In The

Court of Appeals

Ninth District of Texas at Beaumont

_____

NO. 09-07-396 CV

_____

KELLY MARIE GETSCHEL-MELANCON, Appellant

V.

JEFFREY BRIAN MELANCON, Appellee

On Appeal from the 279th District Court
Jefferson County, Texas
Trial Cause No. F-199,306

MEMORANDUM OPINION

This appeal concerns two provisions contained in the parties' divorce decree. Issue one asserts that the trial court abused its discretion in imposing a geographical restriction on the primary residence of the parties' child. Issue two asserts that the trial court abused its discretion by imposing curfew and dating restrictions on the parties. We affirm.

Kelly Marie Getschel–Melancon and Jeffrey Brian Melancon were married on July 18, 2005. Approximately six weeks later, Kelly gave birth to their son. In December 2006,

Jeffrey filed a petition seeking a divorce. After a bench trial, the court granted the divorce. Among other provisions, the final divorce decree made Kelly and Jeffrey joint managing conservators of their minor child and gave Kelly the exclusive right to designate the child's residence, subject to certain geographical restrictions. The decree also prohibited the parties from having certain evening visitors during the times they possessed the child.

With respect to the geographical restriction on the child's primary residence, we hold that the trial court acted within its discretion to limit Kelly's rights. With respect to the limitation on the right of each parent to have visitors during certain evening hours, we hold that Kelly has not met her burden of showing the trial court abused its discretion. Accordingly, we also overrule issue two.

Standard of Review

The Texas Family Code directs that the child's best interest "shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM. CODE ANN. § 153.002 (Vernon 2002). The appellate court views such determinations under an abuse of discretion standard. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). The trial court abuses its discretion if it acts arbitrarily or unreasonably. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex. 1990).

Geographical Restriction

When, as here, a trial court orders appointment of joint managing conservators, the court must either "establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence" or "specify that the conservator may determine the child's primary residence without regard to geographic location." TEX. FAM. CODE ANN. § 153.134(b)(1)(A), (B) (Vernon Supp. 2008). The divorce decree established Jefferson County, Texas and its contiguous counties as the geographic area within which Kelly is to maintain the child's primary residence.

During the trial, Kelly testified that she had no plans to relocate from Jefferson County, that her aunt lived in Mauriceville, and that her uncle lived in Lumberton. While Kelly testified that she owned some land in Louisiana, she never testified that she wanted to move there or that she had family members who currently live there. According to Kelly, she had lived in Texas most of her life since graduating from high school. Finally, Kelly testified that it was in their child's best interest to see his father regularly.

While the Family Code does not provide the factors a trial court should follow when deciding whether to impose domicile restrictions on a custodial parent, the Texas Supreme Court outlined relevant considerations in *Lenz v. Lenz*, 79 S.W.3d 10, 15-17 (Tex. 2002). *Lenz* involved a primary custodial parent's right to modify a joint managing conservatorship to remove a residency restriction. *Id*. at 11. The *Lenz* Court considered the following factors

in determining whether relocation was in the child's best interest: (1) the reasons for and against the move; (2) the effect on extended family relationships; (3) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; (4) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the non-custodial parent and child; and (5) the nature of the child's existing contact with both parents, and the child's age, community ties, and health and educational needs. 79 S.W.3d at 15-17. We have previously applied the *Lenz* factors to evaluate whether a trial court abused its discretion in a divorce proceeding when it imposed a geographical restriction on the custodial parent's right to designate the child's residence. *See Morgan v. Morgan*, 254 S.W.3d 485, 487-88 (Tex. App.–Beaumont 2008, no pet.).

Lenz's first factor, the reasons for the move, is not relevant since Kelly had no plans to move. With respect to the child's extended family relationships, all of the child's relatives appear to live within the restriction imposed by the decree. With respect to the third factor, which considers the interests of the non-custodial parent, the restriction will assist in allowing the child's father to maintain a close relationship with his son. With respect to factor four, the visitation schedule, the restriction appears to benefit the schedule. Finally, we see no evidence that the restriction will negatively impact the child's existing contacts

with his parents given the child's age and community ties, and there is no testimony that was relevant to any special health or educational needs.

While Kelly argues that the restriction will prevent her from moving if she decides to do so in the future, the decree is sufficiently flexible to allow the judge to consider whether to modify it in the event Kelly actually anticipates moving to a location outside the area identified in the decree. The decree specifically provides that it is subject to modification by the court, by written agreement of the parties, or in the event that Jeffrey moves from the same area. Moreover, the Family Code, where there is a material change in circumstances, allows a court to modify previous orders when the modification is shown to be in the child's best interest. TEX. FAM. CODE ANN. § 156.101 (Vernon Supp. 2008). Thus, based on the testimony and under the circumstances before the trial court, we conclude the court was entitled to weigh any burden on Kelly against the child's interest in having full and continuous relationships with his father and other nearby relatives.

Further, we find that the trial court had sufficient information upon which to exercise its discretion. *Cisneros v. Dingbaum*, 224 S.W.3d 245, 257 (Tex. App.–El Paso 2005, no pet.) (explaining that abuse of discretion review requires an inquiry into whether the trial court had sufficient information upon which to exercise its discretion and whether it erred in its application of discretion). We hold that Kelly has not demonstrated any abuse of

discretion in the trial court's ruling that restricts her right to designate the child's primary residence. We overrule issue one.

Restriction on Certain Evening Visitors

At trial, the parties raised numerous issues that the trial court resolved. The divorce decree is forty-four pages long, and while it dissolves the parties' marriage, it also adjudicates conservatorship issues, establishes possession rights and obligations, declares the respective interest of each spouse in that spouse's separate property, and divides the parties' community property and debt. Among its provisions is the visitor-restriction clause contested by Kelly in issue two. The clause provides that neither party "shall permit a person with whom the party has a dating relationship or intimate sexual relationship to remain in the party's residence with the child between the hours of 10:00 PM and 6:00 AM the next day."

Kelly contends that the court gave no reasons for its decision to include this restriction and that it abused its discretion by acting arbitrarily and unreasonably. Kelly argues that the clause restricts her from socializing and that "[j]uveniles are allowed more time with their sweethearts than [she will have]." Kelly further argues that the order was imposed on her so that Jeffrey could control her activities.

Kelly seems to contend that the restriction affects only her, but the clause applies equally to Jeffrey. In addition, she fails to argue that the restriction adversely affects the child's best interest, a concept that is the "primary consideration of the court in determining

the issues of conservatorship and possession of and access to the child." *See* TEX. FAM. CODE ANN. § 153.002; *Lenz*, 79 S.W.3d at 14.

The trial court specifically found that the restrictive provision was in the child's best interest. In the absence of argument and authorities contending to the contrary, we decline to find that the trial court abused its discretion. *See* TEX. R. APP. P. 38.1 (e), (h); *Pat Baker Co., Inc. v. Wilson,* 971 S.W.2d 447, 450 (Tex. 1998) ("It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error."). We overrule issue two and affirm the trial court's judgment.

AFFIRMED.

_____
HOLLIS HORTON
Justice

Submitted on July 28, 2008
Opinion Delivered October 16, 2008
Before McKeithen, C.J., Kreger and Horton, JJ.