In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00202-CV

IN THE INTEREST OF T.C. AND D.C., CHILDREN

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 71,464-D; Honorable Don Emerson, Presiding

July 26, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

In March 2012, the trial court entered a *Final Order in Suit Affecting the Parent-Child Relationship* appointing Appellant, A.S., possessory conservator of her children, T.C. and D.C.[1] H.S., the children's maternal grandfather, was appointed permanent managing conservator. In September 2014, Appellee, J.C., the children's paternal grandmother, filed a petition to modify conservatorship, seeking appointment as managing conservator. A.S. filed a *pro se* answer contesting J.C.'s petition.

[1] To protect the privacy of the parties involved, we refer to them by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014).

A temporary hearing was held in October 3, 2014,[2] and following a final hearing on April 28, 2015, the trial court entered its *Order in Suit to Modify Parent-Child Relationship* appointing J.C. as sole managing conservator and A.S. as possessory conservator. A.S. did not appear at the final hearing but was notified by the Potter County District Clerk that a "default judgment" had been entered against her. Proceeding *pro se*, A.S. appeals the order of April 28, 2015, asserting the trial court erred in entering a default order when she had no notice of the final hearing and there was no evidence to support the allegations made by J.C.[3] We affirm.

BACKGROUND

In 2012, when A.S. was appointed possessory conservator and her father, H.S., was appointed managing conservator, her right to possession and access of the children was conditioned on her visitation being supervised. The court order did not, however, specify who was to supervise the visits. Several years thereafter, J.C., who lives in McKinney, Texas, sought to modify conservatorship by alleging that A.S. was living with her father in violation of the court's visitation order. J.C. also alleged the conditions of the small home were not suitable for the children. She averred the home was filthy with visible roaches and trash strewn everywhere. She also alleged the children had lice and slept on the floor because one bedroom was occupied by H.S. and the other by A.S. and her boyfriend, who was on parole. Furthermore, according to J.C., the children's educational needs were not being met.

[2] The record of that hearing was not included with the appellate record.

[3] Other parties affected by the modification order, including H.S., did not appeal.

When suit was first filed, notice of a temporary hearing to be held on October 3, 2014, was provided to H.S. at his home address. Citation, with notice of the temporary hearing date, was also served on A.S. at the same address. Both H.S. and A.S. filed a *pro se* answer on October 2, 2014. In her answer to J.C.'s petition, A.S. admitted living with her children but denied J.C.'s other allegations.

The clerk's record does not contain a notice of hearing for the final hearing held on April 28, 2015. However, at the final hearing, J.C.'s counsel advised the trial court that notice was provided to A.S. by both regular mail and certified mail. Both mailings were addressed to the same address where A.S. had been served when suit was filed. The certified mail notice was returned unclaimed, but notice by regular mail was not returned.

J.C. and her husband were the only witnesses at the final hearing.[4] J.C. testified that A.S. has alienated her and her husband from the children. J.C.'s husband testified they own a home and both have steady employment. Although he described himself and his wife as poor, he testified they have a suitable and stable home to provide for the children. At the conclusion of the testimony, the trial court announced, "these folks [J.C. and her husband] are appointed managing conservator." The *Order in Suit to Modify Parent-Child Relationship* was signed and filed on April 28, 2015.

That same day, i.e., April 28, 2015, the Potter County District Clerk notified A.S. that a "default judgment" had been entered. The notice was mailed to the same

[4] The record indicates that J.C.'s son, the children's father, is incarcerated for molesting the children and that A.S. never worked her services in the CPS case.

address where A.S. was first served with notice of the suit. On May 14, 2015, A.S. timely filed a notice of appeal. However, no motion for new trial was filed.

APPLICABLE LAW

If a defendant is properly served with process, in order to have a default judgment set aside, the defendant must prove the following three elements: (1) the failure to answer was not intentional or the result of conscious indifference but was due to a mistake or accident, (2) there is a meritorious defense, and (3) the motion is filed at such time that granting a new trial would not result in delay or otherwise injure the plaintiff. *In the Interest of R.R.*, 209 S.W.3d 112, 114-15 (Tex. 2006) (citing *Craddock v. Sunshine Bus Lines*, *Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939)).

Once a defendant has made an appearance in a case, she is entitled to notice of a dispositive hearing as a matter of due process under the Fourteenth Amendment. *Peralta v. Heights Medical Center*, *Inc.*, 485 U.S. 80, 81, 108 S. Ct. 896, 99 L. Ed. 75 (1988); *LBL Oil Co. v. International Power Services*, *Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989) (*per curiam*). The notice must be reasonably calculated, under the circumstances, to apprise all interested parties of the pendency of the action and afford them the opportunity to present their objections to the relief being requested. *Kuykendall v. Beverly,* 436 S.W.3d 809, 813 (Tex. App.—Texarkana 2014, no pet.). In this regard, under Rule 21a of the Texas Rules of Civil Procedure, if notice of a hearing is properly addressed and mailed, postage prepaid, a presumption arises that the notice was properly received by the addressee. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987). This presumption may be rebutted by an offer of proof of non-receipt; however,

in the absence of any evidence to the contrary, the presumption has the force of a rule of law. *Kuykendall,* 436 S.W.3d at 813.

Failure to provide notice of a post-answer final hearing constitutes a lack of due process and is grounds for reversal. *Id.* Although the right to proper service of trial settings is a due process right, that right may be waived if not brought to the attention of the trial court. *Caudle v. Oak Forest Apts.*, No. 02-14-00308-CV, 2015 Tex. App. LEXIS 12803, at *8 (Tex. App.—Fort Worth Dec. 17, 2015, pet. denied) (mem. op.). In that regard, complaints regarding the trial court's failure to set aside a default judgment must be raised in a motion for new trial. TEX. R. CIV. P. 324(b)(1); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 699 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). A motion for new trial is the vehicle for introducing evidence to satisfy the *Craddock* elements.[5] *Puri v. Mansukhani*, 973 S.W.2d 701, 715 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Failure to file a motion for new trial waives appellate review that a default judgment should be set aside. *Barret v. Westover Park Cmty. Ass'n*, No. 01-10-011112-CV, 2012 Tex. App. LEXIS 1585, at *5-6 (Tex. App.—Houston [1st Dist.] March 1, 2012, no pet. (mem. op.).

ANALYSIS

A.S. filed a *pro se* answer to J.C.'s petition to modify conservatorship. Accordingly, in the posture of a post-answer default, due process required that she receive notice of the final hearing via a means reasonably calculated to apprise her of the pendency of that hearing. At the final hearing, counsel advised the court that A.S.

[5] The same *Craddock* requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987).

was given notice of the final hearing via U.S. mail, postage prepaid, at the address where she was served and where she subsequently received notice of entry of judgment. On appeal, she maintains for the first time that she did not receive such notice.

In the underlying case, A.S. did not file a motion for new trial or any other post-judgment motion requesting a hearing to present evidence that she did not receive notice of the final hearing. Having failed to file a motion for new trial, we conclude she waived appellate review. Consequently, the propriety of the default judgment is not subject to appellate review. Our disposition of her complaint regarding the default judgment dispenses with the necessity of reviewing her claim that the evidence does not support the trial court's conservatorship order. A.S.'s issues are overruled.

CONCLUSION

The trial court's *Order in Suit to Modify Parent-Child Relationship* is affirmed.

Patrick A. Pirtle
Justice