Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00727-CV

IN THE INTEREST OF E.D.M., A CHILD

On Appeal from the County Court at Law No. 1
Galveston County, Texas
Trial Court Cause No. 08FD1279

M E M O R A N D U M O P I N I O N

Appellant, David Morton, appeals the trial court's judgment confirming child support arrears in the amount of $38,188.26. In two issues, appellant contends that the trial court erred by excluding evidence relevant to his defenses to the arrearage suit. We affirm.

I. BACKGROUND

Appellant and Phyllis Johnson were married in Arkansas in 1990. One child, E.D.M., was born of the marriage. Johnson filed for divorce in Arkansas in 1993. Pending the divorce, three separate orders were signed regarding support: a temporary order, an agreed order, and a contempt order. The temporary order, signed on June 22, 1993, ordered appellant to pay $50 a week for the support of E.D.M. The agreed order, signed on September 14, 1993, ordered appellant to pay a reduced amount—$33 a week.

The contempt order, signed following the Arkansas court's finding that appellant had failed to pay support as ordered, required appellant to pay outstanding support totaling $150. On May 16, 1994, the Arkansas court signed a final decree granting the couple's divorce, awarding custody to Johnson, awarding visitation to appellant, and ordering appellant to pay child support in the amount of $55 a week. Appellant made no support payments thereafter and moved to Texas.

The Arkansas decree was registered with the state of Texas on May 16, 2008. On the same day, appellee, the Office of the Attorney General ("OAG"), filed a motion to confirm arrearages, claiming that appellant owed $39,435 in arrears under the Arkansas decree. Appellant answered the suit, denied liability, and claimed that the support order was obtained by fraudulent inducement and that the OAG's enforcement suit was barred by the applicable statute of limitations and the doctrine of estoppel. The OAG's motion was heard at trial by the IV-D associate judge, who made an audio recording of the hearing. But no transcription was made by an official court reporter. At the conclusion of trial, the associate judge signed an order confirming arrearages in the amount of $38,188.26 and rendered judgment in favor of the OAG for the confirmed amount.

Appellant now appeals the judgment, contending that the trial court erred by excluding evidence relevant to his defenses of fraudulent inducement and estoppel. Specifically, appellant contends that during the Arkansas divorce, Johnson offered to vacate the Arkansas contempt order and refrain from seeking further child support if appellant abandoned his visitation rights. According to appellant, he voluntarily relinquished his parental rights relying on Johnson's representations. Appellant claims that evidence of the parties' agreement supported his defenses of fraudulent inducement and estoppel and that the trial court erred by excluding this particular evidence.[1]

[1] For the first time in his reply brief, appellant contends that the trial court also erred by denying his motion for new trial, which identified the same evidentiary issues. However, the appellate rules do not allow an appellant to raise a new issue in a reply brief. Tex. R. App. P. 38.3. Because appellant did

II. APPELLATE RECORD

As a threshold matter, we address the status of the appellate record in this case. The underlying proceeding was tried in the County Court at Law No. 1 in Galveston County, which has no official court reporter. Although there is no official court reporter and no official reporter's record in this case, the associate judge made an audio recording of the trial proceeding. However, the audio recording was not filed with this Court, and the record is unclear as to whether appellant ever requested the tape recording from the associate judge.

Nevertheless, even had appellant filed the audio recording with this Court, we are not authorized to consider a recording from Galveston County in the absence of an order by the Supreme Court of Texas. *See* RULES GOVERNING THE PROCEDURE FOR MAKING A RECORD OF COURT PROCEEDINGS BY ELECTRONIC RECORDING, *reprinted in* TEXAS RULES OF COURT–STATE 457 (West 2010); *see also In re D.D.A.*, No. 14-05-00046-CV, 2006 WL 1547869, at *2 (Tex. App.—Houston [14th Dist.] June 8, 2006, no pet.) (per curiam) (concluding that appellate court was not authorized to consider audio recording from Galveston County in the absence of a supreme court order); *Henning v. Henning*, 889 S.W.2d 611, 612 n.1 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting that appellate court had no authority to consider audio tapes from trial court proceeding in a county excluded from the supreme court's order pursuant to the Texas Rules of Court). Because the Supreme Court of Texas has not authorized this Court to consider the tape recording made below by the associate judge, we could not consider the audio recording even if it had been filed.

Furthermore, when trial proceedings are electronically recorded, it is the appellant's burden to have the portions relevant to the issues in his appeal transcribed and filed in the appellate court as an appendix to his brief. Tex. R. App. P. 38.5(a)(1); *see*

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not challenge the trial court's ruling on the motion for new trial in his original brief, this particular argument is waived. *See id.*

also Marena v. George, No. 14-03-01283-CV, 2004 WL 2340631, at *1 (Tex. App.—Houston [14th Dist.] Oct. 19, 2004, no pet.) (mem. op.); *In re K.S.E.*, No. 04-02-00319-CV, 2003 WL 21269585, at *1 (Tex. App.—San Antonio June 4, 2003, no pet.) (mem. op.). Appellant has not filed an appendix of the electronically recorded portions of the trial relevant to his evidentiary complaints. Accordingly, neither the audio recording nor a transcription of the audio recording is part of the appellate record. Without a reporter's record, the audio recording, or a transcription of the audio recording, our review is limited to the clerk's record.

We also take notice that appellant failed to make a formal bill of exception or written proffer to preserve his evidentiary complaints. *See* Tex. R. App. P. 33.2 (requiring a party to file a formal bill of exception regarding an appellate complaint that would not appear in the record); *see also* Tex. R. App. P. 33.1(a). The clerk's record contains no written proffer or bill regarding appellant's evidentiary complaints.

III. WAIVER

Appellant's evidentiary complaints necessarily require a review of a record. We cannot determine whether the trial court erred by excluding evidence without having first reviewed that evidence. Without a reporter's record, the audio recording, a transcription of the audio recording, or a written bill or proffer of the excluded evidence, there is nothing to review on appeal. *See* Tex. R. App. P. 33.1(a); *see also Marena*, 2004 WL 2340631, at *1 (concluding that in the absence of a transcription of the electronically recorded portion of the trial relevant to the appellant's arguments, the court could not determine whether the trial court abused its discretion). Accordingly, we overrule appellant's first and second issues and affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.