In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00148-CV

IN THE INTEREST OF D.L.Z.

On Appeal from the 1-A District Court
Newton County, Texas
Trial Cause No. 3943-D

MEMORANDUM OPINION

Appellant, Sharon Louise Luckie, the mother of D.L.Z., appeals the trial court's judgment appointing the paternal grandparents of D.L.Z. as the co-managing conservators of the child and appointing her possessory conservator. We affirm the judgment of the trial court.

During their marriage, Sharon Luckie and Horace Zeigler ("H. Zeigler") had a child, D.L.Z. Apparently, at some point prior to August of 2005 Luckie and H. Zeigler separated. The parties were divorced in December of 2006. The final divorce decree appointed H. Zeigler as the sole managing conservator of the child and made Luckie a

possessory conservator.

In August of 2005, D.L.Z. went to live with his grandparents (the "Zeiglers"). The parties dispute the circumstances under which D.L.Z. went to live with the Zeiglers. Luckie testified in the underlying proceedings that the Zeiglers picked up D.L.Z. for a three-day visit, and thereafter refused to return D.L.Z. to her. H. Zeigler testified that Luckie called him in the summer of 2005 and asked him to come get D.L.Z. because "her father was kicking her out of the house [and] she could not handle taking care of [D.L.Z.]" According to H. Zeigler, Luckie "couldn't handle it" and asked him to "just come get him." H. Zeigler stated that he and his parents made the five hour drive to get D.L.Z., drove Luckie to a hotel, gave her some money, and took D.L.Z. back to the Zeiglers' home. D.L.Z. has lived with his grandparents since August of 2005.

In May of 2008 Luckie filed a petition to modify the prior custody determination; the petition alleged a material change in H. Zeigler's circumstances. Because the Zeiglers were unaware that Luckie had already filed a petition to modify the prior SAPCR order, they filed a similar petition seeking to be appointed "co-sole managing conservators" of D.L.Z. in June of 2008. The trial court treated the Zeiglers' petition "in the nature of an intervention" in Luckie's suit.

The trial court held two hearings on the petition to modify in August and December of 2008. At the end of the first hearing, the trial court declined to rule on the petition and entered temporary orders appointing the Zeiglers as managing conservators and Luckie

and H. Ziegler as possessory conservators of D.L.Z. The court also ordered that a social study of Luckie and the Zeiglers be conducted. A social study was conducted of both parties and presented to the trial court at the final hearing on the petition for modification. The final hearing took place on December 18, 2008. After hearing the evidence, the trial court appointed the Zeiglers as co-managing conservators of D.L.Z. and appointed Luckie and H. Ziegler as possessory conservators. The trial court entered findings of fact and conclusions of law. This appeal followed.

Luckie asserts three issues on appeal: (1) the trial court erred in finding that Luckie voluntarily relinquished actual care, control, and possession of D.L.Z., (2) the trial court abused its discretion in determining that the appointment of the Zeiglers as co-managing conservators was in the best interest of D.L.Z., and (3) the Texas Family Code, as applied to Luckie and her son, violates Luckie's constitutional rights. The Zeiglers argue in part that Luckie's pleadings requested only the relief she was granted and, therefore, bar her from complaining about the trial court's order. Specifically, the Zeiglers argue that Luckie "filed pleadings requesting that the child remain in the home of the Appellees' [sic] and that she be given a standard possession order." The Zeiglers rely on an amended motion filed by Luckie on June 20, 2008, two days after the Zeiglers filed their Original Petition seeking to be appointed managing conservators.

Luckie's "1st Amended Motion" asserts that the final divorce decree "failed to specify the times and conditions for the possession of the child by [Luckie] as required by

Section 153.006 of the Texas Family Code," and requests an "order which details the possession rights of [Luckie] for [D.L.Z.] which were granted under the Final Divorce Decree." The Zeiglers argue that by filing the amended pleading Luckie "dropped her claim and request to be appointed primary conservator, and instead sought only to be granted a Standard Possession Order." The Zeiglers further contend that because Luckie received all the relief she requested in her 1st Amended Motion she has no right to complain of the trial court's order on appeal.

Generally, where a party receives all the relief he requests in the lower court, he cannot invoke jurisdiction of an appellate court seeking different relief. *See White v. Comm'rs Court of Kimble County*, 705 S.W.2d 322, 325 (Tex. App.--San Antonio 1986, no writ) (citing *Trad v. Gen. Crude Oil Co.*, 474 S.W.2d 183, 184 (Tex. 1971) and *Gilson v. Universal Realty Co.*, 378 S.W.2d 115, 121 (Tex. Civ. App.--Houston 1964, writ ref'd n.r.e.)). We note that during the first hearing on the modification suit, Luckie's counsel clarified that Luckie was in fact seeking to be named managing conservator, not a possessory conservator. In addition, Luckie testified that she was asking the Court to appoint her as the managing conservator with the right to determine the residence of D.L.Z. At the close of the final hearing on the petition, the Zeiglers' counsel argued that the 1st Amended Motion was the live pleading before the court and that it asked "strictly for possessory conservatorship and rights of visitation under a standard possession order." In its findings of fact, the trial court concluded as follows:

> 2. The pleadings on file by [Luckie], by which the Court considered her request for modification, is 1st Amended Motion filed June 20, 2008.
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> 3. The 1st Amended Motion filed by [Luckie] requested modification that the Court enter an order setting forth that she is entitled to visitation and possession of the subject child under the terms of a Standard Possession Order, as prescribed by Section 153 of the Texas Family Code, and not that she be named the Sole Managing Conservator or the primary Joint Managing Conservator.

"A plaintiff's timely filed amended pleading supersedes all previous pleadings and becomes the controlling petition in the case regarding theories of recovery." *Elliott v. Methodist Hosp.*, 54 S.W.3d 789, 793 (Tex. App.--Houston [1st Dist.] 2001, pet. denied) (citing TEX. R. CIV. P. 65). An amended pleading replaces the previous pleading and renders it ineffective. *See* TEX. R. CIV. P. 65; *see also Wren v. Tex. Employment Comm'n*, 915 S.W.2d 506, 508 (Tex. App.--Houston [14th Dist.] 1995, no writ). As reflected in the trial court's findings, the court concluded that the 1st Amended Motion superseded Luckie's prior pleading. "[A]n oral statement at trial is insufficient to modify the pleadings." *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex. 2000). We note that Luckie made no attempt to file a trial amendment or otherwise amend her pleadings during or after either of the two modification hearings. *See* TEX. R. CIV. P. 66, 67. Significantly, Luckie does not complain on appeal that the trial court erred in its findings regarding her 1st Amended Motion.

Luckie cannot show that she was harmed by any error of the trial court because she received all the relief she requested in the pleading at issue. *See generally* TEX. R. APP. P.

44.1(a). Under the circumstances, we cannot find the trial court committed reversible error in finding that Luckie voluntarily relinquished possession of D.L.Z. or by appointing the Zeiglers as co-managing conservators of the child. *See id*. Moreover, even if we were to reach her issue, her complaints on appeal as to the trial court's findings are without merit.

Findings of fact in a bench trial have the same force and dignity as a jury's verdict. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). "We apply the same standards in reviewing the legal and factual sufficiency of the evidence supporting the trial court's fact findings as we do when reviewing the legal and factual sufficiency of the evidence supporting a jury's answer to a jury question." *Rich v. Olah*, 274 S.W.3d 878, 883 (Tex. App.--Dallas 2008, no pet.). In our legal sufficiency review, we consider the evidence in the light most favorable to the finding of the fact finder and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). Crediting favorable evidence if a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not, we determine whether a reasonable person could reach the challenged finding. *See id.* In reviewing the factual sufficiency, we consider all the evidence and overturn the trial court's findings only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones* 917 S.W.2d 770, 772 (Tex. 1996).

Luckie complains on appeal of the trial court's finding that she "voluntarily

relinquished actual care, control, and possession of [D.L.Z] for a period of one year or more, a portion of which was within 90 days preceding May 2, 2008 . . . ." *See* TEX. FAM. CODE ANN. § 153.373(1) (Vernon 2008) (regarding rebuttal of the statutory parental presumption). While there was conflicting evidence regarding Luckie's voluntary relinquishment of D.L.Z. to the grandparents, the trial court, as the trier of fact, was "the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Nordstrom v. Nordstrom*, 965 S.W.2d 575, 580 (Tex. App.--Houston [1st Dist.] 1997, pet. denied). Luckie acknowledges through her testimony that she was aware that D.L.Z. was in the possession of the Zeiglers from and after the summer of 2005 and she was granted visitation with D.L.Z. by the terms of the divorce decree; however, she chose not to exercise her rights to visit her son out of fear that she might compromise her legal position to contest the visitation provision in the future. Nevertheless, Luckie testified that she had not visited with D.L.Z. since September of 2006, almost two years before the date of the first hearing on the petition for modification. Based on our review of all the evidence, we conclude the trial court's finding that Luckie voluntarily relinquished actual care, control and possession of D.L.Z. to his grandparents for a period of one year or more and that appointing the Zeiglers as co-managing conservators was in the best interest of D.L.Z. is supported by the great weight and preponderance of the evidence. We overrule issues one and two.

In issue three, Luckie argues that "[t]he Texas Family Code as applied to [Luckie]

and [D.L.Z.] violates the due process rights of [Luckie] under the Fourteenth Amendment of the United States Constitution." "The burden is on the party attacking the statute to show that it is unconstitutional." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002). In arguing that her constitutional rights have been violated, Luckie does not point to a specific provision of the Texas Family Code. Therefore, we cannot evaluate her constitutional complaint. *See id.* (regarding proper analysis in an as-applied constitutional challenge); *see generally* TEX. R. APP. P. 38.1(h). Additionally, Luckie's constitutional issue was not raised in the trial court. Issue three is not preserved for our review. *See* TEX. R. APP. P. 33.1 (a); *see also In re C.T.H.*, 112 S.W.3d 262, 264-65 (Tex. App.--Beaumont 2003, no pet.). We overrule issue three.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 11, 2010
Opinion Delivered April 22, 2010

Before McKeithen, C.J., Kreger and Horton, JJ.