In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00191-CV

IN THE INTEREST OF S.G.E.

On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 09-09-09379 CV

MEMORANDUM OPINION ON MOTION FOR REHEARING

Appellant filed a motion for rehearing. Appellee filed a response. She notes that this is an accelerated appeal, and asks that this Court deny the motion because "[c]ontinued delay is not in the best interest of the child."

To the extent we are able to discern issues raised in the motion, we consider those issues to determine whether a rehearing should be granted. Appellant contends the judge who presided over the trial had a conflict of interest that tainted the integrity of the proceedings. The record does not show that the judge was disqualified by reason of the relationship between the judge and appellee's lawyer. *See* Tex. R. Civ. P. 18b(a). Appellant's motion for rehearing suggests that the trial court should have disclosed the

potential conflict. Appellant is relying on a copy of a newspaper article in which the author reports that appellant claimed to have learned on the third day of the trial that the lawyer representing appellee was the trial judge's personal attorney. This article is filed in the papers of the case but not attached to a motion for new trial. Absent a non-waivable disqualification or a record that supports a finding that the complaint could not have been preserved, the circumstances in this case do not support disregarding the usual procedures for error preservation. *See* Tex. R. App. P. 33.1; Tex. R. Civ. P. 18a; *see also generally Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (due process requirements). Appellant filed a motion for continuance, not a motion to recuse. *See McElwee v. McElwee*, 911 S.W.2d 182, 185-86 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

Appellant contends he had a right to counsel that was violated by the trial court's failure to appoint an attorney to represent appellant in a trial in which a supervisor with Child Protective Services testified. No statutory right to counsel exists in a private termination suit. *In re J.M.W.*, No. 09-08-00295-CV, 2009 WL 6031287, at *6 (Tex. App.—Beaumont Mar. 11, 2010, pet. denied) (mem. op.); *In re J.C.*, 250 S.W.3d 486, 489 (Tex. App.—Fort Worth 2008, pet. denied). Due process does not require appointment of counsel in every termination proceeding. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27–32, 101 S.Ct. 2153, 2159–62, 68 L.Ed.2d 640 (1981) (termination suit filed by governmental entity); *see also Turner v. Rogers*, ___ U.S. ___,

131 S.Ct. 2507, 180 L.Ed.2d 452, 79 U.S.L.W. 4553 (2011) (child support enforcement contempt action brought by private party).

Appellant complains that the trial court failed to consider his motions. Appellant does not identify any particular motion, but he does mention that the trial court erred in proceeding to trial without a home study or financial statement. Lack of a home study is not outcome determinative even in cases where one is required. *In re D.C.*, No. 01-11-00387-CV, 2012 WL 682289, at *13 (Tex. App.—Houston [1st Dist.] Mar. 1, 2012, pet. denied) (mem. op.). Financial statements are mandatory in child support cases, but this is a termination case. *See* Tex. Fam. Code Ann. § 154.063 (West 2008).

Appellant also filed special exceptions, motions requesting a psychological evaluation and a mental examination of appellee, and a motion seeking appointment of an amicus attorney. Appellant requested that these motions be addressed in a hearing on September 20, 2010. A temporary order signed on September 20, 2010, recites that a hearing was held on that date and appellant appeared at the hearing. At that time, the parties had an October 4, 2010 trial setting. The trial court granted appellee's motion for a continuance. This record does not reflect why the trial court did not rule on appellant's motions on September 20, 2010 or during the pre-trial hearing conducted on March 11, 2011. Because the record does not show that appellant requested rulings on these motions during either of the pre-trial hearings, appellant has not shown that the trial court abused its discretion.

Appellant filed several written motions during the trial, but these motions were untimely pursuant to the scheduling order. It appears appellant neither obtained leave to file the motions nor showed good cause for the trial court to grant leave for the late filing and presentation of these motions. After resting, appellant presented a motion for continuance that the trial court denied. No abuse of discretion is shown on this record.

Appellant complains that the trial court failed to consider exculpatory evidence from a hearing on a motion for a protective order. The trial court took judicial notice of the evidence from the protective order hearing. *See generally* Tex. R. Evid. 201. The record does not support appellant's claim.

Several complaints presented on rehearing relate to the exclusion of evidence at trial. Appellant complains that the trial court failed to consider a psychological assessment of appellant, but he has not shown that the document was admissible or that an objection to its admissibility was improperly sustained.

The trial court sustained appellee's hearsay and relevance objections to appellant's proffer of a videotape of a Safe Harbor interview of the child. A copy of a video recording of the forensic interview is in the possession of the district clerk and has been forwarded to this Court pursuant to the trial court's safekeeping order, and is in the appellate record.

The forensic interview was conducted as part of an investigation initiated by a call from appellant. The C.P.S. records were admitted in evidence. The Department ruled out

the allegation of abuse. In the interview, S.G.E. related that while she has been living in Texas with appellee she has been spanked. The trial court determined the forensic interview lacked relevance because it did not concern conduct by appellant. In the interview, S.G.E. says that appellant is "sweet." When appellant asked to play "three seconds" of the interview for this purpose, appellee stipulated to S.G.E. having made the statement.

We review a trial court's admission or exclusion of evidence for abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). The trial court apparently concluded that the video recording would not tend to make any material fact more or less probable. The trial court could reasonably have determined that the video evidence of the child's statement regarding appellant was unnecessary to review because of appellee's stipulation. A judgment will not be reversed because the trial court erroneously excluded evidence that is cumulative or not controlling on a material issue dispositive to the case. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

Lastly, appellant complains that the trial court did not allow appellant to call a witness by telephone. Appellant failed to demonstrate the witness's unavailability, and he did not make an offer of proof regarding the evidence the witness would have provided. *See* Tex. R. Evid. 103.

Referring to appellee's post-trial motion to withdraw the sum of $1,300 from the child support registry, appellant argues that the trial court's non-support finding is not

supported by clear and convincing evidence. *See* Tex. Fam. Code Ann. § 161.001(1)(F) (West 2008). Appellant admitted he did not support the child in the year before this suit was filed. Payments made after the suit commenced do not establish that appellant provided support during an earlier period of time. Accordingly, the trial court could have disregarded evidence that tended to show support provided after the suit was filed. *See In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

Appellant complains that the trial court stopped appellant's final argument. During his argument, appellant offered a personal apology to the judge. The judge responded, "Thank you." The judge asked, "Anything further?" Appellant did not inform the trial court that he wished to make an additional statement. *See* Tex. R. App. P. 33.1.

Appellant contends he failed to prosecute his appeal because his retained appellate counsel became too ill to prepare a brief but did not withdraw from the case. Appellee states in her response that appellant "had sufficient time to file a brief and state his case prior to retaining" his attorney. She notes also that he was aware of his attorney's condition when he retained the attorney.

Appellant had been given a final extension to file a brief, and one asserted basis for yet another extension was the condition of his newly retained attorney. Appellant's prior decision to represent himself on appeal was voluntary. He was previously represented by other counsel on appeal. Appellant's first attorney's motion to withdraw asserted that "appellant has requested counsel withdraw." Appellee objected, appellant's

counsel explained, "because Appellee is pro se and thinks that this is an attempt by Appellant to put her in a position where she has to deal with him directly rather than through an attorney." Over appellee's objection, this Court granted appellant's request to proceed without an attorney in the appeal.

On April 12, 2012, this Court granted appellant's request to proceed without his second attorney. Appellant has not secured new counsel. We have considered the issues raised in the motion for rehearing. Appellant has had an adequate opportunity to present any appellate issues to this Court. We decline appellant's request to reinstate his appeal. Appellant's motion for rehearing is overruled. Tex. R. App. P. 49.3. No further motion for rehearing may be filed with this Court. Tex. R. App. P. 49.4; *see* Tex. Fam. Code Ann. § 109.002(a) (West Supp. 2011) ("The procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply to an appeal in which the termination of the parent-child relationship is in issue.").

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DAVID GAULTNEY
Justice

Opinion On Motion for Rehearing
Delivered May 17, 2012

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