In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00109-CV

IN THE INTEREST OF D.S.H.

On Appeal from the 418th District Court
Montgomery County, Texas
Trial Cause No. 09-10-09572-CV

MEMORANDUM OPINION

This is a *pro se* appeal by M.H., the father of D.S.H.,[1] from the trial court's order in a suit to modify the parent-child relationship. In ten appellate issues, M.H. challenges (1) the finality of the trial court's order, (2) the veracity of the evidence adduced at the temporary order hearing, (3) whether the trial court erred by not providing an interpreter at the temporary orders hearing to assist M.H. due to his hearing difficulties, (4) the sufficiency of the evidence supporting the jury's verdict regarding conservatorship, and (5) the trial court's calculation of the amount of child

[1]The record reflects that D.S.H. is now over eighteen years of age.

support it ordered M.H. to pay. We affirm the trial court's order in part and reverse and remand in part.

BACKGROUND

The child's mother, A.H., filed a petition to modify the parent-child relationship, in which she asserted that circumstances had materially and substantially changed since the order to be modified was signed. A.H. asserted that D.S.H. was twelve years of age or older and would express his desires to the court regarding the parent who he felt should have the exclusive right to designate his primary residence. A.H. requested that she be appointed the person with the exclusive right to designate D.S.H.'s primary residence and requested that she be named sole managing conservator. A.H. alleged that M.H. has a history of child neglect directed against D.S.H. and asked the court to require that M.H.'s periods of visitation "be continuously supervised by an entity or person chosen by the Court." A.H. requested that the trial court enter temporary orders and a temporary restraining order, and she sought an order requiring M.H. to pay child support.

M.H. filed an answer, as well as a counter-petition to modify the parent-child relationship. M.H. contended in his counter-petition that A.H. should be restricted to one visit with D.S.H. per month or a possession order should be entered, and M.H. maintained that A.H. "has a history or pattern of child neglect directed against the

child[.]" M.H. asserted that circumstances had materially and substantially changed and that the child support payments previously ordered should be terminated. According to M.H., the support payments previously ordered do not comply with the guidelines contained in Chapter 154 of the Texas Family Code, and termination of the child support would be in D.S.H.'s best interest. M.H. pleaded that A.H. "should be ordered to pay child support, . . . health insurance premiums for coverage on the child, and 50 percent of the child's uninsured medical expenses." M.H. also requested the entry of temporary orders. Although M.H. alleged that the ordered child support did not comply with Chapter 154 of the Texas Family Code,[2] M.H. did not request credit for social security payments D.S.H. was receiving due to M.H.'s disability in his answer or his counter-petition. M.H. filed a motion requesting the appointment of an interpreter to assist him during the proceedings due to his hearing problem, and he subsequently filed a second motion requesting appointment of an interpreter and modification of court procedures.

After conducting a hearing on the requests for a temporary order, the court appointed A.H. and M.H. as temporary joint managing conservators and awarded A.H. the exclusive right to determine D.S.H.'s residence. The trial court also gave

[2]The divorce decree provided that neither party was obligated to pay child support.

A.H. the exclusive right to receive child support and to make medical and dental decisions, psychological treatment decisions, and educational decisions for D.S.H. As part of the temporary order, the trial court entered a standard possession order, under which M.H. elected to exercise possession of D.S.H. on the first, third, and fifth weekends of the month. In addition, the trial court determined that M.H.'s net resources per month are $1733.45 and A.H.'s net resources are $0, and "[t]he percentage applied to the first $8,550 of [M.H.]'s net resources for child support is twenty percent. The trial court also signed a separate order requiring M.H.'s employer to withhold $396.69 per month for child support.

At trial,[3] which occurred approximately two years after the trial court entered temporary orders, A.H. testified that she and M.H. divorced in 2007, and she currently resides with her fiancé, her mother, her three other children, and D.S.H. A.H. explained that she was awarded primary custody of D.S.H. under the temporary orders, and she testified that D.S.H. was doing well and making good grades. A.H. testified that she and D.S.H. have a close relationship and D.S.H. confides in her. A.H. testified that if she were awarded primary custody of D.S.H., she could communicate with M.H. and they could agree on decisions regarding D.S.H.'s medical care and education. A.H. testified that M.H. receives disability, so D.S.H.

[3]M.H. requested a partial reporter's record.

also receives disability payments. A.H. testified that although D.S.H. was ordered to begin paying child support two years ago when the temporary order was entered, he only paid child support for ten months. A.H. testified that M.H. had only exercised his visitation rights a few times since the temporary orders were entered.

According to A.H., when D.S.H. was living with M.H., D.S.H. told A.H. that he was having a hard time, could not take it anymore, and intended to run away. A.H. explained that D.S.H. had run away at least three times, had stolen money from M.H., and had been in jail, but since D.S.H. has been living with her, he has not been in any trouble. A.H. expressed concern that D.S.H.'s previous issues would return if he went back to live with his father. During cross-examination, A.H. testified that she currently resides in a four-bedroom trailer, and D.S.H. has his own room. A.H. testified that she is currently on welfare. A.H. testified that M.H. neglected D.S.H. by not providing for his needs and being unable to stop D.S.H. from running away, and she explained that she had seen photographs D.S.H. had taken of the travel trailer where he had resided with his father. A.H. testified that when she picked up D.S.H., he had a trash bag filled with some items, but she did not look through the items because she was concerned with comforting D.S.H.

D.S.H., who was seventeen and a half years old at the time of trial, testified that he currently resides with his mother, three siblings, stepdad, and grandmother,

and he has his own room. D.S.H. testified that he is maintaining "pretty good" grades at school, and is involved in extracurricular activities and a work program. D.S.H. also testified that he has been accepted to a junior college and has applied to another college. D.S.H. explained that, with the exception of the trial, he feels positive about his life, and he enjoys living with his mother. In addition, D.S.H. testified that he faces consequences from his mother if he slacks academically or at work. D.S.H. testified that he has a good relationship with his mother.

D.S.H. explained that he felt that if he were sent to live with his father, all of the progress he has made will "wash away[.]" D.S.H. described his relationship with his father as "rough" and lacking any "bonding time." D.S.H. explained that he lived with his father for several years in an R.V. park, and his father eventually bought a piece of land, put a steel building on the land, and put bunk beds in the building. According to D.S.H., when he and M.H. first moved into the steel building, they had no electricity, running water, or indoor kitchen. D.S.H. testified that he and his father cooked on a propane unit that was "outside in the woods . . . by the cabin[.]" According to D.S.H., his father had a gas generator that ran for two to three hours per day. D.S.H. testified that his father sometimes locked him in the cabin. D.S.H. explained that the living conditions were so harsh that he could not stand living there, and he believes that his father still lives in the same building. D.S.H. testified that

when he went to live with his mother, M.H. only exercised visitation two or three times, and when M.H. came to get him, M.H. argued with him and told him he was ruining his life. D.S.H. explained that M.H. recently tried to pick him up for a visit, but D.S.H. was fearful and did not feel comfortable going with M.H. because "he just started immediately yelling at me like usual and saying negative things[.]"

According to D.S.H., M.H. has slapped him across the face two or three times when D.S.H. was fourteen or fifteen years old. D.S.H. explained that on one occasion, his father gave him $100,000 in cash and instructed him to bury it on the property. D.S.H. kept some of the money, but his father caught him with the money and later pressed charges. D.S.H. testified that he had undergone testing by psychiatrists because his father insisted that "there was something wrong with me in my head[,]" but the doctors concluded that D.S.H. was "just a stressed teenager[.]" D.S.H. explained that he feared he would have to repeat his senior year of high school and would have flashbacks if he had to live with M.H.

During cross-examination, D.S.H. testified that at the temporary hearing, he brought some of his old shoes that were worn out, had holes in them, and the sole was falling out. D.S.H. testified that his father had bought the shoes, and did not replace them when they wore out. D.S.H. denied giving any of the money he stole from M.H. to his mother, and he testified that his mother did not know he had taken

the money. D.S.H. testified that M.H. never referred to himself as D.S.H.'s father, and M.H. preferred to be called "sensei[.]" D.S.H. testified that he had been told he had PTSD, but psychiatrists ruled that out. In addition, D.S.H. testified that he has had breakdowns, nightmares, and panic attacks, but he does not have violent outbursts or try to hurt anyone.

At the conclusion of that part of the trial, the case was submitted to the jury. The jury was presented only questions regarding the conservatorship of D.S.H., and the jury determined that the order designating M.H. as D.S.H.'s conservator who has the exclusive right to designate D.S.H.'s primary residence should be modified to designate A.H. as the conservator who has that exclusive right. The remaining issues were then tried to the bench.

A.H. testified that the temporary order gave her the exclusive right to make medical and educational decisions for D.S.H. and contained a standard possession order, and she testified that she believed incorporating those provisions into a final order would be in the best interest of D.S.H. Additionally, A.H. testified that she requested that the order requiring M.H. to pay child support continue, and sought cash medical support of $100 per month. During cross-examination, A.H. denied being involved in any theft from M.H., and she testified that she did not know D.S.H. stole from M.H. A.H. testified that D.S.H. had shown her photographs of M.H.'s

home, and there were maggots. A.H. testified that she no longer had in her possession the worn out shoes that D.S.H. was wearing when she picked him up. A.H. testified that D.S.H. receives a social security check, and she also testified that M.H. only paid ten months of child support.

M.H. testified that he currently has no money buried on his property, and he has approximately $200 in his savings account. M.H. testified that records from the Attorney General's office show that he owes child support of $3875.99 as of November of the previous year, but M.H. disputed that amount, claiming that he should be credited for D.S.H.'s social security checks.[4] M.H. testified that A.H. claims he currently owes her $4238.28 in child support. M.H. testified that he receives disability, and his limited hearing makes it difficult for him to earn additional money. During closing arguments, A.H.'s counsel stated that although M.H. had claimed that he received social security payments, M.H. did not produce evidence of such payments during discovery, and A.H.'s counsel pointed out that he had objected when M.H. had attempted to offer evidence of the payments for that reason.

At the conclusion of M.H.'s testimony, the trial judge questioned A.H.'s counsel, A.H., and M.H. In response to a question from the trial court, A.H.'s counsel

[4]The Attorney General is not a party to this appeal.

responded that he believes M.H. should get credit for social security money D.S.H. receives due to M.H.'s disability if M.H. had introduced evidence of the payments. Both M.H. and A.H. informed the trial court that D.S.H. was receiving $390 per month from social security due to M.H.'s disability. When the trial judge asked M.H. what happened to the $45,000 cash he had left after D.S.H. stole from him, M.H. testified that he used the money to put up the cabin, water well, electric lines, an outside shelter, and to replace the building that was stolen. When the trial judge asked where the cash came from, M.H. responded that he had income from rental property and had saved some money from operating his tree business. M.H. indicated that the property he had been renting was valued at $90,000 and was paid for. M.H. also stated that he receives $329 per month in dividends from money he put into a stock fund, and he indicated that the current fair market value of the stock he owns is $260,000. In addition, M.H. stated that he receives social security disability in the amount of $801 per month because he has epilepsy, hearing loss, and problems with his back and right knee.

The trial court accepted and approved the jury's verdict awarding A.H. the exclusive right to determine D.S.H.'s residence and indicated that "[t]he remaining rulings are from the bench." The trial court appointed A.H. and M.H. joint managing conservators of D.S.H. and awarded A.H. the exclusive right to receive child

support, and to make educational, medical, psychiatric and psychological decisions on behalf of D.S.H. The trial court ruled that the remaining rights "are joint subject to the agreement of the other parent conservator." In addition, the trial judge awarded M.H. a standard possession order and ordered him to pay child support of $346.69 per month. The trial court ordered A.H. to obtain Medicaid coverage for D.S.H. and ordered M.H. to pay an additional $50 per month in cash for medical support. The trial court pronounced that "[t]he prior temporary orders in this case will survive and either party may seek enforcement of same." When M.H. asked the trial judge whether he would receive credit for D.S.H.'s social security check, the trial judge responded:

> The only thing that was tried to the Court was the modification. Both of y'all are making arguments about each owing the other money. I don't know if the Court will have to cross these bridges at a future time, but that was not an issue before the Court in this modification trial."

In accordance with its oral pronouncements, the trial court signed an order on January 19, 2016. The trial court also signed findings of fact and conclusions of law. In finding of fact number sixteen, the trial court found that "[t]he amount of child support ordered by the Court is in accordance with the percentage guidelines." In finding of fact number seventeen, the trial court found that M.H.'s net resources are $1733.45, and in finding of fact number nineteen, the trial court found that "[t]he percentage applied to the first $8,550 of [M.H.]'s net resources for child support is

20 percent." In conclusion of law number twenty-eight, the trial court concluded that M.H. "should pay child support in the amount of $346.[6]9 per month." In addition, the trial court, in finding of fact ten, found portions of M.H.'s testimony incredible.

We first address M.H.'s argument that the trial court's order is interlocutory because it does not dispose of all issues before the court. Specifically, M.H. contends the order is interlocutory because it did not specifically address his request that the amount of child support be offset by disability payments D.S.H. received as a result of M.H.'s disability. The trial court's order, which was entered following a jury trial and bench trial on the merits, included a calculation of the amount of child support M.H. owed, but did not specifically rule on M.H.'s request; however, the order included the following language: "IT IS ORDERED that all relief requested in this case and not expressly granted is denied." A judgment or order entered after a trial on the merits is presumptively final. *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 280 (Tex. App.—Austin 2002, no pet.) (holding that in a suit to modify a suit affecting the parent-child relationship, a new final order results from a modification proceeding); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 197, 199 (Tex. 2001). We conclude that the trial court's order is final and appealable. *See Bilyeu*, 86 S.W.3d at 280; *Lehmann*, 39 S.W.3d at 197, 199.

We next address M.H.'s challenge to the sufficiency of the evidence regarding conservatorship.[5] As discussed above, D.S.H. is now over the age of eighteen. *See* Tex. Fam. Code Ann. § 101.003 (West 2014) (defining "child" or "minor" as a person under eighteen years of age who is not and has not been married and, only for purposes of child support, defining "child" as a person over eighteen years of age "for whom a person may be obligated to pay child support"); *Ngo v. Ngo*, 133 S.W.3d 688, 691-92 (Tex. App.—Corpus Christi 2003, no pet.) (holding that unless one of the three exceptions to mootness applies, conservatorship becomes moot once a child reaches the age of eighteen). Accordingly, because D.S.H. is now over eighteen years of age, the issue of conservatorship of D.S.H. is moot. *See* Tex. Fam. Code Ann. § 101.003; *Ngo*, 133 S.W.3d at 691-92.

Even if the issue of conservatorship were not moot, or if this Court erred by concluding that the issue is moot, the jury heard evidence that D.S.H. had to live in primitive conditions, which D.S.H. described as "harsh[,]" when he lived with M.H.; M.H. sometimes locked D.S.H. inside the home; D.S.H. had a difficult relationship with M.H.; and D.S.H. had run away from home three times while living with M.H.

[5]Although M.H. states in his reply brief that "[c]onservatorship is not the issue[,]" we interpret the evidentiary issues he raises regarding allegedly fabricated evidence and denial of "fundamental constitutional rights" as, in part, an attack on the conservatorship finding. We also interpret these challenges as pertaining, in part, to the trial court's calculation of child support.

In addition, the jury heard evidence that D.S.H. had not been in trouble, was making good grades, was happy living with A.H., and has a good relationship with A.H. On this record, we conclude there is sufficient evidence to support the jury's finding that A.H. should have the exclusive right to determine D.S.H.'s residence. We conclude that the trial court did not abuse its discretion by awarding A.H. the exclusive right to determine D.S.H.'s primary residence. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982) (holding that we review a trial court's order regarding conservatorship under an abuse of discretion standard); are *Halleman v. Halleman*, 379 S.W.3d 443, 447 (Tex. App.—Ft. Worth 2012, no pet.); *Jenkins v. Jenkins*, 16 S.W.3d 473, 477 (Tex. App.—El Paso 2000, no pet.).

We now turn to M.H.'s complaint that the trial court erred by not providing him with an interpreter to assist him during the temporary order hearing. As discussed above, prior to the temporary order hearing, M.H. filed a motion requesting the appointment of an interpreter and requested a hearing in said motion. *See* Tex. R. Civ. P. 183 (providing that the trial court may appoint an interpreter). However, the record of the temporary orders hearing does not reflect that M.H. repeated his request for an interpreter or obtained a ruling on his motion. Therefore, we conclude that M.H. did not preserve the issue for appellate review. *See* Tex. R. App. P. 33.1(a); *Butler v. Sutcliffe*, No. 02-15-00319-CV, 2016 WL 4491224, at *7

(Tex. App.—Fort Worth Aug. 26, 2016, no pet.) (mem. op.). M.H.'s status as a *pro se* litigant does not excuse his failure to preserve for appellate review his complaint regarding his request for an interpreter. *See Martinez v. Cherry Ave. Mobile Home Park*, 134 S.W.3d 246, 249-50 (Tex. App.—Amarillo 2003, no pet.).

With respect to M.H.'s arguments regarding falsified evidence and his allegation that A.H. committed perjury at the temporary hearing, all of the evidence and testimony about which M.H. complains concerned the issue of conservatorship. As discussed above, D.S.H. is now over eighteen years of age. In addition, "[t]emporary orders are binding only until a final judgment is entered appointing a permanent managing conservator." *In the Interest of P.R.*, 994 S.W.2d 411, 417 (Tex. App.—Fort Worth 1999, pet. dism'd w.o.j.), *disapproved of on other grounds by In the Interest of J.F.C.*, 96 S.W.3d 256, 267 n.39 (Tex. 2002). Because a final judgment has been entered and the temporary orders are no longer binding, we overrule M.H.'s arguments regarding alleged perjury and falsified evidence at the temporary hearing. *See id*.

We now turn to M.H.'s arguments regarding the trial court's failure to credit him for the social security payments D.S.H. received as a result of M.H.'s disability in calculating the amount of child support. An appellate court will not disturb a court's order modifying child support unless the complaining party shows a clear

abuse of discretion. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *In the Interest of G.L.S.*, 185 S.W.3d 56, 58 (Tex. App.—San Antonio 2005, no pet.). "A trial court's failure to analyze or apply the law correctly constitutes an abuse of discretion." *In the Interest of G.L.S.*, 185 S.W.3d at 58.

As discussed above, A.H. sought child support from M.H. in her motion to modify. Before making its oral pronouncement, the trial judge stated that he did not believe the issue of which spouse owed the other money was before him in the modification proceeding. The trial court decided to award child support to A.H., and he made findings of fact and conclusions of law regarding M.H.'s net resources, the percentage to be applied to M.H.'s net resources in calculating child support, and the amount of child support that M.H. must pay per month. Both A.H. and M.H. told the trial judge that D.S.H. received $390 per month due to his father's disability.

Section 154.132 of the Texas Family Code provides as follows:

> In applying the child support guidelines for an obligor who has a disability and who is required to pay support for a child who receives benefits as a result of the obligor's disability, the court *shall* apply the guidelines by determining the amount of child support that would be ordered under the child support guidelines and subtracting from that total the amount of benefits or the value of the benefits paid to or for the child as a result of the obligor's disability.

Tex. Fam. Code Ann. § 154.132 (West 2014) (emphasis added). Because section 154.132 requires the trial court to subtract the benefits paid to the child as a result of

the obligor's disability from the amount of child support that would be ordered under the child support guidelines, we conclude that the trial court abused its discretion by failing to do so. *See id*. We sustain M.H.'s arguments regarding the credit for the disability payments D.S.H. received. We affirm the remainder of the trial court's order, but we reverse that portion of the trial court's order which required M.H. to pay monthly child support and remand the cause to the trial court for further proceedings consistent with this opinion. *See In the Interest of G.L.S.*, 185 S.W.3d at 61.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

STEVE McKEITHEN
Chief Justice

Submitted on January 5, 2017
Opinion Delivered April 20, 2017

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