In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00255-CV

IN THE INTEREST OF E.R.S., A CHILD

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2015-516,168, Honorable Ruben Gonzales Reyes, Presiding

May 24, 2018

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

This is an appeal from a no-answer default final order in a suit affecting the parent-child relationship (SAPCR) rendered against appellant, Cassie Brooke Stone (the mother), and in favor of appellee, Brandon Keith Stone (the father). We will affirm the final order.

The father and the mother were divorced in August 2015. In October 2016 the father petitioned the trial court to modify the divorce decree's provisions regarding the parent-child relationship. A recitation in a subsequent court order states that the mother was served with citation on October 19, 2016. The clerk's record does not contain the

mother's answer and the clerk of this Court has verified with the trial court clerk that an answer was not filed.

By amended petition filed in March 2017, the father requested additional relief. The record contains no indication that the mother was served a copy of this pleading.[1] Among other things, he sought the exclusive right to designate the primary residence of E.R.S., an order compelling the mother to pay child support, and a permanent injunction restraining certain conduct by the mother. The father supported his amended pleading with an affidavit predicated on the statement, "The child's present circumstances would significantly impair his physical health or emotional development."[2]

The associate judge conducted a temporary-orders hearing on March 30, 2017. The order recites that the mother did not appear for the hearing and the word "default" appears the title of the instrument.

Neither the mother nor the father appeared in person for the final hearing and no reporter's record of the proceeding was made. According to a recitation in the final order "the parties" waived a reporter's record. The trial court signed a default final order granting the father the exclusive right to designate the primary residence of E.R.S. without

[1] *Cf. In re E.A.,* 287 S.W.3d 1, 6 (Tex. 2009) (explaining defendant who does not answer following service must nevertheless be served with an amended petition seeking more onerous relief although service of the amended petition is now accomplished according to Rule 21a procedure). This service issue was not preserved in the trial court and is not raised on appeal.

[2] *Cf.* TEX. FAM. CODE ANN. § 156.102(a),(b)(1) (West 2014) (concerning suit to modify exclusive right to designate primary residence of child within one year of order).

regard to geographic location,[3] ordering the mother to pay child support, and permanently enjoining specific conduct by the mother.

The mother filed a motion to set aside the default final order and for a new trial. In the motion she alleged her counsel electronically filed an answer, the father's counsel knew of the mother's counsel's representation, and the mother's counsel did not receive notice of the final hearing. A meritorious defense to the father's case was not alleged and the motion was not verified or supported by affidavit.

After a hearing,[4] the trial court denied the mother's motion by a short order signed June 6, 2017. If the motion for new trial hearing was evidentiary, findings of fact and conclusions of law were neither requested nor filed.[5]

The mother appealed the denial of her motion for new trial but did not file a reporter's record. The father as appellee did not file a brief on appeal. After giving notice to the mother's counsel that a reporter's record had not been filed and affording the mother an opportunity to cure the omission, we ordered that only those issues or points raised and not requiring a reporter's record for decision would be considered. *See* TEX. R. APP. P. 37.3(c).

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[3] *See* TEX. FAM. CODE ANN. § 153.134(b)(1)(B) (West 2014).

[4] Although no reporter's record of the hearing has been filed, our communications with the reporter and other references to the hearing in documents in the clerk's record demonstrate that the trial court conducted a hearing on the mother's motion for new trial.

[5] Attached to the mother's brief are copies of four emails. Because they are not part of the official record we may not consider them in deciding the appeal. *Samara v. Samara,* 52 S.W.3d 455, 456 n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (op. on reh'g).

In her sole issue on appeal, the mother argues the trial court abused its discretion by denying her motion for new trial because good cause for granting it was shown. She contends her evidence met the requirements set out in *Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124 (1939).

We review the trial court's denial of a motion for new trial for an abuse of discretion. *Cliff v. Huggins,* 724 S.W.2d 778, 778-79 (Tex. 1987). The court's discretion is not unbridled, however; it may not decide cases merely as it deems proper without reference to any guiding rule or principle. *Craddock,* 133 S.W.2d at 126. Thus, a trial court abuses its discretion if it acts without reference to any guiding rules and principles or, said another way, if its actions were arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985). Generally, under the abuse of discretion standard applied in family law cases, legal and factual sufficiency of the evidence are not independent grounds of error but are relevant factors for determining whether the trial court abused its discretion. *In re B.F.,* No. 07-16-00282-CV, 2017 Tex. App. LEXIS 2712, at *9 (Tex. App.—Amarillo Mar. 29, 2017, no pet.) (mem. op.).

Under *Craddock*, the default judgment rendered against the mother should be set aside only if the proof supporting her motion for new trial satisfied three requirements. *See Fid. & Guar. Ins. Co. v. Drewery Constr. Co.,* 186 S.W.3d 571, 574 (Tex. 2006) (per curiam). Those requirements are: (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake, (2) the

motion for new trial sets up a meritorious defense, and (3) granting the motion will not cause delay or otherwise injure the plaintiff. *Craddock*, 133 S.W.2d at 126.[6]

As noted, we have no reporter's record of the hearing on the mother's motion for new trial. Without an evidentiary record from the hearing we are not able to determine the sufficiency of the mother's proof. Having no evidentiary record, it is not possible for us to gauge whether the mother satisfied the *Craddock* requirements. We are thus unable to say the trial court abused its discretion when it denied the mother's motion for new trial.

Accordingly, we overrule the mother's issue and affirm the trial court's final order.

James T. Campbell
Justice

[6] Because the best interest of the child is the fundamental consideration in a SAPCR, some courts of appeals have expressed concern in applying the *Craddock* standards to default situations. *See, e.g, Rhamey v. Fielder,* 203 S.W.3d 24, 28 (Tex. App.—San Antonio 2006, no pet.) (collecting cases and "urg[ing] the Texas Supreme Court to reconsider whether *Craddock* is an appropriate standard in this context . . ." (citation and internal quotation marks omitted)); *but cf. Lowe v. Lowe,* 971 S.W.2d 720 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). The court in *Rhamey* concluded that without direction from the Texas Supreme Court it was bound to apply the *Craddock* standard. *Rhamey,* 203 S.W.3d at 29 (citing *Martinez v. Martinez,* 157 S.W.3d 467, 470 (Tex. App.—Houston [14th Dist.] 2004, no pet.)).