D.B.A. Family Law Section Case Law Update

May 11, 2016

GEORGANNA L. SIMPSON, P.C.

ATTORNEY AT LAW
1349 Empire Central Drive
Woodview Tower, Suite 600
DALLAS, TEXAS 75247-4042
PHONE 214-905-3739 • FAX 214-905-3799
EMAIL: georganna@glsimpsonpc.com

BETH M. HEARN

ATTORNEY AT LAW
555 Republic Drive, Ste. 200
Plano, Texas 75074
Phone: 469-509-6253 • Fax: 469-519-4253
EMAIL: beth@bhearnlegal.com

DIVORCE
Validity of Marriage

TRIAL COURT REQUIRED TO DETERMINE TO WHAT EXTENT BANKRUPTCY STAY AFFECTED DIVORCE PROCEEDINGS.

***Adeleye v. Driscal*, ___ S.W.3d ___, No. 14-14-00822-CV, 2016 WL 1714657 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (subst. op.) (04-28-16).**

Facts: After the appellate court affirmed Husband and Wife's final decree of divorce, Husband filed a motion for rehearing alleging that he filed for Chapter 13 bankruptcy before the divorce was filed and that the bankruptcy was not discharged until after the divorce decree was signed. Thus, Husband argued that due to the automatic stay, the trial court lacked jurisdiction to divide the marital estate.

Holding: Abated and Remanded

Opinion: Any action taken in violation of an automatic bankruptcy stay is void, not merely voidable. The appellate court remanded the case to the trial court to determine whether the alleged stay prohibited proceedings in this case.

DIVORCE
Standing and Jurisdiction

PURSUANT TO FAMILY CODE, SAPCR COULD NOT BE SEVERED FROM DIVORCE.

***In re B.T.G.*, ___ S.W.3d ___, No. 05-13-00305-CV, 2016 WL 1367073 (Tex. App.—Dallas 2016, no pet. h.) (04-06-16) (on reh'g).**

Facts: Husband and Wife were married for one year and had one Child of the marriage. Wife also had a teenage son from a previous marriage. During the marriage, the parties accumulated no community property or debt other than personal belongings.

The trial court entered temporary orders in the SAPCR, found that Husband had committed family violence, appointed Wife temporary sole managing conservator of their Child, and granted Wife temporary exclusive possession of the parties' residence. Subsequently, because Husband refused to move out of the residence, and Wife and her children were forced to sleep at shelters or with friends. In order to provide for a more permanent home, Wife obtained financing to buy a HUD home. She moved to sever the divorce from the SAPCR because if the divorce was not finalized "soon enough" she would lose out on the opportunity to buy a home at price she could afford.

The trial court severed the divorce from the SAPCR and proceeded with a bench trial on the divorce. A divorce was granted on the ground of insupportability and provided that the child-related issues would be addressed in the pending SAPCR. The severance order and the divorce decree stated that severance was in the best interest of the Child.

Husband appealed arguing that the trial court erred in severing the divorce from the SAPCR.

Holding: Vacated and Remanded

Opinion: Under the Tex. R. Civ. P., a trial court generally has broad discretion in ruling on a motion for severance. However, the Tex. Fam. Code trumps the Tex. R. Civ. P., and under the Family Code, a divorce suit involving children must include a SAPCR for the children of the marriage. Further, because a property division must be included in a divorce, and a court's division of property must have due regard for the rights of the children of the marriage, a SAPCR and divorce should not be severed.

DIVORCE
DIVISION OF PROPERTY

WIFE FAILED TO ESTABLISH VALUE OF REIMBURSEMENT CLAIM BECAUSE SHE DID NOT PROVE THAT ENHANCED VALUE WAS ATTRIBUTABLE TO CAPITAL IMPROVEMENTS.

***In re Marriage of McCoy and Els*, ___ S.W.3d ___, No. 14-14-00870-CV, 2016 WL 1444139 (Tex. App.—Houston [14 Dist.] 2016, no pet. h.) (04-12-16).

Facts: Husband and Wife were married 25 years and lived in a home Husband inherited. During the divorce, Wife sought reimbursement to the community for capital improvements to Husband's separate property. Wife testified to the value of the home at the time of marriage and the time of divorce. Additionally, she testified to the type and cost of the improvements to the property. The court found the reimbursement claim was equal to the enhanced value and split that value equally between the parties. Husband appealed arguing that the evidence was insufficient to support the trial court finding regarding the value of the reimbursement claim.

Holding: Reversed and Remanded

Opinion: To be reimbursable, a property's enhanced value must be "attributable to the community expenditures." A determination must be made as to the value at the date of dissolution had the improvements not been present on the property.

Here, Wife testified to the value of the property at the time of marriage. She testified to many capital improvements likely entitled to reimbursement, but only provided dates for improvements that occurred fifteen years after the marriage. Additionally, the present value was assessed ten years after that. There was no competent evidence of the property's value without the improvements. The court noted that this determination would have been easier if the improvements had been done closer in time to the two valuations.

SAPCR
PROCEDURE AND JURISDICTION

FATHER FAILED TO PRESENT ANY EVIDENCE TO JUSTIFY TRIAL COURT'S USE OF TEMPORARY EMERGENCY JURISDICTION UNDER THE UCCJEA.

***In re Salminen*, ___ S.W.3d ___, No. 01-14-01021-CV, 2016 WL 1356840 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (04-05-16).

Facts: Mother was a Finnish citizen, Father lived in New York, and the Child was a dual citizen of the U.S. and Finland. Two prior orders for conservatorship had been entered in Finland.

Mother and the Child moved temporarily to Texas, where Mother filed a petition to enforce Father's child support obligation. Father challenged the trial court's subject matter and personal jurisdiction under UIFSA and alternatively asked the trial court to exercise temporary emergency jurisdiction under the UCCJEA. Father claimed that he had been denied visitation and that Mother habitually exercised global forum shopping. The trial court denied Father's special appearance and plea to the jurisdiction and stated that it would "take general jurisdiction" under the UCCJEA. The trial court signed a temporary order giving Father immediate physical custody of the Child. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Although Mother initially pleaded that she and the Child lived in Texas at the time she filed, she later filed a motion indicating that they had returned to Finland. Nothing in the record supported a finding that the Child's home state was Texas.

Additionally, the evidence did not support an exercise of temporary emergency jurisdiction. There was no evidence that the Child had been abandoned or was subjected to or threatened with mistreatment or abuse. Further, even though Father testified that he had missed two visitations, he did not testify that Mother was to blame for the missed visitations.

Moreover, the trial court failed to comply with the UCCJEA's requirements that the court recognize the prior orders in its order, that it specify a period that it considered adequate to allow Father to obtain an order from the Finnish court, or that it made any effort to communicate with the Finnish courts.

SAPCR
CONSERVATORSHIP

GRANDMOTHER HAD STANDING TO SEEK CONSERVATORSHIP BECAUSE SHE EXERCISED ACTUAL CARE, CONTROL, AND POSSESSION OF THE CHILDREN.

In re K.S.**,** ___ S.W.3d ___, No. 14-15-00008-CV, 2016 WL 1660366 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (04-26-16).

Facts: Mother, Father, and their nine Children lived in Maternal Grandparents' house. When Grandmother filed her original petition seeking sole managing conservatorship, five of the children were minors. At the time of the appeal, only three were still minors.

Grandmother was the primary caregiver for the Children, and she and her husband supported the family financially. Father had a history of physically abusing the Children, and Mother took no steps to stop the abuse. TDFPS conducted an investigation, and at trial, representatives from TDFPS testified, as well as some of the adult Children. The trial court appointed Grandmother sole managing conservator, granted Mother limited, supervised visitation with the Children, and ordered that Father have no access to or possession of the Children. The parents appealed, arguing in part that Grandmother lacked standing to seek sole managing conservatorship of the Children.

Holding: Affirmed

Opinion: The 14th District Court in Houston has previously held that Tex. Fam. Code § 102.003(a)(9)'s "actual care, control, and possession" does not require exclusive control, legal control, or that the parent relinquished care, control, and possession. Rather, the party seeking standing must show that she developed and maintained a relationship with the children entailing the actual guidance, governance, and direction similar to that typically exercised by parents with children.

Here, Grandmother was the primary caretaker for the Children, bought most of their food clothes, health care, and dental care, took them to and picked them up from school, and attended the Children's activities. This evidence was corroborated by multiple witnesses.

MISCELLANOUS

STATUTE REQUIRING COURTS TO APPOINT FIRST-LISTED APPOINTEE IN ROTATION LIKELY CONSTITUTIONAL BECAUSE APPOINTMENT IS AN ADMINISTRATIVE FUNCTION, NOT SUBSTANTIVE, CORE JUDICIAL POWER.

Tex. Att'y Gen. Op. No. KP-0071, 2016 WL 1554215 (03-16-16).

Issue: Whether Senate Bill 1876 (the "Bill) from the 84th Legislative Session modifying Tex. Gov't Code §§ 37.003 and 37.004 is unconstitutional.

The Bill requires a court using a rotation system for appointment of attorneys ad litem, guardians ad litem, mediators, and guardians to appoint the person whose name appears first on the applicable list maintained by the court, unless (1) otherwise agreed by the parties and the court; or (2) a person's special expertise, prior involvement, or geographic location is required to handle a complex matter.

Judge Olsen, a Tarrant County probate judge, questioned the constitutionality of the Bill, arguing that the Bill deprives judges of discretion in the appointment process.

Holding: Likely Constitutional

Opinion: Judicial appointments of ad litems and mediators do not constitute an exercise of a substantive, core judicial power but are more properly characterized as administrative functions necessary for the efficient and uniform administration of justice. Thus, it is unlikely that the Bill violates the separation of powers clause of the Texas Constitution.

Additionally, the term "qualified" (e.g., "qualified mediator") has a commonly understood meaning and is not unconstitutionally vague.

TRIAL COURT CORRECTLY RECHARACTERIZED MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.

In re Child**,** ___ S.W.3d ___, No. 02-15-00118-CV, 2016 WL 1403320 (Tex. App.—Fort Worth 2016, no pet. h.) (04-07-16).

Facts: Mother and Father signed affidavits of voluntary relinquishment of their parental rights to the Child. They also signed an agreed judgment terminating their parental rights. Mother and Father believed they had a "contact agreement" with the adoption agency, which would allow them some access to the Child. However, when that agreement was not honored, Mother and Father challenged the adoption through a petition for bill of review, alleging the affidavits were procured by fraud. The adoption agency filed a motion to dismiss the bill of review. Mother and Father argued that a motion to dismiss was inappropriate and that the proper vehicle would have been a motion for summary judgment. Thus, the trial court determined that the motion was "inartifully named" and gave Mother and Father additional time for discovery and to file a response. After a hearing, the trial court granted summary judgment for the adoption agency. Mother and Father appealed.

Holding: Affirmed

Majority Opinion: (J. Walker, J. Dauphinot) The substance of the motion to dismiss alleged that Mother and Father could not satisfy the third bill-of-review element. Further, justice required a recharacterization because a motion for summary judgment was the proper procedural vehicle to contest the petition for bill of review. Thus, the trial court correctly recharacterized the motion as a motion for summary judgment.

Awareness of a legal remedy and decision not to pursue it precludes subsequent equitable relief through a bill of review. Mother and Father were not entitled to bill of review because they chose not to timely pursue legal remedies out of fear they would jeopardize their contact with the Child.

Concurring Opinion: (J. Sudderth) The motion to dismiss bore no resemblance to a motion for summary judgment. Additionally, summary judgment cannot be granted on grounds not expressly presented in the motion. However, a trial court's discretion gives it "the right to be wrong, as long as it does no harm."

Here, no harm was done because the trial court gave the parents notice that it was considering the motion to dismiss as a motion for summary judgment on the narrow ground articulated, provided additional time for discovery, and granted an extension to file a response to the re-designated motion.

Justice Sudderth concurred only in the outcome because "the majority's conclusion that the trial court's decision was legally correct, rather than harmless error, creates an unnecessary trap for practitioners and trial courts alike."

ASSOCIATE JUDGE'S "FINAL ORDER" WAS NOT A FINAL APPEALABLE ORDER.

Gerke v. Kantara**,** ___ S.W.3d ___, No. 01-14-00082-CV, 2016 WL 1590847 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (04-19-16).

Facts: After a 7-day trial of a modification proceeding, the associate judge signed an order of modification. During the trial, the parties twice waived a de novo hearing on the record, but the order contained no waiver of appeal. The referring court never signed the order. Mother appealed.

Holding: Dismissed

Majority Opinion: An associate judge has the authority to recommend a ruling to the referring court, and a proposed order becomes appealable only after it is adopted by the referring court. While Tex. Fam. Code § 201.007(a)(14) gives an associate judge authority to sign a final order in certain circumstances (default judgment, agreed decree), those circumstances were not present here.

Additionally, Tex. Fam. Code § 201.007(a)(16) gives an associate judge the power to sign a final order if the right to appeal to the referring court has been waived. However, it does not give the associate judge authority to *render and* sign a final order. Regardless, because Tex. Fam. Code § 201.007(a)(16) does not give the associate judge the authority to render judgment, the order signed by the associate judge was not a final appealable order.

Concurring Opinion: The majority addressed a question that was unnecessary to dispose of this appeal. Tex. Fam. Code § 201.007(a)(16) only applies to final orders "that include[] a wavier of the right of appeal [to the referring court]." Because the order in question contained no such waiver, the majority should not have addressed the broader question of whether an associate judge's "final order" entered pursuant to Tex. Fam. Code § 201.007(a)(16) could be appealed to the court of appeals.