ORAL ARGUMENT – 01/09/02
01-0232
LENZ V. LENZ

ORSINGER: The issues in this case go to the very core of human relations. It involves a broken family and the parent/child relationship against the backdrop of foreign nationality, disparate economic opportunities, different opportunities for emotional health and happiness and the proper role the legal system in telling a German family essentially how to go forward with their lives after a divorce when one of them wants to live in the US and the other one wants to live in Germany.

We're here today because Rosemarie Lenz is presented with a terrible choice. A jury has decided that it is in the best interest of her children for her children to live with her and for her to determine their principal residence. But a district judge has told her that she can only perform this function of custodian of the children if she does so in Bexar county, Texas, and sends her children to a school in Bexar county, Texas.

Notwithstanding the fact that she wishes to return to her native land where they speak her native language and where she's been trained to work in the German health care field, where her extended family and the childrens' extended family lives, and where her fiance lives and works.

HECHT: The family code seems to be pretty clear that this jury finding is binding. But I'm puzzled why four judges don't think so.

ORSINGER: The tradition in Texas has been that the TCs have had a tremendous amount of prerogative in the custody arena. The legislature initially started by saying when we have managing conservatorship verses possessory conservatorship, that the decision as to managing conservator was binding on the TC. Then we liberalized and we decided that we would create a presumption, the legislature did, that both parents should be appointed as joint managing conservators so that you don't have any clear differentiation between who is the controlling parent and who is not. As a result of that then you had to start breaking up the individual parental rights in deciding which ones were core rights of the conservator and which ones were not.

Because trial judges still felt like they had extreme prerogative notwithstanding the binding nature of the jury verdict, the legislature has come back and amended the family code several times, including on the core issues involved in this case to specify that the freedom to choose the principal residence of the children is a jury verdict that is binding on the TC.

So we come from a tradition in this state where the district judge has had a tremendous amount of authority other than in the principal custody decision to a situation now where a jury verdict really doesn't necessarily resolve who the principal custodian is, and we have to talk about individual rights.

HECHT: Did anything change in the 2001 session?

ORSINGER: The standard for modification changed, but with regard to the binding nature of the jury verdict, no. Perhaps a question that Ms. Lopez can address on her argument is is that in her brief she's citing a 1999 version of this statute that talks about the court has an obligation to specify either that the children are bound to remain in the county or to give one parent or the other the right to choose the county. However, at the time this case was tried, the family code didn't say that. The family code said that the court must decide which parent will have the exclusive right to determine the residency of the children. The jury charge is actually in the language of the statute that was in effect at the time of trial. And I think the legislature has been trying to clarify this, but I really believe that it's going to take a decision of this court on this precise issue to settle this issue in the minds of the district judges.

HANKINSON: The case law out of the CA seems to say that with respect to the issues on which a TC cannot contravene the jury's verdict, that in fact an appellate court, however, could reconsider the jury's decision. For example, on a sufficiency challenge.

ORSINGER: Right. That goes to the issue of whether the El Paso case TAB is good law or not. And that came out of the tradition that if you try a case to a jury, the judge cannot n.o.v it, or the judge could grant a new trial. The El Paso court I think stands behind that legal sufficiency. The only resolution for that in a custody case is a new trial. However, there are other CA's that have disagreed with that and believe that ordinary no evidence standards apply. And I submitted additional authority from Prof. Jack Sampson from UT Law School, who believes that the CA was wrong to ignore that precedent. And I think that is an issue that this court should resolve in this case.

HANKINSON: So in fact it's the view then that even the appellate courts are going to be constrained to order a new trial as opposed to rendering in contravention of a jury verdict on a legal sufficiency point?

ORSINGER: That is entirely a matter of interpretation of the meaning of that statute. I'm not even sure that my opinion on that is that well formed. I do agree though that the legislature appears to suggest that the remedy is not to enter a countervailing judgment. And by inference, that means there either is no reversal, meaning no judicial oversight of the jury decision, or the remedy is a new trial as opposed to having the judge override what 10, or 11 or 12 of the citizens say.

HANKINSON: There was no similar constraint on reviewing the jury's answer to question no. 1, in which the modification issue was submitted to the jury?

ORSINGER: No. The legislature has never said that there's a disability on the court on that issue.

HANKINSON: And if I understand your position is that in fact the TC did not jnov the jury's answer to question no. 1, but in fact relied upon it and then did its own modification?

ORSINGER: It is my position that the opposing party did not preserve their no evidence complaint because although they filed the jnov they did not get a ruling on it. And the truth is, the judge didn't say he was sustaining or overruling the jnov. He just did what he did.

HANKINSON: By reading the order that the TC entered, it says that pursuant to the jury's verdict it is ordered, and then he orders a modification. So by virtue of that relief unless he had determined that there was sufficient evidence to question the response to question no. 1, he could not have preceded to modify the order.

ORSINGER: I absolutely agree. The court indicated its concurrence with the jury verdict that there was material and substantial change.

HANKINSON: In fact if I understand the pleadings correctly in this case, both parties had pled for modification and both parties had pled that they wanted to be the person who would be responsible for determining primary residence.

ORSINGER: That is correct. Both parties were contending there had been a material and substantial change.

HANKINSON: Looking at your preservation point. The cases that you cite predate the amendment of the appellate rules. And the appellate rules now provide that while you have to get a ruling on a complaint - I take it that your position is not that they didn't present it, because there is a motion challenging...

ORSINGER: You're right. The question is, they didn't secure a ruling.

HANKINSON: But the rule now says that the TC ruled on the request, objection or motion either expressly or implicitly. Given the addition of the language expressly or implicitly to rule 33.1, why isn't it enough and why can't we consider it to be an implicit over ruling that in fact the court's order reflects that it is based upon the sufficiency of the evidence to support the jury's finding on modification? Why isn't that an implicit ruling?

ORSINGER: Because it's clear that the court felt that the evidence supported the answer to the modification - material and substantial change. It's apparent that the judge felt there was a material and substantial change. Otherwise he couldn't have reduced the geographical restrictions from Texas to Bexar county. So then we move away from the material and substantial change part to whether removing the relocation restriction is a positive improvement and the best interest, which is where I think the core of this case was decided. Did Judge Specia find there was no evidence to support the jury verdict or did he just say it is my prerogative as a district judge no matter what the jury says...

HANKINSON: There would have to be evidence to support both parts of question no. 1 before you could do any kind of a modification? I mean you just split the modification requirement and

tack the second piece on to the actual relocation decision to the actual specific modification? I had understood that both of those statutory requirements had to be met before you could ever even broach the subject of what modification would be appropriate.

ORSINGER: In my view, and we used to submit these as a cluster of three separate issues, and as a result of some SC decisions, we went with broad form. But we used to ask was there a material substantial change, and then you would ask whether the proposed request of the modification was in the best interest of the children. I think that the family lawyers and the family law judges see them as separate questions even though they are submitted in broad form under one question. But it's obvious that Judge Specia considers them to be separate questions, because he felt he had the grounds to modify, but he didn't agree with the jury's decision on what the modification should be.

HANKINSON: So it's your view that the second part of question no. 1 is the evidence that's necessary to support the decision on question no. 2, which would give her the exclusive right? The jury determined that Ms. Lenz would have the exclusive right to determine primary residence.

ORSINGER: Would you say that again.

HANKINSON: I'm just trying to understand because it's not kind of the way the charge reads. Is this what you're saying, that the second part of question no. 1, that a modification of the terms and conditions would be a positive improvement for in the best interest of the children, that there must be legally sufficient evidence of that piece before the jury could answer no. 2. I thought you had to have both before you could get to number 2.

ORSINGER: No. You have to have both before you can sustain two. But you don't have to have both before you get to two. You have to show a material and substantial change, which means that something is going to happen. Now then the question is, what's going to happen? You've got different evidence on...

HANKINSON: The charge was submitted: if you have answered question no. 1, we do, then we answered question no. 2, otherwise do not answer. So it's not split that way. It's not presented to the jury that way.

ORSINGER: I believe it is. I believe that the jury doesn't ever get to the question of deciding which of these two would have the exclusive right to determine unless they find that there's been a modification and there's a reason to change the previous existing joint _____ conservatorship.

HANKINSON: So if I understand your preservation point is that because the TC did what it did, which was enter a modification nobody had asked for, that we can't really say that - I'm having a hard time then making the connection of why there's not an implicit ruling on the jnov.

ORSINGER: Because the TC obviously agreed there was grounds to modify because he and

himself made a modification. What your argument is, did the TC implicitly decide that it was not appropriate to remove the relocation restriction. Because question 2 basically said, which one of these two people is going to decide where these kids live? One wants to live in Germany and the other wants to live in San Antonio. And so when the jury thought there was material and substantial change evidence had been decided, yes, then you move on to the question, who's going to decide where the children live?

O'NEILL: Where does best interest of the child come in?

ORSINGER: Best interest of the child is an overriding factor for the jury to consider in what it's doing. But best interest does not determine whether there's a material and substantial change. Best interest just determines whether a party's requested relief in modification should be granted or not.

O'NEILL: But it appears to me that what was decided here was that although the jury found in question no. 1 that the change would be in the best interest of the children, that is a part of the question.

ORSINGER: A modification should occur. In answer to question no. 1, you don't know for sure what the answer to two is going to be. It could be that dad will have final authority, or mother will. Question no. 1 doesn't tell you who won. It just tells you that there's going to be a change of some kind.

O'NEILL: There should be a modification. And it doesn't say who.

ORSINGER: Question no. 2 tells you, who's going to have the power to decide where the children live. And that's the question, was that legal sufficiency point preserved or can you infer that the judge overruled it. And I would say no. I think that if you look at this record, you can infer that Judge Specia felt like it didn't matter what the answer to question no. 2 was. That he could impose a geographical restriction that he thought was appropriate and then allow the mother to pick the home in the geographical area he chose.

O'NEILL: What if there was no evidence that a modification was in the children's best interest? What if he felt there was no evidence that there should be a modification?

ORSINGER: Then you get back to the original question, can he n.o.v. it or does he have to grant a new trial. But we don't have to answer that question because he obviously felt like there was enough evidence because he himself ordered a modification.

O'NEILL: But the CA seemed to believe that...

ORSINGER: I thought the CA believed that there was no evidence of best interest and positive improvement, and they weren't arguing there is no evidence of material and substantial

change. Both sides alleged material and substantial change.

O'NEILL: Right. And that's the premise of my question is at what point can a TC come in and decide what's in the best interest of the children separate and apart from the statutory and mandatory jury function of deciding question no. 2?

ORSINGER: In areas besides the four enumerated areas where the jury verdict is binding. In areas outside those four areas the trial judge has the freedom to maneuver. But in those 4 areas, the legislature has said you don't have the power to override the jury verdict on these 4 issues. Now that brings me to another issue, apart from the preservation point. And that is, since this case was tried and started up on appeal, the US SC decided in Troxel(?) v. Granville(?), which I've not cited in my briefs, but it's 530 US 57, that the 14th amendment due process clause has a substitute due process standard that should be applied whenever there's a state involvement in parental decisions.

ENOCH: So that's going to be my question. How is the legislative direction that this jury determination is mandatory different than how the courts have historically viewed jury determinations in civil cases other than family law?

ORSINGER: We have a specific legislative directive that the jury verdict is binding on the court as to this kind of issue. And ordinarily you...

ENOCH: In the context of family law where jury breaks have historically been advisory that hasn't been the circumstance in civil cases. If you talk to a civil judge, a civil judge would say yeah, the jury verdict, I am bound to the fact findings of the jury unless there's no evidence supporting that, or unless the finding is against the overwhelming weight and preponderance of the evidence. So a civil judge, not in a family case, would have always historically assumed that the finding of fact is binding on them unless there is no evidence supporting it. How is the instruction in the family law context where family judges have not been bound by jury verdicts, getting instructions from the legislature - in family law cases you are going to be bound by the jury verdict indicating an intent that in the absence of any evidence, in the presence of overwhelming evidence to the contrary a jury is free to violate substantive due process rights of an individual in child custody. How do you read in the family code that the legislature intended that the judge not exercise the judicial function in evaluating the jury verdict?

ORSINGER: I think it depends entirely on what issue you are asking the judiciary to protect as against the jury. Clearly if the 14th amendment of the US constitution requires that the state of Texas do something no jury under the guys of the jury verdict can override that constitutional right. So there are unquestionable limits no matter what the legislature said. But this court is faced with clear language that's been refined over the years to make it more and more binding and less and less subject to the TC's getting around it. And we have to somehow interpret that statutory directive and make sense of it applied to a custody case.

My view is the way it makes sense in a custody case is to say, the trial judge

has a lot of power, subject of course to the 14th amendment, but when it comes to the core issue of who's going to be the managing conservator or who's going to determine the principal residence, the trial judge is constrained by the jury verdict.

Now then a question I think this court has to answer is if there's no evidence, not just insufficient evidence, but I'm talking about legally insufficient evidence so that there's no evidence to support it, then you have to decide whether the remedy is rendition in the ordinary civil case, or remand like it would be...

ENOCH: I come to the family court and I say, I want to establish the principal residence. Judge, I'm requesting that we have a jury trial on establishing principal residence. Does the judge have the authority to refuse to submit the case to the jury?

ORSINGER: If you read the TAB case, I believe it says that the court could grant a directed verdict when the movant rests, but if you try it to a jury verdict you can't enter a judgement contrary to the jury verdict. And that's in fact what the family code says.

ENOCH: I can keep the jury from getting that question, but if I give it to the jury then I'm stuck with whatever their answer is?

ORSINGER: Well, I'm not suggesting that that's the way you should leave the law. I think you need to address that question. In my view it should be a directed verdict standard and the n.o.v. standard should be the same. And you all need to reconcile exactly what power a district judge has in the face of the clear legislative directive.

OWEN: As a practical matter, how many cases are there going to be where there's just absolutely no evidence supporting the right for one parent as opposed to the other to make that decision?

ORSINGER: When have you ever heard of a custody case that was tried for 2 weeks in front of a jury where there was no evidence to support some party's position? Even a parent getting up and testifying that I believe it's in the best interest of my child for so and so to happen is more than a scintilla of evidence. And our record is replete with more than just her personal opinions. So I think as a theoretical matter it is unlikely that there truly is no evidence. In this case on modification when both sides are alleging that there is material and substantial change it's not plausible to argue that there's no evidence to support a modification. The only question is what is the outcome given that there is going to be a modification...

HECHT: If there's some evidence to support the jury's verdict on one and none on two, there's still no way to render is there? What is there to render? How could you render a judgment?

ORSINGER: The only thing that you could render at that point is on issues that are not exclusively in the power of the jury. So the TC could modify visitation. There's a lot of things the

TC could do, but it can't do those things in my view that are prerogative of the jury.

HANKINSON: So is it your view - is there anything, any authority at all for Judge Specia to have made the modification he did to her exclusive right to determine the county of residence as determined by the jury?

ORSINGER: There is logic, but there is no authority. And the logic is as follows: that although the family code says the jury verdict is binding on who will pick the principal residence of the children, Judge Specia says I have the authority to decide the geographic area in which that will be exercised. I could say it would be in the State of Texas. I could say it could be in Bexar county. I could say it would be in a specific school district in Bexar county. I'm still letting Rosemarie Lenz decide what house the children will live in, but I'm going to decide what county, what school district, even what block they live on. Now that's just a logic. Because if you take that to its extreme you see that the power of the district judge can destroy the prerogative of the managing conservator who the jury said should have the exclusive right to pick, that the judge can so hem that in that he takes that power away. In fact something like that happened in the case that I didn't cite in my brief, Phillips v. Beaver, decided by this court, 995 S.W.2d 655, by Justice O'Neill, and it wasn't a relocation case. It was a modification case where somebody had left Texas. And the question was, can the court come in and alter the primary residence power, or is that like a modification of custody? Because they lost modification jurisdiction after the child was gone for 6 months. But they retained other kinds of jurisdiction. The trial judge tried to get around that by saying, well I'm going to leave everybody joint managing conservator, but I'm going to change the person who can control the principal residence. And this court found that picking the principal residence was inherently custodial, and that it was a core right of managing conservatorship.

So in my view when you take Phillips v. Beaver case and see that we're talking about the core right of managing conservatorship, look at the Truxel(?) v. _____, US SC case that says there are substantive due process protections for parental prerogatives. Realize that the jury has said, that the mother should exercise the prerogative of where they live in this case, and realize that the legislature has said that the jury's decision is binding on the TC, then Justice Specia's analysis that I'm going to give her this power, but I'm going to restrict so heavily that it's essentially defeated, is trying to do through a limited procedure what really defies the legislation and the statute.

HANKINSON: Is there legislative history to that effect? I know there's commentary out there that supports that position.

ORSINGER: The legislative history on family law litigation is very spotty. What you end up having is you end up having Prof. Sampson and one or two family lawyers that get up and testify about what they think, and then after the fact there's an amendment after the hearing, so the language that gets enacted isn't what was testified on anyway. I haven't done the legislative history on this. It may be meaningful and if you want me to I would.

HANKINSON: The jury question was the exclusive right. Is there a conflict between what

Judge Specia did in the use of the word exclusive?

ORSINGER: There's no question there's a conflict between that and exclusive because the jury verdict gave her the exclusive right to pick the county and exclusive right to choose the primary residence. If the jury gave her the exclusive right to pick the county, then how can he pick the county? This whole case was tried on whether this woman and these two boys are going to go back to Germany or not. Everyone knows that's what we were trying. The judge said that. And the jury said she could go to Germany. And the judge said, you not only can't go to Germany, but you've got to educate your kids in Bexar county.

HANKINSON: Mr. Lenz asked for a jury in this case. Could this have been tried to the court had no one requested a jury?

ORSINGER: Absolutely. And then the judge would be exercising the fact finding prerogative that the legislature has protected for the jury if a jury is requested. Now I haven't said anything about my preemption argument on immigration. I think that's a very meritorious argument and I would ask the court to consider that, because this morning I received a copy of a motion to modify custody filed by Rudy Lenz, signed by my opposing counsel Jo Chris Lopez, which indicates that no matter what you rule we may find ourselves back in front of a Bexar county court again, and if there is a preemption issue here we would ask the court to resolve it now in case we are forced to relitigate custody notwithstanding the outcome of this appeal.

* * * * * * * * * *

RESPONDENT

LOPEZ: There is no question that divorced parents deserve a certain amount of autonomy in raising their children. But there is also no question that the rights of the children, the independent rights of the children need to be protected and they need to be considered.

Justice O'Neill that was your question. Who is charged with protecting the rights of the children? And it is the TC that is charged with that duty.

O'NEILL: But you would agree there is some overlap and some confusion here between the interplay of the mandatory jury determination on who decides primary residence, and the court's all encompassing function to determine what's in the best interest of the children. So there is some intersection there that we're going to have to figure out who has the upper hand on that.

LOPEZ: I do agree. And I think that it's helpful to consider that relocation cases generally arise in two contexts. First they arise in the context of a divorce. When you have a divorce and parents are splitting up, and one parent chooses to move from the area where the children and the family has lived, then a TC must make an initial determination of where the children will live. That is what happens to the children. Now that issue is not before this court. And the Texas courts have not addressed in the divorce context the relocation standards. But the second context in which

relocation issues arise is post-divorce. Here we have a divorce decree that was very specific. It was an agreed decree that designated the State of Texas as the state where the children would reside. Ms. Lenz agreed to joint managing conservatorship. She agreed that Mr. Lenz would be active and involved in the children's lives. She agreed that the children would live in Texas. That was done in 1997...

HANKINSON: But let's look at the order that we're being asked to review today. Do you agree that the TC's order reflects that the TC determined that there was sufficient evidence to support modification and to make a modification as to primary residence?

LOPEZ: No.

HANKINSON: Then how could the TC have done paragraph 6, which in fact he ordered a modification relating to primary residence if the other requirements were not met?

LOPEZ: Because there are two modification standards which apply here. Mr. Orsinger has directed the court to the statute that makes jury determinations binding.

HANKINSON: Go back to just the order. When I read the order, the order says pursuant to the jury's verdict it is ordered. And it incorporates by reference the earlier order save and except the relocation paragraph which it then modifies. Now I don't know any other way to read that except to decide that the TC in fact did decide that there was sufficient evidence to support a modification relating to relocation. Otherwise, the TC could not have entered the paragraph in which it restricted Ms. Lenz from taking the children outside of Bexar county. Do you agree?

LOPEZ: Let me explain. I think that it is confusing and it's a very good question. If you look at Tab 2, I have copied for the court the statute that applies. I copied the statute that is currently in effect rather than that that was in effect in 1998. The only difference is that now a party cannot request a jury in a parentage case. But otherwise the statute is the same statute.

If you look at that statute, 105.002, the party is required to a jury trial on the appointment of a managing conservator, the appointment of a joint managing conservator, and the determination of primary residence of the children. A party is not entitled to a jury verdict on a specific term or condition of possession, or any right or duty of a managing conservator. The right to determine county is a right and duty of a managing conservator that is not a binding jury issue.

HANKINSON: That's not my question. My question is, I'm trying to understand what the TC did. I have the same problem Justice Hecht does in terms of trying to figure out what authority he had to do what he was doing. You could take the position there was legally sufficient evidence of positive improvement and best interest, and therefore, there could be no modification.

LOPEZ: Yes.

HANKINSON: But the TC in fact did modify. Right?

LOPEZ: Yes.

HANKINSON: Now we may disagree about - you may have a different view than Mr. Orsinger about the authority for that modification, but in fact there was a modification. And the TC could not have modified that earlier order unless the TC determined that the jury's answer to the questions relating to material change and to positive improvement and best interest were supported by legal and sufficient evidence.

LOPEZ: Yes.

HANKINSON: Otherwise, we would be back to just the original order.

LOPEZ: That's right.

HANKINSON: So the trial judge did decide there was sufficient evidence to support modification. And our argument is over what modification could be made and who got to make it.

LOPEZ: There were two modification issues that were before the court. First of all, did modify the decree in terms of which parent has the right to determine. That was a jury issue. That was submitted. And the other issue on the modification of a term of conservatorship, which is the county issue, was not a jury issue and the judge was not bound by the jury.

HANKINSON: I understand that. That's the second phase of the inquiry. I'm just trying to get on the same page with everybody about whether there's legally sufficient evidence or not to support a modification. Then we get to the question of what modification is going to be made and who gets to make it? I'm still at the first point. Do you agree that the trial judge found that there was legally sufficient evidence to support a modification under the requirements of the statute?

LOPEZ: I think that the court determined that there was not legally sufficient evidence to support positive improvement and best interest.

HECHT: What difference does it make who gets to pick if they can't pick but one thing?

LOPEZ: Mr. Orsinger has argued that the trend of the legislature has been to become more restrictive in terms of the joint managing conservatorships and the court's designation of a joint managing conservatorship, and the rights and duties that joint managing conservators have. And I think that that is correct. And if you look at the statute that is in place now, that is at Tab 3 and 4 in the materials that I gave you, tab 4 is the statute that is in effect now. And it says, that in rendering an order appointing joint managing conservators, the court shall designate the conservator who has the right to determine the primary residence, and establish a county of residence in which the child

is to reside and any contiguous counties, or specify that a conservator may determine the child's primary residence without regard. Now this is critical. About 70% of my practice is family law. There is often situations where you have a couple who are divorced or who are divorcing and the court says, I'm going to restrict the residence to a certain county. I'm going to restrict it to Bexar county. But in Bexar county you can have a residence on one side of the county that is almost 50 miles from the other side of the residence.

HECHT: He could say, I will make it the west half of Bexar county. But my question is, what difference does it - if the judge is going to tell you where, tell the person who gets to pick where they have to live, what's the right of picking about? If I had a statute that says, well you get a jury trial on liability, but the judge gets to set damages and he can set them from zero to a zillion, I don't really feel like I've got much of a jury trial.

LOPEZ: But except that in family law when you have the right to determine primary, you have a right to determine where the children's principal address is, and you have a right to determine school district.

HECHT: Yeah, but you're saying that you can only exercise that right within the boundaries that the trial judge says.

LOPEZ: Yes.

HECHT: It doesn't seem like that's much of a jury issue.

LOPEZ: When you consider for example, Travis county, you can have a person that resides in Round Rock, North Austin, and the other parent resides in South Austin. There is a big distance between those two residences. And if the TC says, parent in Round Rock gets to determine the address, then the children go to school in Round Rock...

HECHT: No. The judge says the parent in Round Rock can determine any place for this child to live as long as it's in South Austin.

LOPEZ: Or in Travis county.

HECHT: Well South Austin. That's where the other parent lives. Well you might as well give the choice to the other parent.

LOPEZ: If both parents reside in Travis county under my example, and you have one in Round Rock and you have one in South Texas, and the court says, it's going to be Travis County but the parent in Round Rock gets to choose, then the children will go to school there.

ENOCH: Are you agreeing that the TC's discretion includes a subpart of any county, or are you arguing that the discretion is to pick the county?

LOPEZ: To pick a county or contiguous counties.

ENOCH: But I couldn't understand from your answer - the question was suppose the judge picks Tarrytown as being the area where the person who gets the right to pick must pick. Now do you agree that the court didn't have the authority to do that, or are you saying the court has the authority to do that as well?

LOPEZ: I think under they hypothetical, of course, there's going to be all of the facts and circumstances that support what the TC is implementing. But I think a TC has the power to say Tarrytown. Has the power to say Austin, or to say Austin, San Marcos, and some contiguous area.

In this case, the designation is not narrow. It's Bexar county...

OWEN: But the whole trial is over whether they are going to Germany or not. Wouldn't you agree that that was what was in front of the jury?

LOPEZ: I do.

OWEN: So what was the point of the jury trial in this case? The jury was going to decide are they going to Germany or not, so what was the point of the trial?

LOPEZ: The point of the jury trial was whether these children are allowed to leave Texas with their mother to move to Germany.

OWEN: And the jury said yes. So why isn't that binding?

LOPEZ: The question is whether or not there is sufficient evidence to support that answer.

OWEN: And if there is, where did the TC get the authority to ignore it?

LOPEZ: I think that the family code authorizes a TC in §153.134 where you have joint managing conservatorships, and that...

HANKINSON: But that's when a court orders a joint conservatorship. When that's been requested and the court orders and these are all of these requirements that the order has to contain. We already have that kind of an order in this case. And this was a modification proceeding. And the specific issue was, as Justice Owen said, were these children going to be allowed to go to Germany with their mother or not. We're not asking the court to order a joint conservatorship with all the specific requirements.

LOPEZ: You had a joint managing conservator, but also don't forget...

HANKINSON: And it had a provision in there on where the children were going to live and who could decide what and the specific request for modification was by both parents. And the jury said mom gets to do it.

LOPEZ: And the question for this court that the CA answered in support of Mr. Lenz's position is that there was no evidence of positive improvement or best interest to support that finding.

HECHT: But if there was, then they get to go to Germany?

LOPEZ: If there was then this court needs to consider is there still discretion within the TC that is granted by §153.134 where if you had joint managing conservatorship a court can make an order restricting the residence to a particular area.

HANKINSON: Is it your position that the only authority that Judge Specia had to include the geographic restriction that he did contained in §153.134 of the Family code?

LOPEZ: Yes.

HANKINSON: That's all we need to look at?

LOPEZ: I believe that that is correct. I believe that Judge Specia's determination was based on two things. First, he determined that there was no evidence...

HANKINSON: I understand. But I'm looking for his authority to make this particular modification, and I wanted to know where it came from, and it's just this statutory provision not any place else?

LOPEZ: That's right.

OWEN: But doesn't the one that was in existence at the time this case tried, 105.002(c)(2)(c), when it's talking about what you get a jury trial on. It says, the party is not entitled to a jury verdict on the issues of any right or duty of a possessory or managing conservator other than the issue of primary residence determined under subdivision 1(d). Now doesn't that say pretty clearly that the TC does not decide the issue of primary residence and no duties that have anything to do with that?

LOPEZ: I think that the statute says that the issue of which parent has the right to determine primary domicile, primary residence, is an issue for the jury. But I don't think that this statute necessarily eliminates the right of a TC to say that, the primary residence is restricted to a certain geographical area.

HECHT: You told Judge Hankinson that you thought there was evidence to support the

jury's answer to question one. Is that correct?

LOPEZ: Because question one as it was submitted to the jury went to the issue of the primary residence. That's the only issue that was submitted to the jury. Question one: is there a material and substantial change or has the order become unworkable? And I don't think anybody contested that issue. And then as a second prong to the modification standard, the positive improvement and best interest test.

HECHT: And then you think there was evidence for the first part but not the second part?

LOPEZ: I don't think that there was evidence of positive improvement or best interest to support the jury's answer that there was a positive improvement best interest.

HANKINSON: And where will we find the ruling on your motion for jnov challenging the sufficiency of the evidence on that point?

LOPEZ: I'm not the complaining party. I am not complaining at all about the TC's judgment. I am the respondent and I don't think that I had the obligation to present this court with an order...

HANKINSON: You were complaining to the TC that the jury's verdict was not supported by legally sufficient evidence. Did both parties go up to the CA or was it just you?

LOPEZ: Both parties went to the CA.

HANKINSON: So you went to the CA and complained. And Rule 33 requires that you have presented your complaint to the TC and actually get a ruling before you can challenge that.

LOPEZ: I didn't complain to the CA. My position at the 4th CA was that there was no evidence, and that this is an independent ground for affirming.

HANKINSON: That's my point. You made the no evidence challenge in the CA. That's the same challenge you made in your jnov motion. So if you were going to make that challenge in the CA, rule 33 required you to present it to the TC and get a ruling. So my question is, did you ever get a ruling on your jnov motion either express or implicitly as the rule now requires?

LOPEZ: Implicit in the TC's judgment. Implicit in the order that is before the court is the finding that the evidence was insufficient.

HANKINSON: Explain that to me.

LOPEZ: If you look at the conservatorship language that is paragraph 6, the court says,

pursuant to the jury's verdict it is ordered that the prior order of this court as reflecting the decree of divorce incorporating the Arizona decree, and the parenting plan is incorporated into this order. The provision goes on further to state that, it is ordered that Rosemary Lenz and Rudy Lenz shall continue as joint managing conservators. That is implicit that the court has found that implicit in this order the joint managing conservatorship is in the best interest of the children. Then the court goes on, it is further ordered that Rosemary Lenz is appointed the joint managing conservator with the right to establish the primary order. That is consistent with the prior order that was in effect. However, then the court says that as a condition of possession to the joint managing conservatorship, the children shall reside in and attend school in Bexar county, Texas. And I think that that is implicit that the evidence was not sufficient to support the requested modification, the request to eliminate the geographic restriction that was already in place.

HANKINSON: If that's the case, and the court in fact did grant your jnov by virtue of this, then why hasn't the court by doing that run into a problem of §102.002, because it has now specifically contravened the jury's finding of question no. 2? That's the problem I have. It seems to me like you get caught coming and going. Because if the TC agreed with you and determined that there was no evidence to support that, then you've got a problem with the fact that we have the court contravening the jury's verdict on question 2.

LOPEZ: What we have to remember is that there is an order in place already. When these people come to court there is already an order in place that provides a geographic restriction. It was Ms. Lenz's burden to prove the standards, the three prong tests necessary to modify that order. The position that we have taken is that she has failed to satisfy that burden.

HANKINSON: I understand. So you're position is that she's failed to satisfy the burden, and that means you say that the trial judge jnov'd the jury's verdict then?

LOPEZ: Right.

HANKINSON: And §105.002 says the TC can't do that. If you did get a ruling and he granted the jnov, it seems to me you've got a problem with the trial judge contravening the jury's verdict.

LOPEZ: What the TC did is say there is no evidence to support a modification, therefore, we're going to leave the existing order in place that names mother primary.

HANKINSON: But he didn't leave it in place. He modified it to change the relocation provision.

LOPEZ: And I believe that that was authorized by the subsequent section of the family code. But even if the judge could not contravene the verdict of the jury, I think that the CA has the right to review the evidence for sufficiency. And that analysis was done...

HANKINSON: If you've preserved error?

LOPEZ: Yes.

O'NEILL: Let's presume you've preserved error. Let's presume the CA has the authority to go back and conduct this review. But we've found that there was a scintilla of evidence to support the jury's finding of best interest. Do you lose?

LOPEZ: I think that if you find that there is a scintilla of evidence then you still need to determine, does §153.134 which allows a court when joint managing conservatorship is entered, still give the court some authority to, even when a jury determines there is a primary residence, restrict the right of the parent to a specific geographic area.

OWEN: What if we disagree with you down the line. We say that the TC cannot contravene the jury's verdict, there is some evidence to support it, and that Ms. Lenz is entitled to move to Germany with her children. Are you going to then go back and say you get another jury trial on who gets to designate the children's primary residence?

LOPEZ: There was a reference made by Mr. Orsinger at the end of his argument as to other actions that have been filed. I don't think any of that is before the court, but since it was raised, these children do not want to move...

OWEN: That's not my question. Under the family code is there any provision on how long these jury findings are intact or can you just turn around and ask for a new modification order in another jury trial successively until maybe you win?

LOPEZ: The family code does provide for a modification if there is a material and substantial change in circumstances. So it's not only filing actions until you win. You do have a burden of proving a material and substantial change in circumstances. And very frankly, that is a criteria that has been very liberally construed.

JUDGE: What are the children's ages?

LOPEZ: Oliver is 15, and Dominic will turn 10 in June.

* * * * * * * * * *

REBUTTAL

ENOCH: In the Family Code how old is a child when they can make some sort of choice?

ORSINGER: That changes almost every legislative session. As of the last legislative session we're back to 12.

ENOCH: Do we have a problem here where a child could choose which family they

want to live with?

ORSINGER: You have just asked a question that no one in America seems to ask, but it even came out in the Troxel(?) case: what rights if any does a child have to litigate what they want to do with their own lives? For the most part in Texas, we just let the parents litigate, and then in some counties they appoint attorneys ad litem for the children, and in some they don't. That's not an issue in this case.

ENOCH: Did Judge Specia visit with this children?

ORSINGER: You can't do that in a jury trial, because then you would be hearing evidence on dispositive points outside the purview of the fact finder.

ENOCH: Well we're arguing about the judge making some decisions that are not required by the jury, and some _____.

ORSINGER: There is case law that you're not supposed to be interviewing the children privately when you have a jury making decisions. Now there may be some logic in it if the judge has some prerogative to go away from the jury verdict. That didn't happen in this case, and that doesn't have to be resolved.

HECHT: Respondent's brief says that the uncontroverted evidence is that the Lenz children wish to remain in Texas.

ORSINGER: Ms. Lopez and I have disagreed on what this reporter's record says. And we've analyzed it. We've recited the page and line. There's not enough time in oral argument to resolve that. I filed a responsive brief when she challenged what she felt like I was being unfair of the characterization. Let me just say this. Ms. Lopez's brief is written contrary to the assumption of a no evidence challenge. I believe since I won a jury verdict, that I'm entitled to all inferences and have all contrary evidence ignored. That's what this case law has said from this court for 50, 75 years maybe even longer. And so I don't think it's appropriate to go down there and say, well when the court appointed psychologist or someone else says that at one time the children said one thing, but then there's a family therapist that said another time the children said another thing. I don't think we should be engaged in weighing that. I think you should look only at the testimony that says, well at the time that the children were in front of the family therapist they expressed an interest in going back to Germany, or their mother testified that they told them they wanted to go to Germany. On a no evidence review, we are entitled to those presumptions because we got the jury verdict.

It's very important that the court not be confused. And I'm glad that counsel has given you this exhibit because there are two different versions of the statute on court ordered joint conservatorship. Under Tab 3 is the law that was in effect when we tried our case and when the judgement was signed. Under Tab 4 is the law that went into effect on Sept. 1999, after the judgment was signed.

Look at Tab 3, 153.134(b)(1). This is what the court's authority was at the time of the trial on the judgment: In rendering an order appointing joint managing conservators, the court shall establish the county of residence of the child until altered by further order or designate the conservator who has the exclusive right to determine the primary residence of the child.

Now in my view the Family Code provision behind Tab 2 says, that if there is a jury, that decision about whether someone will be designated as having the exclusive right to determine the primary residence is a decision for the jury and not for the court.

It is very important in your disposition of this case if you sustain our position on appeal, that you clearly mandate that Rosemary Lenz can go to Germany with these children. If we come down with a decision that does not make that clear, I'm going to be in front of a district judge on temporary order to retain temporary custody here until we can have another jury trial on whether she should be able to go to Germany.

RODRIGUEZ: How do we evaluate your statement there that we have to resolve every _____ in your favor with Tab 6, 153.002?

ORSINGER: We won a jury verdict. And although the burden of proof at trial, or should I say the standard by which decisions are made at trial of best interest, when you win a jury verdict and somebody's on appeal trying to overturn the jury verdict, there are well established rules on how you will review the evidentiary support for that jury verdict. So while best interest is the standard in the TC, when you get up on appeal and you're trying to override a jury verdict, the party who's trying to override the jury verdict loses all the inferences in their favor, and it is required that you ignore all the evidence in their favor and look the other direction.

O'NEILL: In order for us to say what you've just asked us to do, that she can go to Germany with the children, we would have to say that from the date of this jury verdict or this judgment, there could not ever be any changed circumstances?

ORSINGER: No. I think all you have to do is give us a rendition that a judgment should have been entered, and it is therefore, reformed that she is permitted to pick the residence anywhere that she wants with some kind of clear language from the 9 justices on this court or however many concur in the result that a trial judge can't come down now 30 days after your decision is decided and put temporary orders in place and refute it.

O'NEILL: But even if we were to find that and modify the judgment, they could still come in couldn't they and say, well since then things have changed?

ORSINGER: Right. At the time of trial this man made $175,000 a year, and my client made $6 an hour working part time. He can force her to litigate this yes, but I'm asking...

O'NEILL: And there's nothing we could do?

ORSINGER: Nothing you can do. But what you can do is you can make it clear in your judgment that she's entitled to move to Germany until there is some trial that takes away her right to principal residence, primary residence. And if you don't do that, I'm afraid that this has been an exercise in futility because this district judge or perhaps another one is just going to enter a temporary order and this whole appeal just disappears.

HANKINSON: Do you still want a remand on attorney's fees?

ORSINGER: I do, but it should be a separate remand and it should be a limited remand. There's precedent for it in this court on cases even that I've had here. The trial judge denied attorney's fees to my client on the grounds that she didn't get her principal desire, which was to move to Germany. There is precedent in the Broomey(?) case where the court made a ruling that the trial judge made an error as a matter of law; you reverse the error and render what the proper judgment should be, but you remand the question of attorney's fees to be considered in light of the fact that the TC now knows that someone who lost actually won. And that might make a big difference on the award of attorney's fees, especially in light of the fact that another custody lawsuit has been initiated, and the resources may not be there to defend it.

Although we have not discussed my preemption arguments, you may not get to them because of statutory interpretation. These are German citizens, three of them are not American citizens. There is field preemption that's as clear as any preemption under the US constitution, and if in fact somehow you don't get past the statutory interpretation, I would ask you to seriously consider those arguments.