Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00256-CV

Jael **RIVERA**,
Appellant

v.

Gabriel **FIGUEROA**,
Appellee

From the 224th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-CI-03465
Honorable Rosemarie Alvarado, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: February 20, 2019

REVERSED AND RENDERED

Jael Rivera appeals an order imposing a joint and mutual permanent injunction, appointing Rivera and appellee Gabriel Figueroa joint managing conservators of the parties' child F.G.F. with detailed rights of possession and access, and ordering the payment of certain sums as child support. Rivera contends the injunction against her was not supported by the pleadings, and the trial court did not have jurisdiction to enter orders regarding conservatorship, possession and access, or child support. We reverse all provisions of the trial court's order except the provision imposing a permanent injunction against Figueroa.

BACKGROUND

On February 27, 2018, Rivera filed an application for a family violence protective order which included a request for a temporary ex parte protective order pursuant to chapter 83 of the Texas Family Code. Rivera requested that the protective order contain numerous provisions including provisions granting her exclusive possession of F.G.F., who was two-and-a-half years old, and ordering Figueroa to pay child support. Rivera's application stated, "The Ex Parte Protection Order and Protective Orders requested by Jael Rivera are in the best interest of the family, household, or member of her family or household." In the alternative, Rivera requested a permanent injunction restraining Figueroa from: (1) committing acts of family violence against Rivera or any member of her family or household; (2) engaging in threatening or harassing conduct towards Rivera or any member of her family or household; (3) communicating with Rivera or any member of her family or household except through Rivera's attorney or a person appointed by the court; (4) engaging in conduct reasonably likely to harass, annoy, alarm, abuse, torment or embarrass Rivera or any member of her family or household; (5) going within 200 yards of Rivera, her residence, or her place of work; (6) going within 200 yards of F.G.F. or near his residence, child-care facilities or school except as necessary to attend court proceedings or to carry out visitations as set out by court order; and (7) possessing a firearm or ammunition.

On the same day the application was filed, the trial court signed a temporary ex parte protective order. The order referred to section 83.001 of the Texas Family Code and listed numerous actions Figueroa was prohibited from taking. The order also set a hearing for March 15, 2018, and stated the purpose of the hearing was to determine whether the court should issue a protective order. No pleadings were filed by Figueroa.

At the conclusion of the hearing on March 15, 2018,[1] the trial court denied Rivera's application for a protective order but partially granted her request for a permanent injunction by granting a joint and mutual permanent injunction as to both parties. In addition, the trial court appointed Rivera and Figueroa as joint managing conservators with a "50/50 possession and access schedule," and the trial court detailed that schedule. The trial court also made rulings ordering certain sums to be paid as child support including costs associated with F.G.F.'s daycare and medical care and the apartment where Rivera and Figueroa had been living. The trial court signed an order consistent with its verbal rulings on March 29, 2018, and Rivera timely appealed.[2]

DISCUSSION

In her first issue, Rivera contends the trial court erred in granting a permanent injunction against her because no pleadings were on file to support that relief. In her second issue, Rivera contends the trial court did not have jurisdiction to grant any relief regarding the conservatorship, possession and access of F.G.F. or regarding child support because the trial court denied Rivera's request for a family violence protective order.

A judgment must be supported by the pleadings. *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983); TEX. R. CIV. P. 301. Because a party's pleading invokes the trial court's jurisdiction, an order or judgment not supported by the pleadings is void for lack of jurisdiction. *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *In re P.M.G.*, 405 S.W.3d 406, 417 (Tex. App.—Texarkana 2013, no pet.). Unpled issues may be tried by consent; however, the doctrine of trial by consent "only applies when the record as a whole shows the unpled issue was tried." *In re M.G.N.*, 491 S.W.3d 386, 407 (Tex. App.—

[1] Figueroa appeared at the hearing pro se, and Rivera was represented by counsel. Both parties testified and responded to numerous questions asked by the trial court.
[2] Both parties are represented by counsel on appeal.

San Antonio 2016, pet. denied). "[A]n issue is not tried by consent if the evidence relevant to that issue is also relevant to other issues raised by the pleadings." *King v. Lyons*, 457 S.W.3d 122, 127 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

In this case, no pleadings were on file requesting a permanent injunction against Rivera. Furthermore, Rivera only requested relief relating to child support and possession and access of F.G.F. in relation to her request for a family violence protective order. *See* TEX. FAM. CODE ANN. § 85.021(3), (4) (authorizing family violence protective order to provide for the possession of and access to a child and to require the payment of child support). Although evidence was admitted at the hearing regarding possession and access and child support, that evidence was relevant to Rivera's request for a family violence protective order; therefore, the issues of possession and access and child support were not tried by consent.

Figueroa responds to both issues asserting the technical rules of pleading do not apply in determining child custody issues because the trial court has broad, equitable powers to determine the best interest of the child. In support of this contention, Figueroa principally relies on the Texas Supreme Court's decision in *Leithold v. Plass*, 413 S.W.2d 698 (1967). In *Leithold*, the court held:

> [W]e are of the view that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings. Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children. It is beside the point that in the instant proceeding the trial court, whether erroneously or not, construed the pleadings of petitioner as seeking only a modification of visitation rights; the point is that once the child is brought under its jurisdiction by suit and pleading cast in terms of custody and control, it becomes the duty of the court in the exercise of its equitable powers to make proper disposition of all matters comprehended thereby in a manner supported by the evidence.

413 S.W.2d at 701 (internal citations omitted). *Leithold*, however, was an appeal from a trial court's order on a motion to modify which invoked the trial court's continuing, exclusive

jurisdiction under the Texas Family Code.[3] *See* TEX. FAM. CODE ANN. § 156.001 ("A court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child."). For this reason, the Texas Supreme Court limited its discussion of pleading requirements to suits "properly invoking the jurisdiction of a court with respect to custody and control of a minor child." *Leithold*, 413 S.W.2d at 701. Rivera's application for a family violence protective order, however, did not invoke such jurisdiction. *See* TEX. FAM. CODE ANN. § 102.001 (providing for suits affecting the parent-child relationship to be filed under Title 5 of the Texas Family Code which encompasses suits for conservatorship, possession and access and child support).[4] As previously noted, although Rivera's application requested relief relating to possession and access and child support, that relief was only requested in relation to the contents of a family violence protective order. *See* § 85.021(3), (4) (authorizing family violence protective order to provide for the possession of and access to a child and to require the payment of child support). And, we do not construe the reference to "visitations as set out by court order" in the exception to Rivera's request to permanently enjoin Figueroa from going within 200 yards of F.G.F. as invoking the trial court's jurisdiction with respect to custody and control of F.G.F. *See* § 102.008 (setting forth required contents of a petition under Title 5 including a statement as to whether a protective order under Title 4 is in effect in regard to a party to the suit or a child of a party to the suit).

Because Rivera's application did not invoke the jurisdiction of the court with respect to custody and control of F.G.F., any relief granted by the trial court was required to be supported by the pleadings. And, because the trial court denied Rivera's request for a family violence

[3] The other cases cited in Figueroa's brief similarly arise from suits relating to motions to modify or divorce proceedings.
[4] We note the sections of the Family Code pertaining to family violence protective orders are contained in Title 4.

protective order, no pleadings supported the trial court's relief as to conservatorship, possession and access, and support of F.G.F.; therefore, the provisions of the trial court's order granting that relief are void. *See Guillory*, 442 S.W.3d at 690; *In re P.M.G.*, 405 S.W.3d at 417. Similarly, because no pleadings supported a permanent injunction against Rivera, the provisions of the trial court's order granting that relief are also void. *See Guillory*, 442 S.W.3d at 690; *In re P.M.G.*, 405 S.W.3d at 417; *cf. King*, 457 S.W.3d at 131 ("Considering the aforementioned authorities, we conclude that in suits affecting the parent-child relationship, a trial court may not grant injunctive relief against a party unless that party had notice by way of the pleadings or the issue was tried by consent.").

CONCLUSION

The only provision of the trial court's order supported by the pleadings is the provision imposing a permanent injunction against Figueroa. The remaining provisions of the trial court's order are reversed, and judgment is rendered that those provisions are void.

Beth Watkins, Justice