TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00636-CV

Timothy Onkst, Appellant

v.

Jennifer Onkst, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT
NO. D-1-FM-14-003084, HONORABLE KARIN CRUMP, JUDGE PRESIDING

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

In this child-custody case, Timothy Onkst appeals the trial court's final judgments on Jennifer Onkst's Motion for Enforcement and Petition to Modify the Parent-Child Relationship.[1] For the reasons set forth below, we will affirm the judgments of the trial court.

BACKGROUND

Timothy and Jennifer were married on December 23, 2010, and had their first child, B.O., in October 2011. The couple separated and subsequently reconciled on several occasions during that time, and they separated for the last time on August 26, 2012, after police were called to respond to a domestic altercation. On October 2, 2012, Jennifer obtained a two-year protective order against Timothy that prohibited him from going within 200 yards of Jennifer's home, her place of employment, or their child's school (except to carry out visitation). The parties finalized their

[1] For clarity, we refer to the parties by their first names.

divorce on December 12, 2013. In the final decree, Jennifer was named as sole managing conservator of B.O., and Timothy was named possessory conservator with visitation rights.[2]

In September 2014, Jennifer filed her live motion for enforcement and petition to modify, alleging that Timothy had violated the terms of the decree by failing to pay child support as ordered; failing to attend orientation at Planet Safe, a neutral exchange location agreed to by the parties for their exchanges of B.O.; and failing to attend therapy sessions as ordered. Jennifer further requested that Timothy be held in contempt and confined for the violations, which resulted in Timothy's being appointed counsel to represent him in the enforcement matter. Timothy also filed a motion to modify seeking, among other things, to reduce his child-support obligation because he alleged his income had changed and he could no longer pay the ordered amount. In December 2014, Jennifer requested a new protective order based on allegations that Timothy had violated the original protective order by repeatedly sending her harassing text messages in which he called her derogatory names. The trial court granted the new protective order on January 27, 2015.

On February 11, 2015, the trial court entered a Final Order on Suit Affecting Parent-Child Relationship granting Jennifer's enforcement request, holding Timothy in contempt because he had not satisfied his child-support obligation under the terms of the parties' divorce decree, granting Jennifer's requested modification of the terms of the visitation schedule, and denying Timothy's request to lower his child-support obligation. Jennifer filed a Motion to Modify, Correct,

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[2] Since the entry of the decree, the parties have continuously engaged in disputes about the enforcement of the decree. Because it is well known to the parties, we do not detail the extensive procedural history of this case here; rather, we include only those developments relevant to the issues raised on appeal.

or Reform Judgment on March 11, 2015, seeking adjustments to the decree to allow for enforcement. On March 13, 2015, Timothy filed his own Motion to Modify, Correct, or Reform Judgment. The trial court issued a Clarifying Order on April 14, 2015, in which it clarified issues relating to the exchange of B.O. and modified Timothy's periods of possession. Timothy subsequently filed an Amended Motion to Modify and an Amended Motion for New Trial, which the trial court denied on July 7, 2015. This appeal followed.[3]

DISCUSSION

Timothy raises ten issues in his *pro se* brief, complaining of the trial court's admission and exclusion of evidence, the failure of certain witnesses to appear during trial, the trial court's consideration of issues that he asserts were previously determined in earlier proceedings, and his lack of counsel at the protective-order hearing.

In addition to responding to the merits of Timothy's claims, Jennifer asserts that Timothy's brief is inadequate and that he has therefore waived all of his issues. Although we hold *pro se* litigants to the same standards as those represented by counsel, *see Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978); *see also Stewart v. Texas Health & Human Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *2 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.), we must also liberally construe briefs and strive to reach the merits whenever possible, *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221–22 (Tex.

[3] Timothy first filed a notice of appeal and began appellate proceedings in June 2015. He then filed a second appeal after the denial of his motion for new trial. The two appeals were consolidated under the present cause number.

2017) (quoting *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008)). Accordingly, we will address Timothy's issues to the extent we are able to divine his arguments. *See Forbes v. Forbes*, No. 03-15-00130-CV, 2016 WL 612175, at *4 (Tex. App.—Austin Feb. 12, 2016, no pet.) (mem.op.) (citing *Stewart v. Texas Health & Human Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *1 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem.op.)) (addressing *pro se* issues "as best we can" in the interest of justice).

Issue 1: Exclusion of Telephone Records

In his first issue, Timothy asserts that the trial court would not consider telephone records offered at "trial, or in post-trial hearings on June 16, 2015 or October 16, 2015." We have no reporter's record from any post-trial hearings on June 16, 2015 or October 16, 2015, and we have only a partial reporter's record from the final hearing. In the portion of the record we have before us, Timothy did not offer any telephone records into evidence. Even assuming that such evidence was offered during the trial, without a complete reporter's record on appeal, we are unable to determine whether the trial court erred. *See* Tex. R. App. P. 37.3(c); *In re Spiegel*, 6 S.W.3d 643, 646 (Tex. App.—Amarillo 1999, no pet.). Accordingly, we must assume that the omitted parts of the record support the trial court's judgment. *See Bennett v. Cochran*, 96 S.W.3d 227, 230 (Tex. 2002) ("The court of appeals was correct in holding that, absent a complete record on appeal, it must presume the omitted items supported the trial court's judgment."); *Hughes v. Armadillo Props. for Lina Roberts*, No. 03-15-00698-CV, 2016 WL 5349380, at *2 (Tex. App.—Austin Sept. 20, 2016, no pet.) (mem. op.); *Hebisen v. Clear Creek Indep. Sch. Dist.*, 217 S.W.3d 527, 536 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("Where there is no reporter's record and no findings of

fact, we assume the trial court heard sufficient evidence to make all necessary findings in support of its judgment.").

We overrule Timothy's first issue.

Issue 2: Enforcement of Subpoenas

In his second issue, Timothy next asserts that the trial court erred when it "allowed subpoenas to be ignored and would not make [certain] witnesses appear [at the final hearing]." Timothy states that Lt. Glenn Borkowicz, Detective Tracy Riley, Jeannie Tomanetz, and Sharon Ibanez all "had vital testimony that was not allowed to be presented." As with his first issue, the appellate record does not contain a writ of attachment, motion to compel, or other request for enforcement of these subpoenas, nor does it contain "proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered." Tex. R. Civ. P. 176.8(b); *Old Republic Ins. Co. v. Edwards*, No. 01-10-00150-CV, 2011 WL 2623994, at *12 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.). Without such proof, the trial court has no authority to hold a witness in contempt or issue a writ of attachment to force the witness to appear at trial. Tex. R. Civ. P. 176.8(b). Timothy fails to demonstrate any error by the trial court.

We overrule Timothy's second issue.

Issue 3: Admission of Copies of Text Messages

In his third issue, Timothy contends that the trial court erred in allowing Jennifer to introduce photocopy printouts of text messages between the parties. Although Timothy states that the evidence offered was "factually insufficient," it seems he is actually challenging the authenticity

of the text messages and the trial court's ruling on his objection. We review a trial court's ruling on evidentiary objections for abuse of discretion. *See Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Here, Timothy objected to the admission of the text messages based on a lack of authentication. However, Jennifer testified that she received the messages between certain dates, that the messages were from Timothy, and that the exhibit offered reflected the thread of text messages between her and Timothy, thus satisfying the authentication requirements of Rule of Evidence 901. *See* Tex. R. Evid. 901(b)(1) (allowing authentication of evidence through testimony of witness with knowledge). Based on the authentication provided by Jennifer, we cannot determine that the trial court abused its discretion in admitting the text messages.

We overrule Timothy's third issue.

Issue 4: Previous Contempt Proceedings

In his fourth issue, Timothy asserts that he was held in contempt for nonpayment of child support on certain dates even though he had already been found "not guilty" on those same dates in a previous contempt proceeding. There is no previous motion for enforcement or contempt that is part of the record before us, nor does the record contain a transcript of a prior contempt or enforcement hearing or other record of a ruling on the contempt issue. Because there is no support for Timothy's assertion in the incomplete appellate record, we must assume the missing portions of the record support the trial court's ruling. *See Bennett*, 96 S.W.3d at 230.

We overrule Timothy's fourth issue.

Issue 5: Child Support Ordered in Excess of Guidelines

In his fifth issue, Timothy asserts that the trial court erred when it ordered child support at more than 20% of Timothy's take-home pay in violation of section 154.125(b) of the Family Code. Timothy further states that the trial court "did not consider evidence offered . . . to show a change in circumstance, employment, and income." The trial court has broad discretion in setting and modifying child-support payments. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). Compliance with the statutory guidelines is discretionary when a trial court is considering whether to modify an existing child support order. Tex. Fam. Code § 156.402; *In re S.D.*, No. 02-10-00221-CV, 2011 WL 3847440, at *4 (Tex. App.—Fort Worth Aug. 31, 2011, no pet.) (mem. op.); *In re G.J.S.*, 940 S.W.2d 289, 294 (Tex. App.—San Antonio 1997, no writ). A child support order that is not in compliance with the guidelines does not by itself establish a material and substantial change in circumstances. *In re G.J.S.*, 940 S.W.2d at 294. Thus, to the extent Timothy asserts that the trial court erred by failing to decrease his child support burden to meet the guidelines, we overrule this issue.

Timothy also states that the trial court erred because it "did not consider evidence offered by [Timothy] to show a change in circumstance, employment, and income." But Timothy fails to give any indication of what the "evidence" was or how it showed a material and substantial change in circumstances, and accordingly, he has waived this issue. *See* Tex. R. App. P. 38.1(i) (stating that appellant's brief must "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record").

We overrule Timothy's fifth issue.

Issue 6: Trial Court's Failure to Issue Findings Relating to Child Support

Similarly, in his sixth issue, Timothy asserts that the trial court erred by failing to make the required findings to support a child-support award of more than 20% under the statutory guidelines. However, the trial court denied Timothy's request to modify his child support; it did not render a new child-support order. The trial court is not required to make findings under section 154.130 when denying a motion to modify. *See Rumscheidt v. Rumscheidt*, 362 S.W.3d 661, 664 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *In re D.S.*, 76 S.W.3d 512, 522 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Terry v. Terry*, 920 S.W.2d 423, 425–26 (Tex. App.—Houston [1st Dist.] 1996, no pet.)) (holding trial court was not required to make findings under Family Code section 154.130 when it did not issue or render a new child-support order but merely denied obligor's motion to modify child support).

Accordingly, we overrule Timothy's sixth issue.

Issue 7: Previous Adjudication of Child Support

In his seventh issue, Timothy asserts that the trial court erred by "hearing a motion for enforcement and modification on child support dates and information that had already been heard and adjudicated previously." Without any further specificity, Timothy asserts that "the trial court allowed multiple arguments and testimony on issues and events from prior to 2013 and as far back as 2010. Under res judicata and collateral estoppel, the court should not have heard arguments or testimony prior to December 11, 2013." We hold that Timothy has waived this issue due to inadequate briefing. Tex. R. App. P. 38.1(i) (brief must"contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). Not only does

Timothy offer no citation to any legal authority or to the record, but he does not even specify what "arguments and testimony" was heard or on which "issues and events prior to 2013." Although we must liberally construe Timothy's brief, we will not, and indeed cannot, comb through the entire record looking for such errors because doing so would give *pro se* litigants an unfair advantage over those represented by counsel. *See McClain v. Byrne*, 03-16-00216-CV, 2016 WL 4506304, at *1 (Tex. App.—Austin Aug. 24, 2016, no pet.) (mem.op.); *see also Stewart v. Texas Health & Human Servs. Comm'n*, No. 03-09-00226-CV, 2010 WL 5019285, at *2 n.1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.) ("[P]ro se appellants are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties.").

We overrule Timothy's seventh issue.

Issue 8: Clarification Order

In his eighth issue, Timothy asserts that the trial court erred by substantively modifying the trial court's judgment in its Clarifying Order. However, even assuming, without deciding, that the "clarification" was a modification, we conclude the trial court had authority to modify the child-support obligation and visitation schedule, and thus committed no error in doing so. The final judgment was first entered on February 11, 2015, and Jennifer and Timothy filed motions to modify the judgment on March 11, 2015 and March 13, 2015, respectively. Thus, the trial court retained plenary power to modify its order at the time it entered the Clarifying Order on April 14, 2015. *See* Tex. R. Civ. P. 329b. Accordingly, the changes made to the order would have been permissible if it were rendered as part of a "modification" order. We, therefore, conclude the trial court, while perhaps mistaken in titling its order, did not err in entering the order. *See In re*

V.M.P., 185 S.W.3d 531, 534–35 (Tex. App.—Texarkana 2006, no pet.) (mistitling of modification as clarification while court had plenary power was not error).

We overrule Timothy's eighth point of error.

Issue 9: Sufficiency of Evidence Supporting the Protective Order

Timothy next challenges the court's issuance of the new protective order because there was no "evidence that satisfied the required findings" and because it was "without proper application." Essentially, Timothy challenges the sufficiency of the evidence to support the protective order. However, the January 27 protective order is not among the orders listed in Timothy's notice of appeal, and even as such, Timothy provided only an incomplete reporter's record including "excerpts" from the final hearing. As we have stated above, because we have an incomplete record, we must presume that the missing portions of the record support the judgment of the trial court. *See Bennett*, 96 S.W.3d at 230.

We overrule Timothy's ninth issue.

Issue 10: Appointment of Counsel

In his tenth and final issue, Timothy asserts that the trial court erred by failing to appoint him counsel for the protective order and enforcement action. He further states that he "was told by Travis County Associate Judge Andrew Hathcock that he could not retain court-appointed counsel for the enforcement and protective order portions of the final hearing."

The reporter's record filed with this Court does not include any hearings in front of Judge Hathcock, and the clerk's record includes the temporary orders of Judge Hathcock, in which it was ordered that Timothy's appointed attorney cover enforcement proceedings in which Jennifer

requested incarceration as relief for contempt, as well as other orders appointing multiple attorneys for Timothy as recently as October 1, 2014, prior to Jennifer's request for a protective order. At some point between October 1, 2014 and October 10, 2014, it seems Timothy sought to replace his appointed counsel with retained counsel. Timothy retained Richard Laird prior to a hearing scheduled for October 13, 2014, and made no subsequent request for appointed counsel. The protective order and the court's final order, both of which were heard by the trial court on January 26–27, 2015, state that Timothy "appeared in person and through his attorney, Richard Laird, and announced ready." Thus, Timothy was represented by counsel at the hearing on both the enforcement and protective-order matters, and there is nothing in the record to support his contention that he was denied appointed counsel.

We overrule Timothy's tenth issue.

CONCLUSION

Having overruled all ten of Timothy's issues on appeal, we affirm the judgments of the trial court.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 16, 2017