

Affirmed as Modified and Opinion Filed April 19, 2017



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00213-CV

**IN THE INTEREST OF T.W.G., ADULT DISABLED CHILD,
AND E.A.G., MINOR CHILD**

**On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-15-00621-S**

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Whitehill
Opinion by Justice Francis

In this appeal of a final decree of divorce, Father raises four issues challenging the trial court's provisions for child support for his adult disabled child, the disproportionate division of property, and the awarding of the federal income tax dependency exemption to Mother. Mother concedes the exemption issue. We conclude all other issues are without merit. Accordingly, we modify the divorce decree to delete the dependency exemption provision and affirm the decree as modified.

The following evidence was presented in a trial before the court. Mother and Father were married in 1992 and have two children—an adult son, T.W.G., born in 1993, and a minor daughter, E.A.G., born in 2000. In 2008, Father left Mother and moved in with his girlfriend. A few months later, he moved back in with Mother and said he was ending the relationship with his girlfriend. Mother and Father signed a year-long lease on a house, but a few months later, Father

returned to his girlfriend, leaving Mother to pay the remaining \$4,000 on the lease. Since the separation in 2009, Father has lived with his girlfriend and has had a child with her. Father did not pay child support for either of his two underage children with Mother until 2011, when Mother filed an application for child support with the Attorney General's Office. After that, Father began paying \$540 a month in child support for E.A.G. Other than this, Mother said Father has not provided financial assistance. Father ultimately filed for divorce in 2015, and Mother filed a counter-petition, which she amended several times, seeking child support for both children, a disproportionate share of the community estate, and damages from the girlfriend.

With respect to her adult son, T.W.G., Mother testified he has a condition called agenesis of the corpus callosum, which she explained means the fibers that should connect the right side of the brain to the left side did not develop. The condition has existed since birth and has left T.W.G. disabled. Mother said he lives with her, is not attending and has not ever attended college, and is not employed. She said he will need support for the rest of his life. He has a primary care physician who he sees each year. She said that in 2015, T.W.G. spent the night with Father “[t]wo, maybe three times,” leaving her with the total responsibility for his daily needs. A handwritten summary of expenses related to T.W.G. was admitted into evidence. The summary showed, among other things, adult care at \$500 a month (“125 for 3 days”). Also, the summary showed T.W.G. receives \$733 in SSI benefits and \$180 in SNAP benefits. Although Mother did not testify about the contents of the exhibit, Father does not dispute on appeal that T.W.G. receives SSI benefits and SNAP benefits. On cross-examination, Mother said T.W.G. goes to his grandmother's once or twice a month and sometimes stays for a week. She also testified T.W.G. took an extended course in computers at Bill J. Priest Institute.

Mother testified she works for an architecture firm earning about \$50,000 a year. She did not have a retirement plan. She drove a 2007 Mercedes C230 but was behind on the payments at

the time of trial. She offered into evidence Father's banking records to support her claim he wasted community assets during the time they have been separated. The records show that from December 2008 to June 2015, Father spent almost \$13,000 on golf; about \$4,600 on trips to the Dominican Republic, Las Vegas, Mexico, New Orleans, and other destinations; and had almost \$73,000 in ATM withdrawals. Mother testified that since Father moved out, Father's girlfriend had sent her text messages "taunting" her. In one of the text messages, the girlfriend told Mother that Father gave her \$10,000 for a down payment on a house and spent his money on "me/us."

Father testified he is a shop supervisor for an HVAC equipment company and earns a base salary of \$52,000 a year as well as overtime pay. His 2014 tax return showed his income at \$67,094. He also had a 401(k) account with a balance of \$76,695.09 as of July 2015.

Father admitted he committed adultery and has a child with his girlfriend. Father said he and his girlfriend lease a condominium, but he did not know the amount of the rent. He gives his girlfriend \$1,000 each month and helps to provide for their son. He also acknowledged taking out a \$25,000 loan against his 401(k) plan. Of that, he said he gave Mother \$1,800 and gave his girlfriend \$1,000. Father and his girlfriend travel together and have been to Las Vegas four or five times and the Bahamas, among other places. He also acknowledged he enjoys playing golf every other week and pays \$50 each time. Father said he has been driving a 535i BMW since December 2014.

Father's girlfriend testified she and Father have a child together. She said Father transferred money to her each month, and the money goes to "the residence and bills." Father also makes "expenditures" for their son. She also acknowledged she and Father have been on multiple vacations together but said she "ha[s] a job too." She told the court she is a dentist and earns \$200,000 annually.

After hearing the evidence, the trial court issued a memorandum ruling finding T.W.G. requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support, and the disability existed on or before T.W.G.’s eighteenth birthday. As relevant here, the ruling made provisions for child support for T.W.G. and confirmed an arrearage for him. With respect to the property division, the trial court found Father wasted community assets and committed fraud on the community estate. The court ruled each party would keep “whatever property, personal property, and vehicles” in his or her possession and would be responsible for whatever debt is in his or her name; awarded Mother 80 percent of Father’s retirement account during the marriage and awarded Father the remaining 20 percent; awarded Mother attorney’s fees in the amount of \$10,000 against Father; awarded Mother the dependency exemptions for T.W.G. and E.A.G. for federal income tax purposes; and denied Mother’s request for spousal maintenance. Finally, the trial court granted a “directed judgment” in favor of Father’s girlfriend. The trial court reduced its findings to judgment and, in the decree, dissolved the marriage on the grounds of adultery committed by Father and insupportability. Father appealed.

Most appealable issues in a family law case, including the issues in this case, are evaluated under an abuse of discretion standard. *See Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011) (child support); *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987) (division of property); *Bell v. Bell*, 513 S.W.2d 20, 22 (Tex. 1974) (division of property). A court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules or principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). Under an abuse of discretion standard, legal and factual sufficiency are not independent, reversible grounds of error but are relevant factors in assessing whether the trial court abused its discretion. *In re C.A.S.*, 405 S.W.3d 373, 383 (Tex. App.—Dallas 2013, no pet.). To determine whether the trial court abused its

discretion, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion and (2) erred in its application of that discretion. *Id.* We conduct the sufficiency review when considering the first prong. We then determine whether, based on the evidence, the trial court made a reasonable decision. *Id.* A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Id.*

In his first issue, Father asserts the trial court abused its discretion in ordering support for T.W.G. as an adult disabled child without evidence of the statutory predicate facts. Under section 154.302(a), a trial court can order support for an adult disabled child for an indefinite period if the court finds:

- (1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and
- (2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child.

TEX. FAM. CODE ANN. § 154.302(a) (West 2014). Father asserts no evidence shows T.W.G. requires substantial care and personal supervision and is incapable of self-support. We disagree.

The evidence was undisputed that T.W.G. has a congenital disability because the fibers connecting the right side of his brain to the left side did not develop. T.W.G. lives with Mother, is not employed, and has never attended college. Mother told the court T.W.G. will need support for the rest of his life. When asked if she was “asking this Court to find that [T.W.G.] has a disability, whether institutionalized or not, that requires substantial care now and personal supervision because of a mental or physical disability which would not be capable of self-support and that disability existed at his 18th birthday,” Mother replied, “Yes.” In addition to the above testimony, Mother presented a summary of expenses for T.W.G. The summary includes expenses for “adult care” and also shows T.W.G. receives SSI and SNAP benefits. SSI claimants must prove they are disabled within the meaning of the Social Security Act. *Thompson v. Smith*, 483

S.W.3d 87, 93–94 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (citing 42 U.S.C. § 423(d); 20 C.F.R. § 404.1505(a)). The Act defines “disability” as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A), *quoted in Shave v. Apfel*, 238 F.3d 592, 594 (5th Cir. 2001); *Thompson*, 483 S.W.3d at 94. We conclude the trial court had sufficient evidence upon which to exercise its discretion and did not err in exercising that discretion to find T.W.G. was disabled to the extent he needed substantial care and supervision. *See Thompson*, 483 S.W.3d at 94 (concluding that, in addition to other evidence, fact that child unable to obtain employment and qualified for SSI benefits supported trial court’s disability finding). We overrule the first issue.

In his second issue, Father contends the trial court abused its discretion in awarding adult child support “without evidence of at least one of the required factors for such an award.” In the decree, the trial court ordered Father to pay \$958.20 monthly for T.W.G. and E.A.G. Once E.A.G. emancipates or graduates high school, the obligation is reduced to \$745.26 each month for T.W.G. until his “disability is removed.”

In setting the amount of adult child support, the court shall determine and give special consideration to:

- (1) any existing or future needs of the adult child directly related to the adult child’s mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
- (2) whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
- (3) the financial resources available to both parents for the support, care, and supervision of the adult child; and

(4) any other financial resources or other resources or programs available for the support, care, and supervision of the child.

TEX. FAM. CODE ANN. § 154.306 (West 2014).

Father argues the statute requires some evidence of each of the four factors, and the trial court heard no evidence of the first factor. Again, we disagree. Mother testified to the nature and duration of T.W.G.’s disability, his living circumstances, his lack of employment, and his need of support for the rest of his life. Father acknowledged his son had “disabilities” and did not dispute Mother’s testimony he would always need support. Additionally, there was evidence of Mother’s and Father’s incomes, and Mother provided evidence of T.W.G.’s expenses and income. From the list of expenses, including a line item for “adult care” with the words “125 for 3 days,” the trial court could have determined T.W.G. had existing and future needs for an adult care facility for three days a week due to his disability. We conclude the evidence of the requisite factors guiding the trial court’s discretion in setting the amount of child support was sufficient. We overrule the second issue.

In his third issue, Father contends the trial court abused its discretion by awarding Mother a disproportionate share of the community estate. He argues the marital estate consisted solely of Father’s 401(k), and the trial court awarded 80 percent of the 401(k) to Mother.

The trial court has broad discretion in dividing the marital estate, and we presume the trial court exercised its discretion properly. *Murff v. Murff*, 615 S.W.2d 696, 698–99 (Tex. 1981). In dividing the marital estate, the trial court shall order a division of property that it deems “just and right,” having due regard for the rights of each party. TEX. FAM. CODE ANN. § 7.001 (West 2006).

The property division is not required to be equal, and the court may consider many factors in making the division. *Murff*, 615 S.W.2d at 699. Such factors include the spouses’ relative ages, education, business opportunities, earning abilities, physical and financial

conditions, size of the separate estates, nature of the property, fault in breaking up the marriage, the benefits the spouse who did not cause the break up would have received had the marriage continued, and whether one of the parties of the marriage has wasted community assets. *Id.*; *In re C.A.S.*, 405 S.W.3d at 384; *Phillips v. Phillips*, 75 S.W.3d 564, 567, 573 (Tex. App.—Beaumont 2002, no pet.). The party complaining of the division of the community estate has the burden of showing from the evidence in the record that the division was so unjust and unfair as to constitute an abuse of discretion. *In re C.A.S.*, 405 S.W.3d at 384.

Here, as previously outlined in detail, the evidence shows Father left his family in 2009, moved in with his girlfriend, and had a child with her. He did not pay support for either of his underage children with Mother until 2011, when Mother sought help from the AG’s office. After that, he paid \$540 monthly for E.A.G. During the six-year separation, Mother testified Father offered no financial support except for support for E.A.G. She also presented evidence that, during this time, he spent almost \$13,000 on golfing, took numerous trips with his girlfriend, and had almost \$73,000 in ATM withdrawals. Father’s own testimony showed he acquired a 535i BMW a year before trial, took vacations with his girlfriend, and borrowed \$25,000 from his 401(k), from which he claimed to give \$1,800 to Mother and \$1,000 to his girlfriend. He also transferred \$1,000 each month to his girlfriend. The girlfriend, in a text to Mother, suggested Father gave her \$10,000 for a down payment on a house. Additionally, the evidence showed Father’s earnings were considerably more than Mother’s. Given the evidence of Father’s fault in the breakup of the marriage, his borrowing of \$25,000 from the community estate, the expenditures on his girlfriend with community funds, and the disparity in earning capacity, we conclude the trial court did not abuse its discretion in awarding Mother a disproportionate share of the community estate. *See, e.g., Golias v. Golias*, 861 S.W.2d 401, 403 (Tex. App.—Beaumont 1993, no writ) (upholding award of 79% of community estate to wife

and citing as examples several other cases upholding disproportionate awards ranging between 80% and 96%). We overrule the third issue.

In his fourth issue, Father argues the trial court abused its discretion in awarding the dependency exemptions to Mother and relies on *In re J.G.Z.*, 963 S.W.2d 144, 150 (Tex. App.—Texarkana 1998, no pet.). Mother concedes this issue. Accordingly, it is sustained.

We modify the trial court's final decree of divorce to delete the dependency exemption provision. We affirm the decree as modified.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

Whitehill, J., Dissenting

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE INTEREST OF T.W.G., ADULT
DISABLED CHILD, AND E.A.G., A
MINOR CHILD

No. 05-16-00213-CV V.

On Appeal from the 255th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DF-15-00621-S.
Opinion delivered by Justice Francis;
Justices Lang-Miers and Whitehill
participating.

In accordance with this Court's opinion of this date, the trial court's final decree of divorce is **MODIFIED** as follows:

To delete the Dependency Exemption provision.

It is **ORDERED** that, as modified, the trial court's final decree of divorce is **AFFIRMED**.

It is **ORDERED** that appellee LaShawn Webb Gray recover her costs of this appeal from appellant Eric Deon Gray.

Judgment entered April 19, 2017.