Opinion issued March 3, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00440-CV

THERESA SEALE AND LEONARD SEALE, Appellant

V.

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ROBERT BROWN, AND DONNA BROWN, Appellee

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On Appeal from the 310th District Court
Harris County, Texas
Trial Court Case No. 2008-60603

MEMORANDUM OPINION

Theresa and Leonard Seale appeal the trial court's designation of Robert and Donna Brown as joint managing conservators of the minor child M.M. Both the Browns and the Seales petitioned to intervene as parties to a suit brought by the

Department of Family and Protective Services (DFPS) to terminate parental rights and designate a conservator for the child. The Seales argue on appeal that the trial court erred in denying DFPS's motion to strike the Browns' petition because the Browns lacked standing to intervene under the Family Code. The Seales also argue the trial court erred in denying their own petition because they had standing and none of the parties filed a motion to strike their intervention. Finally, the Seales challenge the Browns' appointment as M.M.'s joint managing conservators.

We reverse and remand for a new trial on the merits.

Background

DFPS took custody of M.M. at her birth in October 2008 when she tested positive for marijuana and her mother tested positive for marijuana and Valium. DFPS initiated a suit affecting the parent child relationship ("SAPCR") within days of M.M.'s birth and filed a petition for the protection of the child, conservatorship, and the termination of parental rights. DFPS placed M.M. with the Seales who the agency believed to be M.M.'s paternal grandparents. A paternity test later showed that the Seales had no blood relationship to M.M. The Seales continued to raise M.M., even after the discovery, with Theresa Seale staying home to care for her and Leonard Seale supporting the family.

M.M.'s maternal great-aunt, Donna Brown, discovered in July 2009 that the child was being raised by people who had no blood relationship to M.M. She

attempted to contact DFPS regarding M.M., but did not receive a response from the agency until December 2009. DFPS told Donna that the agency would conduct a home study, but it did not initiate a home study until shortly before trial.

In February 2010, the Browns filed a petition to intervene in the DFPS suit and asked to be designated as M.M.'s joint managing conservators. A month later, they filed a motion asking the trial court for leave to file their petition to intervene.[1] DFPS filed a motion to strike the Browns' petition. After a hearing on March 30, 2010, the trial court denied DFPS's motion to strike and allowed the Browns to intervene as parties to the suit one month before trial.

The Seales filed their own petition to intervene on April 13, 2010, within two weeks of the hearing on DFPS's motion to strike the Browns' intervention. Trial began two weeks later at which time the Browns alleged that the Seales only served them on the day of trial and had failed to file a motion for leave to file their petition. The Seales explained that they had not intervened earlier because they did not consider themselves to be adversaries to any parties to the proceeding until the trial court allowed the Browns to intervene. The trial court ruled, "I'm going to deny your request for intervention as no motion for leave has been made," but would allow the Seales to testify if called. The Browns then invoked the Rule and

[1] As discussed below, a motion for leave to intervene is not required by Texas Rule of Civil Procedure 60.

excluded all witnesses from the courtroom, including the Seales. *See* TEX. R. EVID. 614.

At trial, the court terminated all parental rights to M.M. after her mother signed a voluntary relinquishment of her rights.[2] The trial court then heard testimony as to conservatorship. DFPS argued that M.M. should remain with the Seales. One of M.M.'s case workers testified that M.M. had been with the Seales for her entire life—18 months at the time of trial—and that the child had bonded with her foster parents. She testified that M.M.'s only contacts with the Browns were two visits in the month before trial at the DFPS office.

Theresa Seale testified to M.M.'s daily routine, her family's financial and living situation, and that she had two grown sons with drug problems—one of whom lived with M.M.'s mother at the time. Leonard Seale testified that he had not smoked marijuana in the last two to three years, but that in the past he had smoked marijuana with his stepson who everyone believed to be M.M.'s father. He testified that he had never smoked marijuana with M.M.'s mother and that she had not lived on his property after she became pregnant with M.M. M.M.'s mother testified that she had lived on the Seale's property for several months and had smoked marijuana before, during, and after her pregnancy with Leonard Seale and his stepson. She stated that she preferred that DFPS place M.M. with the Browns.

[2] The trial court also terminated parental rights as to any unknown father of M.M.

Donna Brown testified as to her family's financial and living situation and that she wanted conservatorship of M.M. because of her family connection. She stated they were in the final stages of adopting a three year-old girl who was the child of a distant cousin and had lived with them since infancy. She also testified that her 26 year-old physically disabled son lived with them as well and that he was doing well despite past instances of depression and suicidal thoughts as a teenager. Robert Brown testified that he had a robbery and a DWI conviction and had used marijuana and cocaine, but that none of these behaviors continued past the early 1980s.

The trial court appointed the Browns as joint managing conservators with DFPS. The Seales timely filed a notice of appellate points under Texas Family Code section 263.405(b) and a motion for new trial challenging the denial of DFPS motion to strike the Browns' petition to intervene, the trial court's denial of their own petition, and the trial court's appointment of the Browns as conservators even though they lacked standing to participate. The trial court denied the motion for new trial and the Seales appealed.

Petition to Intervene in SAPCR Proceedings

The Seales contend that the trial court erred in denying DFPS's motion to strike the Browns' petition to intervene and in dismissing their petition to intervene. All parties agreed that Texas Rule of Civil Procedure Rule 60 governs

the intervention procedure in this case. Rule 60 permits any party to intervene in an action "subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60; *see McCord v. Watts*, 777 S.W.2d 809, 811–12 (Tex. App.—Austin 1989, no pet.) (applying Rule 60 to petitions to intervene in SAPCR proceeding). The rule authorizes a party with a justiciable interest in a pending suit to intervene as a matter of right. *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008).

Ordinarily, to have a justiciable interest the intervenor must show standing to have brought the original suit, or that he would be able to defeat recovery, or some part thereof, if the action had been brought against him. *Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.). "However, an intervenor in a suit affecting the parent-child relationship does not need to plead or prove the standing required to institute an original suit because managing conservatorship is already in issue." *Id.* Section 102.004(b) of the Family Code provides that the trial court may grant a grandparent or "other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter," if the court has proof that appointing either parent as a managing conservator would impair the child's health and emotional development. TEX. FAM. CODE ANN. § 102.004(b) (West 2008).

Under Rule 60 of the Texas Rules of Civil Procedure, an intervenor is not required to secure the trial court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike. *See Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990); *see also Harris Cnty. v. Luna-Prudencio*, 294 S.W.3d 690, 699 (Tex. App.—Houston [1st Dist.] 2009, no pet.). We examine the trial court's ruling on a motion to strike for abuse of discretion. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657; *In re N.L.G.*, 238 S.W.3d 828, 829 (Tex. App.—Fort Worth 2007, no pet.). In reviewing matters committed to a trial court's discretion, we are not to substitute our own judgment for that of the trial court but to determine whether the trial court acted in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *See Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

I. Motion to Strike the Seales' Petition

The Seales contend that no party raised a motion to strike their petition and therefore the trial court abused its discretion by striking the petition *sua sponte*. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657 (holding trial court cannot strike a petition to intervene without a party's motion to strike). The Browns objected on the first day of trial that the Seale's petition for intervention had not been filed until two weeks before trial, that they had only received service on the day of trial, and that the Seales had not filed a motion for leave to file their petition. The Seales

responded that they had filed the petition within two weeks of the trial court's order allowing the Browns to intervene, before which they believed they were the only family seeking conservatorship of M.M.

We must determine whether the Browns' objection constituted a motion to strike. An intervenor does not need the trial court's permission to intervene, therefore, the burden rests on the objecting party to raise a motion to strike to challenge a petition to intervene. *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657. The Browns did not use the words "motion to strike," but their objection challenged the Seales' right to intervene as a full party to the suit and sought the same relief as a motion to strike—namely that the trial court prevent the Seales from intervening. The name of the motion does not matter as long as the relief sought and effect are made clear to the trial court. *See C/S Solutions, Inc. v. Energy Maint. Servs. Group, L.L.C.*, 274 S.W.3d 299, 307 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (stating trial court should consider substance of plea for relief, not merely title given). The Browns therefore effectively raised a motion to strike the Seales' petition to intervene.

II. Abuse of Discretion

We examine the trial court's ruling on a motion to strike for abuse of discretion. *In re N.L.G.*, 238 S.W.3d at 829. The trial court ruled on the Seales' petition by stating, "I'm going to deny your request for intervention as no motion

for leave has been made." The intervenor does not need the trial court's permission to intervene. *Harris Cnty.*, 294 S.W.3d at 699. Even though the trial court gave an incorrect basis for its ruling, however, we consider whether a legitimate basis exists. *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 119 (Tex. 1999).

With a petition to intervene, a trial court abuses its discretion if it strikes a petition in which (1) the intervenor could bring the same action, or any part thereof, in their own names, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenors' interest. *See Harris Cnty.*, 294 S.W.3d at 699 (citing *Guaranty Fed. Sav. Bank*, 793 S.W.2d at 657).

First, the Seales satisfied the first prong because they had standing to intervene in DFPS suit based on their substantial past contact with M.M—they had raised her for the entirety of her 18 month life—and the undisputed allegation in DFPS's and their own petitions that placement with M.M.'s mother would significantly impair the child's health and emotional wellbeing. *See* TEX. FAM. CODE ANN. § 102.004(b).[3]

[3] Although the Seales' petition did not allege facts to establish their substantial contact with M.M., they told the trial court after the Browns' objection, "They have been the foster parents since this child came home from the hospital." Also, no party contested the Seales' standing to intervene either at the trial court or to this court.

Second, the inclusion of the Seales would not have further complicated the case. The Seales did not bring any new issues or claims to the trial because M.M.'s conservatorship was already before the court and DFPS was advocating for the Seales to be granted custody of M.M. The Seales testified at trial regardless of their status as full parties to the case. While allowing their attorney to call and cross-examine witnesses would have added another attorney to the proceeding, and thus lengthened the trial to some degree, seven attorneys were already participating. The addition of a single attorney when so many were already participating is not sufficient to outweigh the Seales' justiciable interest.

The Seales' petition also did not complicate the case because, under these unusual and narrow facts, the timing of their petition to intervene would not have adversely affected the trial or the other parties to the case. The Browns—who lacked standing to intervene under the Family Code[4]—first participated in the case less than one month before trial when the court denied DFPS's motion to strike the

[4] At oral argument, DFPS conceded, and the Browns' counsel did not disagree, that the Browns did not have standing to intervene at the time they filed their petition if they were not within the third degree of consanguinity. Sections 102.003 and 102.004 of the Family Code list who is entitled to bring an original suit and who has standing to intervene. *See* TEX. FAM. CODE ANN. § 102.003, 102.004 (West 2008). Persons within the third degree of consanguinity may be entitled to bring an original suit—and thereby intervene—if certain other conditions are met, but the Browns do not fall within the definition of third degree consanguinity given in section 102.003. Admittedly, the Browns may now be able to satisfy standing to intervene requirements in section 102.004(b) at a new trial given their substantial contact with M.M. since the trial court's judgment named them joint managing conservators.

Browns' petition to intervene. The Seales, who had standing to intervene, filed their petition only two weeks later. The Seale's involvement and interest in the suit could hardly have been surprising to either the trial court or the parties. The Seales had possession of M.M., had raised her for her entire life, and DFPS petitioned for and argued that M.M. remain in their care. The Seales, without counsel, had attended all the hearings in the case. They had had no reason to intervene before the Browns became parties when the matter was uncontested. The Browns' intervention changed the dynamics of the case, so it should not have surprised anyone that the Seales would now want to participate in protecting their conservator status.

The only substantive reason offered by the Browns for striking the Seales' petition was that they were not served until the day of trial. The Seales did not refute or offer any excuse for their failure. But that failure did not prejudice the Browns under these narrow circumstances given the Seales' clear interest in the suit and the proximity of the two interventions.

Third, the inclusion of the Seales as parties was essential to the protection of their interest. The Seales were unable to call their own witnesses or cross-examine the witnesses brought at trial. By preventing the Seales from presenting any evidence at trial, other than their own testimony, the trial court eviscerated their ability to present their position effectively. *See Taylor v. Taylor*, 254 S.W.3d 527,

535 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding trial court abused its discretion by forbidding party from calling or cross-examining witnesses as sanction for not producing witness and exhibit list before trial). The Browns also invoked the Rule excluding witnesses from the courtroom immediately after the trial court dismissed the petition to intervene. The Seales, therefore, were not allowed to be present during trial and their attorney was prohibited from informing them of the substance of the trial testimony. TEX. R. CIV. P. 267(d) ("Witnesses . . . shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys *in the case*" (emphasis added)); *Bishop v. Wollyung*, 705 S.W.2d 312, 314 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (holding trial court may not exclude party in interest, whether named party or not). Indeed, the court ordered them and the other witnesses "not to discuss anything" about the case until the trial was concluded. That limitation on their ability to communicate interfered with their ability to protect their interest.

Given the Seales' standing, the Browns' lack of standing, the lack of surprise or inconvenience to the parties or trial court, and the harm to the Seales' interest, we hold the trial court abused its discretion by granting the Browns' motion to strike the Seales' petition to intervene.

III. Harmful Error

We may not reverse the judgment of the trial court unless we conclude the error probably caused the rendition of an improper judgment or probably prevented the petitioner from properly presenting the case to the appellate courts. *See* TEX. R. APP. P. 44.1(a); *Quick v. City of Austin*, 7 S.W.3d 109, 126 (Tex. 1998). The Browns contend that any error by the trial court in striking the Seales' intervention or allowing their own is harmless because the trial court may award conservatorship to any suitable, competent adult. They assert the trial court heard sufficient evidence regarding the suitability of both the Browns and Seales to justify its decision.

The trial court may designate a suitable, competent adult as conservator regardless of whether the adult intervened as a party to the suit. *See* TEX. FAM. CODE ANN. §§ 153.002, 161.207 (West 2008). Here, ironically, the trial court allowed the Browns to intervene without standing under the Family Code and excluded the Seales who had standing and a justiciable interest. The Browns' attorney played a major role at the trial eliciting some of the most substantial direct and cross-examination testimony of any party except DFPS. The Browns also remained in the courtroom and heard all the evidence presented to the trial court while the Seales waited in the hall to be called as witnesses. The Seales were, therefore, unable to call their own witnesses, cross-examine and refute the

evidence against them, present attorney argument at the open and close, or make any objections to preserve error on appeal. Their lack of participation prevented the Seales from properly preserving, advocating, and presenting their case on appeal. Admittedly, DFPS's interests aligned with the Seales' desire to be named M.M.'s conservator, at least at the start of the hearing. The Seales were forced to rely, however, on another party to the proceeding rather than use their own counsel to advocate their interest. DFPS switched its position on appeal so that they now support placement with the Browns and counsel for DFPS indicated that DFPS changed its position during the hearing based on the testimony of M.M.'s mother that she had smoked marijuana with Leonard Seale while pregnant with M.M. We hold that the trial court's error in excluding the Seales was harmful because it prevented them from participating as a full party to the suit despite their clear justiciable interest.

We sustain the Seales' second issue.

Conclusion

We hold the trial court abused its discretion in dismissing the Seales' petition to intervene and that such error was harmful. We reverse the judgment of the trial court and remand the case for a new trial on the merits.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.