IN THE
TENTH COURT OF APPEALS

No. 10-16-00393-CV
No. 10-16-00396-CV

IN THE INTEREST OF R.W.K., A CHILD

IN THE INTEREST OF L.E.M.K., A CHILD

From the County Court at Law
Ellis County, Texas
Trial Court Nos. 91784CCL & 93756CCL

MEMORANDUM OPINION

In one issue in appellate cause numbers 10-16-00393-CV and 10-16-00396-CV, appellant, V.L., contends that the trial court abused its discretion by ordering her to comply with the requirements of a Family Service Plan after a trial on all the issues. Specifically, V.L. argues that the trial court is without authority to grant relief on unpleaded theories, on a theory that was not tried by consent, and when there is no express statutory authority to do so. We affirm.

I. ANALYSIS

In her sole issue in both appellate cause numbers, V.L. asserts that the trial court erred by ordering her to comply with the requirements of a Family Service Plan after a trial on all issues. We disagree.

In this case, the parties ask us to interpret various provisions of the Texas Family Code involving a situation where the trial court declined to terminate the parental rights of V.L. because it was not in the best interest of the children. "A question of statutory construction is a legal one which we review de novo, 'ascertaining and giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words.'" *MCI Sales & Serv. v. Hinton*, 329 S.W.3d 475 (Tex. 2010) (quoting *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007)); *see Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (citing *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000)). In doing so, our objective is to give effect to the Legislature's intent, which requires us to first look to the statute's plain language. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015); *Leland*, 257 S.W.3d at 206. If that language is unambiguous, we interpret the statute according to its plain meaning. *Lippincott*, 462 S.W.3d at 509. We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *Lippincott*, 462 S.W.3d at 509; *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008).

Section 153.002 of the Family Code provides that: "The best interest of the child shall always be the primary consideration of the court in determining issues of conservatorship and possession of and access to the child." TEX. FAM. CODE ANN. § 153.002 (West 2014). Moreover, section 153.005(b) states that: "A managing conservator must be a parent, a competent adult, the Department of Family and Protective Services, or a licensed child-placing agency." *Id.* § 153.005(b) (West Supp. 2016). In the instant case, the trial court concluded that the Department had established the predicate grounds for terminating V.L.'s parental rights; however, according to the trial court, termination of V.L.'s parental rights was not in the best interest of her children, R.W.K. and L.E.M.K. As such, under section 153.005(b), the Department was named managing conservator of the children. *See id.* V.L. was denied visitation rights with the children "due to [her] present conditions and the safety concerns concerning [V.L.]," unless the Department determines supervised visitation is in the children's best interest.

In any event, after the trial court signed its final order on November 1, 2016, the Department filed a motion for clarification, seeking a determination as to whether V.L. was required "to continue to make efforts to remedy the safety concerns in [her] home during the period of PMC to the Department without termination, such as comply with an ongoing Family Service Plan." Still within its plenary power, the trial court signed an order of clarification on November 18, 2016, requiring V.L. "to comply with the Department's original, or any amended, service plan during the period that the Texas

Department of Family and Protective Services is the Permanent Managing Conservator of the child." *See* TEX. R. CIV. P. 329b(d) ("The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.").

Nevertheless, V.L. argues that the trial court lacked authority to require her to comply with the requirements of the Family Service Plan because the trial court cannot grant relief on unpleaded theories, on a theory that was not tried by consent, or when there is no express statutory authority to do so. Contrary to V.L.'s assertions, section 161.205 of the Family Code provides the following: "If the court does not order termination of the parent-child relationship, the court shall: (1) deny the petition; or (2) *render any order in the best interest of the child*." TEX. FAM. CODE ANN. § 161.205 (West 2014) (emphasis added). Furthermore, section 263.404(a) of the Family Code states that:

> The court may render a final order appointing the department as managing conservator of the child without terminating the rights of the parent of the child if the court finds that:
>
> (1) appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; and
>
> (2) it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator.

Id. § 263.404(a) (West Supp. 2016). In making this decision, the court must consider several factors, including "the needs and desires of the child." *Id.* § 263.404(b).

In addition to the foregoing, sections 263.002 and 263.501(a) of the Family Code require the trial court to "hold a hearing to review the conservatorship appointment" at least once every six months until the Department is no longer the child's permanent managing conservator. *See id.* §§ 263.002, 263.501 (West Supp. 2016). And before each hearing, the Department must prepare a report, which includes information necessary for the trial court to make findings under section 263.5031 of the Family Code. *See id.* § 263.5031 (West Supp. 2016). As outlined in section 263.5031, the trial court must review the permanency progress report prepared by the Department to determine, among other things, "the continuing necessity and appropriateness of the placement of the child"; "the appropriateness of the primary and alternative permanency goals for the child"; and "whether to order the department to provide services to a parent for not more than six months after the date of the permanency hearing," if the court determines that further reunification efforts are in the child's best interest and likely to result in the child's safe return. *Id.* These provisions allow for the Department to continue to work with V.L. so that she may possibly achieve supervised or unsupervised visitation with the children in the future. If the trial court lacked the authority to order services in this context, there would be very little for the Department to address in its section 263.5031 report regarding V.L.'s progress, or lack thereof, towards improving her situation in the best interest of the children. And finally, section 263.106 of the Family Code provides, in relevant part, that

the trial court "may render additional appropriate orders to implement or require compliance with an original or amended service plan." *Id.* § 263.106 (West 2014).

We conclude that the above-mentioned statutory provisions—in particular, sections 161.205 and 263.106 of the Family Code—authorized the trial court to modify its final order to require V.L. to comply with the Family Service Plan given that V.L.'s parental rights were not terminated. *See id*. §§ 161.205, 263.106; *see also Lippincott*, 462 S.W.3d at 509; *Leland*, 257 S.W.3d at 206. Furthermore, we are not persuaded by V.L.'s other complaints given that the record shows that the Department filed a motion for clarification on November 10, 2016, which requested that the trial court order V.L. to comply with "an ongoing Family Service Plan" during the period that the Department remains the permanent managing conservator of the children. In other words, we cannot say that the trial court granted relief to the Department based on unpleaded theories. *But see Degroot v. Degroot*, 369 S.W.3d 918, 925 (Tex. App.—Dallas 2012, no pet.) ("A party may not be granted relief in the absence of pleadings to support that relief."); *Daniels v. Daniels*, 45 S.W.3d 278, 282 (Tex. App.—Corpus Christi 2001, no pet.) ("There must be some pleading pending against which a summary judgment can be granted. . . . Where there is no pleading, there can be no judgment."). Moreover, because we conclude that the Family Code provides authority for the trial court's action in this case, we necessarily reject V.L.'s contention that this issue was not tried by consent. Accordingly, we overrule V.L.'s sole issue on both appeals.

II. CONCLUSION

Having overruled V.L.'s issue in both appellate cause number 10-16-00393-CV and 10-16-00396-CV, we affirm the judgments of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray dissenting with a note)*
Affirmed
Opinion delivered and filed May 10, 2017
[CV06]

*(Chief Justice Gray dissents. A separate opinion will not issue. He notes, however, that the Court validates the State's efforts to obtain relief for which they had no pleading on file and based only on the post judgment motion to clarify. This is an unusual method of finding pleading support for an issue that was not tried by express or implied consent. It would have been better addressed by the Department if they had filed a post judgment motion to amend pleadings. But given that this is a suit unique to the Family Code, it may be acceptable to grant post-judgment relief requested for the first time only in a post-judgment motion. However, the specific relief granted is not supported by the statute. The statute allows the trial court to order the Department to continue to provide services; it does not authorize the court to order the parent to comply with those ordered services. See Tex. Fam. Code 263.401 et seq. If the parent has to be ordered to comply with services necessary to secure the eventual return of their children, the State is subsequently deprived of critical information as to whether the parent is capable of parenting without ongoing state intervention. The legislative purpose of allowing the court to order the department to continue to provide services is thus thwarted by ordering the parent to comply with a service plan. Holding the parent cannot be ordered to comply with the service plan does not impair the duty of the State to prepare a progress report, nor the court's need or ability to review compliance with the service plan as part of the subsequent permanency hearings. Because the court construes the statue to allow

the trial court to order compliance with a service plan, rather than simply to order the Department to provide services to appellant, I respectfully dissent.)