**Affirmed; Opinion Filed March 29, 2018.**

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

**No. 05-17-00302-CV**

**IN THE INTEREST OF A.M. AND D.M., MINORS**

**On Appeal from the 255th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DF-14-08639**

## MEMORANDUM OPINION

Before Justices Francis, Brown, and Stoddart
Opinion by Justice Stoddart

This is an appeal from a final decree of divorce. In three issues, appellant Daniel Munoz argues the trial court erred by refusing to set aside a post-answer default judgment and not granting his motion for new trial in its entirety, the trial court abused its discretion by excluding admissible evidence, and the trial court abused its discretion when it divided the parties' residences. We affirm.

Appellee Maria Munoz filed a petition for divorce and appellant answered. On October 26, 2014, appellee filed a motion requesting a social study and a motion for continuance stating that the trial was set to begin on January 6, 2016, but the parties needed more time to conduct a social study. The record does not show the trial court ruled on this motion.

The trial court entered a final decree of divorce on February 16, 2016. The decree states that the court heard the case on January 6, 2016. The parties agree that appellant's counsel failed to appear on January 6. Appellant filed a motion to reconsider, which states his counsel received

"a letter indicating transmittal of a Final Decree of Divorce and further indicated that [counsel] had not attended the hearing." He then learned the trial court did not rule on the motion for continuance and the trial was not reset. The record does not show the trial court ruled on appellant's motion to reconsider.

On March 18, 2016, appellant filed a motion for new trial citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). In an attached affidavit, appellant's counsel stated he received the motions for a social study and continuance, but had no record showing the disposition of the motions. Appellant's counsel learned the trial was never reset when he received the Final Decree of Divorce. Counsel asserted he reasonably relied upon the motion for continuance to conclude the trial date would change. He stated the "issue of conservatorship and primary possession [of the children] were contentious due to the living arrangements of the Petitioner. Petitioner was cohabiting with a married man who allegedly had a criminal record at the time of the Default Judgment." Following a hearing, the trial court granted the motion for new trial as to the division of property, but denied the motion as to custody, access, and possession of the children. The trial court entered a second Final Decree of Divorce on February 24, 2017. This appeal followed.

In his first issue, appellant argues the trial court erred by failing to grant the motion for new trial in its entirety. We review a trial court's ruling on a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam). *Craddock* provides that a new trial should be granted when (1) the defaulting party's failure to appear was not intentional, or the result of conscious indifference, but was due to a mistake or an accident; (2) the defaulting party has a meritorious defense or claim; and (3) the motion is filed at a time when the granting of a new trial will not occasion delay or work other injury to the prevailing party. *Craddock*, 133 S.W.2d at 126. The defaulting party bears the burden to set forth facts

establishing all three prongs of the *Craddock* test. *In re A.T.*, No. 05–16–00539–CV, 2017 WL 2351084, at *10 (Tex. App.—Dallas May 31, 2017, no pet.) (mem. op.). If the motion for new trial and accompanying affidavits or other evidence fail to establish any element of the test, we will affirm the trial court's denial of a new trial. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *In re A.T.*, 2017 WL 2351084, at *10.

A meritorious defense is one that, if proved, would cause a different result upon retrial of the case. *Abuzaid v. Modjarrad & Associates, P.C.*, No. 05-16-00777-CV, 2017 WL 5559591, at *7 (Tex. App.—Dallas Nov. 14, 2017, no pet.) (mem. op.). It is not sufficient for a motion for new trial to merely allege the movant has a meritorious defense. *Id.* A motion for new trial sets up a meritorious defense "if the facts alleged in the movant's motion and supporting affidavits set forth facts which in law constitute a meritorious defense, regardless of whether those facts are controverted." *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006) (per curiam). The motion must be "supported by affidavits or other evidence providing prima facie proof that the defendant has such a defense." *Lerma*, 288 S.W.3d at 928.

We question whether appellant adequately briefed his first issue because it lacks analysis of the *Craddock* factors with adequate citations to the record. *See* TEX. R. APP. P. 38.1(i). However, liberally construing his brief, we conclude the trial court did not err by denying his motion for new trial because appellant did not assert a meritorious defense. Although he stated he had such a defense and that the issue of conservatorship was contested, the motion was not supported by affidavits or other evidence providing prima facie proof that he had a defense. *See Lerma*, 288 S.W.3d at 928. We overrule appellant's first issue.

In his second issue, appellant states the trial court abused its discretion by excluding admissible evidence and denying his right to cross examine a witness. Appellant refers the Court

to various portions of the record but provides no analysis to support his issue.[1] Further, although he cites two cases, appellant makes no effort to apply the law from those cases to facts in the record. Appellant's second issue is devoid of argument. An appellant's brief must contain, among other things, a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. *See* TEX. R. APP. P. 38.1(i). We conclude appellant's brief lacks appropriate citations to the record and authorities as well as arguments to show the trial court's rulings were in error. *See id.* We overrule appellant's second issue.

In his third issue, appellant states the trial court erred in its division of the parties' residences. Appellant does not make any citation to authorities or the record as it relates to the division of property between the parties. *See id.* He also offers no argument explaining how the division of property was erroneous. *See id.* While his third issue appears in his statement of issues, it does not appear anywhere else in his brief. We conclude appellant's third issue is inadequately briefed. *See id.* We overrule his third issue.

We affirm the trial court's final decree of divorce.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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[1] Appellant's record citations for his second issue appear as follows: "RT Vol. 4 p. 20 line 25 - p. 21 line 24; p. 24 line 5 - p. 25 line 6; p. 29 line 7- line 19; p.31 line 3- line 12; p. 34 line 12 - page 35 line 5. Page 40 line 14 - p. 42 line 17; p. 42 line 22 - p.45 line 6; and p. 46 line 1 - p.47 line 6."

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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| IN THE INTEREST OF A.M. AND D.M., MINORS<br><br>No. 05-17-00302-CV | On Appeal from the 255th Judicial District Court, Dallas County, Texas<br>Trial Court Cause No. DF-14-08639.<br>Opinion delivered by Justice Stoddart.<br>Justices Francis and Brown participating. |

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

It is **ORDERED** that Maria Munoz recover her costs of this appeal from Daniel Munoz.

Judgment entered this 29th day of March, 2018.