TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00918-CV

D. M., Appellant

v.

Texas Department of Family and Protective Services, Appellee

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-FM-18-000957, THE HONORABLE DARLENE BYRNE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Daniella appeals from a district court's order appointing her mother Brandy as the sole managing conservator of five of Daniella's children and appointing Daniella as a possessory conservator of those children.[1] Specifically, Daniella contends the court abused its discretion because the Department of Family and Protective Services failed to rebut the statutory presumption in favor of naming Daniella, a natural parent, as a managing conservator. *See* Tex. Fam. Code § 153.131(b). We will affirm.

[1] We refer to the appellant and her mother by pseudonyms. Tex. Fam. Code § 109.002(d). A sixth child is no longer a subject of this suit. Outside of her contention that she herself should have been named a managing conservator of her children, Daniella does not challenge the appointment of Brandy as a managing conservator.

BACKGROUND

The Department became involved with Daniella's family in November and December of 2017 due to reports of "medical neglect, physical neglect, and neglectful supervision," in addition to concerns about "domestic violence and drug use." In February of 2018, the Department filed a petition asking the court to name a managing conservator over Daniella's children or, in the alternative, to terminate the parent-child relationship between Daniella and those children, who ranged in age from four to eleven years old at the time of trial. The court named the Department temporary managing conservator of the children. The Department placed the children in a shelter and then with Brandy, where they remained for most of the pendency of the case. The Department's original goal was family reunification.

While the case was pending, Daniella migrated between Austin and Denton and struggled with homelessness. The Department sometimes had trouble contacting Daniella, and its early reports describe Daniella as "minimally cooperative" with the caseworker. The reports also allege that Daniella's boyfriend was using and possibly selling cocaine, that the children were routinely exposed to the drug, and that each child had tested positive for the drug when the Department obtained custody. Daniella was ultimately arrested and incarcerated for an unknown offense in July of 2019.

The matter was tried to the bench in October and November of 2019. Daniella was incarcerated at the time, but a bench warrant allowed her to appear in person for the trial. She did not take the stand. Three witnesses testified: Department caseworker Nancy Hernandez, court-appointed special advocate Kayla Tatum, and Daniella's mother Brandy. None of the parties admitted any exhibits into evidence.

Hernandez testified that the children had been "really happy" and "active" while in Brandy's care. She explained that the children are "very attached" and "bonded" to Daniella and noted that they had become "pretty much a little bit confused as to what's going on with their mother . . . ."[2] She testified that Daniella's supervised visits with the children had gone very well and that the children were "obviously thrilled and excited to see their mom." She explained that after some initial resistance to the Department's involvement, Daniella had "do[ne] well" with her services and "was able to sustain housing and employment," leaving Hernandez hopeful for reunification. Hernandez had nevertheless concluded that appointing Brandy as sole managing conservator is in the best interest of the children because "[with Brandy] being the only provider and caretaker of these children since this case started . . . the children are being well taken care of, they have been safe, and they basically would be just be all together" if Brandy were named managing conservator.

Tatum testified that she had interviewed the children, Daniella, and Brandy, and that she believed it would serve the children's best interest to appoint Brandy as managing conservator and allow visitation with Daniella. She said she had reason to believe there had been a domestic-violence incident between Daniella and a boyfriend, although she conceded that she had no first-hand knowledge of that alleged incident. She also said that "initially when the case began," the "consumption of illegal substances" by Daniella and her boyfriend was "a concern." She testified that she could not remember how many times, if any, she had watched the children interact with their mother. She said she had supported the expanded visitation rights offered by

[2] This is an apparent allusion to the arrest and incarceration, although Hernandez never expressly referred to either one.

the Department during the pendency of the case and that she, like Hernandez, had hoped for family reunification.

Brandy testified that the children were originally "having issues" at school but were "getting better" in her care and that she was in the process of moving to a four-bedroom home to provide enough space for the children to remain together with her. She reported that Daniella had always been "consistent" in her visitation with the children. She emphasized how much the children love their mother and asked for a "step-up" plan under which Daniella would gain increased access to her children as she progressed through court-ordered services and drug-testing requirements. Brandy testified that she would need financial assistance paying for childcare for so many children, but that she believed her appointment as sole managing conservator is in the best interest of the children.

After hearing testimony and argument, the district court rendered a final decree naming Brandy as sole managing conservator of the five children and Daniella as possessory conservator. The court also appointed one of the biological fathers as co-possessory conservator of two of the five children. Daniella timely perfected this appeal. *See* Tex. R. App. P. 28.4 (governing "appeals in parental termination and child protection cases").

DISCUSSION

In a single issue on appeal, Daniella contends that the district court erred in appointing her mother as the sole managing conservator because the Department failed to carry its burden to rebut the statutory presumption in favor of appointing a natural parent as a managing conservator. *See* Tex. Fam. Code § 153.131(b). We review the appointment of a conservator for an abuse of discretion. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex.

1982). "An abuse of discretion does not occur as long as some evidence of a substantive and probative character exists to support the trial court's decision." *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In making this determination, we review the record in the light most favorable to the trial court's decision and indulge every legal presumption in its favor. *See Patterson v. Brist*, 236 S.W.3d 238, 240 (Tex. App.—Houston [1st Dist.] 2006, pet. dism'd).

Chapter 153 of the Family Code governs conservatorship, possession, and access to children. *See* Tex. Fam. Code §§ 153.001–709. That chapter stipulates, "The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." *See id*. § 153.002. "It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child." *Id*. § 153.131(b). Therefore, "unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child." *Id*. § 153.131(a). "This statute thus requires the nonparent to offer evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child." *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990). A party seeking to have a non-parent named as managing conservator must rebut the statutory presumption by a preponderance of the evidence. *See id.*

Here, the Department contends that the reports, service plans, affidavits, and other documents filed during the pendency of the case are replete with allegations of acts and

omissions that suggest Daniella's appointment as managing conservator might result in physical or emotional harm to the children. But as we have previously explained, "A court may take judicial notice of the existence of pleadings and other documents that have been filed in a case, *but the court cannot take judicial notice of the truth of allegations in those documents unless they have been admitted into evidence*." *B. L. M. v. J. H. M., III*, No. 03-14-00050-CV, 2014 WL 3562559, at *11 (Tex. App.—Austin July 17, 2014, pet. denied) (mem. op.) (emphasis added) (citations omitted) (referring to trial court's improper reliance on affidavits filed with court but not admitted into evidence at termination hearing). In this case, none of the parties offered these documents or any other exhibits into evidence.

Because none of the parties tendered exhibits, the district court was left with the testimony of the three witnesses and the court's previous findings as the only evidence on which to base its decision. *See In re A.O.*, No. 04-12-00390-CV, 2012 WL 5507107, at *3 (Tex. App.—San Antonio Nov. 14, 2012, no pet.) (mem. op.) ("But a trial court may take judicial notice of its previous orders and findings of fact from the same case." (citations omitted)). Those findings include, as of March of 2018, that: 1) the children were "suffering from the effects of abuse or neglect," 2) the children "require protection from family violence," 3) "a continuing danger to the physical health or safety" of the children was present in Daniella's household, and 4) removal was necessary for the "safety" and "welfare of the children." At trial, Tatum testified that "when the case began" she had concerns about domestic violence and concerns that the children were exposed to substance abuse by both Daniella and her boyfriend. The district court's orders throughout the pendency of the case found that Daniella had "not made the progress necessary to alleviate" these concerns or the harmful impact of these circumstances on the children. Moreover, the bench warrant reveals that at the time of trial Daniella was

incarcerated and serving a sentence of unknown duration for an unknown offense. In short, the record, when viewed in the light most favorable to the district court's decision, includes probative evidence of acts and omissions that could harm the children's physical health and emotional development and that therefore weigh against the statutory presumption in favor of appointing Daniella as a managing conservator. *See In re A.M.T.*, 592 S.W.3d 974, 978 (Tex. App.—San Antonio 2019, pet. denied) (holding presumption rebutted where there was evidence of recent incarceration and a "history of drug use, domestic violence," "inconsistent visits with [the child], unstable housing, and lack of employment"); *J.C. v. Texas Dep't of Family & Protective Servs.*, No. 03-12-00670-CV, 2013 WL 1405892, at *7 (Tex. App.—Austin Apr. 3, 2013, no pet.) (mem. op.) (holding presumption rebutted where father was incarcerated and testified that he "would need six months to one year after he was released before he would be ready to care for his children"); *cf. In re S.W.H.*, 72 S.W.3d 772, 778 (Tex. App.—Fort Worth 2002, no pet.) (holding history of, rather than presence of, incarceration and drug addiction insufficient to rebut statutory presumption where petitioner "failed to provide any expert witnesses or other evidence to establish that [child] would be harmed by placing her with [mother]"). The district court therefore did not abuse its discretion in declining to appoint Daniella as a managing conservator, and we overrule Daniella's sole issue on appeal.

CONCLUSION

Because the district court did not abuse its discretion in declining to name Daniella as a managing conservator of the children, we affirm the district court's order.

Edward Smith, Justice

Before Justices Goodwin, Kelly, and Smith

Affirmed

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