Reversed and Remanded in Part; Affirmed in Part; and Majority and Concurring Opinions filed April 19, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00926-CV

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ANGELA RATISSEAU, Appellant

V.

STEVEN RATISSEAU, Appellee

On Appeal from the 257th District Court
Harris County, Texas
Trial Court Cause No. 99-03656

M A J O R I T Y O P I N I O N

Appellant, Angela Ratisseau, appeals a default divorce rendered by the trial court. She attacks only those portions of the judgment addressing the trial court's appointment of appellee, Steven Ratisseau, as a managing conservator of appellant's daughter, L.R., and his right to determine L.R.'s primary residence. In two issues, Angela contends: (1) Steven's Original Petition did not support the trial court's custody award; and (2) the evidence was factually and legally insufficient to support the trial court's decision to award Steven the right to determine L.R.'s primary residence. We reverse the trial court's judgment.

On January 28, 1999, Steven properly served Angela with his Original Petition for Divorce. Angela failed to answer. When, on March 30, 1999, the trial court commenced the divorce proceeding, Angela did not appear. The trial court took judicial notice of Angela's failure to answer and proceeded on a default basis. On April 14, 1999, the trial court rendered a Final Decree of Divorce, dissolving the marriage of Steven and Angela Ratisseau, dividing their property, and appointing Steven and Angela joint managing conservators of their daughter, with Steven maintaining the right to establish L.R.'s primary residence.

In her first issue, Angela contends the trial court's custody award was not supported by Steven's Original Petition for Divorce. Steven's petition states: (1) the parties were married on November 17, 1996; (2) L.R. was born on February 16, 1995; and (3) L.R. is a child of the marriage. Thus, it is apparent from the face of Steven's petition that L.R. is *not* a child of the marriage. Because the Original Petition does not establish Steven's standing to initiate a suit affecting the parent-child relationship, Angela asserts the trial court erred in naming Steven the managing conservator of L.R.

Angela claims that a default judgment must be supported by a petition that states a valid cause of action, and that when determining whether a valid cause of action has been pleaded, the court must look solely to the pleadings, without resort to outside information, and must find the elements of the cause of action and the relief sought. Because Steven's petition did not allege any facts that would show Steven is a parent or otherwise had standing under the Texas Family Code to initiate a suit affecting the parent-child relationship, Angela asserts that he failed to state a valid cause of action, and the default judgment rendered by the trial court was fundamentally erroneous.

In response, Steven contends the judgment is in accord with the allegations in his petition where he is referred to as L.R.'s father and L.R. is described as his child. Because these allegations were unchallenged by Angela at trial, Steven argues the trial court was authorized to conclude that he was, in fact, a parent of the child. In support of this contention, Steven directs us to *UNL, Inc. v. Oak Hills Photo Finishing, Inc.*, which holds that "a default

judgment will stand if the plaintiff has alleged a claim upon which the substantive law will give relief and has done so with sufficient particularity to give fair notice to the defendant of the basis of his complaint." 783 S.W.2d 402, 406 (Tex App.—San Antonio 1987, no writ). Steven contends his petition gave fair notice; thus, Angela's first issue is a technical defect that does not constitute fundamental error.

Steven fails, however, to mention, consider, or distinguish the applicability of Section 6.701 of the Texas Family Code, which provides: "In a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer." TEX. FAM. CODE ANN. § 6.701 (Vernon 1998). In other words, the statute requires the petitioner, in a suit for divorce, to adduce proof to support the material allegations in the petition despite a respondent's failure to answer. Thus, we find Steven is precluded from relying on default judgment precedent pertaining to suits not involving a divorce.

In *Harmon v. Harmon*, an appeal of a no-answer default divorce judgment, this Court cited the general rule regarding default judgments and held: "[N]o evidence is required to support a default judgment. A defendant's failure to appear or answer is taken as an admission of the allegations in the plaintiff's petition." 879 S.W.2d 213, 217 (Tex. App.—Houston [14th Dist.] 1994, writ denied). However, we question the correctness of our previous decision. The identical provision now contained in Section 6.701 was, at the time *Harmon* was decided, found in Section 3.53 of the Family Code. Act of May 28, 1973, 63rd Leg., R.S., ch. 577, § 19, 1973 Tex. Gen. Laws 1604. The court, in that case, did not distinguish, limit, or otherwise restrict the application of Section 3.53; in fact, the court made no reference to the statute.

We find the doctrine of *stare decisis* must yield to the clear pronouncements of the Legislature. Section 6.701 required Steven to present evidence proving the allegations contained in his petition at the divorce proceeding. *Roa v. Roa*, 970 S.W.2d 163, 165 n.2 (Tex. App.—Fort Worth 1998, no pet.); *Considine v. Considine*, 726 S.W.2d 253 (Tex. App.—Austin 1987, no writ). There is, however, no evidence in the record before us to support

Steven's assertion that he had standing to initiate a suit affecting the parent-child relationship. See TEX. FAM. CODE ANN. § 102.003 (Vernon Supp. 2000). Furthermore, Section 153.131 of the Texas Family Code requires the appointment of a child's parent as the sole managing conservator or both parents as the joint managing conservators, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical or emotional development. TEX. FAM. CODE ANN. § 151.131 (Vernon Supp. 2000). Because the record contains no evidence showing Steven's standing as a parent, or evidence establishing that appointment of Angela as L.R.'s sole managing conservator was not in L.R.'s best interest, the trial court had no authority to name Steven a managing conservator of the child.

Accordingly, we sustain Angela's first issue. Because of the disposition of this issue, we need not address the remaining issue. We reverse the trial court's judgment and remand for a new trial only on the issues of child custody, visitation, and support. We affirm the remainder of the judgment.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Concurring Opinions filed April 19, 2001.

Panel consists of Justices Anderson, Hudson, and Edelman. (Justice Edelman joins this opinion.)

Publish — TEX. R. APP. P. 47.3(b).