Opinion issued July 25, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00642-CV

ANDRÉ A. WHEELER, Appellant

V.

ERIKA CONROY WHEELER, Appellee

On Appeal from the 310th District Court
Harris County, Texas
Trial Court Case No. 2011-49132

MEMORANDUM OPINION

André Wheeler appeals an order modifying a joint managing conservatorship order. On appeal, André contends that the trial court erred by (1) striking his jury request; (2) denying his motion for new trial; (3) denying his motion for continuance; (4) failing to file findings of fact and conclusions of law;

(5) ignoring his motion to recuse; (6) refusing to hear his motion to vacate, modify, correct, or reform the judgment; and (7) making biased statements on the record. We reverse.

Background

André and Erika Wheeler have two children, born during their marriage. They later divorced. In April 2015, Erika petitioned to modify the trial court's order governing the parent-child relationship. André filed a counter-petition in June 2015 and a notice of jury demand along with the required jury fee.

In her petition, Erika requested that André be ordered to pay increased child support and that she be granted sole managing conservatorship or joint managing conservatorship over the children with the rights and duties of a sole managing conservator. In his counter-petition, André asked that the court appoint him joint managing conservator with the exclusive right to determine the primary residence and medical care of the children.

The proceedings in the trial court and on appeal have been rancorous. Of relevance to this appeal, an amicus attorney appointed by the trial court requested payment of fees, and the trial court ordered each party to pay the amicus attorney $8,000 in compensation. Erika paid her share of the fees in full, but André had paid only a portion of his share before the trial court ordered them to pay the amicus attorney an additional amount as security for costs. By January 2016, Erika

had complied with the second order, but André had not, and he was still $5,000 in arrears on his share of the fees. Erika moved to strike André's jury demand as a sanction for his failure to pay the $5,000 in amicus fees. The trial court granted the motion and struck André's jury demand. André moved for reconsideration of the order, arguing that the sanction violated his constitutional right to a jury trial. The trial court denied the motion.

The case proceeded to trial before the bench. According to evidence adduced at trial, Erika Wheeler teaches fifth grade and earns a salary of $54,000 per year. André Wheeler practices criminal law and earns an income of $4,000 per month. André presented some evidence in support of his counter-petition that he be appointed a joint managing conservator with the exclusive right to determine the primary residence, including testimony that he had moved close enough to the children's school so that the children could live with him without changing schools. André's wife, Tiffany Wheeler, testified that they had tried to sign the children up for sports teams but could not because the children did not spend enough time in their care and Erika refused to give her permission. Tiffany also claimed that the children had behavioral problems and difficulties in school and that she was helping the children with these issues.

At the conclusion of the bench trial, the trial court increased André's child support obligation. It reappointed Erika and André as joint managing conservators,

and ordered that Erika retain the right to designate the children's primary residence.

Discussion

André raises numerous challenges to the trial court's rulings. We address his challenge to the trial court's order striking his jury demand because it is dispositive.

A. Applicable Law

The Texas Constitution guarantees the right to a trial by jury. *See* TEX. CONST. art. I, § 15. To be entitled to a trial by jury, a party must file a written request for a jury trial and pay a jury fee. TEX. CONST. art. V, § 10 (stating that "no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature"). In civil cases, a party may not have a jury trial "unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." TEX. R. CIV. P. 216. A request for a jury trial made in advance of the thirty-day deadline is presumed to have been made at a reasonable time before trial. *Sims v. Fitzpatrick*, 288 S.W.3d 93, 102 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing *Halsell v. Dehoyos*,

810 S.W.2d 371, 371 (Tex. 1991)); *In re J.N.F.*, 116 S.W.3d 426, 436 (Tex. App.—Houston [14th Dist.] 2003, no pet.)).

We review a court's denial of the right to a jury trial under an abuse of discretion standard. See *Mercedes–Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996); *Sims*, 288 S.W.3d at 102. We consider the entire record and will find an abuse of discretion only when the trial court's decision was arbitrary, unreasonable, and without reference to guiding principles. *Mercedes–Benz Credit*, 925 S.W.2d at 666; *Sims*, 288 S.W.3d at 102. "The refusal to grant a timely requested jury trial is harmless error only if the record shows that no material issues of fact exist[ed] and an instructed verdict would have been justified." *Sims*, 288 S.W.3d at 102; *see also Caldwell v. Barnes*, 154 S.W.3d 93, 98 (Tex. 2004) ("The wrongful denial of a jury trial is harmful when the case contains a question of material fact.").

A party is entitled to a verdict by the jury on the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child. TEX. FAM. CODE ANN. § 105.002(c) (West 2003). A court may not contravene a party's right to a jury verdict on the primary residence issue. *Id*.

A trial court abuses its discretion by striking the jury demand of a party for failure to pay the amicus fee when that party has raised an issue solely within the

province of the jury under section 105.002(c). *See In re I.R.H.*, 01-15-00787-CV, 2016 WL 3571398, at *5 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet.).

B. Analysis

It is undisputed that André demanded a jury trial and paid the fee timely. In his counter-petition, André sought the exclusive right to designate the primary residence of the child—an issue on which, according to the Family Code, he is entitled to a jury verdict. *See* TEX. FAM. CODE ANN. § 105.002(c).

A trial court may appoint an amicus attorney if it "finds that the appointment is necessary to ensure the determination of the best interest of the child." TEX FAM. CODE ANN. § 107.021. And, a court may not require an amicus attorney to "serve without reasonable compensation" for services rendered. *Id.* The court thus was authorized to appoint the amicus attorney and to order the parties to compensate the attorney for services rendered. *Nelson v. Nelson*, 01-13-00816-CV, 2015 WL 1122918, at *3–4 (Tex. App.—Houston [1st Dist.] Mar. 12, 2015, pet. denied). The trial court erred, however, in striking the jury demand as a sanction for failing to comply with its interim orders. A trial court has no authority to strike a jury demand as a sanction for failure to pay amicus attorney's fees when the Family Code expressly authorizes a trial by jury as to the determination of the children's primary residence. *See In re I.R.H.*, 2016 WL 3571398, at *5; *see also In re F.A.V.*, 284 S.W.3d 929, 931 (Tex. App.—Dallas 2009, no pet.) (mother's

failure to pay parenting coordinator did not warrant striking pleadings); *Saxton v. Daggett*, 864 S.W.2d 729, 734 (Tex. App.—Houston [1st Dist.] 1993, no writ) (granting mandamus relief from order striking pleadings as sanction for failure to pay interim ad litem fees). Accordingly, we hold that the trial court erred by striking André's jury demand as a sanction for failure to pay the amicus fee. *See id.*

We may reverse the trial court's order only if the error in striking the jury demand was harmful. *See In re I.R.H.*, 2016 WL 3571398, at *5. Erika relies on our court's decision in *Nelson* to contend that any error in striking the jury demand was harmless. In *Nelson*, however, the complaining party presented no evidence at the bench trial to contest the court's determinations, nor did he raise any evidentiary issues in his petition. *See* 2015 WL 1122918, at *3–4 (finding harmless error where court struck jury request of party that presented no evidence at trial); *see also In re I.R.H.*, 2016 WL 3571398, at *5 (distinguishing *Nelson* where complaining party adduced evidence supporting issue within jury's province under the Family Code). Here, in contrast, André presented some evidence in support of his counter-petition that he be appointed joint managing conservator with right to designate primary residence of the child. Because it deprived André of that right, the trial court's error in striking his jury demand was harmful. *See* TEX. FAM. CODE ANN. § 105.002(c) (providing that party is entitled to jury verdict

and trial court may not contravene jury verdict on issue of appointment of joint managing conservator).

Conclusion

We reverse the trial court's order and remand the case to the trial court for reinstatement on the jury docket. In light of our disposition of this issue, we need not reach the remaining issues presented on appeal.

Jane Bland
Justice

Panel consists of Justices Higley, Bland, and Brown.