Are Pleadings Even Needed in Family Court?

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At least in the counties contained within the Houston First and Fourteenth Courts of Appeals, family court judges cannot grant relief unless there are pleadings asking for that relief or unless the issue was tried by consent. A recent case provides a surprisingly broad view of what constitutes a "pleading" that can justify granting relief not explicitly mentioned in the current petition.

I represented the father who won on appeal in *Flowers v. Flowers*, 407 S.W.3d 452 (Tex. App. - Houston [14th Dist.] 2013, no pet.) and that case holds:

1. A family court cannot grant relief unless there are pleadings asking for the relief or the issue was tried by consent. The Rules of Civil Procedure apply in family cases, even those involving children.

2. An issue is not tried by consent if it is never mentioned or discussed at trial.

The Fourteenth Court of Appeals in May 2014 reaffirmed the basic notion that relief cannot be granted without pleadings requesting the relief or trial by consent in *In re A.D.*, No. 14-12-00914-CV (Tex. App. - Houston [14th Dist.] 5/6/2014)(no pet.). The court stated:

> *A trial court may not enter judgment on a claim that was not sufficiently pleaded or otherwise tried by consent. Texas follows a "fair notice" standard for pleading, meaning we consider whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.*

(Citations omitted).

This case, however, allowed the trial judge to rely on motions for temporary orders and not the current pleading to justify granting the mother only supervised visitation. *In re A.D.* involved a modification suit where the father's pleading asked to switch primary custody to him and grant the mother a standard possession order. However, the trial court went much further and ordered that the mother only have supervised visitation. On appeal, the mother complained that the father did not have pleadings asking for supervised visitation.

> *Although Cayne requested standard possession for Sommer in his petition to modify, several months later, he filed his supporting affidavit. In the affidavit, Cayne alleged facts that would support not only giving him custody but also ordering that Sommer's visitation be supervised. Specifically, Cayne averred that due to Sommer's false sexual-abuse accusations, there was a "clear and present danger to the child's safety and welfare."*

Then, while his petition to modify was pending, Cayne filed multiple motions, requesting temporary orders for A.D.'s safety and alleging the child was in danger in Sommer's care. The trial court granted the second motion, giving Cayne custody and ordering that Sommer's visitation be supervised. At the hearing, the court remarked that Sommer was causing "harm" and "abuse" to A.D. through her "continuing course of conduct." Sommer did not object to this restriction on the ground that she lacked notice that Cayne sought such relief. This restriction remained in effect until trial of Cayne's petition for permanent modification.

In summary, Cayne's pleadings, as a whole, alleged A.D. was in danger while in Sommer's care. Such allegation, together with the trial court's temporary orders, provided fair notice that Cayne sought to prevent A.D. from being in Sommer's care. Accordingly, the pleadings supported supervised visitation.

This opinion says that during the bench trial on visitation (following the jury trial on primary custody), the father testified about his request for supervised visitation and the mother's attorney objected because there were no pleadings. The opinion does not say how the trial judge ruled during the hearing but he ended up ordering supervised visitation. This opinion does not seem to be based on trial by consent, but rather that odd notion that the motions, affidavits and orders on temporary orders were enough to put the mother on notice that the father was asking for supervised visitation in the final order even though his petition did not request that relief at all. Experienced family law attorneys are likely to disagree with this ruling because we feel we should be entitled to prepare for trial based on the current live petition, not a motion for temporary orders. Parties often ask for relief in temporary orders that they do not want in the final order.

This decision seems to be based as much on the bad facts involving the mother's allegations of sexual abuse against the father as it does on the notion that you must ask for relief in your pleadings before you can be granted that relief. Unlike the *Flowers* case, at least the issue of supervised visitation had been discussed and presented at some point in the *A.D.* case. In *Flowers*, the trial judge removed the geographic residence restriction even though the mother did not ask for that relief and despite the fact that the topic was never once mentioned at trial.

The Fourteenth Court of Appeals had earlier in *Baltzer v. Medina,* 240 S.W.3d 469, 746 (Tex. App.— Houston [14th Dist.] 2007, no pet.) held that a trial court abused itsdiscretion in modifying a joint managing conservatorship and in appointing the father the sole managingconservator because the father had not requested that relief in his pleadings.

The Houston First Court of Appeals has also held that there must be pleadings or trial by consent in order to grant relief in a child custody case. *In re Sanner*, No.(Tex. App.— Houston [1st Dist.] May 20, 2010, no pet.) (mem. op.)("without proper pleadings, the trial court exceeded its authority by modifying and reforming some of the conservatorship and possessionprovisions of its prior orders..."); *Binder v. Joe*, 193 S.W.3d 29, 32-33 (Tex. App.— Houston [1st Dist.] 2006, no pet.) (trial court erred in naming parent sole managing conservator when his pleadings did not request that relief in restricted appeal from default judgment).

Numerous other courts have also concluded in family law cases that relief not requested in pleadings and not tried by consent cannot be granted. See e.g. *In re A.B.H. and L.N.H.*, 266 S.W.3d 596, 600-01 (Tex. App.— Fort Worth 2008, no pet.)(error for trial court to grant modification and appointfather sole managing conservator when father's pleadings did not seek that relief and the issue was nottried by consent). *Teel v. Shifflett*, 309 S.W.3d 597, 602-03 (Tex. App.—Houston [14th Dist.] 2010,

pet.denied)(error for trial court that granted protective order to find that the parties were "intimate parties"when the relief was not requested in the petitioner's pleadings); *In re S.A.A.*, 279 S.W.3d 853, 856 Tex. App.— Dallas 2009, no pet.)(trial court erred in granting divorce on grounds of adultery when adultery was not plead or proven, stating, "A court's jurisdiction to render judgment is invoked by pleadings, and a judgment unsupported by pleadings is void."). *Moneyhon v. Moneyhon*, 278 S.W.3d 874, 878-9 (Tex. App.— Houston [14th Dist.] 2009, no pet.)("petition must give fair and adequate notice of the claims beingasserted..." and it was error to grant relief based on breach of fiduciary duty when that claim was not plead or tried by consent).

The San Antonio Court of Appeals in a memorandum decision, *In re M.B.B-Y.*, No.04-10-00541-CV (Tex. App.—San Antonio, April 6, 2011, no pet.) (mem. op.) stated:

> *"Texas is a 'fair notice' state, which means that all parties are entitled to fair notice of a claim."The Texas Family Code specifically requires parties to include in their pleadings a "statement describing what action the court is requested to take concerning the child and the statutory grounds on which the request is made." Tex. Fam. Code Ann. § 102.008(a)(10) (West 2008).Without proper pleadings and evidence, a trial court exceeds its authority if it modifies or reformsprevious orders affecting the custody of a child.*

(Case citations omitted).

Old fogeys and those without the ability to determine if cases have been overruled or bypassed by changes to the Texas Family Code might cite *Leithold v. Pass*, 413 S.W.2d 698 (Tex. 1967) and its progeny, which appear to apply very relaxed (or even non-existent) pleading requirements in child custody cases. An example of this old line of cases said,"... the paramount concern is the best interest of the child, and the niceties of the procedural rules of pleading will not be used to defeat that interest." *Boriackv. Boriack*, 541 S.W.2d 237, 242 (Tex. Civ. App.—Corpus Christi 1976, writ dismissed) (trial court didnot err in ordering wife to pay child support even though pleadings did not request support). The Houston Fourteenth Court of Appeals, in the *Baltzer* decision, has already addressed this argument in Footnote No. 5:

> *In Leithold v. Plass, the Texas Supreme Court held that the petitioner's pleadings for modification were sufficient. This case predated the enactment of the Texas Family Code, and it is not clear what issue was presented regarding the petitioner's pleading. It appears that respondent argued that petitioner's pleading was insufficient to request a modification of visitation rights because petitioner requested that he be given "custody and control" of his son rather than "visitation." The Texas Supreme Court held that petitioner's pleading was sufficient. In this case the high court did not hold that the civil procedure rules regarding pleadings and judgments do not apply to cases involving custody of minor children. Even if it had so held, the enactment of section 156.004 of the Texas Family Code would supersede this holding.*

(Citations omitted).

Some less informed courts of appeals continue to follow the 1967 *Leithold* case as if the Texas Family Code had never been adopted. *In re O'Neal*, No. 07-13-003358-CV (Tex. App. - Amarillo 12/23/2013)(mem. op.)(orig. proc.) involved parents who divorced in 2009 and a mother, who was given the exclusive right to determine the child's primary residence. The father in 2011 filed a motion to modify and his pleadings asked the trial court to appoint him "as the person who has the right to designate the primary residency of the child." The father also requested temporary orders switching primary custody to him because,"the child's present circumstances would significantly

impair the child's physical health or emotional development, and the requested temporary order is in the best interest of the child." The father also asked for an injunction preventing either parent from "consuming alcohol within the 12 hours before or during the period of possession of or access to the child." The mother filed a general denial and subsequently countersued for a change in venue, for reimbursement of medical and dental care for the child and increase in child support.

On September 24, 2013, the trial court held a hearing for temporary orders (over two years after the modification suit was filed). After the hearing, the trial court expanded the father's visitation to every other week, restricted the geographical location of the child to Hardeman County and reduced the father's child support. The mother then filed a petition for writ of mandamus.

The Amarillo Court of Appeals, whose law books only go up to the late 1960's apparently, granted mandamus on the trial court imposing a new geographic residence restriction without finding the child was in danger. However, the court rejected the mother's argument that the father had no pleadings asking for the relief he received in temporary orders, stating:

> *A trial court's decision awarding relief that no one requested is normally an abuse of discretion. However, strict pleading requirements grow more lax in matters of the parent / child relationship. According to our Supreme Court, "a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child." Leithold v. Plass, 413 S.W.2d 698, 701 (Tex. **1967**) (emphasis added); In re P.M.G., supra; accord, Conley v. St. Jacques, 110 S.W.2d 1238, 1242 (Tex. Civ. App.—Amarillo **1937**, writ dism'd) (stating that "technical rules of practice and pleading are of little importance in determining issues concerning the custody of children [since] [i]t is not only the right but the duty of the trial court to ascertain any and all facts, and make such investigations as, in his judgment, will assist him in reaching a proper conclusion as to the problems surrounding their custody to the end that he may determine the person who is best qualified and most suitable to furnish the proper environments and home in which they are to live."). In petitioning for the authority to designate the child's primary residence, [the father] effectively bestowed upon the trial court authority to address all relevant custody and control matters, including that of child visitation. So, we reject [the mother's] suggestion that the trial court's decision to consider the temporary change of visitation fell outside the scope of issues before it.*

(Some citations omitted).

This *O'Neal* case is clearly based on decisions from 1937 and 1967 that are no longer followed and which were in effect overruled by the enactment of the Texas Family Code. It might be that either Houston court of appeals would have also refused to grant a writ of mandamus, however. The father's pleading asking that primary custody be switched to him probably could reasonably be interpreted to allow the trial judge to think increased visitation for the father was also at issue.

Likewise, for example, a mother's modification petition asking that primary custody be switched to her and asking that the father should be ordered to pay her child support, could probably be interpreted to imply a request that her child support obligation be terminated even if her petition does not explicitly say that.

ProDoc and standard State Bar forms for petitions and counterpetitions do not include very specific requests for relief. The best and safest practice is for attorneys to add a specific list of all relief they seek for their clients in their pleadings.