Affirmed and Memorandum Opinion filed October 26, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00826-CV

JOSHUA D. WHITE, Appellant

V.

JENNIFER SHANNON, Appellee

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Cause No. 2007-35559

MEMORANDUM OPINION

This is an appeal from a divorce action and suit affecting the parent-child relationship (SAPCR). Appellant, Joshua White, appeals the portion of the final divorce decree confirming the trial court's order granting a partial motion for summary judgment in favor of appellee, Jennifer Shannon. Specifically, Joshua contends that the trial court erred in (1) ignoring his standing to bring suit, (2) improperly denying his requests for

appointment as a joint managing conservator and for imposition of a geographical restriction, and (3) denying his right to a jury trial. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 29, 2005, Jennifer gave birth to R.R.W., the minor child who is the subject of the SAPCR. At the time, Joshua and Jennifer were in a relationship and Joshua was named as R.R.W.'s father on the birth certificate. On June 15, 2006, Joshua and Jennifer were married. Sometime thereafter, Jennifer informed Joshua that he was not R.R.W.'s biological father. A paternity test dated April 20, 2007, confirmed that Joshua was not R.R.W.'s biological father. A subsequent paternity test dated June 28, 2007, revealed that Ryan Tiffany was R.R.W.'s biological father.

On June 14, 2007, Joshua filed a petition for divorce. In his petition, Joshua requested, among other things, that he and Jennifer be appointed joint managing conservators of R.R.W. and that he be designated as primary conservator with the exclusive right to establish R.R.W.'s residence. Jennifer filed a counter-petition for divorce in which she requested that Ryan be adjudicated as R.R.W.'s father and that she and Ryan be appointed joint managing conservators. On November 9, 2007, Jennifer filed a partial motion for summary judgment on the issue of paternity ("first partial summary judgment motion"), which the trial court subsequently granted.

On July 15, 2008, Jennifer filed a motion to dismiss ("first motion to dismiss") contending that Joshua lacked standing to seek custody of R.R.W. and that the trial court consequently lacked jurisdiction over the lawsuit. On October 27, 2008, Joshua filed a second amended petition alleging that he had standing as R.R.W.'s acknowledged or presumed father. On November 11, 2008, Jennifer filed another motion to dismiss ("second motion to dismiss") requesting that the trial court strike Joshua's pleadings related to R.R.W. In her motion, she argued that Joshua's claim in his second amended petition that he is R.R.W's father could not be considered because it was filed after the trial court had already granted summary judgment in her favor on the paternity issue. On

February 13, 2009, the trial court denied Jennifer's first motion to dismiss and found that Joshua had standing to bring suit. The court set a trial date of July 28, 2009. In its order, the court stated that "[t]he issue for trial is Appointment of Respondent, Non-Parent, as a conservator …."

On March 26, 2009, Jennifer filed another partial motion for summary judgment ("second partial summary judgment motion") on the issue of conservatorship. Joshua filed a response and supplemental response to the motion. On July 13, 2009, the trial court granted Jennifer's motion. In its order, the court denied Joshua's request for conservatorship and stated that the judgment disposed of all of Joshua's claims related to R.R.W.

On July 28, 2009, Joshua filed a request for a jury trial on the issues of conservatorship and imposition of a geographical restriction. On August 24, 2009, the trial court signed the final decree of divorce. The decree incorporated the orders granting Jennifer's two partial summary judgment motions.

II. STANDARD OF REVIEW

Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that judgment should be rendered as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). In reviewing a traditional summary judgment, we examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007). Once the movant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the non-movant to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the challenged element. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

III. ANALYSIS

In his second issue, Joshua challenges the portion of the final divorce decree confirming the trial court's order granting Jennifer's second partial motion for summary judgment. He argues that, in doing so, the court improperly denied his request to be appointed a joint managing conservator of R.R.W.

On March 26, 2009, Jennifer filed a second partial motion for summary judgment on Joshua's request for appointment as a joint managing conservator. In her motion, she relied on section 153.131(a) of the Texas Family Code, which provides that a parent should be appointed the child's managing conservator "unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development." TEX. FAM. CODE ANN. § 153.131(a) (West 2008).[1] She argued that in the absence of evidence to rebut the parental presumption, Joshua's request to be appointed a joint managing conservator should be denied.

The presumption that the best interest of the child is served by awarding custody to the parent is deeply embedded in Texas law. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). Thus, in an original custody determination such as the one at issue here, a parental presumption applies. *Id.* For the court to overcome the presumption and award managing conservatorship to a non-parent under section 153.131 in this circumstance, the non-parent must prove by a preponderance of credible evidence that appointing the parent as a managing conservator would result in serious physical or emotional harm to the child. *See Brook v. Brook*, 881 S.W.2d 297, 299 (Tex. 1994).

To survive summary judgment, Joshua had to produce evidence showing that the appointment of Jennifer or Ryan as a managing conservator would not be in R.R.W.'s best

[1] Although she quoted the language from section 153.131, Jennifer mistakenly cited section 153.004 in her motion. Section 153.004 states that the parental presumption set out in section 153.131 may be rebutted by a finding of a history of family violence involving the child's parents. *See* TEX. FAM. CODE ANN. § 153.004 (West 2009).

interest. *See* TEX. FAM. CODE ANN. § 153.131(a); TEX. R. CIV. P. 166a(c). That is, as a non-parent, Joshua had to present evidence of specific actions or omissions by Jennifer or Ryan to demonstrate that the appointment of either or both parents as managing conservator would result in significant impairment to R.R.W.'s physical or emotional development. *See Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Acts or omissions that would show significant impairment of the child include physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent. *In re B.B.M.*, 291 S.W.3d 463, 469 (Tex. App.—Dallas 2009, pet. denied).

In his supplemental response to Jennifer's second partial summary judgment motion, Joshua admitted that he was not R.R.W.'s biological parent. However, he argued that appointment of Ryan as a joint managing conservator would not be in R.R.W.'s best interest because Ryan's appointment would significantly impair the child's physical health or emotional development. In support of his position, he alleged that Ryan (1) abandoned R.R.W. and has never paid child support or contributed to her well-being; (2) was not a part of R.R.W.'s life until Joshua filed his petition for divorce; and (3) fathered another child around the same time that R.R.W. was born and spent all of his money and time on that child instead of on R.R.W. The only summary judgment evidence Joshua presented was an affidavit attached to his supplemental response, which stated, in its entirety, as follows:

> BEFORE ME, the undersigned authority, on this day personally appeared, JOSH D. WHITE, who first being by me duly sworn, under oath, deposes and says that he has read the attached *Petitioner's Supplemental Responses to Counter-Petitioner's Motion for Partial Summary Judgment*, that the responses and all the facts contained therein are true and correct and within his personal knowledge.

Joshua has presented no evidence raising a fact issue regarding whether appointment of Ryan or Jennifer as a joint managing conservator would result in serious

physical or emotional harm to R.R.W.[2] There is no evidence of physical abuse, severe neglect, drug or alcohol abuse, or immoral behavior on the part of either Jennifer or Ryan that would overcome the parental presumption. Further, Joshua's claim that Ryan abandoned R.R.W., did not pay child support, and was not a part of R.R.W's life until after Joshua filed his petition is unavailing. The paternity test establishing Ryan as R.R.W.'s biological father is dated June 28, 2007—two weeks *after* Joshua filed his petition for divorce. Further, there is no evidence to suggest that Ryan knew that he was R.R.W.'s biological father before the paternity test was conducted. Thus, Joshua's claims that Ryan abandoned R.R.W. and failed to pay child support are unsupported by the record. We conclude that there is no genuine issue of fact concerning appointment of Jennifer and Ryan as R.R.W.'s conservators. Consequently, issue two is overruled.

In his first and third issues, Joshua complains that the trial court's ruling granting Jennifer's second partial summary judgment motion was in error because it ignored his standing to bring suit and deprived him of a jury trial on the issues of conservatorship and imposition of a geographical restriction. Because these issues are related, we address them together.

Texas Family Code section 102.003(a)(9) provides, in relevant part, that "[a]n original suit may be filed at any time by . . . a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE ANN. § 102.003(a)(9) (West Supp. 2009). The purpose of section 102.003(a)(9) is to create standing for those who have developed and maintained a relationship with a child over time. *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App.—Dallas 2003, no

[2] Summary judgment affidavits "shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f) (emphasis added); *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008). We note that Joshua's affidavit sets forth no facts whatsoever but merely refers to the facts contained in his supplemental response. Jennifer did not challenge the sufficiency of Joshua's affidavit in the trial court and does not raise the issue here.

pet.). A determination of standing under this section is necessarily fact specific and resolved on an ad hoc basis. *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.) (citing *Doncer v. Dickerson*, 81 S.W.3d 349, 362 (Tex. App.—El Paso 2002, no pet.)). In its February 13, 2009 order denying Jennifer's first motion to dismiss, the trial court found that Joshua had standing under section 102.003(a)(9).

Joshua argues that by granting Jennifer's second partial summary judgment motion, the trial court ignored its finding that he had standing to bring suit.[3] We disagree because standing is the right to be heard, not the right to win. *See In re Smith*, 260 S.W.3d 568, 573 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (noting whether grandparent ultimately succeeds in access suit is different question than whether grandparent has right simply to bring suit); *In re C.M.C.*, 192 S.W.3d 866, 869–70 (Tex. App.—Texarkana 2006, no pet.) ("[A] decision concerning whether a party has standing is not a decision deciding the merits of a case."). The trial court's ruling meant that Joshua had standing to bring a SAPCR seeking an original custody determination. However, Joshua's standing did not preclude the trial court from disposing of his claims on summary judgment grounds.

Joshua also argues that the trial court erred in granting Jennifer's second partial summary judgment motion because it deprived him of his right to a jury trial on the issue of conservatorship. This argument is equally unavailing. The Texas Constitution provides a right to trial by jury in district court. *See* TEX. CONST. art. V, § 10; *see also id.* art. I, § 15 ("The right of trial by jury shall remain inviolate."). Additionally, the Texas Family Code provides that, with certain exceptions not applicable here, a party in a SAPCR may demand a jury trial regarding, among other things, the appointment of joint managing conservators. TEX. FAM. CODE ANN. § 105.002(a)–(c) (West Supp. 2009).[4] However,

[3] We note that Jennifer concedes in her brief on appeal that Joshua had standing to bring suit pursuant to Texas Family Code section 102.003(a)(9).

[4] Section 105.002(b) provides that a party may not demand a jury trial in (1) a suit in which adoption is sought, including a trial on the issue of denial or revocation of consent to the adoption by the managing conservator, or (2) a suit to adjudicate parentage under Chapter 160. *See* TEX. FAM. CODE ANN. § 105.002(b) (West Supp. 2009).

the right to a jury trial in civil cases is regulated by certain procedural rules and is not absolute. *Sandhu v. Pinglia Invs. of Tex., L.L.C.*, No. 14-08-00184-CV, 2009 WL 1795032, at *3 (Tex. App.—Houston [14th Dist.] June 25, 2009, pet. denied) (mem. op.); *Fertic v. Spencer*, 247 S.W.3d 242, 251 (Tex. App.—El Paso 2007, pet. denied). The summary judgment process provides a method of terminating cases when only questions of law are involved and there are no genuine issues of fact. *Bliss v. NRG Indus.*, 162 S.W.3d 434, 437 (Tex. App.—Dallas 2005, pet. denied). The function of summary judgment is not to deprive a litigant of the right to a jury trial, but to "eliminate patently unmeritorious claims and defenses." *Fertic*, 247 S.W.3d at 251. When a party cannot show a material issue of fact, there is nothing to submit to the jury and the granting of summary judgment does not violate the constitutional right to a jury trial. *Sandhu*, 2009 WL 1795032, at *3; *Bliss*, 162 S.W.3d at 251.

Contrary to his assertion, Joshua was not impermissibly denied a jury trial on the issue of conservatorship. Rather, that issue properly was resolved by summary judgment. *See In re R.H.H.*, No. 04-09-00325-CV, 2010 WL 2842905, at *2 (Tex. App.—San Antonio July 21, 2010, no pet.) (mem. op.) (concluding father was not denied jury trial on issue of joint managing conservatorship where issue was resolved by summary judgment). Because the trial court properly granted summary judgment on Joshua's request to be appointed a joint managing conservator, there remained no issue appropriate for a jury determination.

Finally, Joshua contends that the trial court erred in denying his request for imposition of a geographic restriction on R.R.W.'s residence. Section 153.134(b)(1) states that, in rendering an order appointing joint managing conservators, a court may establish a geographic area within which the primary conservator shall maintain the child's primary residence. TEX. FAM. CODE ANN. § 153.134(b)(1) (West Supp. 2002). "[T]he purpose of imposing a geographic residency restriction is to ensure that those who have rights to possession of the child are able to effectively exercise such rights." *In re S.M.D.*,

___ S.W.3d ___, 2010 WL 647876, at *12 (Tex. App.—San Antonio Feb. 24, 2010, no pet.). Because Joshua has no possessory right to R.R.W., the trial court did not err in denying his request for imposition of a geographic residency restriction. Issues one and three are overruled.

We affirm the judgment of the trial court.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce.