In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00531-CV

IN RE MEAGAN LEEANN CALKINS AND DUANE CALKINS

Original Proceeding

MEMORANDUM OPINION

Meagan Leeann Calkins and Duane Calkins seek mandamus relief from a temporary order that appoints Meagan's parents, Tony Randall and Leslie Randall, as temporary managing conservators of the Calkins' child, A.L.R.

Meagan and Duane began dating as high school students. Duane moved to Houston to attend a trade school for diesel mechanics, and he and Meagan continued to see each other. Meagan was a student in College Station, Texas, and was financially supported by the Randalls when she became pregnant. Meagan concealed her pregnancy from her parents until June 2010. The Randalls paid for Meagan's obstetrical care. After A.L.R.'s birth on August 29, 2010, Meagan and her baby resided with the Randalls. Duane visited five or six times and paid approximately $300 for the support of A.L.R. Duane graduated in January 2011. Meagan returned to college for the Spring 2011

semester in what proved to be an unsuccessful attempt to remain enrolled. From January through mid-May, A.L.R. remained with the Randalls, who provided a sitter during the day, while Meagan attended school during the week and returned to her permanent residence with the Randalls each weekend.

Meagan was accepted at Stephen F. Austin University in Nacogdoches, but Duane got a job in College Station. Meagan informed her parents that she and Duane planned to live in College Station while Meagan made a daily commute to Nacogdoches for class. On the weekend of August 6, Meagan abruptly informed her parents that she and A.L.R. were moving out of the Randalls' home and moving in with Duane. Meagan and Duane moved into a two-bedroom apartment in College Station. They married on August 15, 2011.

Leslie Randall and her son Mitchell stopped by the Calkins' apartment the following week. The apartment was very sparsely furnished but Meagan and Duane had a playpen crib for the baby. A.L.R. was excited to see her grandmother. Leslie asked if she could take A.L.R. for the weekend, but Meagan refused. The baby cried when Leslie left.

The trial court heard testimony regarding an emotional attachment between A.L.R. and her grandmother. Mitchell stated that A.L.R. has bonded to her grandmother and not to Meagan. The babysitter testified that when Meagan returned from college in May 2011, she appeared to be detached from an emotional bond with A.L.R. In the babysitter's opinion, the Randalls have better parenting skills and a more stable home.

Leslie also testified that she believes there is an emotional danger in separating A.L.R. from her, and that she has better parenting skills than her daughter has. In her opinion, she had bonded with the child and Meagan had not.

Meagan testified that she had moved to College Station with A.L.R. a few weeks earlier. When Meagan left her parents' house, she left the furniture from her old apartment because the furniture was not hers and had not been given to her. She also left the car she had been using, and the credit cards her parents had allowed her to use in the past. She is currently A.L.R.'s caretaker, and she testified that while she lived in her parents' home, she was the one who fed the child. Meagan testified that she intended her living arrangement with her parents to be temporary. According to Meagan, A.L.R. is still becoming accustomed to Duane, but they are both bonding with the child.

Meagan testified that she and Duane are paying $625 per month to lease their apartment. Meagan acknowledged that her plans for attending a new university might be delayed. Duane's parents were going to give them a crib and other furnishings during the Labor Day weekend. Meagan has applied for CHIPs in an attempt to obtain health insurance for A.L.R. She admitted that "we're still going to struggle some" but "that's how it is with any parents just starting out." In Meagan's opinion, it would be easier on A.L.R. to adjust to the separation from her grandmother now than it would be when the child is older.

Duane testified that he works from 7:30 to 6:00 on weekdays, from 7:30 to 5:00 on Saturday, and from 10:00 to 5:00 on Sunday. He is earning $9 per hour and works

approximately sixty hours per week. Duane testified that they are living in a quiet neighborhood and there are children his daughter's age living in other apartments in the complex. When asked if it would impact A.L.R. emotionally if she were to be taken away from her parents, Duane replied that it would be hard for him to say what kind of emotional distress, at her age, might result. He admitted that "children do adjust to their environment" but expressed his opinion that a child should be with her parents.

The Calkinses contend that the trial court abused its discretion by granting temporary custody to the Randalls. Section 102.003 of the Family Code confers standing to bring a suit affecting the parent-child relationship on a person who has had actual care, control, and possession of the child for at least six months ending not more than ninety days preceding the date of the filing of the petition. Tex. Fam. Code Ann. § 102.003(a)(9) (West 2008). When someone other than the parents claims standing under the "actual care" requirement of section 102.003(a)(9), the trial court must consider whether the parents are adequately caring for the child. *In re C.T.H.S.*, 311 S.W.3d 204, 209 (Tex. App.—Beaumont 2010, pet. denied). When someone claims standing under the "control" requirement of section 102.003(a)(9), he must show that the parents have conferred upon the non-parents the authority to make decisions of legal significance for the child. *In re K.K.C.*, 292 S.W.3d 788, 792-93 (Tex. App.—Beaumont 2009, orig. proceeding).

Section 102.003(a)(9) must be applied in a manner that preserves the constitutional liberty interests retained by a fit parent who is adequately caring for her child. *Id.* at 793-94; *see also Troxel v. Granville*, 530 U.S. 57, 68-69, 120 S.Ct. 2054,

147 L.Ed.2d 49 (2000). Here, the Randalls presented evidence that they had been acting as caregivers for their grandchild and had been providing financial support to their daughter for the benefit of A.L.R., but they also acknowledged that Meagan participated in providing care for A.L.R. Meagan's absence for the Spring 2011 semester was intended to be temporary and did not last for six months. The evidence from the temporary hearing does not establish that Meagan relinquished her parental rights to A.L.R.'s grandparents.

Section 102.004 of the Family Code confers upon grandparents standing to file an original suit affecting the parent-child relationship "if there is satisfactory proof to the court that . . . the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development[.]" Tex. Fam. Code Ann. § 102.004(a)(1) (West 2008). "Despite considerable discretion vested in courts to issue temporary orders 'for the safety and welfare of the child,' a court cannot act to infringe on a party's constitutional rights." *In re Scheller*, 325 S.W.3d 640, 644 (Tex. 2010). Evidence that the child misses the grandparents who have been providing care for the child does not by itself justify infringing upon the parents' rights to make child-rearing decisions. *Id*. at 643-44.

Moreover, in *Scheller* and other cases in which the Supreme Court has reviewed temporary orders, the trial court merely awarded temporary possessory rights to the non-parents. *Id.*; *see also* Tex. Fam. Code Ann. § 153.433 (West Supp. 2010); *In re Derzapf*, 219 S.W.3d 327, 333-34 (Tex. 2007); *In re Mays-Hooper*, 189 S.W.3d 777-78 (Tex.

2006). The evidence in those cases focused on the effect of the child's separation from the grandparent because the temporary order affected only grandparent access. Here, the trial court awarded temporary managing conservatorship to the non-parents. The issue is not whether denial of access by the grandparent would significantly impair the child's physical health or emotional well-being, but whether the child's present circumstances would significantly impair the child's physical health or emotional development. *Compare* Tex. Fam. Code Ann. § 102.004(a) *with* Tex. Fam. Code Ann. 153.433(a)(2). The record of the temporary hearing shows that the Calkinses are inexperienced at parenting and are living in relative poverty, but there is no evidence that the child's physical environment poses a danger to the child's safety and welfare. *See* Tex. Fam. Code Ann. 102.004(a). Meagan is caring for the child, Duane has a job, and there is no evidence that in her present environment A.L.R. is being neglected in any way. The evidence adduced at the temporary hearing does not justify removing A.L.R. from the custody of Meagan and Duane. Because temporary orders that divest fit parents of possession of their child are irremediable, mandamus relief is appropriate. *In re Derzapf*, 219 S.W.3d at 335.

The Calkinses asked this Court to compel the trial court to dismiss the Randalls' suit. The parties' pleadings have not been made a part of this mandamus record, so we are unable to determine with certainty the issues in controversy in the litigation. Also, we cannot determine whether the Randalls have been provided an opportunity to amend their pleadings. *See In re K.K.C.*, 292 S.W.3d at 791. The focus of this temporary hearing is

the immediate safety and welfare of the child, not the child's long-term physical welfare and emotional development. *See* Tex. Fam. Code Ann. § 105.001(West 2008). Under the circumstances, relators have not established that the trial court abused its discretion by not dismissing the suit at this time.

We lift our stay order of September 22, 2011, and conditionally grant mandamus relief. We direct the trial court to vacate its temporary order of September 1, 2011. We are confident that the trial court will comply promptly; the writ shall issue only if the trial court fails to comply.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on October 3, 2011
Opinion Delivered October 20, 2011

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