In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00024-CV

IN THE ESTATE OF L.D. MAY

On Appeal from the County Court at Law No. 1
Jefferson County, Texas
Trial Cause No. 92535

MEMORANDUM OPINION

This appeal arises from a dispute between the parties regarding the identity of the heirs of L.D. May, who died in September 2005. A jury determined that L.D. adopted the appellee, Wendy Lucille May, by estoppel. Following the trial, the trial court signed a judgment which declared that Wendy is the sole surviving daughter of L.D. May, and the heir entitled to one hundred percent of L.D. May's real and personal property. Helen May Stephenson, Barbara May Jerry, Dorothy May Joubert, Paul May, Percy May, and Russell May timely filed their appeal. On appeal, the appellants argue that Wendy bore the burden of proving her claim of equitable adoption by clear and convincing evidence. They also assert that regardless of whether Wendy's burden was to prove her claim by

clear and convincing evidence or by a preponderance of the evidence, the evidence is legally and factually insufficient to support the jury's verdict. We affirm the trial court's judgment.

Failure to Preserve Error

The appellants contend that the proper burden of proof in the trial of an equitable adoption case is a clear and convincing standard. The jury charge placed the burden of proof on Wendy to prove her claim under a preponderance of the evidence standard. In response, Wendy contends that by failing to object to the standard used in the trial court's charge, the appellants failed to preserve their complaint for our review.

With respect to preserving any complaint regarding Wendy's burden of proof, Rule 272 of the Texas Rules of Civil Procedure requires that a party object to the court's charge, either orally or in writing, before the charge is read to the jury. Tex. R. Civ. P. 272; *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). If the party fails to timely present its objection to the court, the objection is waived. Tex. R. Civ. P. 272, 274; *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 627-28 (Tex. App.—Dallas 2004, pet. denied). To preserve an issue for appellate review, the record must show that the party presented its objections to the court and obtained a ruling. *Mitchell*, 156 S.W.3d at 628.

The record reflects that the appellants first complained about the trial court's use of a preponderance standard in their motion for new trial. "Objections to the court's

charge in a motion for a new trial are untimely and preserve nothing for review." *Id.*; *see also* Tex. R. App. P. 33.1(a) (directing that to preserve error, a timely complaint must be made to the trial court).

In the absence of a timely objection to the standard the charge employs on the burden of proof, the sufficiency of the evidence supporting a jury's verdict is reviewed on appeal by the questions and instructions used by the trial court in the charge. *See Regal Fin. Co., Ltd. v. Tex Star Motors, Inc.*, No. 08-0148, 2010 Tex. LEXIS 611, at *14 (Tex. Aug. 20, 2010) (not yet released for publication) (instructing that evidentiary sufficiency must be measured against jury charge); *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71 (Tex. 2000) (holding that court bound to review evidence in light of instruction submitted to jury without objection). We conclude that by failing to file a timely objection to the trial court's charge, the appellants did not preserve their arguments that contend Wendy should have been required to prove her claim of adoption by estoppel by clear and convincing evidence. We overrule issues one and two in their entirety, and we also overrule the portion of issue three that contends the standard of proof should have been based on a clear and convincing standard.

Sufficiency of the Evidence

The appellants' third issue also argues that the evidence is legally and factually insufficient under a preponderance standard to support the jury's finding that L.D. adopted Wendy by estoppel. When analyzing a challenge to the legal sufficiency of the

evidence supporting a jury's verdict, we view the evidence in the light most favorable to the prevailing party, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Since Wendy prevailed at trial, we view the evidence in the light most favorable to her claim. *See id.* The evidence is legally sufficient if it enables "reasonable and fair-minded people to reach the verdict under review." *Id.* at 827. In determining factual sufficiency of the evidence, courts of appeals must weigh all the evidence, both for and against the finding. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). In reviewing a factual sufficiency challenge to a finding for which the appellee had the burden of proof, we "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (citations omitted); *Royce Homes, L.P. v. Humphrey*, 244 S.W.3d 570, 575 (Tex. App.—Beaumont 2008, pet. denied).

Adoption by estoppel is recognized when efforts to adopt are ineffective as a result of a failure to strictly comply with statutory procedures, or because, out of neglect or design, agreements to adopt are not performed. *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963); *Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W.2d 972, 973-74 (1951); *Spiers v. Maples*, 970 S.W.2d 166, 170 (Tex. App.—Fort Worth 1998, no pet.); *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 579 (Tex. App.—Austin 1995, no writ). To show

equitable adoption, a person must prove the existence of an agreement to adopt and performance by the child. *Spiers*, 970 S.W.2d at 171; *Luna*, 906 S.W.2d at 581. It is not necessary that there be direct evidence of the agreement. *Spiers*, 970 S.W.2d at 171. The agreement, like any other ultimate fact, may be proven by the acts, conduct, and admissions of the parties, and by proof of other related facts and circumstances. *Id.* Children claiming equitable adoption act in reliance on their belief in their "status" as children of the adoptive parents, not necessarily in reliance on agreements to adopt or on representations about adoptive status. *Luna*, 906 S.W.2d at 581; *see also Spiers*, 970 S.W.2d at 171.

Six people testified during the proceeding to determine heirship. Wendy's testimony, along with the testimony of her half-siblings, Paulfry Jackson and Zoe Jackson-Jarra, are consistent with the jury's finding on the issue of adoption by estoppel. The testimony of Helen Stephenson and Paul May, L.D.'s siblings, as well as the testimony of a family friend, Arthur Robinson, generally dispute Wendy's claim that L.D. had adopted her.

Paulfry and Zoe testified that L.D. began dating and living with Bettye Comeaux–Wendy's, Paulfry's, and Zoe's now deceased mother–before Wendy was born. According to Paulfry and Zoe, they considered L.D. to be their stepfather, and each had a good relationship with L.D. Both also testified that Bettye used May as her last name after Wendy was born, that Wendy's siblings knew many of L.D.'s family members, that L.D.

held Wendy out to be his daughter to the May family and to others, and that Wendy loved her father and was extremely upset at his death. According to Paulfry, L.D.'s family always treated Wendy with affection in his presence, and that L.D. was "very good" to her. Zoe testified that L.D. was a "loving, doting kind of dad" towards Wendy.

According to Wendy, L.D. was the only father she had ever known and loved, and he held her out to be his daughter. The trial court admitted Wendy's birth certificate into evidence: it states that Wendy's last name is May and L.D. is her father. Wendy indicated that she has always used May as her last name, and May is the surname shown on her driver's license and social security card. According to Wendy, L.D. lived with her, Bettye, and some of Wendy's siblings until she was approximately ten years old. Even after L.D. and Bettye broke up, Wendy lived with L.D. for several years as a pre-teen and teenager, before she went to college, and during some of her college breaks. In approximately 2001, after college, Wendy moved in with L.D. and resided with him until he required nursing-home care following a stroke. Wendy said that L.D. had given her financial assistance, exchanged gifts with her, and taught her how to do various things throughout her life. Wendy testified that after moving back in with L.D. after college, she contributed to the household by buying groceries. According to Wendy, she formed a family relationship with the May family from an early age. Wendy stated that she attended family events and that L.D.'s family knew her as L.D.'s daughter.

During the trial, Wendy also explained that for a period of time while L.D. was still alive, she received social security benefits. The trial court admitted social security records which indicate that Wendy "received SSA child benefits under her father's record, L.D. May[.]"

The trial court also admitted testimony from members of L.D.'s family that tends to dispute Wendy's claim of adoption by estoppel. Helen and Paul, L.D.'s siblings, testified that L.D. never lived with Bettye or Wendy, and that L.D. never held Wendy out as his daughter. Helen and Paul explained that L.D. was injured in 1981, and could not work. Paul testified that L.D. "didn't have nothing to take care of the family with." Arthur, one of L.D.'s friends and the nephew of one of L.D.'s sisters, testified that L.D. had lived with his mother after he was divorced, and that he never knew Bettye or Wendy.

Nevertheless, the jury could have doubted the accuracy of the testimony of L.D.'s siblings which cast doubt on Wendy's claim that L.D. adopted her. For example, Helen explained that she was unaware whether L.D. had agreed to be listed as Wendy's father on her birth certificate. Additionally, Helen and Paul were not aware that Wendy had received social security benefits under L.D.'s name. Helen also recalled that on many occasions, she heard Wendy refer to L.D. as her father.

In summary, the jury heard conflicting testimony on Wendy's claim of adoption by estoppel. "Jurors are the sole judges of the credibility of the witnesses and the weight

to give their testimony. They may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary." *City of Keller*, 168 S.W.3d at 819 (footnotes omitted).

Viewing the evidence in the light most favorable to the jury's verdict, we conclude the evidence is legally sufficient to support the jury's finding on the issue of adoption by estoppel. *See id.* at 827. Additionally, based on the record, we cannot say that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain*, 709 S.W.2d at 176. We also conclude that the evidence is factually sufficient to support the verdict. *See id.* We overrule the appellants' third issue and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on December 6, 2010
Opinion Delivered February 10, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.