

# **In re T.D.M.C., IN THE INTEREST OF T.D.M.C. No. 12-03-00300-CV (TXCA12)**

---

**IN THE INTEREST OF T.D.M.C.  
No. 12-03-00300-CV  
Court of Appeals of Texas, Twelfth District, Tyler.  
April 29, 2005**

APPEAL FROM THE 349TH JUDICIAL DISTRICT COURT OF ANDERSON COUNTY, TEXAS

Panel consisted of Worthen, C.J., Griffith, J. and DeVasto, J.

## **MEMORANDUM OPINION**

JAMES T. WORTHEN Chief Justice

In four issues, Lanny Malcolm Collett and Mary Lois Collett appeal the trial court's order appointing Lisa Ann Collett sole managing conservator of T.D.M.C. On appeal, Lanny and Mary present four issues. We dismiss for want of jurisdiction in part and affirm in part.

### **Background**

Lanny Malcolm Collett II ("Collett") and Lisa Ann Collett are the parents of T.D.M.C., born March 3, 1996. Lanny and Mary are the paternal grandparents of T.D.M.C. On July 31, 1996, Lanny and Mary were appointed sole managing conservators of T.D.M.C. Collett and Lisa, who were married at the time, were appointed possessory conservators, both having executed affidavits designating Lanny and Mary as managing conservators. Lisa revoked her affidavit on November 19, 1996, and, through her motion to modify the parent-child relationship, requested appointment as joint managing conservator of T.D.M.C. Collett and Lisa were divorced in February of 1997. Lisa subsequently gave birth to a daughter, and moved to Mississippi. T.D.M.C. lived continuously with Lanny and Mary.

On May 3, 2002, after a hearing on Lisa's motion to modify, the trial court ordered modification of the parent-child relationship. Specifically, the court ordered appointment of Lisa, Lanny, and Mary as joint managing conservators of T.D.M.C. Lanny and Mary were granted the exclusive right to establish the primary residence of the child within Anderson County, Texas. Lisa, Lanny, and Mary were each given the independent right to make decisions concerning the child's education. However, the trial court ordered Lanny and Mary to enroll T.D.M.C. in public school beginning with the 2002-2003 school year. Further, the trial court ordered Lanny and Mary to enroll T.D.M.C. in an educational preschool program, such as Southside Baptist, for at least one time per week for a minimum of one-half day beginning the week of May 6, 2002 and continuing each week thereafter until the beginning of public school in the fall of 2002. The trial court also ordered that T.D.M.C. should not receive, be taken to, or be submitted for psychological or psychiatric evaluation, examination, or treatment without prior court approval. Finally, the order included specific times and dates for visitation between Lisa and T.D.M.C. from May through August 2002. Lanny and Mary requested findings of fact and conclusions of law, which the trial court filed on June 24, 2002. Lanny and Mary requested additional or amended findings of fact and conclusions of law, but the trial court did not act on the request.

On February 12, 2003, the parties agreed to temporary orders and, on April 7, 2003, the trial court modified the orders. The April 7 order appointed Lisa, Lanny, and Mary temporary joint managing conservators of the child, but gave Lisa the exclusive right to establish the child's primary residence without regard to geographic location, to consent to psychiatric and psychological treatment, and to make decisions concerning his education. The trial court also specified times and dates for monthly visitation and weekly telephone calls by Lanny and Mary.

In June 2003, the trial court heard Lisa's petition to modify the parent-child relationship and first amended motion for enforcement. During the first day of the hearing while Mary was being questioned by her attorney, the trial court observed that Mary had not been satisfied with anyone who has interacted with her, including the person conducting a home study and the doctors. Then, the trial court stated that "[s]he's filed a complaint against the ad litem." Mary's counsel excepted to this second statement, contending that the attorney ad litem informed the court

about the grievance in an attempt to prejudice the court. Later, Mary's counsel again excepted to the trial court's statement and objected to its ex parte communications with the attorney ad litem. However, the trial court stated that it was his understanding that the ad litem was appointed by the court and, thus, had a special relationship with the court. Mary's counsel pointed out that the "code of ethics" prohibited the attorney ad litem from disclosing that a grievance had been filed against her. The trial court found no impropriety.

The next day, Mary's counsel moved for a mistrial because the attorney ad litem communicated with the trial court regarding the grievance. Mary's counsel stated that the misconduct "obviously prejudiced" the trial court and referred to other remarks by the court that Lanny and Mary "do not get along with anybody." The trial court overruled Mary's motion for a mistrial and noted her counsel's objection to his ruling. Further, the trial court observed that the attorney ad litem "correctly" approached the court regarding the possibility of a conflict arising from the grievance because she was appointed by the court. In fact, the court stated that its attitude toward and comments regarding Mary were based on repeated hours of testimony, hearings, and cumulative knowledge since the first hearing in January of 2002.

At the conclusion of the hearing, the trial court appointed Lisa sole managing conservator and Collett possessory conservator, but specified limited visitation by Lanny and Mary. The trial court signed an order incorporating these rulings and giving Lisa the exclusive right to establish the primary residence of the child, to consent to psychiatric and psychological treatment of the child, and to make decisions concerning the child's education. Further, this order explicitly stated that it "supercedes all prior orders concerning the child." This appeal followed.

### **May 3, 2002 Modification Order**

In their first issue, Lanny and Mary argue that the trial court erred when it mandated in its May 3, 2002 order that T.D.M.C. be enrolled in public school, contrary to its order giving Lanny and Mary the independent right to make educational decisions on behalf of T.D.M.C. In their second issue, Lanny and Mary contend that the trial court erred when it mandated in its May 3 order that, as primary joint managing conservators, they could take the child to a psychiatrist or psychologist only if they first obtained the court's approval, contrary to the guidelines of the Texas Family Code. In their third issue, Lanny and Mary argue that the trial court erred by failing to respond to their request for additional or amended findings of fact and conclusions of law.

On July 22, 2003, the trial court ordered modification of the parent-child relationship. This judgment disposed of all parties and issues in the proceeding and is, therefore, a final judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). Complaints about temporary orders are moot where a final order has been entered. *In re P.R.*, 994 S.W.2d 411, 417 (Tex. App.–Fort Worth 1999, pet. dismissed w.o.j.), *disapproved on other grounds, In re J.F.C.*, 96 S.W.3d 256, 267 & n.39 (Tex. 2002); *Wright v. Wentzel*, 749 S.W.2d 228, 234 (Tex. App.–Houston [1st Dist.] 1988, no writ); *Garner v. Garner*, 673 S.W.2d 413, 418 (Tex. App.–Fort Worth 1984, writ dismissed). Because the May 3 order is a temporary order and a final order has been entered in the proceeding, Lanny and Mary's arguments regarding the trial court's mandates in the order are moot and their argument regarding the trial court's failure to file additional or amended findings of fact and conclusions of law is also moot. Accordingly, we dismiss Lanny and Mary's first, second, and third issues for want of jurisdiction.

### **Ex Parte Communications**

In their fourth issue, Lanny and Mary argue that the trial court erred by denying their motion for a new trial and overruling their objection to the attorney ad litem's ex parte communications with the trial court. More specifically, Lanny and Mary contend that the trial court erred by failing to grant a mistrial because the attorney ad litem's ex parte communications influenced and prejudiced the trial court. They also assert that the trial court's incurable error caused them irreparable harm and, thus, the judgment of the trial court should be reversed and this cause remanded for a new trial.

We review the trial court's denial of a motion for mistrial under an abuse of discretion standard. *In re M.N.G.*, 147 S.W.3d 521, 530 (Tex. App.–Fort Worth 2004, pet. denied) (citing *In re J.A.*, 109 S.W.3d 869, 874 (Tex. App.–Dallas 2003, pet. denied); *City of Jersey Village v. Campbell*, 920 S.W.2d 694, 698 (Tex. App.–Houston [1st Dist.] 1996, writ denied)). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or, in other words, whether the act was arbitrary or unreasonable. *In re M.N.G.*, 147 S.W.3d at

530 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 214-42 (Tex. 1985)). The mere fact that a trial court may decide a matter within its discretionary authority in a different way than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer*, 701 S.W.2d at 242.

The Texas Code of Judicial Conduct provides that, except as authorized by law, a judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. Tex. Code Jud. Conduct, Canon 3(B)(8), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. B (Vernon 2005). ***Ex parte communications involve fewer than all of the parties legally entitled to be present during a discussion of any matter.*** *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal) (citing Jeffrey M. Shaman, et al., Judicial Conduct and Ethics, § 6.01 at 145 (1990)). ***These communications are barred in order to guarantee that every person legally interested in a proceeding is given the right to be heard according to law.*** *Id* Further, all information, proceedings, hearing transcripts, statements, and any other information coming to the attention of the investigatory panel of the District Grievance Committee must remain confidential and may not be disclosed to any person or entity unless disclosure is ordered by the court. Tex. R. Disciplinary P. 2.15, 833-834 S.W.2d (Texas Cases) XXXVII, XLIX (Tex. 1991). Here, we must examine the record as a whole to determine whether the trial court's impropriety, if any, harmed Lanny and Mary. *See Pitt v. Bradford Farms*, 843 S.W.2d 705, 706-07 (Tex. App.—Corpus Christi 1992, no writ).

According to the trial court, the attorney ad litem approached the court regarding the possibility of a conflict arising from a grievance filed against her by Lanny and Mary. This communication did not involve the merits of the conservatorship issue that was before the court. Therefore, it was not prohibited by the Code of Judicial Conduct. Moreover, we decline to hold that under the circumstances presented here, the attorney ad litem's discussion of the grievance with the trial court violated the Texas Rules of Disciplinary Procedure. However, even if the trial court erred, Lanny and Mary have not shown harm. An examination of the record reveals that this case has been ongoing before the trial court since 2002, that the trial court filed findings of fact after its May 3 order noting the precarious situation of Lanny and Mary in their attempt to retain custody of T.D.M.C., and that the April 7 modification of temporary orders gave Lisa exclusive rights to determine the child's primary residence, education, and any psychiatric or psychological treatment. All of these events preceded the trial court's communication with the ad litem. Moreover, the trial court observed that its comment was the result of repeated hours of testimony, hearings, and cumulative knowledge since 2002. In sum, the record shows that the trial court's attitude toward and opinion of Lanny and Mary was based on its experience with them during the litigation, its decision on the merits of the case was not dependent on the ex parte communication, and this communication did not prejudice or influence the trial court. Because Lanny and Mary have failed to show that the complained-of communication was improper and caused them harm, we conclude that the trial court did not err in denying their motion for mistrial. Accordingly, we overrule Lanny and Mary's fourth issue.

### **Disposition**

Having determined that Lanny and Mary's first, second, and third issues are moot, we dismiss these issues for want of jurisdiction. Having overruled Lanny and Mary's fourth issue, the ***judgment*** of the trial court is ***affirmed***.