In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00393-CV

TIMOTHY JAMES HARRIS, Appellant

V.

DIANA LYNN HARRIS, Appellee

On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 10-01-00365 CV

MEMORANDUM OPINION

Timothy James Harris appeals from the child support order in a divorce decree. He filed a *pro se* brief on appeal. Although a clerk's record is presented for our review, there is no reporter's record.

Diana Lynn Harris filed a petition for divorce. The petition states, "Neither party should be ordered to pay child support pursuant to the parties' agreement as detailed in their Marital Settlement Agreement." The petition further states that the "parties have entered into a Marital Settlement Agreement, a copy of which is attached and incorporated herein by reference. All issues of property and debt distribution have been

mutually agreed upon by the parties and are detailed in their Agreement." The marital settlement agreement, contained in the clerk's record, states in part as follows:

> Petitioner [Diana] and Respondent [Timothy] agree that neither party shall pay child support to the other because both parties have agreed to split the travel expenses for visitations for the minor child equally (50/50). The issue of child support shall be reserved and the Court shall retain jurisdiction over this issue.

Timothy signed a waiver of citation that was filed with the trial court. The waiver states in part as follows:

> I am the Respondent in the above entitled and numbered cause. I have received a copy of the Original Petition, which I have read and understand.
>
> I hereby enter my appearance in said cause for all purposes, waive the issuance, service and return of citation upon me, and agree that said cause may be taken up and considered by the Court at any time without further notice to me. . . . I waive the making of a record of testimony.

The waiver indicates Timothy understood Diana's petition for divorce would be presented to the trial court. A proposed final decree of divorce, signed by Timothy and Diana, was filed. The decree did not contain a child support order, and the marital settlement agreement explained why: "[N]either party shall pay child support to the other because both parties have agreed to split the travel expenses for visitations for the minor child equally (50/50)."

The trial court did not approve the proposed decree. The trial court signed a judgment on July 23, 2010, that included a child support order. Nothing in the record establishes that Timothy received notice that an amended or revised version of the

divorce decree had been proposed or that it would be presented to the trial court on July 23, 2010. To the contrary, the record contains an April 1, 2010 letter from the "418th Judicial District Court" to Diana and Timothy at their respective addresses. Referencing an enclosed scheduling order, the letter informs the parties of a pretrial conference on Friday, September 17, 2010, and a trial date on September 27, 2010. The letter states that all parties and attorneys must be present and prepared to discuss all issues relating to the case (including settlement) at the docket call-pretrial conference. The letter also states that the "trial and the docket call-pretrial conference dates are firm and are not subject to change." Two months before the dates that the trial court had set for the pretrial conference and the trial, the trial court signed the revised version of the decree.

Timothy states that his due process rights were violated. He also contends the trial court set the child support too high. He asserts he earns approximately $800 per month, and he has to pay child support for a different child in Ohio. He notes that the parties waived child support in the "Marital Settlement Agreement[.]"

Due process refers to fundamental fairness in procedure, and generally involves assuring that a party has adequate notice and an opportunity to be heard. *See City of Dallas v. Saucedo-Falls*, 268 S.W.3d 653, 660 (Tex. App.—Dallas 2008, pet. denied); *Argyle Indep. Sch. Dist. v. Wolf*, 234 S.W.3d 229, 249 (Tex. App.—Fort Worth 2007, no pet.) (citing *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). As one court has explained, "Procedural due process requires an opportunity

granted at a meaningful time in a meaningful manner for a hearing appropriate to the nature of the case." *Byers v. Patterson*, 219 S.W.3d 514, 526 (Tex. App.—Tyler 2007, no pet.) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). "'[T]he remedy for a denial of due process is due process."' *Cnty. of Dallas v. Wiland*, 216 S.W.3d 344, 354 (Tex. 2007) (quoting *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 933 (Tex. 1995)).

A trial court is not required to sign an order in accordance with a parenting plan if it is not in the best interest of the child. *See* Tex. Fam. Code Ann. §§ 153.007(d), 154.124(d) (West 2008). Section 153.007(d) provides:

> If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan. If the parties do not submit a revised parenting plan satisfactory to the court, the court may, after notice and hearing, order a parenting plan that the court finds to be in the best interest of the child.

Similarly, in addressing child support, section 154.124(d) provides that "[i]f the court finds the agreement is not in the child's best interest, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child."

Timothy waived service on the original petition. A waiver of service is permitted by the Family Code. *See* Tex. Fam. Code Ann. § 6.4035 (West 2006). A party who waives service of an original petition may still be entitled to notice if the petition is amended to add new claims, however. *See Smith v. Smith*, 241 S.W.3d 904, 907-09 (Tex. App.—Beaumont 2007, no pet.). In *Smith,* we also questioned whether a waiver of

further notice, like the one Timothy signed, "allowed the trial court to dispense with notifying him of a trial that was not based on the petition that is the subject of his waiver." *Id.* at 906 n.1.

No pleading in this case requested child support. Despite the agreed parenting plan, the trial court is authorized by statute to order child support after making the necessary finding. *See* Tex. Fam. Code Ann. §§ 153.007(d), 154.124(d). The trial court provided notice of a trial setting to Timothy and Diana, but that notice is not sufficient to support a judgment signed two months before the trial date. We sustain Timothy's due process issue.

We reverse only the support order, as the order was determined without providing notice and an opportunity to be heard. No party challenges the granting of the divorce or any part of the judgment other than the support order; the remainder of the trial court's judgment is therefore affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART.

____

DAVID GAULTNEY
Justice

Submitted on August 8, 2011
Opinion Delivered August 25, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.