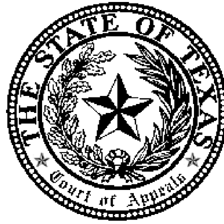
Affirmed and Opinion filed September 27, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00865-CV

LESLEY ANNE KERNAN, Appellant

V.

RICHARD WARREN CRATTY A/K/A RICK CRATTY, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Cause No. 99-19113

O P I N I O N

This is an appeal from a final judgment in a voluntary paternity suit in which the trial court awarded primary joint managing conservatorship to the father. Appellant, Ms. Kernan, complains that the trial court abused its discretion in three ways: (1) by granting discovery sanctions without notice and without a written motion for sanctions; (2) in striking all of Kernan's trial witnesses as a discovery sanction; and (3) by excluding four of Kernan's witnesses for violation of the rule requiring sequestration of fact witnesses during trial. We affirm the judgment of the trial court.

Factual and Procedural Background

Mr. Cratty brought a voluntary paternity action, successfully established his parentage, and was awarded primary custody of his and Ms. Kernan's son. This appeal centers on a discovery dispute decided by the court at a pretrial hearing. In that hearing, the court struck all of Ms. Kernan's witnesses because she failed to identify the witnesses before the close of discovery. In an attempt to show cause why Ms. Kernan did not timely identify the witnesses, Ms. Kernan's counsel cited an oral agreement with appellee's trial counsel which would allow counsel to turn over Ms. Kernan's witness list the week following a scheduled mediation. At the hearing, Ms. Kernan failed to offer any evidence that if the witnesses testified, Mr. Cratty would not be unfairly prejudiced or surprised. Apparently unimpressed with Ms. Kernan's attempt to show cause, the trial court stated that Texas Rule of Civil Procedure 11 requires agreements between parties to be in writing and struck the witnesses. After her witnesses were struck, Ms. Kernan did not pursue or reurge an earlier request for a continuance, and ultimately, announced ready for trial.

Discussion

In her first point, Ms. Kernan argues that the trial court erred when it granted "discovery sanctions against [Ms. Kernan] in the absence of a written motion filed by [Mr. Cratty] or without notice to [Ms. Kernan]." Her second point, a slight variation of the first, complains that the court improperly struck her witnesses as a sanction for discovery violations, and alleges that by doing this, the court ignored the best interests of the child. In her third point of error, Ms. Kernan complains that the court improperly struck her witnesses for violating rule 267 of the Texas Rules of Civil Procedure, referred to in general parlance as "the Rule." We address first Ms. Kernan's first two points.

Although Ms. Kernan claims that the trial court struck her witnesses as a sanction,

Mr. Cratty disputes this claim, and the record does not support it.[1] The following findings of fact and conclusions of law specifically refute Ms. Kernan's contentions:

FINDINGS OF FACT

> 44. Upon presentation of a pre-trial motion filed on [Mr. Cratty's] behalf, the evidence was sufficient to prove that [Ms. Kernan's] identification of . . . trial witnesses . . . was not timely.
>
> 45. Upon presentation of a pre-trial motion filed on [Mr. Cratty's] behalf, there was insufficient evidence offered by [Ms. Kernan] to adequately explain her untimely discovery responses.
>
> 47. A motion for continuance was filed on [Ms. Kernan's] behalf by her attorney of record, however, this motion was later withdrawn and [Ms. Kernan's] attorney announced ready for trial.

CONCLUSIONS OF LAW

> 12. [Ms. Kernan's] designation of persons with knowledge of relevant facts and/or trial witnesses in response to a proper discovery request was untimely pursuant to the *Texas Rules of Civil Procedure.*
>
> 13. Ms. Kernan failed to carry the burden of demonstrating good cause for the untimely designation of . . . trial witnesses as provided by *Tex. R. Civ. P. Rule 193.6.*
>
> 14. The evidence offered by [Ms. Kernan] to explain her untimely discovery responses was insufficient to demonstrate good cause and insufficient to demonstrate a lack of unfair surprise or a lack of unfair prejudice to [Mr. Cratty] as provided by *Tex. R. Civ. P. Rule 193.6.*

Thus, in the court's findings of fact and conclusions of law, there is no reference to rule 215, the discovery sanctions rule. To the contrary, the court specifically referred to rule 193.6. Rule 193.6 mandates that material and witnesses untimely disclosed or identified, be excluded, unless one of two conditions are shown: (1) that the party had good cause for not responding sooner; or (2) that the failure to disclose will not unfairly surprise or prejudice

[1] Although the court states that "[T]his Court since day one has been death on discovery," we do not view this as a clear statement that the court was imposing rule 215.2 discovery sanctions, and there is no other indication in the record that the court struck the witnesses pursuant to the "death penalty" sanction rule. Moreover, we cannot tell from the reporter's record what rule the judge or the lawyers were relying on at the hearing to exclude the witnesses.

the other party. By its plain language, rule 193.6 is the precise rule that the trial court should have relied on to exclude the witnesses.[2] And, case law confirms that such a construction is appropriate: *Alvarado v. Farah Mfr. Co. Inc.*, 830 S.W.2d 911, 914 (Tex. 1992) (construing former rule 215(5)); *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989) (same); *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex.1986) (same); *Elliott v. Elliott*, 21 S.W.3d 913, 921 (Tex. App.—Fort Worth 2000, pet. denied); *Northwestern Nat'l County Mut. Ins. Co. v. Rodriguez*, 18 S.W.3d 718, 721-22 (Tex. App.—San Antonio 2000, pet. denied) (discussing exclusion of experts for failure to comply with TEX. R. CIV. P. 166b(6)); *Rutledge v. Staner*, 9 S.W.3d 469, 472 (Tex. App.—Tyler 2000, pet. denied); *Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136, 148 (Tex.App—Austin 1993, writ denied) (holding that the failure to supplement discovery by providing accurate identification information of certain witnesses precluded the presentation of those witnesses at trial). In short, because Ms. Kernan did not present any evidence showing that she fell under either of the two exceptions to the rule's automatic exclusion, and because Ms. Kernan did not request a continuance, the trial court had no choice but to exclude the witnesses. TEX. R. CIV. P. 193.6.

Ms. Kernan's cases, which she cited for the proposition that the court had to have a hearing before it excluded the witnesses, and for our standard of review, do not alter this conclusion. These cases do not involve the failure to file responses in a timely manner; they involve other discovery misconduct such as the complete failure to identify witnesses or to

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[2] Rule 193.6 states in part as follows:
(a) Exclusion of Evidence and Exceptions.
A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

TEX. R. CIV. P. 193.6

produce documents. These cases do not apply to the exclusion of evidence pursuant to 193.6. As we stated earlier, the evidence is excluded unless the appellant falls under one of two exceptions. The only exclusion Ms. Kernan even attempted to meet was "good cause" for not filing the answers in a timely manner; but, Ms. Kernan did not make the court's decision on this issue a ground on appeal. Consequently, there is nothing for us to review on this issue.

Ms. Kernan also argues that the decision of the court to exclude the witnesses did not take into account the best interests of the child. We have several responses to this argument. First, counsel did not make this argument at the trial court; rather, counsel only raises the issue in a motion for a new trial which was overruled.[3] Second, we acknowledge that the best interests of the child is to be taken into account. However, a party cannot ignore the rules of civil procedure and then argue best interests of the child to try to avoid the consequences of having failed to abide by the rules. After all, the discovery rules apply to family law cases. If they are not followed, consequences will result. Rule 193.6 has several built-in safeguards that prevent automatic exclusion. Counsel here simply did not try to avail himself of these.

Furthermore, as to the fact that the court did not have the benefit of witnesses who would testify favorably for Ms. Kernan, the court did have this testimony, even if it was presented after the trial. And, otherwise, the court had abundant testimony before it supporting its decision that the best interests of the child was to award primary joint managing conservatorship to Mr. Cratty.

In short, finding that the trial court properly excluded witnesses pursuant to rule 193.6 and did not enter a discovery sanctions order pursuant to rule 215, we overrule Ms. Kernan's first two points of error. In light of our ruling on her first two points of error, Ms. Kernan's

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[3] At the pretrial hearing, Ms. Kernan's counsel made one very brief reference to the best interests of the child; but it was such a minor reference that it was more in the nature of an aside that the court might have missed.

third point of error, complaining that the trial court erred when it excluded Ms. Kernan's witnesses for violating "the rule" is moot. The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 27, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).