Dissenting opinion issued February 10, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00308-CV

JONATHAN PENA, Appellant

V.

LAUREN STODDARD, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Case No. 2005-70643

MEMORANDUM DISSENTING OPINION

I reluctantly dissent from this Court's judgment.

I join in the portion of the majority opinion that affirms the trial court's order naming Stoddard as sole managing conservator. I am troubled by the fact that a prior joint-managing-conservatorship order already existed. The trial court

should have made the findings required for a modification of an existing conservatorship order, yet this was never done. *See* TEX. FAM. CODE ANN. § 156.101(a) (Vernon Supp. 2010). However, I acknowledge that both parties argued this issue to the trial court as if it were an original determination, not a modification, and that Pena has never complained, either to the trial court or this Court, that the trial court should have made the findings particular to modifications and failed to do so. Moreover, I acknowledge that the record before us would support trial-court findings on the required issues. Therefore, I join in this portion of the majority opinion.

I do not join in the portion of the majority opinion involving the order for supervised visitation. I am not convinced that the trial court ultimately relied on a "stipulation" as to supervised visitation. Although at trial, the court stated that there was a stipulation on that matter (and Pena's counsel neither objected nor corrected the trial court), when the court made its findings of facts and conclusions of law, it omitted any mention of a stipulation on this matter. It did state, in finding of fact number eighteen (the only finding of fact that makes any reference to a stipulation), that the parties stipulated that, should Pena ever be stationed within 150 miles of Houston, the court may consider that fact a material and substantial change and a basis for modification—a matter as to which Pena agrees he stipulated and which is reflected by the trial record. This is the "stipulation"

read into the record by Pena's counsel when the trial court asked to be told "the stipulation."

That the trial court would take pains to set out a finding of fact as to a stipulation regarding residential proximity (little more than a housekeeping matter to cover the bases for possible contingencies at some unspecified future date) and yet not to similarly memorialize a stipulation on an issue as crucial as supervised visitation is not merely incongruent, but unlikely.

By the time these findings were made, Pena had already filed a motion for new trial in which he stated that there was no, or insufficient, evidence as to supervised visitation. If, as stated by the majority, the trial court based its order of supervised visitation on such a stipulation by the parties, surely a complaint to the trial court that there was no evidence supporting such an order should have put the court on notice that there was no "stipulation by the parties" on which it could base its order.

Stipulations are for matters actually agreed to by the parties and are not to be construed "to effect an admission of something intended to be controverted or so as to waive a right not plainly agreed to be relinquished." *See U.S. Fire Ins. Co. v. Carter*, 468 S.W.2d 151, 154 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam on other grounds*, 473 S.W.2d 2 (Tex. 1971). If the trial court here relied upon such a "stipulation," as the majority asserts, I would hold that reliance was in error

as the issue of possession and access was contested, it was not clear that the stipulation given was meant to apply to that particular issue, and the trial court was effectively put on notice that there was no stipulation by way of the motion for new trial. I would further hold that the motion for new trial served to raise the issue to the trial court and thus the complaint was not waived.

Absent a stipulation, the trial court needed a factual basis to mandate supervised visitation, and Pena was entitled to findings of fact related to that issue. I agree that the inclusion of the language in finding of fact number fourteen that "awarding Pena supervised access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child,"[1] as well as the language in findings of fact sixteen and seventeen that Pena was "abusive toward Stoddard" and "verbally abusive toward Stoddard," suggest that the trial court ordered supervised visitation after concluding that there had been family violence, although no such specific finding actually appears in the record.

[1] *Cf.* TEX. FAM. CODE ANN. § 153.004(d) (Vernon 2008).

I would sustain Pena's first issue, abate the appeal, remand the case to the trial court for further findings, and then consider Pena's second and third issues after such findings are received.

Jim Sharp
Justice

Panel consists of Chief Justice Radack and Justices Bland and Sharp.

Justice Sharp, dissenting .