COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00095-CV

IN THE INTEREST OF S.H.,
A CHILD

FROM THE 442ND DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 14-01640-393

MEMORANDUM OPINION[1]

In one issue, Appellant K.O. (Father) complains of the denial of his motion for new trial after the trial court granted a post-answer default judgment for Appellee B.H. (Mother). Because we hold that the trial court did not abuse its discretion by denying Father's motion for new trial, we affirm.

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[1]*See* Tex. R. App. P. 47.4.

I. Summary of Facts

A. Father Files Initial Pleadings.

Mother and Father were involved in a romantic relationship, and she became pregnant by him. They broke up during the pregnancy, and in March 2014, Father's retained counsel filed a petition to adjudicate parentage seeking that Father be named a joint managing conservator (JMC), to restrict the child's primary residence to Denton and contiguous counties, to change the child's last name to his, and appropriate orders for access, allocation of rights and duties, and child support. Father also sought a temporary order allowing him to attend Mother's medical appointments and to have access to the unborn child's medical information.

B. August 2014 Temporary Orders Set Father's Possession Schedule and Order Him to Enroll in SoberLink.

In April 2014, Mother and Father stipulated that he was the father of the unborn child. The child, S.H., was born in June 2014. In August 2014, the trial court signed temporary orders naming Father and Mother temporary JMCs; awarding Mother the right to designate S.H.'s primary residence; awarding Father the trial court's standard visitation for a child under the age of three, except for granting possession on Wednesdays and Thursdays from 6:00 p.m. to 8:00 p.m. instead of on Wednesdays and Fridays; ordering him to pay Mother $400 per month in child support; restricting both parents' alcohol consumption;

and ordering Father to enroll in SoberLink. In November and December 2014, the couple temporarily reconciled.

C. August 2015 Temporary Orders Reduce Father's Possession Slightly, Tighten His SoberLink Requirements, Tie His Future Possession to Compliance, and Increase His Child Support.

In August 2015, the final hearing began. The trial court heard evidence that Father: (1) did not believe he had a problem with alcohol even though he had two prior convictions for driving while intoxicated (DWIs); (2) missed some court-ordered SoberLink tests and tested positive for alcohol on others; (3) missed some visits with S.H.; and (4) was behind on child support but not on his car payments, which Father viewed as equally important as his child support obligation. The trial court granted a continuance because Mother had filed her response to Father's petition and request for temporary orders on March 27, 2014, but had not served it on Father.

At the termination of the hearing, the trial court ordered:

- That Father participate in SoberLink Recovery Health during all periods of possession;
- That Father submit a breath specimen one hour before the beginning of each period of possession, allowing a 30-minute response period;
- That the period of possession would be forfeited if Father declined the test, missed the test, or had a breath alcohol concentration even as low as .01;
- That Father's periods of possession on Sundays would occur on the first, third, and fourth Sundays of the month (instead of the first, second, third, and fourth);

- That no visitation would occur until SoberLink confirmed that it was providing alerts to both parties, not just to Father;

- That two consecutive failed tests, including declined tests, would result in his possession schedule being surrendered and his possession being supervised by Aaron Robb or someone in his office at Father's expense; and

- That current monthly child support of $570 would be due beginning September 1, 2015.

The trial court also made the following statements to Father:

> Sir, it's clear to me that you think that the Orders of this Court or the Orders of Judge Robison's court are recommendations of things that should happen. That's not it.
>
> Orders of this Court, Orders of Judge Robison's court, need to be followed. And they need to be taken seriously, and you have not done that. You don't have a Court Order to pay your car payment. You have a Court Order to pay child support.
>
> . . . .
>
> But right now, I don't think that you're putting your relationship with your child in front of whatever else you might be doing for the three or four minutes it takes to blow for SoberLink.

D. Mother's Counsel Confirms Setting of Final Trial.

On September 16, 2015, Mother's trial counsel sent a letter to the court coordinator confirming that the final trial was set for December 3, 2015 at 1:30 p.m. The letter was copied to Father's trial counsel.

E. Father's Counsel Withdraws.

On September 30, 2015, Father's trial counsel filed a motion to withdraw on the grounds that Father had failed to communicate with her and was unable to continue to pay for legal representation. The motion provided that "[t]his matter

is set for final trial on December 3, 2015 at 1:30 p.m." Father's trial counsel certified that the motion had been served on Father via email. On October 12, 2015, the trial court granted Father's trial counsel's motion to withdraw.[2] In the order, the trial court found that a copy of the motion had been delivered to Father. The order repeated the date and time of the trial setting.

F. December 3, 2015 Default Judgment Reduces Father's Possession of S.H. and Requires Him to Pay Supervisor.

The trial court held a bench trial on December 3, 2015. Father did not appear. At trial, Mother testified that

- Father "has a very bad drinking problem";
- Father failed two SoberLink tests and resets since the August temporary hearing;
- Both of Father's failed tests showed significant amounts of alcohol in his system;
- Both of Father's failed tests were conducted when he was going to pick up S.H. for visitation;
- Mother received "a call from the SoberLink device . . . an hour before [Father] was due to pick [S.H.] up on Wednesday, the day before Thanksgiving, stating that he would not be picking up [S.H.] and that he[had] deactivated his device";

[2]On its public website, the Denton County District Clerk provides in its "Register of Actions" for the trial court case that the original signed withdrawal order could not be located. A copy of that signed withdrawal order, bearing a large "X" over the October 12, 2015 file stamp and a second signature of the trial judge, was file-marked December 4, 2015.

Further, in the withdrawal order, the trial court found "that no objection to the motion to withdraw ha[d] been filed," but the docket sheet and Register of Actions both provide that Father appeared at the hearing on the motion to withdraw and objected to the withdrawal.

- The appointment of Mother as the sole managing conservator (SMC) with attendant rights and duties would be in S.H.'s best interest based on Father's alcohol abuse and the living conditions at his home; and

- Father was a disruption at S.H.'s daycare center, had "pretty much intimidated everybody" there, and the director did not want him at the daycare center.

Hearing this evidence, the trial court appointed Mother as SMC and appointed Father as possessory conservator. The trial court ordered that Father would have supervised possession of S.H. at his expense for four hours on Sundays of the first and third weekends of each month, for two hours on her birthday, and for four hours each on Christmas Day and Thanksgiving Day. The court also ordered Father to stay away from S.H.'s daycare except for events to which parents were invited. The trial court further ordered Father to pay $570 per month in child support, $1,832.62 in child support and medical support arrearages, and $4,500 in attorney's fees.

G. Father Files Motion for New Trial and Mother Responds.

Father retained new counsel, who filed a first amended motion for new trial along with Father's affidavit and supplemental affidavit alleging that Father's failure to appear was the result of an accident or mistake and was not due to an intentional act or the result of conscious indifference. Father claimed that he had mistakenly believed that the trial was set for December 4, 2015, based on information he had received from his former lawyer. Father attached proof that he had requested time off from his employer for December 4.

Father alleged that the default judgment was based on "misrepresentations [and] omissions of fact, and . . . not in the best interest of" S.H. He claimed that his meritorious defense was that he is S.H.'s biological father and that it was in her best interest to have frequent interaction with him. In his affidavit supporting the amended motion for new trial, he also stated that his "possession with her was substantially stripped." Both of Father's affidavits alleged that he does not pose a danger of harm to S.H. despite what Mother might have told the trial court and that because of his absence at trial, the trial court was not able to hear evidence that he would have offered to refute Mother's allegations. However, Father did not describe this evidence. He further stated that Mother "ha[d] often engaged in acts which ha[d] circumvented [his] rights as a father and further presented a one-sided view of [their] interactions and [his] alleged demeanor with respect to her and/or [S.H.]." Again, however, he did not describe Mother's acts or describe his view of their interactions or his demeanor or otherwise provide refuting evidence. Finally, Father indicated that he was willing to reimburse Mother's legal expenses incurred in obtaining the default judgment.

In Mother's response to Father's original motion for new trial, she maintained that the final trial had been set for December 3 at the August 6, 2015 temporary hearing at which both she and Father were present. She further responded that he had not alleged a meritorious defense.

H. The Trial Court Denies Motion for New Trial after Hearing.

At the February 19, 2016 hearing on his motion for new trial, Father's new counsel argued that as a result of the default judgment, Father had "gone from seeing [S.H.] 48 hours a month to 8 hours a month supervised." Father testified that before the default judgment, he had had possession of S.H. from 6:00 p.m. to 8:00 p.m. on Wednesdays and Thursdays and from 2:00 p.m. to 6:00 p.m. on Sundays and that had his possession schedule stayed on track, his Sunday period of possession would have increased to six hours, for a total of ten hours per week. He admitted that the December 3 trial date was discussed at the August 6 hearing but maintained that he had mixed up the days. Father also testified that he had not seen his daughter since December 3 because he could not afford to pay for supervised visits. He testified that he did not believe that he needed supervised visitation and that he was harmed because he had not been able to address that issue with the trial court.

Father next testified that he had a meritorious defense to Mother's allegations regarding S.H.'s best interest and had not been able to present it to the trial court but could "now present that defense to the Court" and was "ready and willing to proceed and go forward with this matter, if granted a new trial."

According to Father, he was ordered to get SoberLink "[s]imply because" of his two DWIs. In addition, he did not believe that he had a substance abuse problem and had not been diagnosed with one or as "being either mentally incompetent or suffering from an abusive problem." Father also testified that he

did not believe that he posed a threat of danger to S.H., that no social study had been done of either parent, and that he believed that unnamed "factors" in his relationship with Mother had not been discussed in the December 3 trial. Father admitted that something Mother's counsel showed him at the hearing indicated that he had had four positive tests for alcohol since the August 6, 2015 hearing. Father testified that he was willing to cover Mother's legal expenses in obtaining the default judgment against him.

When questioned, Mother admitted that she had texted Father on December 3, 2015, to let him know that the possession schedule had changed as a result of the trial and he had indicated to her that he thought the trial was to occur the next day. Mother also testified, among other things, that

- Father did not comply with the additional orders rendered by the trial court on August 6;
- She believed that Father had alcohol issues;
- She had tried to contact Father in various ways since December 3 to offer him time with S.H., but he did not respond; and
- Father had not contacted her for visitation with S.H. Finally, Mother testified that she had no problem with Father seeing S.H. "as long as he's not drinking."

The trial court denied Father's motion for new trial.

II. The Trial Court Did Not Abuse Its Discretion by Denying Father's Motion for New Trial.

In his sole issue, Father contends that the trial court abused its discretion by denying his motion for new trial after the post-answer default judgment because he satisfied all the *Craddock* factors. *See Craddock v. Sunshine Bus*

Lines, 133 S.W.2d 124, 126 (Tex. 1939). A trial court abuses its discretion by not granting a new trial after a default judgment when the defendant establishes all three elements of the *Craddock* test. *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994) (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992)).

A. The *Craddock* Test

Craddock, which applies to no-answer and post-answer default judgments alike, *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966), provides that a new trial should be granted after a default judgment when (1) the defendant's failure to answer before judgment was neither intentional nor the result of conscious indifference but was due instead to a mistake or an accident, as long as (2) the motion for a new trial sets up a meritorious defense, and (3) the motion is filed when the trial court's granting thereof will not cause delay or otherwise harm the plaintiff. *Craddock*, 133 S.W.2d at 126.

The defaulting party has the burden of setting forth facts establishing all three elements of the *Craddock* test. *Scenic Mountain Med. Ctr. v. Castillo*, 162 S.W.3d 587, 590 (Tex. App.—El Paso 2005, no pet.). If the motion for new trial and accompanying affidavits or other evidence fail to establish any prong of the *Craddock* test, then the trial court's denial of a new trial will be upheld. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Ivy*, 407 S.W.2d at 215.

B. Father Did Not Establish a Meritorious Defense.

A meritorious defense is one that would cause a different—though not necessarily opposite—result upon retrial. *Folsom Invs., Inc. v. Troutz*, 632 S.W.2d 872, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). A party sets up a meritorious defense when his motion for new trial and supporting affidavit or other evidence "set forth facts which in law constitute a meritorious defense, regardless of whether those facts are controverted." *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *Evans*, 889 S.W.2d at 270. The affidavits or other evidence must prove "'prima facie that the defendant has such meritorious defense.'" *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993) (op. on reh'g) (quoting *Ivy*, 407 S.W.2d at 214). This requirement "prevent[s] the reopening of cases to try out fictitious or unmeritorious defenses." *Ivy*, 407 S.W.2d at 214. Therefore, conclusory allegations are insufficient. *$25,435.00 in U.S. Currency v. State*, No. 02-16-00137-CV, 2016 WL 7240654, at *3 (Tex. App.—Fort Worth Dec. 15, 2016, no. pet.) (mem. op.); *Folsom Invs., Inc.*, 632 S.W.2d at 875. A conclusory allegation does not provide underlying facts to support the conclusion. *$25,435.00 in U.S. Currency*, 2016 WL 7240654, at *3; *Weech v. Baptist Health Sys.*, 392 S.W.3d 821, 826 (Tex. App.—San Antonio 2012, no pet.).

Here, Father did not set forth any underlying facts supporting his position that it was in S.H.'s best interest to have frequent interaction with him, that he posed no danger to her, that he could refute Mother's allegations, or that Mother misrepresented or omitted facts at trial. These bare allegations alone are

insufficient to set up a meritorious defense. *See Ivy*, 407 S.W.2d at 214–15 (holding defendant who alleged in motion for new trial that he had good and valid deed to land, a meritorious defense, and fee simple ownership had alleged mere conclusions that were insufficient to set up meritorious defense). Because Father failed to set up a meritorious defense, he did not satisfy all three elements of the *Craddock* test. Thus, the trial court did not abuse its discretion by denying his motion for new trial. *See Holt Atherton Indus., Inc.*, 835 S.W.2d at 83; *Ivy*, 407 S.W.2d at 215. We overrule Father's sole issue.

III. Conclusion

Having overruled Father's sole issue, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

GABRIEL, J., concurs without opinion.

DELIVERED: February 23, 2017