Opinion issued July 21, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00933-CV

CHRISTOPHER HILDEBRAND, Appellant

V.

DODI MARIE HILDEBRAND, Appellee

On Appeal from the 25th District Court
Guadalupe County, Texas
Trial Court Case No. 16-1905-CV

MEMORANDUM OPINION

In this restricted appeal, appellant, Christopher Hildebrand, challenges the trial court's entry of a post-answer default divorce decree awarding certain property and custody of a minor child to appellee, Dodi Marie Hildebrand, in Guadalupe

County.[1] Christopher presents seven issues for review, but he primarily focuses on three issues: (1) whether he received sufficient notice of the final hearing; (2) whether the trial court abused its discretion in awarding all of the community property and his separate property to Dodi; and (3) whether the trial court abused its discretion in awarding sole managing conservatorship to Dodi. We agree with Christopher that he received insufficient notice of the final hearing and that the trial court abused its discretion in its property division and award of sole managing conservatorship to Dodi, who presented no evidence at the final hearing.

We reverse the trial court's judgment and remand for a new trial consistent with this opinion.

Background

In August 2016, Dodi filed a form original petition for divorce from Christopher on the ground of insupportability. *See* TEX. FAMILY CODE ANN. § 6.001. Dodi's petition requested joint managing conservatorship with Christopher over the couple's child, but Dodi asked for the exclusive right to determine the primary residence of the child without any geographic restriction. Dodi also requested that

[1] Pursuant to its docket equalization powers, the Texas Supreme Court transferred this appeal to this Court from the Court of Appeals for the Fourth District of Texas. *See* TEX. GOV'T CODE ANN. § 73.001; Misc. Docket No. 18-9130 (Tex. Sept. 26, 2018). We are unaware of any conflict between the precedent of the Fourth Court of Appeals and of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

the trial court restrict Christopher's access and possession to the child "pending [the] outcome of [a] sexual abuse case against [Christopher]."

Dodi's petition also requested that the court divide the parties' community assets and liabilities if the parties could not agree to a division. Under a section for separate property, the form petition listed several specific types of property, including a "house," "land," and "[c]ars, trucks, . . . or other vehicles." Dodi stated "none" for each of these types of property.

Christopher filed an answer generally denying Dodi's allegations. The Texas Attorney General's Office intervened in the proceeding and claimed that it was a necessary party under Texas Family Code Chapter 231. *See* TEX. FAM. CODE ANN. § 231.101(a) (authorizing Attorney General's Office to establish, modify, or enforce child support). The Attorney General requested that the court award conservatorship to Dodi and award current and future child support and medical support for the child, asked that such support be withheld from Christopher's disposable earnings, and sought discovery from Christopher.

On May 9, 2018, Dodi filed a notice of setting of a hearing on the final divorce decree for June 18, 2018. Dodi's notice certified that she served Christopher with the notice by "[c]ertified [c]ivil [p]rocess [s]erver." The record shows that Dodi requested service of process from the Guadalupe County District Clerk, and a return of service shows that a process server served Christopher with the notice on May 11

at the Guadalupe County Jail, where Christopher was incarcerated for charges apparently unconnected to the divorce proceeding.

On June 18, 2018, the trial court held the final hearing at which Dodi appeared but Christopher did not. Christopher argues that he failed to attend the hearing "because of his being incarcerated in the Guadalupe County Jail – despite repeated request[s] by the appellant to be transferred to the hearing." However, the appellate record contains no such request.

At the hearing, Dodi briefly testified but did not present any evidence. She asked for custody and visitation as "set in the decree [she] presented to the [c]ourt[,]" stating, "I believe these orders would be in my child's best interests." She also asked the court to divide "the property and debts . . . as set into the decree [] that [she] presented to the [c]ourt." The court asked Dodi, "where does it say the amount," in apparent reference to the property division Dodi had requested immediately before the court's inquiry. At that point, counsel for the Attorney General asked to examine Dodi, which the court permitted, and counsel elicited testimony from Dodi that Christopher was currently "in Guadalupe County Jail" and had been since 2016 on "18 counts of child molestation against my daughters."[2] Dodi stated that the court should not grant Christopher visitation, possession, or access to the child, and she

[2] It does not appear from the record that Christopher is the father of Dodi's daughters. According to Dodi's divorce petition and hearing testimony and the final divorce decree, she and Christopher have one male child together.

answered affirmatively when asked if she believed it was in her child's best interest not to have any contact with Christopher. Dodi also answered "yes" when asked if there was any family violence during her marriage to Christopher, testifying that "[h]e would get mad for no reason, and a lot of screaming, yelling, pushing, shoving, you know." When asked if there was any family violence involving the child or other children, Dodi stated that the violence was "[m]ainly against me." Dodi also testified that the child was not covered by health insurance, although she was exploring options to cover the child.

The trial court stated, "I take it [Christopher] was noticed," to which Dodi agreed, and then the trial court stated, "Yeah, the return of service has been on file since May 10th of 2018. There is also a notice of setting for today. [Christopher] filed a denial." The court asked Dodi directly, "And did you send him notice of today's hearing," to which Dodi responded, "Yes." The trial court granted the divorce at the end of the short hearing, the transcript of which consists of a sparse nine pages, including four pages for the cover sheet, appearances, table of contents, and reporter's certification.

The trial court signed the final divorce decree, which stated that "[Christopher] was not present but filed a Global Waiver of Service that waived [Christopher's] right to notice of this hearing and did not otherwise appear." The record does not include a waiver of service, but it does include a return of service on

Christopher of the notice of setting of the final hearing. The decree does not mention this notice.

The decree changed Dodi's name to her premarital name, awarded Dodi sole managing conservatorship of the parties' child, and awarded Christopher possessory conservatorship with visitation rights. The decree also granted Dodi child support and medical support for the child but ordered Christopher to pay $0 per month. The decree awarded Christopher no property other than his retirement funds, and it awarded Dodi her retirements funds and three vehicles that are listed as community property. Dodi did not offer any testimony or evidence about the three vehicles.

The Guadalupe County Clerk's Office mailed notice of the judgment to Christopher, but it was returned to sender.

Christopher did not file a post-judgment motion. On September 19, 2018, Christopher filed a notice of restricted appeal of the June 18, 2018 default divorce decree.[3]

[3] Dodi did not file a responsive brief or respond to late-brief notices from the Clerk of this Court. In a letter, the Attorney General "decline[d] to file a brief in this case" because it "does not get involved in custody disputes, but only seeks to have a conservator appointed with the power to receive child support." According to the letter, "there is no issue for the [Attorney General] to defend in this appeal[,]" presumably because "[c]hild support was set to zero dollars."

Restricted Appeal

A restricted appeal is a direct attack on a judgment. *Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226, 230 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c)" for restricted appeals. TEX. R. APP. P. 30; *see* TEX. R. APP. P. 26.1(a) (requiring notice of appeal to be filed within thirty days after judgment signed, except that it must be filed within ninety days after judgment signed if any party filed motion for new trial, motion to modify judgment, motion to reinstate, or request for findings of fact and conclusion of law), (c) (requiring, in restricted appeal, notice of appeal to be filed within six months after judgment or order signed).

To prevail in this restricted appeal, Christopher must show that: (1) he filed notice of the restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying lawsuit; (3) he did not participate in the hearing that resulted in the judgment he complains of, and he did not file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) the error he complains of is apparent on the face of the record. *Alexander v. Lynda's Boutique*,

134 S.W.3d 845, 848 (Tex. 2004); *Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing TEX. R. APP. P. 30 and *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997)). The "face of the record" includes all the papers on file in the appeal, including the clerk's record and reporter's record. *Wilson*, 132 S.W.3d at 536; *Norman v. Giraldo*, No. 01-13-00334-CV, 2014 WL 2538558, at *2 (Tex. App.—Houston [1st Dist.] June 5, 2014, no pet.) (citing, among others, *Norman Commc'ns*, 955 S.W.2d at 270). The appellant must show affirmative proof of error; we generally may not infer error from silence in the record. *Norman*, 2014 WL 2538558, at *2 (citing *Alexander*, 134 S.W.3d at 849). Nor may we consider evidence or documents that were not before the trial court when it rendered judgment. *Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

The face of the record shows that Christopher was a party to the underlying divorce proceeding, he did not participate in the hearing that resulted in the final divorce decree of which he complains, and he did not file any post-judgment motions or request findings of fact or conclusions of law. *See Alexander*, 134 S.W.3d at 848; *Wilson*, 132 S.W.3d at 536. The record also shows that Christopher did not file a notice of appeal within thirty days after the judgment was signed, which is the general deadline for notices of appeal, but that he did file it within six months after the judgment was signed. *See* TEX. R. APP. P. 26.1, 26.1(c). Christopher, therefore,

meets the procedural requirements for a restricted appeal, but he still must show that the errors he complains of are apparent on the face of the record.

Right to Adequate Notice of Final Hearing

Christopher argues that he did not waive his right to be present at the final hearing, that he was denied access to the courts while in the custody of the Guadalupe County Sheriff's Office, and that the trial court clearly abused its discretion.

A. Standard of Review and Governing Law

"A post-answer default is one rendered when the defendant has filed an answer, but fails to appear at trial." *Mahand v. Delaney*, 60 S.W.3d 371, 373 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (quoting *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)). When a party has filed an answer, he has appeared and placed "in issue" the matters raised in the plaintiff's petition, and the case becomes "contested." *Highsmith v. Highsmith*, 587 S.W.3d 771, 777–78 (Tex. 2019). The rules require trial courts to "set *contested* cases on written request of any party . . . with reasonable notice of *not less than forty-five days* to the parties of a first setting for trial." TEX. R. CIV. P. 245 (emphasis added); *see Highsmith*, 587 S.W.3d at 777.

A defendant who has answered in a lawsuit has a constitutional due process right to receive notice of the final hearing. *Highsmith*, 587 S.W.3d at 777–78 ("Most

critically, a lack of notice violates basic principles of due process.") (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988)); *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 813 (Tex. 2012) ("Entry of a post-answer default judgment against a defendant who did not receive notice of the trial setting or dispositive hearing constitutes a denial of due process under the Fourteenth Amendment of the United States Constitution."). A trial court's failure to comply with notice rules in a contested case deprives the defendant of his "constitutional right to be present at the hearing, to voice objections in an appropriate manner, and results in a violation of fundamental due process." *Blanco v. Bolanos*, 20 S.W.3d 809, 811 (Tex. App.—El Paso 2000, no pet.) (citing *Platt v. Platt*, 991 S.W.2d 481, 483 (Tex. App.—Tyler 1999, no pet.)). Thus, a plaintiff may not take a post-answer default judgment against a defendant on less than 45 days' notice of the final hearing; otherwise the post-answer default judgment is ineffectual and should be set aside. *Id.* (citing *Platt*, 991 S.W.2d at 484).

Appellate courts presume that trial courts will only hear cases upon proper notice to the parties. *Osborn v. Osborn*, 961 S.W.2d 408, 411 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). To rebut this presumption, an appellant must affirmatively show a lack of notice, which generally requires affidavits or other competent evidence showing that he did not receive proper notice. *Blanco*, 20 S.W.3d at 811 (citing *Hanners v. State Bar of Tex.*, 860 S.W.2d 903, 908 (Tex.

App.—Dallas 1993, no writ), and *Turner v. Ward*, 910 S.W.2d 500, 505 (Tex. App.—El Paso 1994, no writ)); *Osborn*, 961 S.W.2d at 411. However, we may not consider evidence or documents that were not before the trial court when it rendered judgment. *Roventini*, 111 S.W.3d at 722.

B. Analysis

Christopher filed an answer denying the allegations in Dodi's divorce petition, which placed in issue and contested the matters that Dodi raised in her petition. *Highsmith*, 587 S.W.3d at 777–78. Christopher therefore had a constitutional due process right to receive adequate notice of the final hearing.

The record shows that on May 9, 2018, Dodi filed a notice of setting of a hearing on the final divorce decree for June 18, 2018. *See Blanco*, 20 S.W.3d at 811–12 (finding inadequate notice based in part on date notice was filed with court). Dodi requested service of process, and the notice was served on Christopher on May 10, which the trial court confirmed at the hearing.[4] Dodi's May 10 service on Christopher provided only 39 days' notice for the hearing set for June 18, not the 45 days required by Rule 245. *See Blanco*, 20 S.W.3d at 811–12 (finding that filing

[4] We note that the final divorce decree does not state Christopher was served with notice, but instead states that "[Christopher] was not present but filed a Global Waiver of Service that waived [Christopher's] right to notice of this hearing." The record does not include any waiver of service, including any mention of waiver at the final hearing, and the trial court's confirmation at the hearing that Christopher was served notice contradicts the statement in the decree that Christopher waived service.

notice of setting 15 days before final hearing was insufficient under Rule 245); TEX. R. CIV. P. 245; *see also Osborn*, 961 S.W.2d at 411. The record affirmatively shows that Christopher received less than 45 days' notice of the final hearing, which deprived him of his due process right to receive notice.[5] *Highsmith*, 587 S.W.3d at 777–78; *Blanco*, 20 S.W.3d at 811; *Osborn*, 961 S.W.2d at 411. We hold, therefore, that the post-answer default divorce decree is ineffectual for lack of adequate notice.

We sustain Christopher's first issue.

Lack of Evidence

Although we hold that reverse and remand for new trial is appropriate for lack of adequate notice, Christopher also challenges the lack of evidence supporting the trial court's property division and award of sole managing conservatorship. We address those arguments, as they are likely to persist on remand.

In his second and third issues, Christopher challenges the trial court's division of marital property and award of sole managing conservatorship. Christopher argues that the trial court erred in its property division because Dodi improperly destroyed his property, including his clothes, work equipment, and his family's personal property that Christopher was storing at his home, and because the trial court

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[5] Christopher asked in his brief and in a motion, which the Court denied, to provide testimony to this Court to consider in our review. Appellate courts may not consider extraneous evidence that is not in the record on appeal and that was not before the trial court when it made its decision. *See Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

awarded three vehicles to Dodi even though at least some of the vehicles were his separate property. Christopher argues that the trial court erred in its award of sole managing conservatorship to Dodi because Dodi's petition requested that the parties be appointed joint managing conservators.

A. Standard of Review and Governing Law

Like most family law issues, we review property division and conservatorship awards for an abuse of discretion. *Whitworth v. Whitworth*, 222 S.W.3d 616, 622–623 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)); *Raymond v. Raymond*, 190 S.W.3d 77, 82 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998)). A trial court abuses its discretion when it acts arbitrarily or unreasonably. *Whitworth*, 222 S.W.3d at 623 (citing *Gillespie*, 644 S.W.2d at 451).

Legal and factual sufficiency challenges are not independent grounds for asserting error, but they are relevant factors in determining whether the trial court abused its discretion. *Cohen v. Bar*, 569 S.W.3d 764, 773 (Tex. App.—Houston [1st Dist.] 2018, pet. denied); *see Wilson*, 132 S.W.3d at 536 ("In addition to citation and service issues, a restricted appeal confers jurisdiction upon the appellate court to review whether the evidence is legally and factually sufficient to support the judgment."). Our legal-sufficiency review considers all the evidence in a light favorable to the finding, crediting favorable evidence if a reasonable factfinder could

do so and disregarding evidence unless a reasonable factfinder could not. *Cohen*, 569 S.W.3d at 773–74 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005), and *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.)). In a factual sufficiency review, we consider all the evidence for and against the challenged finding and set the finding aside only if the evidence is so weak as to make the finding clearly wrong and manifestly unjust. *Id.* at 774 (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). If some evidence of substantive and probative character exists to support the trial court's decision, there is no abuse of discretion. *Id.*

B. Analysis

At the final hearing, Dodi presented no evidence to support her requests for division of property or for her appointment as sole managing conservator. Dodi offered only her own testimony generally requesting that the court award her property and sole managing conservatorship over the child as set forth in her proposed decree. From her brief testimony alone, the trial court awarded Dodi all the parties' community property and awarded her sole managing conservatorship over the child. But because Dodi presented no evidence, there is no evidence—much less evidence of a substantive and probative character—to support the default divorce decree. *Id.*; *see Schlueter*, 975 S.W.2d at 588 (requiring trial courts to divide property in "just and right" manner) (citing TEX. FAM. CODE ANN. § 7.001); TEX.

FAM. CODE ANN. § 153.002 (providing that primary consideration in determining conservatorship and possession of and access to child is best interest of child). Thus, we hold that the trial court abused its discretion in its division of property and in its award of sole managing conservatorship to Dodi.

We sustain Christopher's second and third issues.[6]

Conclusion

We reverse the judgment of the trial court and remand for a new trial that is consistent with this opinion. *See* TEX. R. APP. P. 43.2(d). We dismiss any pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

[6] Because the issues we sustained are dispositive, we do not reach Christopher's remaining issues, including denial of access to courts; proof of ownership of the vehicles awarded to Dodi; fraud or omissions in listing assets; destruction of Christopher's separate property, including clothes, work equipment, and family members' property in Christopher's possession; lack of an agreement between the parties; incomplete record on appeal; failure to receive documents; reestablishment of the relationship between the child and his grandmother and other family members; or the trial court's erroneous exclusion or non-consideration of other evidence. These issues should first be presented to the trial court for a decision.