In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00429-CV

IN THE INTEREST OF S.L.L.

On Appeal from the 317th District Court
Jefferson County, Texas
Trial Cause No. C-173,776-A

MEMORANDUM OPINION

Stephanie Pearson appeals *pro se* an order modifying a child custody judgment. Pearson and Ron C. LaFond obtained a divorce decree in 2001. The decree designated Pearson and LaFond as joint managing conservators of S.L.L., designated Pearson as the person having the exclusive right to determine S.L.L.'s primary residence, and required LaFond to pay monthly child support.

In April 2009, LaFond filed a petition to modify. LaFond pleaded that circumstances had changed since the divorce decree, and that Pearson had voluntarily relinquished the primary care and possession of S.L.L. to LaFond for at least six months. LaFond requested that the trial court modify the judgment by giving him the right to

designate S.L.L.'s primary residency without regard to geographic restriction. He also sought a reduction in the amount of the monthly support payments. Pearson filed a *pro se* summary judgment motion arguing that she did not voluntarily relinquish the primary care and possession of S.L.L. to LaFond for at least six months.

Two days before the hearing on LaFond's petition to modify, Pearson filed a motion for continuance, which the trial court denied. The trial court heard evidence and granted LaFond's petition to modify. The trial court ordered that LaFond and Pearson remain joint managing conservators of S.L.L., that LaFond have the exclusive right to determine S.L.L.'s primary residence, and that neither LaFond nor Pearson were obligated to pay child support. This appeal followed.

MOTION FOR CONTINUANCE

In Pearson's first issue, she argues the trial court abused its discretion in denying her *pro se* motion for continuance. A trial court may grant a continuance for sufficient cause supported by affidavit. *See* Tex. R. Civ. P. 251. Pearson's motion, filed two days before the hearing, requested a continuance "for at least 30 days to allow her to obtain an [a]ttorney[.]" The motion for continuance was not supported by affidavit. *See id.*

An appellate court reviews the denial of a motion for continuance under an abuse of discretion standard. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding); *Garner v. Fidelity Bank, N.A.*, 244 S.W.3d 855, 858 (Tex. App.—Dallas 2008, no pet.). In civil cases in which the absence of counsel has been urged as

grounds for a continuance, courts generally require a showing that the failure to be represented at trial was not due to the party's own fault or negligence. *See State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984); *Ayati-Ghaffari v. H-Ebrahimi*, 109 S.W.3d 915, 916 (Tex. App.—Dallas 2003, no pet.); *see also* Tex. R. Civ. P. 253. When a movant fails to support a motion for continuance with an affidavit, an appellate court presumes that the trial court did not abuse its discretion in denying the motion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *see* Tex. R. Civ. P. 251 (providing conditions for continuances).

Two months after Pearson filed her summary judgment motion, she had not obtained counsel. Pearson did not state in a sworn affidavit or in her motion what efforts she made to retain counsel in the months prior to the hearing. The trial court could reasonably conclude that she did not carry her burden of showing that the delay in obtaining counsel was not her fault. *See Ayati-Ghaffari*, 109 S.W.3d at 916-17. Issue one is overruled.

MODIFICATION

In issues two, four, and five, Pearson challenges the trial court's modification of the divorce decree. She maintains that the trial court abused its discretion in not holding LaFond in contempt of court. She argues that the evidence is insufficient to support modification, that the trial court failed to consider the *Holley* factors or all the grounds for modification under section 156.101(a), and that the trial court failed to make certain

findings of fact. *See* Tex. Fam. Code Ann. § 156.101(a) (West Supp. 2010); *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

We review a trial court's decision to modify conservatorship under an abuse of discretion standard. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). A court may modify a conservatorship order if the modification would be in the child's best interest and: (1) the circumstances of the child or the parties have materially and substantially changed since the original order; (2) the child is at least twelve years of age and has expressed to the court the name of the person the child prefers to have the exclusive right to designate the child's primary residence; or (3) if the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months. Tex. Fam. Code Ann. § 156.101(a).

The best interest of the child is the primary consideration. Tex. Fam. Code Ann. § 153.002 (West 2008); *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000). The trial court has wide latitude in determining the child's best interest. *Gillespie*, 644 S.W.2d at 451. When addressing conservatorship issues, courts may use the non-exhaustive list of *Holley* factors. *See Holley*, 544 S.W.2d at 371-72. The *Holley* factors include the following: (1) desires of the child; (2) emotional and physical needs of the child now and in the future; (3) emotional and physical danger to the child now and in the future; (4) parental abilities of the individuals involved; (5) programs available to those individuals to promote the

best interest of the child; (6) plans for the child by these individuals; (7) stability of the home or proposed placement; (8) acts or omissions of the parent that may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent. *Id.*

Pearson agreed for S.L.L. to live with LaFond for more than six months. She consented to the agreement because the change was in S.L.L.'s best interest. Pearson admitted that S.L.L. made better grades during the year he lived with his father, and that over the past year he matured and now "is in the right frame of mind" to make good choices.

At the time of the hearing, S.L.L. was fifteen years old. LaFond testified S.L.L. had attended ten different schools. LaFond explained that when S.L.L. lived in Texas with his mother, S.L.L. did not get involved in anything outside the home. He would go to school and then play basketball outside. He explained Pearson would not get home from work until late and S.L.L. would prepare his own dinner. He testified that when he suggested to Pearson that she needed to work with S.L.L. on his schoolwork, Pearson responded, '"He needs to do this stuff on his own."'

LaFond explained that Pearson told him when S.L.L. lived with her that S.L.L. was involved with gangs because he was wearing red and "throwing up" gang signs. When LaFond visited S.L.L. at his mother's house, LaFond saw gang graffiti on Pearson's house. Three incident reports from the Converse Police Department were

introduced into evidence. LaFond testified that the first incident related to a fight S.L.L. was involved in at his home in Texas in November 2007. The second incident involved another altercation involving S.L.L. in May 2008. The third incident related to two juveniles who attacked S.L.L. in retaliation for the prior incidents.

LaFond and Pearson agreed for S.L.L., who had performed poorly academically in the eighth grade and got into fights, to live with LaFond in Norway. LaFond denied that he and Pearson agreed that S.L.L. would live with him for only a year. At the time of the hearing LaFond was living in Stavanger, Norway, and working for the military. LaFond testified he is currently not deployable for medical reasons.

Prior to leaving for Norway, S.L.L. had near failing grades. While living in Norway, S.L.L. attended a private school in Norway, paid for by the military. LaFond explained that S.L.L. makes better grades when he is living with him. During the year prior to the hearing, when S.L.L. lived with LaFond, S.L.L.'s grades improved. S.L.L.'s report cards were introduced into evidence. LaFond explained that on other occasions when S.L.L.'s grades would fall, S.L.L. would come live with him, and then S.L.L.'s grades would improve.

LaFond has been taking S.L.L. for treatment for S.L.L.'s ADHD. LaFond explained that S.L.L.'s doctor made specific recommendations on how S.L.L.'s homework should be handled. LaFond stated that he has used the doctor's recommendations as his guideline in working on school work at home with S.L.L.

LaFond presented letters from some of S.L.L.'s teachers in Norway. One of the teachers stated she was impressed with the effort that LaFond and his wife put into parenting and stated that it was obvious that LaFond and his wife made their children's education a priority. She explained that over the past school year S.L.L. had improved academically. She described LaFond and his wife's communication with the school as "flawless" and described them as "a couple that's committed to building a home that will allow for the building of strong-minded, responsible citizens[.]" She "strongly urge[d] [the trial court] to allow this positive work to continue, and to grant custody of [S.L.L.] to [LaFond]." Another letter admitted into evidence from a different teacher stated that "[o]ver the course of the school year [S.L.L.] grew in leaps and bounds. . . . I would have to say that most of [S.L.L.]'s success is due to the intervention and support of his parents, [LaFond] and Michaela." A third teacher's letter acknowledged that "[i]t is therefore clear that [S.L.L.] receives good support at home with his school work."

LaFond not only explained that he is involved in S.L.L.'s academics, but that he serves as the fitness coach for S.L.L.'s school basketball team. While living with his father, S.L.L. has had the benefit of being able to travel to England, The Netherlands, Spain, and Germany.

Just prior to the hearing, S.L.L. received a letter of appreciation for his involvement in building and painting a playground area for children at the local military installation. S.L.L. suffers from asthma and LaFond encouraged S.L.L. to volunteer in

activities related to children with asthma. S.L.L. volunteered at picnics and camps that benefit children with asthma. LaFond and S.L.L. also volunteer to cut the grass at the local park. The court admitted in evidence a letter written to S.L.L. from a community club thanking S.L.L. for his volunteer work.

S.L.L. informed LaFond two weeks prior to the hearing that he would like to "get back" at the guys involved in the altercations in Texas. LaFond believes that if S.L.L. returns to Texas, the fighting will continue due to the combative environment. LaFond explained S.L.L. has an anger problem, but that he is working with S.L.L. through the use of hypothetical situations to help S.L.L. learn to make good decisions.

According to LaFond, Pearson does not encourage S.L.L. to have a good relationship with him. LaFond stated that Pearson had offered to buy S.L.L. a car if he came back to live with her in Texas. LaFond pays child support but during the times when S.L.L. has lived with him, he has not asked Pearson for financial help.

Pearson testified that she initially had S.L.L. diagnosed with ADHD in the fourth grade. When she informed LaFond of the diagnosis he disagreed with it and said it was "stupid." She explained that another time when S.L.L. lived with LaFond, LaFond had taken S.L.L. off of his ADHD medication. S.L.L. returned to his mother's and told her that his father said S.L.L. would do better without the medication. Pearson believes this contributed to the inconsistency with his grades.

Pearson explained that after the fighting incidents involving S.L.L. she moved to a "very nice neighborhood." She explained she works two different shifts -- either 8:00 to 6:00 or 11:00 to 8:00. When she is at work, she has family stay and care for her children. She stated that she and LaFond got along well until S.L.L. went to Norway and S.L.L. and LaFond played a joke on her. S.L.L. told Pearson he had a tattoo and Pearson became angry with LaFond. LaFond went along with the joke and did not tell Pearson that the tattoo was not real until a later date.

According to Pearson, S.L.L. does not want to stay in Norway and he sneaks away to call her and send her e-mails. She introduced some of these emails into evidence. She says LaFond restricts the communication between her and S.L.L. She stated that LaFond refused to return S.L.L. to her at the end of the one-year-period despite her attempts to make travel arrangements for him. She believes S.L.L. has matured and would be happy living with her and that he could be a good example for her other two children who miss S.L.L. Pearson admitted she had been arrested in 2004 for criminal trespass.

Pearson also argues, as part of her second issue, that the trial court abused its discretion in refusing to hold LaFond in contempt for not returning S.L.L. to Pearson after one year. The trial court heard conflicting evidence as to whether Pearson and LaFond had agreed that S.L.L. would live with LaFond for only one year. Judges have wide discretion in whether to find contempt. *In re Bell*, 894 S.W.2d 119, 127 (Tex. Spec. Ct. Rev. 1995). We see no abuse of discretion in refusing to hold LaFond in contempt.

We conclude based on a review of the record that the trial court did not abuse its discretion in finding it was in S.L.L.'s best interest to grant LaFond the exclusive right to determine S.L.L.'s primary residence, and in granting LaFond's motion to modify custody.

In her fifth issue, Pearson argues that the trial court "only considered one ground of section 156.101 in determining that it was in the best interest of the child when it modified the divorce [] decree[.]" Modification is authorized under section 156.101 when modification would be in the best interest of the child and one of the three enumerated grounds justifies the modification. *See* Tex. Fam. Code Ann. § 156.101(a). LaFond alleged in his petition that S.L.L.'s circumstances had changed since the divorce decree, and that Pearson had voluntarily relinquished the primary care and possession of S.L.L. to LaFond for at least six months. Under the statute, the trial court is not required to consider all of the possible grounds if one is satisfied. *See* Tex. Fam. Code Ann. § 156.101(a).

In her fourth issue, Pearson contends the trial court abused its discretion in granting LaFond the exclusive right to determine S.L.L.'s primary residence without considering the factors set out in *Holley v. Adams*, and therefore her due process rights were violated. *See Holley*, 544 S.W.2d at 371-72. The Holley factors are not exhaustive, and no single consideration is controlling. *See id.* at 372. A factfinder is not required to address all of them. *See id.*

The trial court did not make and Pearson did not request findings of fact. Although the trial court did not make written findings regarding its consideration of the *Holley* factors, there was ample evidence presented supporting the trial court's ruling in light of the *Holley* factors. *See Niskar v. Niskar*, 136 S.W.3d 749, 753 (Tex. App.—Dallas 2004, no pet.) (implied findings); *see also* Tex. R. Civ. P. 296, 297.

Pearson argues that the trial court should have interviewed S.L.L. and that she requested the interview at the hearing. Section 153.009(a) of the Texas Family Code allows a party in a nonjury trial or hearing to file an application for an interview in chambers of a child twelve years of age or older to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. *See* Tex. Fam. Code Ann. § 153.009(a) (West 2008). In this case, there is no application for an interview contained in the clerk's record; the trial court had the discretion to deny the verbal request. *See Hamilton v. Hamilton*, 592 S.W.2d 87, 88 (Tex. Civ. App.—Fort Worth 1979, no writ). Issues two, four and five are overruled.

SUMMARY JUDGMENT MOTION

Pearson urges in her third issue that the trial court abused its discretion in failing to consider or grant her motion for summary judgment. Summary judgment is proper when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *City of*

Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979). At the hearing the trial court allowed Pearson to argue her motion, but explained to her that her arguments were evidentiary matters that involve the best interest of the child. When a motion for summary judgment is denied by the trial court because a fact issue exists and the case is thereafter tried on its merits, generally the order denying the motion for summary judgment is not reviewed on appeal. *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *Hines v. Comm'n for Lawyer Discipline*, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi 2000, no pet.); *Horton v. Horton*, 965 S.W.2d 78, 88 (Tex. App.—Fort Worth 1998, no pet.). Issue three is overruled.

APPOINTMENT OF TRIAL COUNSEL

In her sixth issue, Pearson argues the trial court abused its discretion in failing to appoint her a trial attorney and appoint S.L.L. a representative. We review a trial court's failure to appoint trial counsel in a civil case for an abuse of discretion. *See* Tex. Gov't Code Ann. § 24.016 (West 2004); *Gibson v. Tolbert*, 102 S.W.3d 710, 712-13 (Tex. 2003). With certain exceptions, a party is not granted a right to counsel in a civil suit. *Stokes v. Puckett*, 972 S.W.2d 921, 927 (Tex. App.—Beaumont 1998, pet. denied).[1] Pearson has not shown the trial court abused its discretion in failing to appoint her an attorney.

[1]Cases involving juvenile delinquency, termination of parental rights, and court-ordered mental health services are exceptions to this general rule. *See* Tex. Fam. Code Ann. §§ 51.10, 107.013 (West 2008); Tex. Health & Safety Code Ann. § 574.003 (West 2010). None of these exceptions apply here.

In a suit in which the child's best interest is at issue, other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, the court may appoint an amicus attorney, an attorney ad litem, or a guardian ad litem. Tex. Fam. Code Ann. § 107.021(a) (West 2008). The court may make the appointment if doing so is necessary to ensure the determination of the child's best interest. *Id.* § 107.021(b)(2). On this record, we cannot conclude that the appointment of a representative was necessary to ensure the determination of S.L.L.'s best interest, or that the trial court abused its discretion in not appointing a representative for S.L.L. Issue six is overruled.

Having overruled all of appellant's issues on appeal, we affirm the trial court's order.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on January 18, 2011
Opinion Delivered March 31, 2011

Before Gaultney, Kreger, and Horton, JJ.