership for Legal Access." In the section of the form stating "Order to be Modified," Mother wrote "Associate Judge's Report" of "01/2/2013." Additionally, Mother checked a box on the form next to the statement, "I ask the Court to change the possession and access orders to the following." On the lines provided on the form under that statement, Mother wrote a paragraph requesting that Father's visitation be limited to visits at Mother's residence because G.C.W. has an illness that causes her to experience "abdominal pain and nausea" during the "long car trip" from Vidor to visit Father in Dallas. Also, Mother asked the trial court to increase the amount of child support and medical support paid by Father.

A November 14, 2013 "modification" to the "Associate Judge's Report" was labeled "temporary" and contained "findings and recommendations" that included, in part, the following statement: "Pending completion of social study and further orders, the [MSA] attached hereto shall be the temporary order of the court, except all visits to take place in Vidor, TX, unless the

parties agree otherwise."[2] The November 14, 2013 "modification" did not mention or address child support or medical support.

A "social study" was filed July 9, 2014. In that social study, the family counselor who conducted the study wrote in part (1) Mother "did not comply with the [MSA] and stated she was under duress by [Father] and mediator to sign it"; (2) Mother "stated that the [MSA] was also modified after she had signed it, and changed to include wording that she would be responsible for transporting the child to visits with [Father]"; and (3) "[i]t is recommended the mother and father share Joint Managing Conservatorship of the child and the mother be given the exclusive right to designate her primary residence; however, if the mother continues to demonstrate behavior which indicates she is trying to further control and limit the father's relationship with the child, it is recommended that the child's residence be restricted to Dallas and its contiguous counties and that the father be given the right to establish the child's residence if the mother is unwilling to move her residence back to the local area."

Additionally, as part of the social study, Mother and Father each completed a December 3, 2013 "Family Violence Questionnaire." That questionnaire included the question, "Have you experienced any of the following types of abuse from any other party involved in this case?" Both Mother and Father answered "yes" as to "Verbal Abuse" and "Emotional Abuse" and "no" to as to "Physical Abuse" and "Sexual Abuse." Further, that same questionnaire asked, (1) "Are you physically intimidated by the other party?" and (2) "Has the other party ever denied or threatened to deny access to your children?" Mother answered "no" to both of those questions and Father answered "no" to the first question and "yes" to the second question.

The trial court held a September 19, 2014 bench trial at which both parties appeared pro se. The trial court took judicial notice of the MSA and the social study. Also, the trial court

[2] There is no attachment to that document in the record.

observed that the record showed (1) Father filed an October 25, 2013 document styled "Original Petition to Modify the Parent/Child Relationship" in which he sought to "modify a temporary custody order of January the 2nd of 2013" and also filed a November 14, 2013 "Motion to Modify Parent/Child Relationship" in which he stated he wanted "to change the terms of the associate judge's recommendation of January 2nd, 2013"[3] and (2) Mother filed a "motion to modify" seeking "to change the child support." The trial court stated to Father, "But specifically what you [were] trying to do is change the [MSA] that you made in July of last year, right?" Father answered "yes." Then, the following exchange occurred:

> THE COURT: Now, there wasn't any agreement on child support in the mediated settlement agreement, correct?
>
> [FATHER]: Correct.
>
> [MOTHER]: Correct.
>
> THE COURT: Yes. It all had to do with access and possession issues. That's what I remember reading.
>
> [FATHER]: Yes.
>
> [MOTHER]: Yes.
>
> THE COURT: Okay with that. So here's what I'm going to do. I'm going to be hearing the divorce that was filed on November the 16th; the motion to modify that was filed—you filed, sir, on October 25, 2013; the motion you filed to modify, sir, on November 14, 2013. And I'm going to hear the motion to modify the child support, ma'am, that you filed on September the 22nd of 2014 [sic].
>
> Additionally, Mother testified during trial as follows:
>
> THE COURT: Now, either during the pendency of this divorce action or the two years prior to filing has there been a history or pattern of family violence, child abuse or neglect?
>
> [MOTHER]: Yes, there was.
>
> THE COURT: Okay. Explain that to me.

[3] The record on appeal does not contain either of those two documents.

> [MOTHER]: The father was abusing the child.
>
> . . . .
>
> THE COURT: Now, let's go real slow here. So [Father] was abusing y'all's daughter the first ten years of her life. That's a very conclusory statement. Why don't you give me some specify [sic] examples of what you mean by "abuse."
>
> [MOTHER]: Okay. [Father] was abusing me in the beginning of our marriage and—by yelling and screaming, ranting and raving and doing drugs. I had called 9-1-1 the—when my daughter was 1 year old. He was out of control and abusing drugs. And that's when, really, the abuse started. And eventually throughout our marriage, throughout time, the abuse became from me onto the child.
>
> THE COURT: What does that mean?
>
> [MOTHER]: As I started sleeping in a separate room from him and avoiding him, he started yelling at the child more and me less.

Additionally, Mother stated in part (1) she and G.C.W. "were afraid of [Father] throughout these times of his ranting and raving" and (2) "there was also a strike, a hit, to the child." Further, Mother (1) offered into evidence and requested the court to consider a proposed visitation schedule drafted by her, which was similar, but not identical, to the terms of the MSA, and (2) stated she "would be willing to meet [Father] halfway for the visitation."

The trial court signed a "Final Decree of Divorce" dated October 2, 2014. Therein, the trial court stated in part that it "finds that the following orders . . . are in the child/ren's best interest." The trial court ordered that the parents are appointed joint managing conservators and Father has the exclusive right to designate the primary residence of G.C.W. Further, Mother was ordered to pay child support. Additionally, the trial court ordered that the parties are divorced and made orders respecting the division of their property.

Mother timely filed a pro se notice of appeal. Also, she filed an October 9, 2014 pro se motion for new trial based on "misrepresentation of myself in a trial," "falsification of a document as evidence," and "abuse to child and drug use of the father." In her motion for new trial, Mother requested that the trial court designate her the "custodial parent" of G.C.W. and

order Father to pay child support. Further, Mother stated in that motion (1) "[t]he original signed Mediated Settlement Agreement was for [Father] to provide plane tickets for his daughter to fly over to see him on visitation"; (2) "[Father] has falsified the Mediated Settlement Agreement in order to win the case;" and (3) "[t]aking the child away [from Mother] is not in the best interest of the child because it disrupts her normal routine in school for a successful two years." Attached to Mother's motion for new trial was a signed copy of a July 23, 2013 mediated settlement agreement identical to the MSA described above in all respects except that (1) the handwritten portion described above respecting airline tickets was not crossed out and there were no changes made to that provision and (2) unlike the MSA described above, it did not bear a stamp indicating it was filed in the trial court.

On October 23, 2014, Mother obtained counsel. At the October 31, 2014 hearing on Mother's motion for new trial, counsel for Mother argued in part "[the] 2013 mediated agreement basically gave Ms. Wolfe the right to determine the child's home." The trial court denied Mother's motion for new trial.

On November 3, 2014, Mother filed "Amended Requested Findings of Fact and Conclusions of Law" that included the following requested finding of fact: "Settlement Agreement after Mediation between the parties sets up a joint Managing Conservatorship, giving [Mother] the right to determine the domicile of the child, [G.C.W.]." On November 19, 2014, Father filed proposed findings of fact and conclusions of law that included the following finding of fact:

> "[Mother] and Myself Kevin Wolfe both stated in court to both Judge Callahan and Judge Collie that we both no longer agreed to the meditated settlement agreement we signed and we were ordered to complete the Social Study and to try to mediate again after said Social Study by Dallas County Family Court Services. We returned to mediation and were unable to come to an agreement. The statement made by [Mother] that the mediated settlement agreement should be followed is false.

Mother filed a notice of past due findings of fact and conclusions of law on November 25, 2014. The record does not show findings of fact and conclusions of law were filed by the trial court.

II. MOTHER'S ISSUE

In her sole issue on appeal, Mother asserts "[t]he trial court erred in awarding [Father] the right to determine the residence of the child [G.C.W.] along with child support to be assessed against [Mother] despite the mediated settlement agreement." According to Mother, "[t]he trial court did not adhere to Section 153.0071(e) [of the Texas Family Code] which unambiguously states that a party is 'entitled to judgment' on an MSA that meets the statutory requirements." *See* TEX. FAM. CODE ANN. § 153.0071(e) (West 2014). Further, in her prayer for relief in this Court, Mother requests that she be awarded (1) the right to "determine the residence of [G.C.W.]" and (2) child support to be paid by Father "at the State Mandated Rate."

A. Standard of Review

We review a trial court's decision respecting child custody, control, possession, and visitation under an abuse of discretion standard. *See, e.g., Strong v. Strong*, 350 S.W.3d 759, 764 (Tex. App.—Dallas 2011, pet. denied). The trial court's judgment will be disturbed only where the record as a whole shows the trial court abused its discretion. *Id*. at 765. A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or when it acts without reference to any guiding principles. *Id*. When no findings of fact and conclusions of law are filed in a bench trial, it is implied that the trial court made all the necessary findings to support its final order. *Id*. The judgment will be upheld on any legal theory that finds support in the evidence. *Id*.

Because the traditional sufficiency standard of review overlaps with the abuse of discretion standard in family law cases, legal and factual sufficiency are not independent grounds

of error, but they are relevant factors in our assessment of whether the trial court abused its discretion. *Id*. If some evidence of a substantive and probative character exists to support the trial court's decision, there is no abuse of discretion. *Id*.

We review questions of statutory construction de novo. *In re Lee*, 411 S.W.3d 445, 450–51 (Tex. 2013). Our fundamental objective in interpreting a statute is "to determine and give effect to the Legislature's intent." *Id*. at 451 (quoting *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012)). In turn, "[t]he plain language of a statute is the surest guide to the Legislature's intent." *Id*. (quoting *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)).

B. Applicable Law

Texas Family Code section 153.0071 provides in part:

> (c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.
>
> (d) A mediated settlement agreement is binding on the parties if the agreement:
> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
> (2) is signed by each party to the agreement; and
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
> (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and
> (2) the agreement is not in the child's best interest.

TEX. FAM. CODE ANN. § 153.0071(c)–(e-1). "Family violence" is defined in relevant part as "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a

threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself." *Id.* §§ 71.004, 101.0125; *see also* TEX. PENAL CODE ANN. § 22.01(a) (West Supp. 2015) (a person commits an "assault" if the person "(1) intentionally, knowingly, or recklessly causes bodily injury to another, . . . (2) intentionally or knowingly threatens another with imminent bodily injury, . . . or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.").

"By its plain language, section 153.0071 authorizes a court to refuse to enter judgment on a statutorily compliant MSA on best interest grounds only when the court also finds the family violence elements are met." *In re Lee*, 411 S.W.3d at 453. "Stated another way, '[t]he statute does not authorize the trial court to substitute its judgment for the mediated settlement agreement entered by the parties unless the requirements of subsection 153.0071(e–1) are met.'" *Id.* (quoting *Barina v. Barina*, No. 03-08-00341-CV, 2008 WL 4951224, at *4 (Tex. App.—Austin Nov. 21, 2008, no pet.) (mem. op.)).

C. Application of Law to Facts

Neither party has asserted, and the record does not show, that either of them had an attorney present at the time the MSA was signed. *See* TEX. FAM. CODE ANN. § 153.0071(d). Further, the record shows the MSA in the case before us (1) is signed by both Mother and Father and (2) states at the top of the signature page in underlined capital letters in boldfaced type, "**THIS AGREEMENT IS NOT SUBJECT TO REVOCATION**." *See id.* Therefore, we conclude the MSA met the requirements of subsection 153.0071(d).

As to the exception stated in subsection 153.0071(e-1), the judgment in question does not specifically address "family violence" or "impaired . . . ability to make decisions," nor did the

trial court make written findings of fact or conclusions of law respecting those matters.[4] Further, to the extent findings of family violence and impaired decision-making are implied, the record contains no evidence to support such findings. The record shows Mother testified Father "abused" her during the marriage by "yelling and screaming, ranting and raving and doing drugs" and she and G.C.W. "were afraid of [Father] throughout these times of his ranting and raving." However, there is no evidence that either Mother or Father experienced or was in fear of any "physical harm, bodily injury, assault, or sexual assault" by the other or that either party's ability to make decisions was "impaired" by a circumstance involving such. *See id.* §§ 153.0071(e-1), 71.004. Additionally, as part of the social study, Mother and Father each completed a December 3, 2013 "Family Violence Questionnaire" in which each stated they have not experienced physical or sexual abuse by the other and are not "physically intimidated" by the other.

On this record, we conclude the exception stated in subsection 153.0071(e-1) is inapplicable. Consequently, Mother was "entitled to judgment on the mediated settlement agreement" pursuant to subsection 153.0071(e) and the trial court erred when it declined to render such judgment. *See id.* § 153.0071(e); *In re Lee*, 411 S.W.3d at 453; *see also In re Lechuga*, No. 07-15-00088-CV, 2015 WL 2183744, at *3 (Tex. App.—Amarillo May 7, 2015, no pet.) (mem. op.) ("dissatisfaction with the agreement reflected in an MSA is not a valid basis upon which the trial court can set aside a statutorily compliant MSA").[5]

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[4] Mother does not complain on appeal of the trial court's failure to make findings of fact and conclusions of law.

[5] Additionally, as described above, the family counselor who conducted the social study wrote in the study that Mother "stated she was under duress by [Father] and mediator to sign [the MSA]." The issue of whether section 153.0071 mandates rendering of judgment on a statutorily compliant mediated settlement agreement even if it was "procured by fraud, duress, coercion, or other dishonest means" has not been specifically addressed by this Court or the Texas Supreme Court. *See In re Lauriette*, No. 05-15-00518-CV, 2015 WL 4967233, at *3 n.3 (Tex. App.—Dallas Aug. 20, 2015, orig. proceeding) (mem. op.); *In re A.B.*, No. 05-14-01123-CV, 2015 WL 332273, at *5 (Tex. App.—Dallas Jan. 27, 2015, no pet.) (mem. op.). Duress requires a threat that results in a person being incapable of exercising her free agency and unable to withhold consent. *See Rabe v. Dillard's, Inc.*, 214 S.W.3d 767, 769 (Tex. App.—Dallas 2007, no pet.); *see also McCord v. Goode*, 308 S.W.3d 409, 413 (Tex. App.—Dallas 2010, no pet.). In the case before us, the record does not show Mother asserted in the trial court that judgment should not be rendered on the MSA due to duress, nor does Mother address or mention duress on appeal. Moreover, nothing in the record shows a threat made Mother incapable of exercising her free agency as to the MSA or unable to withhold her consent to the MSA. Therefore, to the

We decide in favor of Mother on the portion of her issue respecting her entitlement to judgment on the MSA. However, to the extent Mother argues the MSA precluded the trial court's award of "child support to be assessed against [Mother]" or required the assessment of child support against Father, we cannot agree. The MSA does not mention or address child support. *See Scruggs v. Linn*, 443 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (trial court's ruling on matter not addressed in MSA was not "contrary" to MSA). Further, Mother's appellate brief contains no argument or citation to authority respecting that position or her request that she be awarded child support to be paid by Father "at the State Mandated Rate." *See* TEX. R. APP. P. 38.1(i). On this record, we cannot conclude the trial court erred as to the award of child support in the judgment in question. Nevertheless, "we have broad discretion to remand in the interest of justice." *In re S.E.W.*, 168 S.W.3d 875, 885–86 (Tex. App.—Dallas 2005, no pet.); *accord In re H.H.*, No. 05-15-01322-CV, 2016 WL 556131, at *3 (Tex. App.—Dallas Feb. 12, 2016, no pet. h.) (mem. op.). In light of our conclusion above that Mother is entitled to judgment on the MSA, we conclude that a remand for reconsideration of the portion of the trial court's judgment respecting child support is in the interest of justice. *See In re S.E.W.*, 168 S.W.3d at 885–86.

III. CONCLUSION

We decide Mother's sole issue in her favor, in part. We (1) reverse the portions of the trial court's judgment respecting conservatorship, possession, and child support; (2) render judgment as to conservatorship and possession in accordance with the MSA; and (3) remand this

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extent the trial court declined to render judgment on the MSA on the basis that Mother entered into it under "duress," we conclude the trial court abused its discretion. *See In re Lechuga*, No. 07-15-00088-CV, 2015 WL 2183744, at *2 (Tex. App.—Amarillo May 7, 2015, no pet.) (mem. op.) (concluding trial court's refusal to enforce mediated settlement agreement constituted abuse of discretion to extent trial court relied on "duress" alleged by mother in signing of agreement because record showed no evidence of elements of duress); *cf. In re Hanson*, No. 12-14-00015-CV, 2015 WL 898731, at *7 (Tex. App.—Tyler Feb. 27, 2015, no pet.) (mem. op.) (where record did not support finding of all elements of fraud cause of action, trial court could not reasonably have granted mother's motion to set aside mediated settlement agreement for fraud).

case to the trial court for further proceedings respecting reconsideration of child support.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE MATTER OF THE MARRIAGE OF KEVIN W. WOLFE AND KATHERINE G. WOLFE AND IN THE INTEREST OF G.C.W., A CHILD

No. 05-14-01279-CV

On Appeal from the 302nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-12-20658.
Opinion delivered by Justice Lang, Chief Justice Wright and Justice Brown participating.

In accordance with this Court's opinion of this date, we **REVERSE** the portions of the trial court's judgment respecting conservatorship, possession, and child support; **RENDER** judgment as to conservatorship and possession in accordance with the mediated settlement agreement signed by Kevin W. Wolfe and Katherine G. Wolfe; and **REMAND** this case to the trial court for further proceedings respecting reconsideration of child support.

It is **ORDERED** that appellant KATHERINE G. WOLFE recover her costs of this appeal from appellee KEVIN W. WOLFE.

Judgment entered this 29th day of February, 2016.