REVERSE and REMAND; AFFIRMED and Opinion Filed July 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00612-CV

CAROL BECKA, Appellant
V.
DAVID BECKA, Appellee

On Appeal from the 417th Judicial District Court
Collin County, Texas
Trial Court Cause No. 417-54420-2008

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Bridges

The trial court signed an Agreed Final Divorce Decree (the decree) between appellant Carol Becka (Wife) and appellee David Becka (Husband) on April 1, 2011. The decree included provisions related to specific financial documents and the sale of Husband's orthodontic practice.[1] Wife later sought enforcement of the decree based on Husband's noncompliance with certain terms. After numerous interlocutory orders, including partial summary judgment in Husband's favor, and a

[1] Although children were born during the marriage, they were adults by the time the divorce was finalized.

bench trial, the trial court granted a final judgment in Wife's favor. The final judgment awarded Wife $88,105.03.

In two issues, Wife argues the trial court violated Texas Family Code section 9.007(a) by modifying the divorce decree and by granting partial summary judgment because material fact issues exist regarding the sales price of Husband's orthodontic practice. Because the trial court erred by capping damages related to the sale of the practice and granting summary judgment, we reverse in part and remand for further proceedings. In all other respects, the judgment of the trial court is affirmed.

Background

Relevant to this appeal, paragraphs 10 and 11 of the parties' April 2011 divorce decree states:

> IT IS ORDERED AND DECREED that DAVID C. BECKA is to close any and all USAA accounts awarded in his name in this Agreed Final Decree of Divorce so that CAROL BECKA may receive reimbursement. IT IS FURTHER ORDERED that DAVID BECKA is to sign any documents necessary to transfer the subscriber account into CAROL BECKA'S name and ensure CAROL BECKA receives benefits and all dividends relating to the account.
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> . . .
>
> IT IS ORDERED that the dental practice known as David C. Becka, DDS, PC (hereinafter the "Business") shall be sold under the following terms and conditions:
>
> 1. The parties shall list the Business with FRANK BROWN of WATSON BROWN & ASSOCIATES, INC.
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> 2. The Business, including all hard assets herein shall be sold for a price that is mutually agreeable to Petitioner and Respondent. If Petitioner and Respondent are unable to agree on a sale price, the

parties shall defer to FRANK BROWN. Should the business not sell within 9 months from the date of divorce . . . FRANK BROWN shall be appointed receiver, and either party may request certain terms that FRANK BROWN, shall follow. An alternate receiver may be appointed upon agreement of the parties. . . .

4. The net sale proceeds (defined as the gross sales price less cost of sale [broker fees and closing costs] and full payment of any mortgage indebtedness or liens on the property) shall be distributed as follows:

    a. Upon the sale of the dental practice known as David C. Becka, DDS, PC, the first $55,000.00 from the net sales proceeds shall be paid to CAROL BECKA. IT IS FURTHER ORDERED AND DECREED that DAVID BECKA shall personally guarantee the $55,000.00 and shall pay this amount to CAROL BECKA at the time of closing, or, the time the business closes, whichever comes first. The $55,000.00 payment to CAROL BECKA shall be paid even if the net amount from the sale is less than $55,000.00.

    b. After the $55,000.00 is paid, the remaining net sales (defined as the gross less cost of sale [broker fees and closing costs]) shall be distributed 50 percent to CAROL BECKA and 50 percent to DAVID BECKA.

Wife filed a petition for enforcement on December 29, 2011, claiming, among other things, that Husband failed to supply accounting information and execute the necessary documents related to the USAA account and refused to sell his practice as ordered. On the same day, Wife filed a motion for discharge and replacement of receiver alleging Brown, as receiver, was "making no real efforts to sell the property, fails and refuses and continues to fail and refuse to supply [Wife] with information regarding the sale."

While the enforcement proceeding was pending, Husband sold the practice for $32,500 without Wife's input. Brown, per the decree, brokered the sale.

Wife subsequently filed a first amended petition for enforcement of property division by contempt. She alleged, in part, that compliance with the provisions for "Sale and Operation of the Dental Practice" pursuant to the decree was no longer an adequate remedy because Husband had undervalued the business and wasted assets. She requested $255,000 to compensate for the loss of property.

Husband filed a business bankruptcy in December 2012. He later filed a personal bankruptcy in 2014.

On December 30, 2015, Wife filed her second amended petition for enforcement of property division by contempt. She again alleged, among other things, that Husband failed to execute the necessary closing documents to transfer the USAA account and failed to comply with provisions related to the selling of the practice. She also alleged for the first time that Husband breached the divorce decree by violating the court's orders.[2]

Wife's enforcement action was revived in 2016 after Husband's personal bankruptcy proceeding was dismissed. She filed a third amended petition on April 4, 2016.

[2] She also raised promissory estoppel, common law and statutory fraud, trespass to try title and suit on quiet title.

Husband filed a traditional and no-evidence motion for partial summary judgment on March 30, 2017. In the motion, he recognized Wife was entitled to receive the first $55,000 from the sale of his practice and then split any additional proceeds. Likewise, he admitted he was required to pay her $55,000 regardless of the sale price. However, he argued due to lack of demand, the receiver sold the practice for "scrap value." He asserted there was no evidence of any wrongful action that caused Wife damages in excess of $55,000 or evidence she incurred damages beyond the stipulated $55,000 owed pursuant to the decree. He argued any alleged damages beyond $55,000 were purely speculative.

On April 27, 2017, the trial court held a hearing on Husband's first motion for partial summary judgment. Husband argued there was no evidence supporting Wife's claim the practice could sell for more than the $55,000 the decree awarded her; therefore, damages should be capped at $55,000. The trial court signed an order on October 11, 2017, granting partial summary judgment and capping damages for violation 8 of Wife's enforcement petition at $55,000.[3]

On October 9, 2017, Husband filed a second motion for partial summary judgment and argued Wife's damages arising from other alleged violations relating to sale of his practice should likewise be capped at $55,000. The court held another

[3] Violation 8 claimed, "David Becka failed to comply with paragraph 11, subparagraph 4 when upon the sale of the dental practice David Becka failed to pay to Carol Becka the first $55,000.00 from the net sales proceeds at the time of closing, or, the time the business closed."

hearing in April 2017 and signed an order on July 31, 2018, capping damages for violation 4 to $55,000.[4]

Husband subsequently moved for final summary judgment on August 2, 2018. Relevant to this appeal, Husband argued he was entitled to summary judgment for violation 1, his alleged failure to execute the necessary closing documents to transfer his USAA account to Wife per the decree. He attached his USAA account records from 2009 through 2016. He stated his willingness to agree to a monetary judgment for $10,691.50 (year end 2010) or $10,087.97 (year end 2011) "or any number in between the Court feels is just." On December 13, 2018, the trial court signed an order awarding Wife $10,283 for the USAA account.

The parties continued filing various motions, and the trial court eventually held a bench trial on Wife's pending claims. The trial court ultimately signed a final judgment on April 26, 2019, dismissing Wife's claims and capping damages at $55,000 for breach of contract regarding sale of the practice. It awarded Wife $88,105.03, which included, among other things, $10,283 for the USAA subscriber account. This appeal followed, the atypical case in which the prevailing party appeals the final judgment.

[4] Violation 4 claimed, "David Becka failed to comply with paragraph 11, subparagraph 2 on page 13 when he sold the assets of the business for a price that was not mutually agreeable to Petitioner and Respondent."

Application of Texas Family Code § 9.007(a)

In Wife's first issue, she contends the trial court abused its discretion by modifying the decree in violation of family code section 9.007(a). She argues specifically that the final judgment modifies the decree by (1) awarding Husband the USAA account and related benefits, which the decree awarded to her and (2) permitting Husband to sell the orthodontic practice through a process that violated the decree. Husband responds the trial court did not modify the decree, but instead granted the money judgment Wife requested. Further, he claims Wife is not complaining about the amount awarded for the USAA account, but rather the failure by the trial court to order Husband to close the account, which was impossible.

We review the trial court's ruling on a post-divorce motion for enforcement or clarification of a divorce decree under an abuse-of-discretion standard. *Gainous v. Gainous*, 219 S.W.3d 97, 103 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). A trial court abuses its discretion when it rules arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

The family code provides that a court may not amend, modify, alter, or change the division of property made or approved in the decree of divorce, and any order that does so is beyond the power of the divorce court and is unenforceable. *See* TEX. FAM. CODE ANN. § 9.007(a)-(b); *Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003) (trial court had no authority to enter an order altering or modifying original

disposition of property). However, if a party fails to comply with a divorce decree and delivery of property awarded in the decree is no longer an adequate remedy, the court may render a money judgment for the damages caused by the failure to comply. *See* TEX. FAM. CODE ANN. § 9.010(a); *see also De la Garza v. De la Garza*, 185 S.W.3d 924, 930 (Tex. App.—Dallas 2006, no pet.).

Section 10 of the decree (Provisions Relating to USAA Accounts) required Husband "to close any and all USAA accounts awarded in his name in this Agreed Final Decree of Divorce so that [Wife] may receive reimbursement . . . sign any documents necessary to transfer the subscriber account into [Wife's] name and ensure [Wife] receives benefits and all dividends relating to the account."

In Husband's motion for partial summary judgment, he argued such accounts are typically never closed by a USAA member during their lifetime and usually only pay after the USAA members pass away. However, he stated his willingness to pay Wife the actual cash value of the account at the time of the divorce as damages. He attached his USAA records from 2009 through 2016 to his motion.

Husband testified during a deposition that he does not own the USAA account and does not have the right to give it to Wife. In the affidavit attached to his final motion for summary judgment, he again emphasized he cannot transfer the account to Wife. Instead, once he passes away or surrenders all his benefits including canceling all of his insurance, then the account could be closed and a cash payment of its then-current value would be sent to his estate. He conceded Wife was entitled

to something per the decree and agreed to pay the cash value of the account as of the date of the divorce. At the end of 2010, the value of the account was $10,691.50 and, at the end of 2011, the account was worth $10, 087.97.

During Wife's deposition, she described the USAA account as a subscriber dividend account. She acknowledged a subscriber account is a residual account that does not belong to Husband until the account is closed or he dies. She admitted she wanted "a check from USAA for the subscriber account," and she did not know of any benefit she would receive other than the value of the subscriber account if Husband closed it. Likewise, during her testimony at trial, Wife was unable to articulate any non-monetary benefit she would have received if Husband had closed the USAA account in April 2011. Rather, she testified that, had he closed the account, she would have "had that money for all these years."

At the conclusion of trial, the court took the USAA account under advisement, but indicated "it would just be a draconian result if the Court ordered it closed, but the Court is likely to find Dr. Becka in contempt of this Court's order on that count because it is technically not closed, and it was technically asked to be closed." In a later hearing, the trial court declined to find contempt "due to the impossibility of closing the account."

After considering the evidence, we conclude the trial court acted within its discretion under section 9.010 by awarding a money judgment to compensate Wife for the USAA account rather than ordering it closed as required by the decree.

Although a court is without authority to change provisions in a final judgment relating to property adjudication, it does have authority to make orders necessary to carry the judgment into full effect. *See Dade v. Dade*, No. 01-05-00912-CV, 2007 WL 1153053, at *3 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.) (mem. op.). The trial court considered evidence showing how a USAA account operates, including that such an account is not closed during the holder's lifetime, and Wife's testimony she wanted money from the account, but gained nothing by its closure. The trial court awarded money to Wife based on the values of the account near the time of the divorce, which was the largest benefit she could receive.

To the extent Wife argues she is entitled to the dividends from the account post-divorce because Husband did not close it, we disagree. Wife testified during trial, "In 2011 if the account had been closed, there would not have been a USAA account that we're discussing." Thus, she would not have received any dividends because there would be no account from which to receive such dividends. By granting Wife monetary damages based on account information at the time of the divorce, the trial court awarded Wife damages as if the account had in fact been closed. Wife did not request findings of facts or conclusions of law regarding the USAA account. Thus, we draw every reasonable inference supported by the record in favor the trial court's judgment. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). Accordingly, Wife was not entitled to any further benefits or dividends from the account.

In light of the evidence that Husband neither owned the account nor could transfer or close it, the trial court acted within its discretion by awarding a money judgment based on the amount of the USAA account at the time of the divorce. Thus, although Husband failed to comply with the divorce decree by not closing the account, the court awarded the money damages (as Wife requested in her breach of contract claim) caused by Husband's failure to comply. *See* TEX. FAM. CODE ANN. § 9.010(a); *see also De la Garza*, 185 S.W.3d at 930. Thus, the trial court's order was not an abuse of discretion. *See, e.g., Campbell v. Campbell*, No. 01-10-00562-CV, 2011WL 2436513, at *3 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet.) (mem. op.) (trial court may award money damages when award of property is no longer specifically possible and not an adequate remedy).

We overrule Wife's first issue to the extent she challenges the USAA account. We consider whether the trial court violated family code section 9.007 by modifying the decree when it capped her damages at $55,000 for sale of the orthodontic practice below as part of our review of the summary judgment.

Summary Judgment: Sale of Orthodontic Practice

In her second issue, Wife argues the trial court erred by granting summary judgment on her breach of contract claim because material fact issues exist regarding the value of Husband's practice and the propriety of its sale. Husband responds Wife failed to produce any evidence, other than her own speculation, about the value of the practice; therefore, summary judgment was appropriate.

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *See Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Thus, we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *Id*. at 762. When analyzing a no-evidence summary judgment, "we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). A no-evidence summary judgment is improperly granted if the nonmovant presented more than a scintilla of probative evidence to raise a genuine issue of material fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *IE.com, Ltd. v. Peeler*, No. 05-19-00496-CV, 2020 WL 3424913, at *2 (Tex. App.—Dallas June 23, 2020, no pet.) (mem. op.).

The decree stated the practice should be "sold for a price that is mutually agreeable" to both parties, and if they could not agree then Brown would be appointed receiver. Upon the sale of the practice, the first $55,000 from the net sales proceeds "shall be paid" to Wife. The decree further ordered Husband to

"personally guarantee the $55,000.00 and shall pay this amount . . . at the time of closing, or, the time the business closes, whichever comes first." Husband was required to pay $55,000 even if the practice sold for less. If it sold for more, any remaining net sales would be split evenly.

Husband argues the evidence establishes he sold his practice for the only offer he received from a willing buyer; therefore, the trial court did not err by granting summary judgment and capping Wife's damages at $55,000 per the decree. In support of his argument, he relies on Brown's deposition in which Brown testified he did not receive any other offers close to the $32,500 selling price. Husband explained the substantial decrease in value of his office resulted from it being analog, which he described as obsolete in 2012 when he was trying to sell in the age of electronic offices. Husband testified in his deposition the "current value" of the practice's inventory at the time of the sale was "zero."

In response to Husband's summary judgment motion, Wife attached documentation showing the replacement value of inventory for his practice was $254,192.00. The inventory was considered in mostly "good" and in some instances, "excellent" condition. Wife also attached a June 6, 2011, sales listing with the American Association of Orthodontists describing the practice and all equipment as "well maintained and in excellent condition" with an annual average gross income for the past three years at $300,000. Wife provided evidence of business personal property replacement insurance policies for Husband's practice in the following

coverage amounts: $130,700 for 2008-09; $139,200 for 2009-10; $145,500 for 2010-11; and $152,000 for 2011-12.

During her deposition, Wife testified she had "his word" from the bankruptcy proceeding that the business was valued at $650,000. In his brief, Husband did not dispute stating the value of his practice was $650,000 in his business bankruptcy, but instead, argues "what may have been testified to in a bankruptcy proceeding does not change the fact that the business simply had no potential buyers." His argument is one for a fact-finder.

Accordingly, after examining the entire record in the light most favorable to Wife, as the nonmovant, and indulging every reasonable inference and resolving any doubts against the motion, we conclude Wife produced more than a scintilla of evidence enabling reasonable, fair-minded people to differ in their conclusions regarding the value and subsequent sale of the practice. *See Keller*, 168 S.W.3d at 823; *see also Havner*, 953 S.W.2d at 711. Thus, the trial court erred by granting the partial no-evidence motion for summary judgment capping Wife's damages for breach of contract at $55,000. We sustain Wife's second issue challenging the damages cap.

Having sustained this issue, we need not consider whether the trial court's capping of damages improperly modified the decree. TEX. R. APP. P. 47.1. Likewise, to the extent Wife argues fact issues exist regarding propriety of the sale of the practice, we need not address the argument. *Id*. Husband confessed to the

breach of contract claim leaving only the amount of damages for sale of the practice for the trial court to decide.

Conclusion

We reverse and remand the issue of Wife's damages related to the sale of Husband's orthodontic practice to the trial court for further proceedings in accordance with this opinion. In all other respects, the judgment of the trial court is affirmed.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CAROL BECKA, Appellant	On Appeal from the 417th Judicial District Court, Collin County, Texas
No. 05-19-00612-CV V.	Trial Court Cause No. 417-54420-2008.
DAVID BECKA, Appellee	Opinion delivered by Justice Bridges. Justices Pedersen, III and Evans participating.

We **REVERSE** and **REMAND** the issue of appellant Carol Becka's damages related to the sale of appellee David Becka's orthodontic practice to the trial court for further proceedings. In all other respects, the judgment of the trial court is **AFFIRMED**.

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

Judgment entered July 20, 2020.