REVERSE AND REMAND; and Opinion Filed November 10, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00497-CV

IN THE INTEREST OF I.A.B. AND B.N.G., MINOR CHILDREN

On Appeal from the 296th Judicial District Court
Collin County, Texas
Trial Court Cause No. 296-56047-2014

MEMORANDUM OPINION

Before Justices Francis, Brown, and Schenck
Opinion by Justice Brown

This appeal involves the adoption of I.B., a female minor child, by Royce Gant. I.B.'s maternal grandmother, who along with Gant and I.B.'s Mother is a joint managing conservator of I.B. brings this appeal to challenge the adoption order. Grandmother contends Gant needed Mother's consent to adopt I.B. and because he did not have it, the trial court erred in granting the adoption. We agree. We reverse the adoption order and remand for further proceedings.

I.B. was born in October 2010. Mother knows I.B.'s biological father only as "Omar." Mother does not know where Omar is, and Omar has had no contact with I.B. Mother began dating Gant in 2012, and she and I.B. moved in with him in 2013. In October 2013, Gant and Mother had a daughter together, B.G. Following B.G.'s birth, Mother experienced postpartum depression and began abusing prescription pills and other substances. In the summer of 2014, Child Protective Services got involved after Mother attempted to drive while under the influence

with the girls in the car. CPS issued a safety plan that required Mother to leave the residence and required her contact with the children to be supervised.

On December 4, 2014, Grandmother filed a suit affecting the parent-child relationship naming Mother as the respondent and seeking to be named sole managing conservator of I.B. Grandmother alleged she was concerned for I.B.'s safety with Mother. The following day, the trial court appointed Grandmother sole managing conservator of I.B., and I.B. was removed from Gant's home. Gant intervened and successfully moved to set aside the trial court's order. In his petition, he sought to be appointed sole managing conservator of I.B. Grandmother answered with a general denial. At the same time, under a different cause number, Gant filed a petition to adjudicate parentage of B.G. and establish himself as her father. These two lawsuits were consolidated in January 2015.

On April 9, 2015, Gant filed a petition to terminate the parent-child relationship between I.B. and her unknown father and to adopt I.B. Gant alleged he was eligible to adopt I.B. because the parent-child relationship will be terminated between I.B. and the unknown father, Gant will have been a managing conservator of I.B. for at least six months preceding the hearing, and Mother, a parent whose rights have not been terminated, consents to the adoption. Gant asserted that Mother's written consent would be filed with the court. It never was. The termination/adoption suit and the existing case were consolidated in October 2016.

In January 2017, the issues of conservatorship were tried before the court. In February, the trial court signed an order appointing Gant, Grandmother, and Mother joint managing conservators of I.B. and B.G. Gant was designated the primary managing conservator. The court further ordered that Mother's visitation was to be supervised by Grandmother.

In April 2017, the issues of termination and adoption were tried before the court. Prior to any testimony, Grandmother argued that I.B. was not eligible for adoption under any of the four

circumstances set out in section 162.001 of the family code, titled "Who May Adopt and be Adopted." *See* TEX. FAM. CODE ANN. § 162.001(b) (West Supp. 2016). At issue here is the following subsection of section 162.001:

> (b) A child residing in this state may be adopted if:
>
> . . .
>
> (3) the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, the person seeking the adoption has been a managing conservator or has had actual care, possession, and control of the child for a period of six months preceding the adoption or is the child's former stepparent, and the nonterminated parent consents to the adoption.[1]

Id. § 162.001(b)(3). Grandmother argued that under this provision, the consent of the nonterminated parent is required and Gant did not have Mother's consent. Gant objected to Grandmother's raising this issue because she did not file an answer to his petition for adoption. He later argued Grandmother waived her objection because she did not raise it in a pleading or motion. On the merits, Gant urged a different reading of the statute, arguing that consent of the nonterminated parent was required only if the person adopting is the child's former stepparent. The trial court took the issue under advisement and trial proceeded.

Gant testified he had not obtained Mother's consent for the adoption. Mother herself testified that she did not consent to the adoption. She did not feel it was in I.B.'s best interest, although an amicus attorney appointed for I.B. concluded it was in I.B.'s best interest to terminate "Omar's" parental rights and to grant the adoption.

At the conclusion of trial, the court ruled that the parent-child relationship between the unknown father and I.B. should be terminated and that Gant's petition for adoption should be

[1] None of the other three subsections of section 162.001(b) apply in this case. They provide that a child may be adopted if: (1) the parent-child relationship as to each living parent has been terminated or a suit for termination is joined with the suit for adoption; (2) the parent whose rights have not been terminated is presently the spouse of the petitioner and the proceeding is for a stepparent adoption; or (3) the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, and the person seeking the adoption is the child's former stepparent and has been a managing conservator or has had actual care, possession, and control of the child for a period of one year preceding adoption. TEX. FAM. CODE. ANN. § 162.001(b)(1), (2), and (4). Mother's parental rights have not been terminated, and as Gant and Mother never married, Gant is not a stepparent.

granted. The court later issued an order to that effect and made findings of fact and conclusions of law. Among other things, the trial court concluded that Gant could adopt I.B. under section 162.001(b) as it did not require the consent of the nonterminated parent "because such provision only applies to former stepparents." Alternatively, the court concluded that Grandmother "failed to file any pleadings or provide timely notice of any objections under TEX. FAM. CODE ANN. § 162.001 and thereby waived the right to assert objections or otherwise seek relief pursuant to TEX. FAM. CODE ANN. § 162.001."

In her first issue, Grandmother contends the trial court erred in granting the adoption because Gant did not meet the statutory requirements, specifically the requirement of Mother's consent. Grandmother contends the trial court's interpretation of section 162.001(b)(3) to require consent only for adoption by a former stepparent is an incorrect reading of the statute.

The decision to grant an adoption is within the discretion of the trial court, which may not be set aside except for an abuse of that discretion. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984). We review a trial court's conclusions of law de novo to determine whether they are correct. *Thawer v. Comm'n for Lawyer Discipline*, 523 S.W.3d 177, 183 (Tex. App.—Dallas 2017, no pet.). Conclusions of law must be upheld on appeal if any legal theory supported by the evidence sustains the judgment, and will be reversed only if the conclusions are erroneous as a matter of law. *Id.*

Our fundamental goal when reading statutes is to ascertain and give effect to the Legislature's intent. *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). To do this, we look to and rely on the plain meaning of a statute's words as expressing legislative intent unless a different meaning is supplied or is apparent from the context, or the plain meaning of the words leads to absurd results. *Id.* Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

TEX. GOV'T CODE ANN. § 311.011(a) (West 2013). We presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. *Cadena*, 518 S.W.3d at 325–26.

Gant argued, and the trial court agreed, that section 162.001(b)(3) requires the nonterminated parent's consent only in the event the petitioner is the child's former stepparent. But the language and punctuation of the statute does not support such a reading. Again, the statute provides a child may be adopted if:

> the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, the person seeking the adoption has been a managing conservator or has had actual care, possession, and control of the child for a period of six months preceding the adoption or is the child's former stepparent, and the nonterminated parent consents to the adoption.

If the legislature had intended to require the nonterminated parent's consent only when the person adopting is a former stepparent, the statute would be worded and punctuated differently. In section 162.001(b)(3), the use of a comma after the term "former stepparent" is significant. Serial commas are used to separate words or phrases in a series of three or more terms. *Sullivan v. Abraham*, 488 S.W.3d 294, 298 (Tex. 2016); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 3–4 (2d ed. 2006). The placement of the comma after "stepparent" and before the conjunction "and" indicates the nonterminated parent's consent is the last item in the series. If consent was required only when the person seeking adoption is the child's former stepparent, there would be no comma after "stepparent" and other language and grammar in the provision would have to be altered to indicate that the last item in the series is "the person seeking the adoption is the child's former stepparent and the nonterminated parent consents to the adoption." For example, there would need to be an "and" after "with respect to one parent." Also, there would need to be a serial comma after "six months preceding the adoption" to indicate the

various kinds of persons seeking adoption was the last item in the series. Based on the grammar and punctuation of section 162.001(b)(3), it requires the following four things:

(1) the child is at least two years old,

(2) the parent-child relationship has been terminated with respect to one parent,

(3) the person seeking the adoption

(a) has been a managing conservator for a period of six months preceding the adoption or

(b) has had actual care, possession, and control of the child for a period of six months preceding the adoption or

(c) is the child's former stepparent, and

(4) the nonterminated parent consents to the adoption.

Under similar circumstances, this Court has held that consent of the nonterminated parent is a requirement of section 162.001. *See In re M.K.S.-V.*, 301 S.W.3d 460, 466 (Tex. App.—Dallas 2009, pet. denied). In *M.K.S.-V.*, T.S. became pregnant with a child through artificial insemination using a sperm donor. *Id.* at 462. When the child was born, T.S. and her partner, K.V., lived together and coparented for over a year until their relationship ended. T.S. and the child moved out. T.S. and K.V. agreed on a visitation schedule for K.V. which they followed for almost two years. T.S. discontinued the visits, and K.V. filed suit seeking to be appointed the child's joint managing conservator or to adopt her. *Id.* T.S. moved to dismiss K.V.'s adoption claim, arguing that T.S.'s rights were not terminated, she and K.V. never married, and T.S. would not consent to the adoption. *Id.* at 463. The trial court dismissed K.V.'s adoption claim, and on appeal, K.V. asserted the court erred in doing so. *Id.* at 466. Citing section 162.001, this Court held that consent was a requirement for the adoption. *Id.* Because T.S. did not give her consent, K.V. could not adopt the child and the trial court did not err in dismissing K.V.'s claim.

Id. Likewise, in this case, we have a biological parent whose rights have not been terminated and who does not consent to the adoption of her child by a former partner. The trial court erred in concluding that Mother's consent was unnecessary.

Gant argues in the alternative that the trial court waived the consent requirement because it found Mother refused consent without good cause. Gant cites section 162.010(a) of the family code, which provides:

> Unless the managing conservator is the petitioner, the written consent of a managing conservator to the adoption must be filed. The court may waive the requirement of consent by the managing conservator if the court finds that the consent is being refused or has been revoked without good cause. A hearing on the issue of consent shall be conducted by the court without a jury.

TEX. FAM. CODE ANN. § 162.010(a) (West 2014). The case law citing this provision generally involves adoptions when the Texas Department of Family and Protective Services is the managing conservator and its consent is required. *See, e.g., In re A.L.H.*, 515 S.W.3d 60, 83 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *Celestine v. Dep't of Family & Protective Svcs.*, 321 S.W.3d 222, 232 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *In re A.M.*, 312 S.W.3d 76, 80 (Tex. App.—San Antonio 2010, pet. denied). The trial court even referred to the provision as the "CPS statute." Moreover, we have findings of fact and conclusions of law to indicate the trial court did not decide the case on the basis of section 162.010. The trial court's findings of fact form the basis of the judgment on all the claims and defenses covered by the pleadings. *See* TEX. R. CIV. P. 299. The trial court did not make a finding that Mother refused consent without good cause. Instead, it expressly determined her consent was not required. We cannot uphold the adoption order on this basis. Because Mother's consent was a necessary element of the adoption, we sustain Grandmother's first issue.

We turn to Grandmother's second issue. At trial on the termination and adoption issues, Gant argued Grandmother could not assert I.B. was ineligible for adoption because Grandmother

did not file any pleadings or a motion putting Gant on notice. Before the cases were consolidated, Grandmother filed a general denial in response to Gant's petition in intervention for conservatorship, but she did not file an answer to his petition for termination and adoption. As an alternative reason to support granting the adoption, the trial court concluded that Grandmother "failed to file any pleadings or provide timely notice of any objections under TEX. FAM. CODE ANN. § 162.001 and thereby waived the right to assert objections or otherwise seek relief pursuant to TEX. FAM. CODE ANN. § 162.001." Grandmother has challenged this conclusion in her second issue.

It is true that Grandmother did not file any pleadings seeking relief under section 162.001. But she has not sought to adopt I.B. and thus is not seeking any relief under that provision of the family code. Grandmother did challenge Gant's attempt to gain sole managing conservatorship of I.B., which adequately put him on notice that she was contesting his later petition for adoption. It was not necessary for her to file another general denial in response to his adoption petition. *See* TEX. R. CIV. P. 92 (when defendant has pleaded general denial, and plaintiff shall afterward amend pleading, original denial shall be presumed to extend to all matters subsequently set up by plaintiff). At the outset of the trial on Gant's petition for adoption, Grandmother asserted that I.B. was not eligible for adoption under section 162.001 of the family code. She specifically argued that Mother's consent was required before Gant could adopt I.B. Indeed, whether Mother's consent was necessary was a major focus of the proceeding. The statutory requirements for adoption are the requirements for adoption. Any action or inaction on Grandmother's part could not alter those requirements. Gant was aware that Mother's consent was a statutory requirement to his adoption. He acknowledged that fact in his petition for adoption and alleged Mother's consent would be forthcoming.

Gant further contends that Grandmother is precluded from arguing he was not entitled to adopt because she failed to comply with rule of civil procedure 93(2). That rule requires a defendant who contends the plaintiff is not entitled to recover in the capacity in which he sues to file a verified pleading. TEX. R. CIV. P. 93(2). A party has capacity when it has the legal authority to act. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848–49 (Tex. 2005). For example, minors and incompetents are unable to sue in their individual capacities and must appear in court through a legal guardian, next friend, or guardian ad litem. *Id.* at 849. Similarly, a decedent's estate is not a legal entity and may not properly sue or be sued. *Id.* Grandmother's contention that Gant did not satisfy the requirements for adoption does not implicate his capacity to sue. This argument is unavailing.

Finally, Gant argues Grandmother's position that he is not entitled to adopt I.B. is an affirmative defense she needed to plead. An affirmative defense is "[a] defendant's assertion of facts and argument that, if true, will defeat the plaintiff's or prosecution's claims, even if all the allegations in the complaint are true." *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155–56 (Tex. 2015) (quoting BLACK'S LAW DICTIONARY). Mother's consent to the adoption was an element Gant was required to establish. Her lack of consent is not an affirmative defense. The trial court's conclusion that Grandmother waived her right to assert objections to the adoption is erroneous. We sustain Grandmother's second issue.

In summary, the trial court's conclusions of law provided two bases for granting the adoption without Mother's consent: (1) her consent was not required, and (2) Grandmother waived the right to object to the adoption. These conclusions are both erroneous as a matter of law. Under section 162.001(b)(3), as the nonterminated parent, Mother's consent to Gant's adoption was required. Also, Grandmother appeared at trial and argued Gant was not entitled to adopt without consent. She did not waive her objection to the adoption. Accordingly, the trial

court abused its discretion in granting the adoption. We must reverse the adoption order and remand for further proceedings. We note that Gant remains I.B.'s primary joint managing conservator.

In a third issue, Grandmother contends the trial court erred in terminating the parental rights of the unknown father. She asserts that in terminating the father's rights, the court displayed passion or bias. An appealing party may not complain of errors that do not injuriously affect her or that merely affect the rights of others. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000); *In re D.C.*, 128 S.W.3d 707, 713 (Tex. App.—Fort Worth 2004, no pet.) (mother did not have standing to complain about termination of father's parental rights); *see D.F. v. Tex. Dep't of Family & Protective Svcs.*, No. 03-16-00883-CV, 2017 WL 1315441, at *3 (Tex. App.—Austin Apr. 4, 2017, no pet.) (mem. op.) (same). Grandmother does not allege the termination of the unknown father's rights injuriously affects her. She lacks standing to challenge the termination of the unknown father's parental rights. *See In re D.C.*, 128 S.W.3d at 713. We dismiss her third issue for want of jurisdiction.

We reverse the trial court's order granting the adoption and remand the case to the trial court for further proceedings consistent with this opinion.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF I.A.B. AND G.N.B., MINOR CHILDREN

No. 05-17-00497-CV

On Appeal from the 296th Judicial District Court, Collin County, Texas
Trial Court Cause No. 296-56047-2014.
Opinion delivered by Justice Brown, Justices Francis and Schenck participating.

In accordance with this Court's opinion of this date, the trial court's April 25, 2017 adoption order is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Isolina Jones-Byrd recover her costs of this appeal from appellee Royce Gant.

Judgment entered November 10, 2017.