REVERSED and REMANDED; AFFIRMED and Opinion Filed July 27, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00846-CV

IN THE INTEREST OF R.G.A.C.L.G., A CHILD

On Appeal from the 301st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-15-17201

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Whitehill

In this restricted appeal, Father challenges the post-answer default judgment appointing Father and Mother joint managing conservators of RG and determining Father's child support obligation. In three issues, Father argues that (i) his family violence proof precludes appointing Mother as a joint managing conservator; (ii) there was no evidence of his net resources from which the court could determine child support; and (iii) the trial court erred by denying his motion for new trial, which asserted that he lacked notice of the final trial day's setting.

The Attorney General, intervenor, concedes that there is no evidence from which the trial court could properly determine child support.

We conclude that the trial court did not abuse its discretion by denying Father's motion for new trial because we presume that the omitted portions of the record support the trial court's decision to deny the motion. Likewise, we presume the omitted portions of the record support the joint conservatorship. We further conclude that the child support award was in error because there is no evidence from which the trial court could determine Father's net resources.

Accordingly, we reverse the trial court's child support determination and remand for a new trial on that issue; we otherwise affirm the trial court's judgment.

I. BACKGROUND

Father filed a petition in a suit affecting the parent child relationship and requested a temporary restraining order and a temporary injunction. The TRO was granted and a hearing to determine whether to grant temporary relief was set, but our record does not reflect that any subsequent orders were entered.

Trial was scheduled and continued several times. Both parties appeared and presented evidence on two days nearly eight months apart.

Specifically, on October 2, 2017 Father testified and introduced several video recordings of Mother that he asserts establish that she engaged in violence against him. The session concluded before Father was cross-examined.

On June 25, 2018, Father's father testified. He said that his grandchild was a happy, healthy five-year old. He observed injuries to his son but had no personal

knowledge of how the injuries occurred. He could not identify any concerns about Mother's parenting or her household.

Father didn't appear for a setting on January 31, 2019, at which the court conducted a default prove up and Mother put on limited evidence. The child's ad litem recommended that the court not make a family violence finding.

On May 1, 2019, the court entered a final default judgment against Father. The judgment appoints Father and Mother joint managing conservators of RG and orders that Father pay $813 monthly child support. The court declined to make a family violence finding.

On June 10, 2019, Father filed a motion for new trial and to extend post-judgment deadlines. The motion was supported by Father's unsworn declaration stating that he did not receive notice of the January 31 trial setting and first learned of the court's judgment on June 10, 2019. The trial court on July 10, 2019 conducted a hearing on Father's new trial motion. By written order that same day, the trial court denied Father's motion.

Father filed his notice of appeal on July 16, 2019. We told him that the appeal was untimely and that he should file an amended notice of restricted appeal if he wished to proceed. *See* TEX. R. APP. P. 25.1(d)(7)(A)–(C). Father then filed an amended notice of restricted appeal and a motion requesting that we reconsider treating the case as a restricted appeal. According to Father, the appeal is not restricted because he filed a timely rule 306a motion. *See* TEX. R. CIV. P. 306a.

II. ANALYSIS

A. Preliminary Issue: Should the case proceed as a restricted appeal?

Yes, the case should proceed as a restricted appeal because Father did not obain a trial court finding regarding when Father received notice of the judgment or its signing.

Father argues that this case should not proceed as a restricted appeal because he timely filed a rule 306a motion. *See id*. While this is true, he did not obtain a written order finding the date on which he received notice of the judgment or actual knowledge that it was signed. *See* TEX. R. APP. P. 4.2(c).

Rule of Civil Procedure 306a (3) requires a trial court clerk to immediately notify the parties or their attorneys, by first class mail, of the signing of a judgment or other appealable order. *See* TEX. R. CIV. P. 306a (3). When more than twenty days pass between the date the trial court signs the judgment or order and the date a party receives notice it or acquires actual knowledge of its signing, the period for filing a notice of appeal may be extended to the earlier of the date the party received notice or acquired actual knowledge of the signing. TEX. R. APP. P. 4.2(a)(1); *see Pilot Travel Ctrs., LLC v. McCra*y, 416 S.W.3d 168, 176 (Tex. App.—Dallas 2013, no pet.).

To benefit from this extended time period, Father had to prove, in the trial court on sworn motion and notice, the date on which he first received notice or acquired actual knowledge of the May 1 judgment and that the date was more than

twenty days after the date the judgment was signed. *See* TEX. R. CIV. P. 306a(5); TEX. R. APP. P. 4.2(a)(1), (b). Rule 306a(5)'s requirements are jurisdictional. *Mem'l Hosp. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987). Father met those requirements.

But the rules further provide that the trial court must have signed a written order finding the date when appellant first received notice or acquired actual knowledge that the judgment was signed. *See* TEX R. APP. P. 4.2(c); *see also Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994) (mandamus relief based on trial court's failure to rule on motion to determine the date of notice of judgment; decided under former rule 5(b)(5)). Rule 4.2 is not self-executing. *JRJ Inv., Inc. v. Artemis Global Bus., Inc.*, No. 01-19-00004-CV, 2019 WL 6315195, at *2 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, no pet.) (mem. op.). Because the record does not include a written order complying with these requirements, we deny Father's motion to reconsider our restricted appeal decision.

To prevail on a restricted appeal, an appellant must demonstrate that: (i) the notice of restricted appeal was filed within six months of the date of the judgment or order; (ii) he was a party to the suit; (iii) he did not participate in the hearing that resulted in the judgment complained of and did not timely file a post-judgment motion or request for findings of facts and conclusions of law; and (iv) error is apparent on the face of the record. *See* TEX. R. APP. P. 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). The face of the record, for purposes of a restricted appeal, consists of all the papers that were before the trial court when it

rendered its judgment. *Alexander*, 134 S.W.3d at 848–49; *General Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991). But our scope of review is otherwise the same as that in an ordinary appeal; we review the entire case. *See Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam). Thus, a challenge to the sufficiency of the evidence is reviewable in a restricted appeal. *Id.*

It is undisputed that Father satisfied the first three elements, and only the fourth element is at issue here. We thus consider whether there is error on the face of the record.

B. Third Issue: Did the trial court err by denying the motion for new trial?

No, because the omitted parts of the record presumptively support the trial court's order denying the new trial motion.

Father complains about the court's ruling on the motion for new trial seeking to set aside the default judgment for lack of notice. Although there was a hearing on that motion, the transcript of that hearing is not part of the partial record Father filed on appeal.

Rule 34.6(c) of the appellate rules states the requirements a party must satisfy to appeal without a complete record. *See* TEX. R. APP. P. 34.6(c). If the appellant requests a partial reporter's record, he must also include in the request a statement of the points or issues to be presented on appeal. TEX. R. APP. P 34.6(c)(1). Other

parties may then designate additional exhibits or testimony to be included. TEX. R. APP. P 34.6(c)(2).

If the appellant complies with rule 34.6(c)(1), we presume that the partial reporter's record designated by the parties constitutes the entire record for our review of the stated points or issues, including those points or issues challenging legal and factual sufficiency. TEX. R. APP. P 34.6(c)(4). Complete failure to file a statement of points or issues, however, negates the completeness presumption, creates a new presumption that the omitted portions support the trial court judgment, and requires the appellate court to affirm the trial court's judgment. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2003) (per curiam); *Huber v. Agnew*, No. 05-16-00963, 2017 WL 2464681 at *1 (Tex. App.—Dallas June 7, 2017, no pet.) (mem. op.).

Here, Father did not file a complete record on appeal, nor did he ever file a statement of the points or issues that he intended to present on appeal as rule 34.6(c)(1) requires. Accordingly, we must presume that the omitted portions of the reporter's record are relevant and support the trial court's judgment. *See Huber*, 2017 WL 2464681 at *1.

Consequently, there is no error apparent on the face of the record, and we resolve Father's third issue against him.

C. First Issue: Did the trial court err by appointing Father and Mother joint managing conservators?

As with the foregoing issue, Father did not request a complete record. We thus presume the missing record supports the trial court's judgment. *See Huber*, 2017 WL 2464681 at *1. We resolve Father's first issue against him.

D. Second Issue: Is the child support award erroneous?

Father's second issue argues the child support determination is in error because there is no evidence of his net resources. Intervenor concedes this issue, and we agree.

We review a trial court's judgment on child support for abuse of discretion. *In re J.G.L.*, 295 S.W.3d 424, 426 (Tex. App.—Dallas 2009, no pet.). A trial court's child support order will not be disturbed on appeal unless the complaining party shows a clear abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

In family law cases, the abuse of discretion standard of review overlaps with the traditional sufficiency standards of review; as a result, legal and factual sufficiency are not independent grounds of reversible error, but instead constitute factors relevant to our assessment of whether the trial court abused its discretion. *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied).

To determine whether the trial court abused its discretion we consider whether the trial court (i) had sufficient evidence on which to exercise its discretion and (ii)

erred in its exercise of that discretion. *In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). The applicable sufficiency review comes into play with the first question. *Moroch*, 174 S.W.3d at 857. We then determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Id*. An abuse of discretion generally does not occur if some evidence of a substantive and probative character exists to support the trial court's decision. *In re S.M.V.*, 287 S.W.3d 435, 450 (Tex. App.—Dallas 2009, no pet.).

Under Texas law, child support is generally determined by calculating the child support obligor's monthly net resources and applying statutory guidelines to that amount. *Gonzalezv. Gonzalez*, 331 S.W.3d 864, 868 (Tex. App.—Dallas 2011, no pet.) (citing TEX. FAM. CODE §§ 154.062(a), 154.125, 154.122, 154.123).

Mother did not present evidence from which the trial court could calculate Father's net resources or apply a statutory presumption in order to determine Father's child support liability. *See id*. at 868; *see also* TEX. FAM. CODE ANN. § 154.068(a) (stating presumption to be applied in absence of evidence of party's resources). Instead, she testified generally that she was aware that Father had filed an affidavit of inability to pay for the social study but did not include any information about his income. Father is a real estate broker; had an insurance license; and once had a law license in several states; and Mother did not believe he was indigent. Mother also testified that Father had no disabilities and should be able to pay child

support. Nothing else was offered into evidence on this issue other than Mother's testimony.

On this record, we conclude the trial court lacked sufficient information on which to exercise its discretion concerning the amount of child support Father must pay. *See A.B.P.*, 291 S.W.3d at 95. Accordingly, we sustain Father's second issue.

III. CONCLUSION

We sustain Father's second issue and resolve his remaining issues against him. We reverse the trial court's child support determination and remand for a new trial on that issue, and otherwise affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF
R.G.A.C.L.G., A CHILD,
No. 05-19-00846-CV

On Appeal from the 301st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-15-17201.
Opinion delivered by Justice Whitehill. Justices Osborne and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** on the trial court's child support determination and this cause is **REMANDED** to the trial court for a new trial on that issue. In all other respects, the trial court's judgment is **AFFIRMED**.

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

Judgment entered this 27th day of July 2020.