In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00284-CV

IN THE INTEREST OF S.G.

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 97-06-02612-CV

MEMORANDUM OPINION

Appellant appeals the trial court's rendition of a post-answer default judgment in a suit affecting the parent-child relationship. We affirm the judgment of the trial court.

Appellant Suzanne Richards and appellee Dennis Charles Gerstenberg are the parents of the minor child ("S.G.") who is the subject of the underlying suit affecting the parent-child relationship ("SAPCR"). In July 2006, Gerstenberg filed a petition in Montgomery County to modify the provisions of a prior SAPCR order.[1] The petition alleged that S.G. is "twelve years of age or older," and S.G. signed a statement of

[1] In June 1997, the original SAPCR was filed in the 410th District Court of Montgomery County, Texas, and that court remained the court of continuing, exclusive jurisdiction from that date through the date of the filing of the current SAPCR. *See generally* TEX. FAM. CODE ANN. § 155.001(a) (Vernon 2008).

preference naming Gerstenberg as the child's preference to have the exclusive right to designate the primary residence. In August 2008, Richards filed her Answer, subject to her Motion to Transfer the case to Wise County, Texas. In December 2008, Richards's trial counsel filed an Agreed Motion for Withdrawal of Counsel. In January 2009, the trial court entered an order allowing Richards's counsel to withdraw. The trial court's order set forth "the pending settings and deadlines in the case," which included a "Pre-trial Conference and Docket Call at 8:15 a.m." on March 20, 2009, and a March 23, 2009, trial date.

Following the withdrawal of Richards's trial counsel, the record indicates no further activity in the case until the scheduled pre-trial conference held on March 20, 2009. Richards did not attend. At the pre-trial conference, the trial court struck Richards's pleadings and heard the merits of Gerstenberg's petition to modify. The trial court granted Gerstenberg's motion to modify the prior SAPCR order, appointed Richards and Gerstenberg as joint managing conservators, and appointed Gerstenberg as the person who has the right to designate the child's primary residence. The trial court also approved Gerstenberg's proposed findings of fact and conclusions of law. These findings were filed with the court on March 23, 2009.

On March 23, 2009, the original trial date, Richards filed a pro se motion to set aside the default judgment against her. The motion stated that her failure to appear at the pre-trial conference was "the result of accident and mistake, rather than [Richards's]

intentional or conscious indifference." On March 25, 2009, the trial court signed the SAPCR order naming Gerstenberg as the conservator with the right to designate the primary residence of S.G. The order stated that Richards had made a general appearance, failed to appear at trial, and defaulted. On March 27, 2009, Richards filed a motion for new trial. The motion for new trial referenced her previous motion to set aside the default judgment and sought temporary orders pending a new trial. On April 8, 2009, Richards filed another motion to set aside the default judgment stating that she believed the trial in this matter had been set to begin on March 23, 2009. Richards's post-judgment motions were unsworn and not accompanied by an affidavit or other evidence. Gerstenberg's response disputed Richards's assertions regarding why she failed to attend the March 20, 2009, pre-trial conference. Gerstenberg's response was supported by sworn affidavits from Gerstenberg and his counsel. After considering the motions and response, the trial court denied the motions. This appeal followed.

Richards asserts six issues on appeal: (1) the trial court violated Richards's due process rights by striking her pleadings and rendering a post-answer default judgment; (2) the trial court abused its discretion by striking her pleadings and rendering a post-answer default judgment; (3) the trial court abused its discretion because it acted without reference to the "best interest of the child" standard mandated by the Texas Family Code; (4) the trial court abused its discretion by denying Richard's motion for new trial and motion to set aside the default judgment; (5) the trial court abused its discretion in determining that it

retained continuing, exclusive jurisdiction; (6) the trial court abused its discretion in ruling on Richards's motion to transfer at the pre-trial conference.

JUDGMENT ON THE MERITS

Once a defendant has made an appearance in a case, she is entitled to notice of a trial setting as a matter of due process. *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.--Houston [1st Dist.] 1995, no writ) (citing *LBL Oil Co. v. Int'l Power Serv., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989)). Therefore, it is a denial of due process to convert a pre-trial conference into a trial setting or a default judgment hearing without notice to the defendant of that possibility. *Murphree*, 937 S.W.2d at 495; *Masterson v. Cox*, 886 S.W.2d 436, 439 (Tex. App.--Houston [1st Dist.] 1994, no writ) ("We know of no authority by which the trial court may turn a pretrial conference into a disposition hearing in the absence of a defendant who has answered, without having provided the absent defendant with notice of that possibility."); *Barbosa v. Hollis Rutledge & Assocs. Inc.*, No. 13-05-485-CV, 2007 WL 1845583, at *2 (Tex. App.--Corpus Christi June 28, 2007, no pet.). Richards argues in issue one that the trial court violated her due process rights by striking her pleadings and rendering a default judgment against her. However, we must overrule Richards's first issue because the constitutional due process arguments were not presented to the trial court below. *See* TEX. R. APP. P. 33.1; *see also In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) (noting that to preserve issue for appellate review, including constitutional error, party must present to trial court a timely request, motion, or objection,

state specific grounds therefore, and obtain ruling.). We overrule issue one.

In her second issue, Richards argues that the trial court abused its discretion by striking her pleadings and entering a default judgment against her. We review a trial court's imposition of sanctions under an abuse of discretion standard. *Koslow's v. Mackie*, 796 S.W.2d 700, 704 (Tex. 1990). It is an abuse of discretion to convert a pre-trial conference into a default judgment hearing without notice to the defendant of that possibility. *Murphree*, 937 S.W.2d at 495; *Masterson*, 886 S.W.2d at 439.

Richards cites *Masterson v. Cox* in support of her argument that the trial court abused its discretion. In *Masterson*, the First Court of Appeals held that imposing sanctions in the form of a default judgment for failure to appear at a pre-trial conference was an abuse of discretion. *Masterson*, 886 S.W.2d at 439. The defendant in *Masterson* alleged in her verified motion for new trial that she had no notice that the trial court might dispose of her case on the merits if she failed to attend the pre-trial conference. *Id*. at 438. The Court found significant that the plaintiff's response contained no evidence to controvert the defendant's sworn statement that she had not received proper notice. *Id.*

As set forth above, Richards's post-judgment motions are unsworn and unaccompanied by an affidavit or other evidence.[2] Richards states in her second motion

[2] Richards's motion for new trial merely references her motion to set aside the default judgment. In her original motion to set aside the default judgment, Richards stated that her failure to appear on March 20, 2009, was the result of accident and mistake rather than intentional or conscious indifference and that she believed the pretrial dates set forth in the court's docket control order, including scheduled mediation, would be reset as a

to set aside the default judgment that she "understood that the trial was set to begin on March 23, 2009." Gerstenberg argues on appeal that Richards was put on notice that her failure to attend the pre-trial conference could result in sanctions "and/or the exclusion of some or all of that party's evidence." The docket control order and trial preparation order relied upon by Gerstenberg are not part of the record.

The law presumes that a trial court will hear a case only after proper notice to the parties. *Boateng v. Trailblazer Health Enters., L.L.C.*, 171 S.W.3d 481, 492 n.4 (Tex. App.--Houston [14th Dist.] 2005, pet. denied); *Delgado v. Hernandez*, 951 S.W.2d 97, 99 (Tex. App.--Corpus Christi 1997, no writ). To rebut this presumption, Richards has the burden to affirmatively show a lack of notice by affidavit or other competent evidence. *Jones v. Tex. Dep't of Pub. Safety*, 803 S.W.2d 760, 761 (Tex. App.--Houston [14th Dist.] 1991, no writ); *see also Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966); *Hanners v. State Bar of Tex.*, 860 S.W.2d 903, 908 (Tex. App.--Dallas 1993, writ dism'd) ("This burden is not discharged by mere allegations in a motion for new trial, unsupported by affidavits or other competent evidence, that proper notice was not received."); *Wiseman v. Levinthal*, 821 S.W.2d 439, 442 (Tex. App.--Houston [1st Dist.] 1991, no writ) (A motion for new

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result of the death of Gerstenberg's wife. Gerstenberg responded to the motion, with supporting affidavits, stating that the mediation scheduled pursuant to the trial court's docket control order was cancelled because Richards failed to contact the Dispute Resolution Center to confirm she would attend, and that his wife's funeral was scheduled only after Gerstenberg learned from his attorney that the mediation had been cancelled. In her second motion for default judgment, filed on April 8, 2009, Richards stated that it was her belief that trial on the merits was set for March 23, 2009.

trial to set aside a default judgment must be supported by affidavits or other competent evidence). The facts of *Masterson* are similar to the facts of this case. However, unlike the defendant in *Masterson*, Richards failed to attach competent evidence to her post-trial motions to meet her burden of proof. We overrule issue two.

In issue three, Richards argues that the trial court abused its discretion in striking Richards's pleadings and rendering a post-answer default judgment against her "because, in so doing, the trial court acted without reference to the 'best interest of the child' standard mandated by the Texas Family Code." This argument was not presented to the trial court. *See* TEX. R. APP. P. 33.1. We therefore overrule issue three. Because we find that Richards's post-trial motions were not supported by competent evidence, we also overrule issue four. *See Ivy*, 407 S.W.2d at 214.

VENUE

In her fifth issue, Richards argues that the trial court abused its discretion in determining that it retained continuing, exclusive jurisdiction over this matter, "because the evidence established that the child had resided for more than six months outside Montgomery County, Texas." Richards contends that because she filed a motion to transfer venue and a supporting affidavit alleging that she and S.G. had lived in Wise County, Texas, for more than six months, the trial court no longer retained continuing, exclusive jurisdiction over the matter. In issue six, Richards's argues that the trial court abused its discretion in ruling on Richards's motion to transfer venue at the pretrial

conference because Richards did not receive at least 10 days' notice of the hearing as required by the Family Code.

A trial court has a mandatory duty to transfer child custody proceedings to the county in which the custodial parent has made new residence with the child for the required statutory period when a motion to transfer is filed and supported by an uncontroverted affidavit regarding the change of residence. *See* TEX. FAM. CODE ANN. § 155.201(b) (Vernon 2008), § 155.204(c) (Vernon Supp. 2009). Richards's allegations regarding S.G.'s county of residence are controverted. Gerstenberg responded to Richards' motion to transfer venue and filed a controverting affidavit with his response. Under such circumstances, "each party is entitled to notice not less than 10 days before the date of the hearing on the motion to transfer." *Id.* § 155.204(e). At a hearing on the motion to transfer, the court may only hear "evidence pertaining to the transfer." *Id.* § 155.204(f). If after hearing evidence on the motion, the court finds that grounds for transfer exist, the proceeding must be transferred to the proper court "not later than the 21st day after the date the hearing is concluded." *Id.* § 155.204(g).

After Gerstenberg presented evidence on the motion to modify the SAPCR order the court inquired as to whether Gerstenberg had responded to Richards's motion to transfer venue. Gerstenberg's attorney responded that Gerstenberg had filed a controverting affidavit, and Richards had failed to request a hearing on her motion. This inquiry took place following presentation of evidence on the merits. The trial court did not conduct a

hearing or rule on the motion to transfer. *See generally id.* § 155.204(e), (f), (g).

As the party who filed the motion to transfer, Richards had the burden "to diligently request a setting on the motion and obtain a ruling prior to a trial on the merits." *In re Leder*, 263 S.W.3d 283, 287 n.4 (Tex. App.--Houston [1st Dist.] 2007, orig. proceeding). Richards failed to request or secure a hearing on the motion to transfer. *See generally* TEX. FAM. CODE ANN. § 155.001(a) ("Except as otherwise provided . . . a court acquires continuing, exclusive jurisdiction over the matters provided for by this title in connection with a child on the rendition of a final order."). Because Richards failed to pursue her motion to transfer to obtain a ruling, she waived her right to seek transfer of the case. *See generally* TEX. R. APP. P. 33.1; *see also Cliff Jones, Inc. v. Ledbetter*, 896 S.W.2d 417, 418-19 (Tex. App.--Houston [1st Dist.] 1995, no writ) (To appeal trial court's refusal to transfer venue, a movant must obtain a clear ruling from the trial court, before trial, or venue issue is waived); *Gentry v. Tucker*, 891 S.W.2d 766, 768-69 (Tex. App.--Texarkana 1995, no writ) (must pursue a hearing to complain of failure to transfer venue on appeal); *Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-10 (Tex. App.--Fort Worth 1988, writ denied) (Failing to obtain a ruling on a motion to transfer in a timely manner constitutes waiver on the part of the movant.). Further, because Richards did not assert her complaints with regard to venue in her post-judgment motions, she failed to preserve issues five and six for review. *See* TEX. R. APP. P. 33.1. Issues five and six are overruled.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on April 19, 2010
Opinion Delivered June 24, 2010

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

DISSENTING OPINION

The trial court struck appellant's pleadings and held a default judgment hearing on Friday, March 20, the date of the scheduled pre-trial conference. Appellant was not there. The trial judge signed findings of fact and conclusions of law, and stated on the record that he would sign "a decree" "as soon as it is submitted." The record is clear. Appellant had no notice and no opportunity to be heard before her pleadings were struck and a dispositive ruling was made.

On Monday, March 23, the date the case was set for trial, appellant filed a "motion to set aside default judgment," in which she argued that her failure to appear on Friday was the "result of accident and mistake." She explained she had assumed that a cancelled mediation would have to be rescheduled first. She subsequently filed a "request for new trial" and another "motion to set aside default judgment." She stated that she understood the trial was set to begin on March 23. In my view, she preserved her complaint that the dispositive hearing was held without notice to her. *See* TEX. R. APP. P. 33.1(a),(b). The specific grounds were apparent from the context of her complaint.

Without providing the absent defendant notice of the possibility, a trial court cannot convert a pre-trial conference into a trial in the absence of a defendant who has answered. *See Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.--Houston [1st Dist.] 1995, no writ). Similarly, and more to the point in this case, a court should not strike a party's pleadings as a sanction and render a default judgment without providing the party notice and an opportunity to be heard. *See generally Low v. Henry,* 221 S.W.3d 609, 618 (Tex. 2007) ("Section 10.003 of the Texas Civil Practice and Remedies Code requires a court to provide the subject of a sanctions motion with 'notice of the allegations and a reasonable opportunity to respond'"); C*ire v.*

Cummings, 134 S.W.3d 835, 843 (Tex. 2004) (Rule 215.3, which authorizes a trial court to impose sanctions, requires "notice and hearing" before sanctions are imposed.); *Sears, Roebuck & Co. v. Hollingsworth,* 156 Tex. 176, 293 S.W.2d 639, 642 (Tex. 1956). I therefore respectfully dissent. We should reverse the trial court's judgment and remand the cause for a new sanctions hearing or a new trial.

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DAVID GAULTNEY
Justice

Dissent Delivered
June 24, 2010