NUMBER 13-19-00213-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF S.K. AND L.K., CHILDREN

On appeal from the 267th District Court of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Hinojosa

Appellant T.K. (Father) appeals that portion of the trial court's judgment appointing appellee L.R. a possessory conservator of Father's minor children, S.K. and L.K.[1] In three issues, which we treat as one, Father argues that the trial court abused its discretion in appointing L.R. as a possessory conservator because the evidence supporting its decision was legally and factually insufficient. We affirm.

[1] To protect the identity of the minor children, we refer to the children and their relatives by their initials or an alias. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(a).

I. BACKGROUND

A. Department Intervention

On May 3, 2016, the Department of Family and Protective Services (the Department) filed suit to terminate Father and C.C.'s (Mother) parental rights to S.K. and L.K. The petition was supported by an affidavit of removal alleging that L.K. was born on May 28, 2015, with opiates in his system. Mother and Father entered into a family-based safety plan with the Department which resulted in S.K. and L.K being placed with their maternal grandmother L.R. The affidavit alleged that Mother continued to use "illegal drugs" after L.K.'s birth and that Father was verbally abusive toward Mother.

On June 27, 2016, the trial court awarded temporary managing conservatorship to the Department, and the children remained in L.R.'s care. The trial court later ordered Mother and Father to complete the services required by their respective family service plans. On March 16, 2017, L.R. filed a petition in intervention seeking to be named the children's sole managing conservator.[2] L.R.'s petition alleged that she had standing to intervene in the case under the general standing statute of the Texas Family Code on two bases: she had actual care, control, and possession of the children for at least six months ending not more than ninety days preceding the date of the filing of the petition; and she had been certified as a foster parent, and the children were placed by the Department in her home for at least twelve months ending not more than ninety days preceding the date of the filing of the petition. *See* TEX. FAM. CODE ANN. § 102.003(a)(9), (12). L.R. filed an affidavit supporting her standing allegations. She later filed an amended petition in

[2] The trial court dismissed L.R.'s earlier pro se petition to intervene.

intervention requesting alternatively that the trial court appoint her as a possessory conservator of the children.

While the case was pending, Father discontinued his relationship with Mother and worked toward completion of his family service plan. The children remained in L.R.'s care until August 21, 2017, when the trial court ordered that the children be returned to Father pursuant to § 263.403 of the family code. *See id*. § 263.403 (permitting the court to retain jurisdiction during monitored return of children to parent).

B. Bench Trial

The case proceeded to a bench trial on November 14, 2017. The Department did not pursue termination of parental rights at that time. Instead, the Department recommended that the trial court grant Father sole managing conservatorship of the children and award L.R. possessory conservatorship. L.R. pursued only possessory conservatorship, which Father opposed. The following witnesses testified at trial: Department caseworker Marlinda Oviedo, Court Appointed Special Advocate (CASA) Kelly Blevins, Father, and L.R.

Oviedo testified that Mother did not complete her court ordered services, including the requirement that she complete a drug and alcohol assessment. Oviedo stated that Mother did not visit the children regularly and attended some visits while she was under the influence of a controlled substance. Father, on the other hand, successfully completed his service plan, which included a psychological evaluation, individual counseling, and anger management. Oviedo testified that the children were bonded to Father and were happy when they learned that they were going to live with Father.

According to Oviedo, the children resided with L.R. from July 2015 through August 2017. When they were originally placed with L.R., L.K. was a month old and S.K was a year old. Oviedo stated that the children were "really well bonded to [L.R.]" and "seemed very well adjusted and at home with her." L.R. provided the children with a safe environment and performed all the duties that a parent would. Oviedo believed that it was in the children's best interest for Father to be appointed the sole managing conservator and for L.R. to be appointed a possessory conservator. It was Oviedo's opinion that the children's emotional well-being would be harmed if L.R. did not have visitation. Oviedo explained that children that are removed from their long-time caregiver can exhibit disruptive and aggressive behaviors and regression. Oviedo did not believe Father would permit L.R. regular visitation, unless ordered by the trial court.

Blevins, the CASA assigned to the case, visited the children once a month. She confirmed that the children were very bonded to L.R. Blevins stated that L.R. provided for all the children's needs, was loving and caring toward them, and used appropriate discipline. Blevins agreed that it was in the children's best interest to reside with Father while allowing L.R. to have regular visitation. Blevins believed it would be harmful to the children's emotional well-being if they did not continue to have regular contact with L.R. because she has been their primary caretaker.

Father testified that he had no intention to cut off his children's contact with L.R. However, Father was concerned that L.R. might permit Mother to have contact with the children. It was Father's opinion that L.R. should not be able to interfere with his decisions

concerning where the children reside and the specific weekends and holidays that they have visitation with L.R.

L.R. testified that she would like to have weekend visitations with the children to coincide with those weekends when she has possession of the children's half-sister. She also requested to have visitation for alternating holidays. L.R. stated that the children are always excited for their visits, particularly because they are able to see their half-sister. It was L.R.'s belief that Father would not allow regular visitation if it was not court-ordered. L.R. maintained that she did not plan on having a relationship with Mother.

C. Trial Court's Ruling

The trial court signed a judgment dismissing the Department and designating Father as the children's sole managing conservator. The trial court designated L.R. as a possessory conservator, finding that it was in the children's best interest. The trial court did not appoint Mother as a managing or possessory conservator, finding that doing so would not be in the best interest of the children and would endanger their physical or emotional welfare. Father now appeals.

II. DISCUSSION

In what we treat as his sole issue, Father argues that the trial court abused its discretion in appointing L.R. as a nonparent possessory conservator.

A. Standard of Review

In determining issues of conservatorship and possession and access, the primary consideration is always the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.002; *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002); *Brandon v. Rudisel*, 586 S.W.3d

94, 102 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Trial courts have wide discretion with respect to determining the best interest of a child in conservatorship matters. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *In re K.A.M.S.*, 583 S.W.3d 335, 340–41 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Therefore, we review a trial court's conservatorship decisions for abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (en banc). A trial court abuses its discretion if its decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d at 616; *In re J.J.G.*, 540 S.W.3d at 55.

Under an abuse of discretion standard, legal and factual insufficiency are not independent grounds of error; instead, they are factors in deciding if the trial court abused its discretion. *In re J.J.G.*, 540 S.W.3d at 55. A trial court does not abuse its discretion when it bases its decision on conflicting evidence so long as some evidence of substantive and probative character supports its decision. *Id*. Under this standard, we consider whether the trial court: (1) had sufficient information upon which to exercise its discretion, and (2) erred in its application of discretion. *See id*.; *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

B. Significant Impairment and the Parental Presumption

We first address Father's argument that there is insufficient evidence that denying L.R. access to the children would significantly impair the children's physical health or emotional well-being. Father's argument relies on those statutes governing grandparent access to children. This argument, however, confuses the issue of L.R.'s standing to

intervene, which Father does not challenge, with the propriety of the trial court's possessory conservatorship appointment.

The significant impairment requirement cited by Father derives from those statutes permitting a grandparent to file an initial suit seeking managing conservatorship or to intervene in a pending suit to seek possessory conservatorship. *See* TEX. FAM. CODE ANN. § 102.004(a)(1) (conferring grandparents standing to file an original suit requesting managing conservatorship if there is satisfactory proof that "the child's present circumstances would significantly impair the child's physical or emotional development") *and* § 102.004(b) (conferring standing to a grandparent with substantial past contact with a child to intervene in a pending suit to seek possessory conservatorship if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development). This requirement is also found in the statute governing grandparent suits for possession and access to a child. *See id*. § 153.432 ("Suit for Possession or Access by Grandparent"). However, L.R. intervened pursuant to the general standing provisions as set out in § 102.003(a) of the family code. *See id*. § 102.003(a). As applicable here, § 102.003(a) confers standing to file a suit affecting the parent child relationship to:

> (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition; [and]
>
> (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition[.]

Id. § 102.003(a)(9), (12). A person who has standing to file an initial suit under § 102.003 also has standing to intervene in a pending suit. *See In re M.J.G.*, 248 S.W.3d 753, 757 (Tex. App.—Fort Worth 2008, no pet.).

The Texas Supreme Court addressed the application of the general standing statute to grandparents seeking conservatorship in *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012) (per curiam). Shook was a grandmother who intervened in a pending suit to seek managing conservatorship of her grandchild pursuant to § 102.003(a)(9). *Id*. at 541–42. The court noted that Shook "pled and established general standing to file a suit for conservatorship . . . as someone who has had care, control, and possession of a child for the designated time." *Id*. at 543. Without reference to § 102.004, the court held that Shook had standing to seek conservatorship of her grandchild because she met the requirements of § 102.003(a)(9). *Id*.

Here, L.R. presented evidence in the trial court to support her standing under subsections 102.003(a)(9) and (12). Father did not challenge L.R.'s testimony at trial, and he does not contest her standing on appeal. Because L.R.'s standing was based on the general standing statute, she was not required to present the impairment evidence required for grandparent standing. *See In re J.H. III*, 538 S.W.3d 121, 124 (Tex. App.—El Paso 2017, no pet.) (rejecting similar arguments where grandparent established general standing to seek conservatorship). Furthermore, § 153.432 governing grandparent suits for possession or access is inapplicable in a conservatorship suit brought by a person who demonstrates standing under § 102.003. *See id*. (concluding that § 153.432 did not apply to a conservatorship suit by a grandmother who established

general standing under § 102.003 of the family code). For the foregoing reasons, we conclude that L.R. was not required to present evidence of a significant impairment. Therefore, the trial court could not have abused its discretion on this basis. *See In re J.J.G.*, 540 S.W.3d at 55.

Next, Father contends that the evidence does not "show that [he] is an unfit parent to overcome the presumption that [he] acts in his children's best interest." The presumption that the best interest of the child is served by awarding conservatorship to the child's parent is deeply embedded in Texas law, *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000), and has been codified in the family code. TEX. FAM. CODE ANN. § 153.131(b). However, by the statute's express language, the parental presumption applies only to the appointment of a managing conservator. *Id.*; *see Shook*, 381 S.W.3d at 543 (concluding that the trial court could name grandmother possessory conservator even if she failed to overcome parental presumption for managing conservatorship); *Blackwell v. Humble*, 241 S.W.3d 707, 723 (Tex. App.—Austin 2007, no pet.) (holding that because parents were named joint managing conservators, the trial court's appointment of a grandmother and uncle as possessory conservators did "not run afoul of section 153.131's presumption that it is in a child's best interest for her parent or parents to be appointed managing conservator"). Because Father was appointed the managing conservator of the children, L.R. was not required to overcome any common law or statutory presumption. *See* TEX. FAM. CODE ANN. § 153.131(b); *Shook*, 381 S.W.3d at 543; *Blackwell*, 241 S.W.3d at 723. Therefore, the trial court could not have abused its discretion due to the absence of such evidence. *See In re J.J.G.*, 540 S.W.3d at 55.

C. Best Interest

Finally, Father argues that there was insufficient evidence supporting the trial court's finding that appointing L.R. as a possessory conservator was in the children's best interest.

1. Applicable Law

When it appoints a managing conservator, the trial court has discretion to appoint possessory conservators and award visitation rights. *See* TEX. FAM. CODE ANN. § 153.006(a); *see also In re A.D.A.*, No. 11-12-00002-CV, 2012 WL 4955270, at *5 (Tex. App.—Eastland Oct. 18, 2012, no pet.) (mem. op.). The primary consideration in appointing a possessory conservator is the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.002; *Lenz*, 79 S.W.3d at 14. Trial courts have wide latitude in determining a child's best interest. *Gillespie*, 644 S.W.2d at 451; *In re S.A.H.*, 420 S.W.3d 911, 926 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Texas courts typically utilize the factors set out in *Holley v. Adams* in cases requiring a best interest analysis. 544 S.W.2d 367, 371–72 (Tex. 1976); *see In re S.A.H.*, 420 S.W.3d at 926. Those factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or

omissions of the parent. *Id*. Proof of best interest is not limited to these factors, nor do all factors always apply in every case. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002); *In re S.A.H.*, 420 S.W.3d at 926.

2. Analysis

As to the first *Holley* factor, the evidence demonstrated that the children were excited for their visits with L.R. and that they particularly enjoyed seeing their half-sister during the visits. This factor weighs in favor of the trial court's ruling.

As to the second *Holley* factor, there was testimony that the children were closely bonded to L.R. who served as their primary caregiver for a majority of their lives. L.R. provided the children with a safe environment and capably performed all the duties of a parent. According to the CASA and the children's caseworker, the children's emotional well-being would be harmed if L.R. did not have visitation. Further, the caseworker testified that, in her experience, children removed from their long-time caregiver often exhibit disruptive and aggressive behaviors and regress in their development. This factor also favors the trial court's ruling.

Relevant to the third *Holley* factor, Father testified that he was concerned L.R. would permit Mother to have access to the children. However, L.R. maintained that she would not do so as she did not plan on having a relationship with Mother. The trial court was permitted to resolve this conflicting evidence in favor of its decision to grant L.R. possessory conservatorship. *See In re J.J.G.*, 540 S.W.3d at 55. This factor is neutral as to the trial court's ruling.

With respect to the fourth and eighth factors, all witnesses testified positively as to the parenting abilities of Father and L.R. Further, there was no evidence that either Father or L.R.'s existing relationship with the children was improper. For instance, neither L.R. nor the Department introduced any evidence concerning the allegations relied on to support the Department's initial removal of the children from Father's care. These factors are neutral.

We finally consider the sixth and seventh *Holley* factors,[3] concerning the plans for the children and the stability of the home or proposed placement. There was no evidence that either Father or L.R.'s home was unstable. However, there was conflicting evidence as to whether the children would continue to have regular contact with L.R. and the children's half-sister in the absence of court-ordered visitation. Further, as previously discussed, L.R. served as the primary caregiver for the children for most of their young lives, and they were strongly bonded to her. The children's ability to continue their relationship with L.R. and their half-sister weighs in favor of the trial court's ruling.

We conclude that the record contains evidence of a substantive and probative character establishing that the appointment of L.R. as a possessory conservator was in the children's best interest. *See id*. Therefore, we are unable to conclude that the trial court's ruling was an abuse of discretion. *See id*.; *Stamper*, 254 S.W.3d at 542.

D. Summary

Having rejected each of his arguments, we overrule Father's sole issue.

[3] No evidence was introduced at trial concerning the fifth and ninth *Holley* factors. Therefore, we do not consider those factors in our review.

III. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
25th day of June, 2020.