NO. 12-20-00130-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	*§*	
S.R.S.,	*§*	***ORIGINAL PROCEEDING***
RELATOR	*§*	

MEMORANDUM OPINION

S.R.S. filed a petition for writ of mandamus challenging the trial court's order denying her motion for judgment arising from a Rule 11 agreement between her and Real Party in Interest C.W.B. The Respondent is the Honorable Taylor Heaton, Judge of the County Court at Law Number 2 of Smith County, Texas. We deny the petition.

BACKGROUND

S.R.S. is the paternal grandmother of K.R.S. and K.G.S. C.W.B. is the mother of the two children. In 2013, C.W.B.'s and the children's father's parental rights were terminated, and the children were adopted by S.R.S. and her, now, late husband. In 2017, C.W.B. filed a petition for bill of review, which ultimately resulted in Respondent's entering an agreed order reinstating C.W.B's parental rights and vacating S.R.S. and her late husband's adoption.

In July 2019, S.R.S. filed a petition for bill of review and request for grandparent access to the children. C.W.B. answered and requested attorney's fees, expenses, and court costs. In late October and early November 2019, S.R.S. and C.W.B. signed a Rule 11 agreement, in which they agreed, in pertinent part, as follows:

> 1. [S.R.S.] agrees to dismiss her Petition for Bill of Review filed herein on July 3, 2019, with prejudice, and all terms of the June 8, 2018 Agreed Order remain in effect unless specifically modified herein.

2. [S.R.S.] is enjoined from filing any lawsuit involving the children the subject of this suit without first discussing any prevailing issues with [C.W.B.] or attending mediation of the issues at the sole cost of [S.R.S.].

3. [C.W.B.] agrees to allow [S.R.S.] two hours per month supervised visitation with the children, by written agreement, under the below terms.

4. Supervised visitation by [S.R.S.] with the children shall be by agreement with [C.W.B.] for no more than 2 hours per month and [S.R.S.] shall give [C.W.B.] no less than 7 days, in writing, including electronic writing, prior to her intent to exercise her supervised visitation.

5. [C.W.B.] shall have the right to designate the place and time where [S.R.S.] shall exercise her 2 hours of supervised visitation with the children, and shall give [S.R.S.] no less than 2 days notice via electronic writing of her location designation. [C.W.B.] will not designate any time earlier than 10:00 a.m., or later than 5:00 p.m. When the children reside in Smith County, Texas and contiguous counties thereto, then the location for supervised visitation shall be in either city where the parties reside or any location in between. If and when the children no longer reside in Smith County, Texas and contiguous counties thereto, then the supervised visitation shall be in the city in which the children reside.

6. [C.W.B.] shall be present for the duration of any supervised visitation by [S.R.S.] and the children.

7. [C.W.B.] shall not be present at the periods of supervised visitation with [S.R.S.] and the children.

8. [S.R.S.] shall be responsible for all travel to and from any location chosen by [C.W.B.] for [S.R.S.] to exercise her supervised visitation of the children, including but not limited to any and all costs or expenses incurred during the supervised visitation of the children.

9. [S.R.S.] is enjoined from allowing the biological dad, [G.S.], to be in the presence of or around any location where the children may reasonably be assumed to be present. [S.R.S.] and [C.W.B.] are both enjoined during the supervised visitation periods by [S.R.S.] from (a) using drugs or alcohol within 12 hours before or during the supervised visitation by [S.R.S.] of the children and (b) bringing any other person to the supervised visitation to any location where the children may reasonably be assumed to be present.

IT IS AGREED AND UNDERSTOOD THAT, ONCE THIS AGREEMENT IS ENTERED INTO AND SIGNED BY ALL PARTIES AND APPROVED BY THE COURT, THIS AGREEMENT SHALL BE IRREVOCABLE, UNLESS AND UNTIL OTHERWISE MODIFIED IN WRITING BY THE PARTIES AND/OR THE COURT, AND WILL BE ENFORCED BY THE COURT.

On November 21, 2019, Respondent made a signed notation on the last page of the agreement that it was "APPROVED" and "ADOPTED as an Order of the Court[.]"

Subsequently, S.R.S. filed a motion to enter judgment, to which she attached a copy of the Rule 11 agreement and a proposed "Order Granting Grandparent Possession or Access and Dismissing Petition for Bill of Review." Thereafter, C.W.B. withdrew her consent to the Rule 11 agreement. The parties submitted briefing on the issue to Respondent and, following a

hearing on the matter, Respondent denied S.R.S.'s motion to enter judgment. S.R.S. subsequently filed this petition for writ of mandamus.

AVAILABILITY OF MANDAMUS

Mandamus relief is available if the relator establishes a clear abuse of discretion for which there is no adequate remedy by appeal. ***In re Deere & Co***., 299 S.W.3d 819, 820 (Tex. 2009) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. ***In re Minix***, 543 S.W.3d 446, 450 (Tex. App.–Houston [14th Dist.] 2018, orig. proceeding); *see also* ***In re Dep't of Family & Protective Svcs.***, 273 S.W.3d 637, 642–43 (Tex. 2009) (orig. proceeding).

Whether a clear abuse of discretion adequately can be remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. ***In re McAllen Med. Ctr., Inc***., 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). Because this balance depends heavily on the circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. ***Id***. An appeal is inadequate when the parties are in danger of permanently losing substantial rights. ***In re Van Waters & Rogers, Inc***., 145 S.W.3d 203, 211 (Tex. 2004) (orig. proceeding). "Such a danger arises when the appellate court would not be able to cure the error, when the party's ability to present a viable claim or defense is vitiated, or when the error cannot be made part of the appellate record." ***Id***.

CONSENT JUDGMENT BASED ON RULE 11 AGREEMENT

In her petition, S.R.S. argues that once Respondent signed the parties' Rule 11 agreement, adopting it as an order of the court, C.W.B. no longer could withdraw her consent, and Respondent had a ministerial duty to render judgment in accordance with the agreement.

Texas Rule of Civil Procedure 11 states, "[u]nless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11; *see* ***Cunningham v. Zurich Am. Ins. Co***., 352 S.W.3d 519, 525 (Tex. App.–Fort Worth 2011, pet. denied); *see also* ***In re D.R.G***., No.

14-16-00023-CV, 2017 WL 2960026, at *2–3 (Tex. App.–Houston [14th Dist.] Jul. 11, 2017, no pet.) (mem. op.) (applying general civil principles related to Rule 11 and consent judgments in a suit affecting parent-child relationship). Rule 11 agreements "are contracts relating to litigation." ***Kanan v. Plantation Homeowner's Ass'n, Inc***., 407 S.W.3d 320, 327 (Tex. App.–Corpus Christi 2013, no pet.); ***Trudy's Tex. Star, Inc. v. City of Austin***, 307 S.W.3d 894, 914 (Tex. App.–Austin 2010, no pet.). A settlement agreement must comply with Rule 11 to be enforceable. ***Padilla v. LaFrance***, 907 S.W.2d 454, 460 (Tex. 1995); ***Kennedy v. Hyde***, 682 S.W.2d 525, 528 (Tex. 1984); *see* ***Broderick v. Kaye Bassman Int'l Corp.***, 333 S.W.3d 895, 904–05 (Tex. App.–Dallas 2011, no pet.).

Rule 11 is an effective tool for finalizing settlements by objective manifestation so that the agreements themselves do not become sources of controversy. *See* ***Knapp Med. Ctr. v. De La Garza***, 238 S.W.3d 767, 768 (Tex. 2007). The purpose of Rule 11 is to ensure that agreements of counsel affecting the interests of their clients are not left to the fallibility of human recollection and that the agreements themselves do not become sources of controversy. ***Kanan***, 407 S.W.3d at 327; ***ExxonMobil Corp. v. Valence Operating Co***., 174 S.W.3d 303, 309 (Tex. App.–Houston [1st Dist.] 2005, pet. denied). A trial court has a ministerial duty to enforce a valid Rule 11 agreement. ***In re Guardianship of White***, 329 S.W.3d 591, 592 (Tex. App.–El Paso 2010, no pet.); ***Scott–Richter v. Taffarello***, 186 S.W.3d 182, 189 (Tex. App.–Fort Worth 2006, pet. denied); ***ExxonMobil Corp***., 174 S.W.3d at 309.

But where parties enter into a valid Rule 11 agreement to settle a case, the parties must consent to the agreement at the time the trial court renders judgment. *See* ***Kanan***, 407 S.W.3d at 328; *see also* ***Kennedy***, 682 S.W.2d at 528; ***Burnaman v. Heaton***, 240 S.W.2d 288, 291 (Tex. 1951). The trial court cannot render an agreed judgment after a party has withdrawn her consent to a settlement agreement. *See* ***Padilla***, 907 S.W.2d at 461–62; ***Quintero v. Jim Walter Homes, Inc.***, 654 S.W.2d 442, 444 (Tex. 1983). "When a trial court has knowledge that one of the parties to a suit does not consent to a judgment, the trial court should refuse to sanction the agreement by making it the judgment of the court." ***Quintero***, 654 S.W.2d at 444; ***Burnaman***, 240 S.W.2d at 291; *see* ***Gamboa v. Gamboa***, 383 S.W.3d 263, 269 (Tex. App.–San Antonio 2012, no pet.).

Furthermore, when a trial court renders judgment based on a Rule 11 agreement, the signed judgment must comply literally with the terms of the agreement. *See* ***Tinney v. Willingham***, 897 S.W.2d 543, 544 (Tex. App–Fort Worth 1995, no writ) (citing ***Vickrey v. Am. Youth Camps, Inc***., 532 S.W.2d 292, 292 (Tex. 1976)). A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. ***Tinney***, 897 S.W.2d at 544. Nevertheless, a written settlement agreement may be enforced as a contract even though one party withdraws consent before judgment is rendered on the agreement. ***Mantas v. Fifth Court of Appeals***, 925 S.W.2d 656, 658 (Tex. 1996); ***Padilla***, 907 S.W.2d at 462.

Discussion

In the instant case, S.R.S. argues that Respondent's signing the Rule 11 agreement and adopting the agreement as an order of the court amounted to a rendition of judgment or an interim order, thereby preventing C.W.B. from withdrawing her consent.

We first observe that the Rule 11 agreement is in writing, signed by the parties and their respective attorneys, and was filed with the papers of the record. Thus, it is a valid Rule 11 agreement. *See* TEX. R. CIV. P. 11. We further observe that the trial court's notation on the last page of the agreement that it is adopted as an order of the court is sufficient to qualify the matters therein as a court order. *See* ***In re B.L.R.P***, 269 S.W.3d 707, 710 (Tex. App.–Amarillo 2008, no pet.) ("order" is a direction of court or judge made or entered in writing, and not included in judgment, which determines some point or directs some step in proceedings).[1] But even if we assume arguendo, as S.R.S. contends, that the order is an "interim order that resolves disputed issues" or amounts to a rendition of those issues, that fact is not dispositive of the issue of whether the trial court abused its discretion by refusing to sign the proposed judgment.

S.R.S.'s proposed "Order Granting Grandparent Possession or Access and Dismissing Petition for Bill of Review" contains the conditions to which the parties agreed in their Rule 11 agreement. It also provides, among other things, that each party shall be responsible for his or her own attorney's fees and court costs. In her original answer, G.W.B. sought attorney's fees and costs. *See, e.g.*, TEX. FAM. CODE ANN. § 106.002 (West 2019) (in suit affecting parent-child

[1] Despite the trial court's having adopted the parties' Rule 11 agreement as a court order, the trial court has the power to rescind interlocutory orders to the extent that it retains plenary power. *See* ***Ramirez v. EOG Resources, Inc.***, No. 04-00-00889-CV, 2002 WL 31272373 (Tex. App.–San Antonio Sept. 30, 2002, pet. denied) (op., not designated for publication). However, there is no indication in the underlying proceedings that the trial court expressly rescinded its order adopting the terms of the parties' agreement.

relationship court may render judgment for reasonable attorney's fees and expenses). Because the parties' Rule 11 agreement does not resolve the issue of C.W.B.'s entitlement to attorney's fees in the underlying matter,[2] the trial court had no power to sign a proposed judgment containing such a provision to which the parties did not previously agree.[3] *See* ***Tinney***, 897 S.W.2d at 544; *cf.* ***Weaver v. Thompson***, No. 12-13-00145-CV, 2014 WL 1747006, at *3 (Tex. App.–Tyler Apr. 30, 2014, no pet.) (mem. op.) (order granting summary judgment not final, appealable order because it did not bear any indicia of finality and because pleaded issue of attorney's fees or costs not raised in motion for summary judgment). Therefore, we hold that the trial court did not abuse its discretion in refusing to sign the proposed judgment.[4]

DISPOSITION

Having held that the trial court did not abuse its discretion by refusing to sign the proposed judgment in this matter, we deny S.R.S.'s petition for writ of mandamus.

BRIAN HOYLE
Justice

Opinion delivered July 15, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

[2] We recognize that the Rule 11 agreement serves as a partial modification of the June 8, 2018, agreed order, which, according to the Rule 11 agreement, remains in effect unless the Rule 11 agreement modified its terms. That order sets forth that the attorney's fees and costs are to be borne by the party which incurred them. Therefore, those terms are not modified by the Rule 11 agreement and remain in effect in that cause. But it is not reasonable to conclude that the order regarding attorney's fees and costs in that separate cause should, without more, preclude the parties from seeking and recovering attorney's fees and costs in a subsequent cause.

[3] We further note that the proposed judgment contains language that its provisions are in the best interest of the child. Neither the parties' Rule 11 agreement nor the June 8, 2018, order contains a "best interest" finding. *See* ***Tinney***, 897 S.W.2d at 544; *see also* ***In re Derzapf***, 219 S.W.3d 327, 333 (Tex. 2007) (orig. proceeding) (noting that Texas Family Code, Section 153.433(2) requires grandparent seeking court-ordered access to overcome presumption that parent acts in child's best interest by proving by preponderance of evidence that denial of access to child would significantly impair child's physical health or emotional well-being).

[4] Because we have determined that the trial court did not abuse its discretion, we do not consider whether S.R.S. has an adequate remedy by appeal. *See, e.g.*, ***In re Prudential Ins. Co. of America***, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (considering first whether trial court abused its discretion before considering whether relator had an adequate appellate remedy).

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JULY 15, 2020

NO. 12-20-00130-CV

S.R.S.,
Relator
V.

HON. TAYLOR HEATON,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by: S.R.S.; who is the relator in appellate Cause No. 12-20-00130-CV and a party to Cause No. 17-2106-F, pending on the docket of the County Court at Law No. 2 of Smith County, Texas. Said petition for writ of mandamus having been filed herein on May 29, 2020, and the same having been duly considered, because it is the opinion of this Court that a writ should not issue, it is therefore CONSIDERED, ADJUDGED, and ORDERED that said petition for writ of mandamus be, and the same is, hereby **denied**.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.