Affirmed and Opinion Filed November 3, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01232-CV

IN THE INTEREST OF N.F.M., A CHILD

On Appeal from the 330th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-13-22299

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Fillmore, and Justice Brown
Opinion by Chief Justice Wright

Appellant Father appeals the trial court's final order in this suit affecting the parent-child relationship. In one issue Father contends the trial court abused its discretion by (1) establishing Appellee Mother as joint managing conservator of the parties' child N.F.M.; (2) granting Mother the exclusive right to determine the residence of the child within Dallas and contiguous counties; and (3) including a standard possession order in the final order. We affirm.

BACKGROUND

N.F.M. was born in 2009, when both Mother and Father were teenagers. Although the record does not clearly reflect exact dates, the testimony at trial established the general sequence of events relevant to the parties' dispute. Mother and Father's relationship began when they were in tenth grade. While Mother was pregnant, Mother and Father lived with Father's family. After N.F.M.'s birth, Mother and Father moved out, and lived together for a few months before

their relationship ended. During that time, Mother both worked full time to support the family and obtained her medical assistant degree. After the parties separated, N.F.M. remained with Mother, but visited with Father and his family on a regular basis. The parties apparently came to an informal agreement on N.F.M.'s custody. There is no prior court proceeding either establishing Father's paternity or rendering any other order regarding N.F.M.

Mother subsequently had a child with Kevin Mejia. CPS became involved with the family because of "family violence issues" involving Mejia and Mother that were witnessed by the child. Mejia and Mother separated for a time, and Mejia completed 36 hours in a battering intervention and prevention program.

Some time after CPS became involved with the family, Mother was admitted to a hospital after taking "ten to fourteen pills," according to Armida Cervantes, the CPS caseworker who testified at trial. Cervantes concluded that Mother had attempted suicide, despite Mother's denial, although Cervantes did not speak with any doctor about Mother's condition. Mother testified she took four Tylenol PM because she had been drinking but had to get up for work the next day. She explained that her cousin took her to the hospital because he thought the combination of alcohol and pills could have damaged her liver. She said there was confusion over the number of pills she took because the Tylenol PM was twice as strong as regular Tylenol, "so they considered it me taking, like, ten pills." Mother's sister made arrangements for N.F.M. to stay with Father, and for Mother and Meija's child to stay with Meija. Mother was released from the hospital the following day. She testified that her attending doctor did not make any recommendation to her to seek psychiatric treatment; she was advised only "not to mix liquor with pills."

Following her hospital visit, Mother signed a CPS "Child Safety Evaluation and Plan." The plan provided that both children[1] would remain with Father and his mother, and Mother would visit only with supervision. The plan and accompanying "Agreement for Parental Child Safety Placement" was expected to last no more than 90 days, "with an anticipated ending date on or before 11/29/13." Mother also took classes recommended by CPS. In December 2013, CPS closed the case, advising Mother by letter that "[a]ll services by CPS have ended." Cervantes advised Mother that she could "go and get her children from [Father]." In response to a question from the trial court, Cervantes testified that she "had no further concerns" at the time the case was closed. She explained that Mother had complied with all of CPS's instructions. The court also asked:

> THE COURT: And knowing that [Mother and Meija] were still in a relationship you—the department felt as if [Mother] was capable of taking care of the children at that time?
>
> MS. CERVANTES: Well, because they were—he had complied with what we had asked . . . and we allowed the—them to get back together after they had taken the counseling required.

At the time of trial, however, the child was still living with Father.[2] Mother had attempted to get the children in December 2013, but Father permitted Mother to take only her child with Meija. He refused to allow Mother to take possession of N.F.M., and restricted N.F.M.'s visits with Mother as if the CPS temporary plan was still in place.

In December 2013, Father filed this suit requesting sole managing conservatorship of the child. Although the 90-day period for the supervised visitation recommended by CPS had already elapsed on November 29, 2013, Father nonetheless sought "a possession order that provides that [Mother's] periods of visitation be continuously supervised by an entity or person

[1] Mother testified that she and Cervantes both preferred that the children stay together; Father and his mother had the same preference; and Father asked to keep both children.

[2] Father and N.F.M. resided with Father's parents until February 2015, when Father and N.F.M. moved in with Father's pregnant girlfriend.

chosen by the Court." Father pleaded the he "is the father of the child the subject of this suit and has standing to bring this suit."

Mother filed a counter-petition alleging that appointing both parents as joint managing conservators would be in the child's best interest. Mother also requested that Father pay child support and medical support for the child. Mother pleaded that "the father of the child the subject of this suit is [Appellant]."

Although there was a hearing on temporary orders on February 4, 2014, six months elapsed before temporary orders were issued on August 1, 2014. Under the temporary orders, Father was designated temporary sole managing conservator. Mother's access to the child was limited to visitation supervised by Father's mother. The Associate Judge's Report cited the following facts in support of the temporary orders: (1) Mother "disclosed to [Father] that she had tried to commit suicide," and (2) Mother testified "about her boyfriend's family violence against her" that was witnessed by the child. The temporary orders also prohibited Mother's boyfriend from "being within 200 feet" of the child until further order of the court. Mother was also ordered to contact the Salesmanship Club for counseling, and to remain in counseling and follow the recommendations of the therapist. The associate judge's ruling did not reflect that CPS had already addressed the issues recited in the ruling or that the temporary period of supervised visitation had expired not only by the date of the written order in August, but months before the February hearing.

The unexplained delays in the trial court proceedings from the temporary orders until final trial resulted in CPS's "temporary" plan, to terminate by November 29, 2013, instead being extended until July 2015. N.F.M.'s home had been with Mother for over four years, from her birth in June 2009 until CPS's temporary plan commenced in August 2013. But from August 2013 until July 2015, N.F.M.'s contact with Mother was drastically limited—not only for the 90

days contemplated by CPS to ameliorate a temporary situation—but for two full years. Father continued to require Mother's visitation to be limited and supervised for most of this period of time. In making its rulings at the conclusion of the trial, the court apologized for the delay, stating there "is absolutely . . . no excuse for there to be a six months lapse in time from the time you have a hearing and the time you have a response from this court. . . . That's unacceptable."

The trial court's final order appoints both Mother and Father as parent joint managing conservators of N.R.M.; grants Mother the exclusive right to designate the primary residence of the child "within Dallas and contiguous counties"; includes a standard possession order; grants Mother the exclusive right to receive payments for the support of the child; and orders Father to pay child support to Mother. Father now contends that the trial court abused its discretion in making these rulings.

APPLICABLE LAW AND STANDARD OF REVIEW

The primary consideration in determining conservatorship and possession of and access to the child is the best interest of the child. TEX. FAM. CODE ANN. § 153.002 (West 2014); *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000). The trial court may appoint a sole managing conservator or joint managing conservators. *See* TEX. FAM. CODE ANN. § 153.005(a) (West Supp. 2016). The trial court is required to presume that the appointment of both parents as joint managing conservators is in the best interest of the child until evidence is presented to rebut this presumption. *Id.* § 153.131. Where the parents do not file an agreed parenting plan, the trial court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child. *Id.* § 153.134. Section 153.134 lists the following factors the court considers in determining whether the appointment is in the best interest of the child:

> (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;

> (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
>
> (4) whether both parents participated in child rearing before the filing of the suit;
>
> (5) the geographical proximity of the parents' residences;
>
> (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and
>
> (7) any other relevant factor.

Id. § 153.134(a)(1)–(7); *see also Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). In addition, the family code provides in its "policy and general application of guidelines for possession of a child," that "[i]t is preferable for all children in a family to be together during periods of possession." TEX. FAM. CODE ANN. § 153.251(c) (West 2014).[3]

We review a trial court's decision on conservatorship for an abuse of discretion. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). The test for an abuse of discretion is whether the trial court acted in an arbitrary and unreasonable manner or whether it acted without reference to any guiding principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). In family law cases, the abuse of discretion standard overlaps with traditional sufficiency standards of review; as a result, legal and factual sufficiency are not independent grounds of error but are relevant factors in our assessment of whether the trial court abused its discretion. *In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.). The trial court does not abuse its discretion if some evidence of a substantial and probative character exists to support the trial court's decision. *In re S.E.K.*, 294 S.W.3d 926, 930 (Tex. App.—Dallas 2009, pet. denied). A

[3] Although "courts have traditionally applied the policy of keeping siblings together in custody decisions only to children of the same marriage," *see, e.g.*, *In re K.L.R.*, 162 S.W.3d 291, 306 (Tex. App.—Tyler 2005, no pet.), both parents in this case testified to their preference that N.F.M. and her sister live together. The trial court also stated in its ruling that there is "no reason . . . for these siblings to be split up."

trial court does not abuse its discretion if it bases its decision on conflicting evidence and some evidence supports its decision. *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex. App.—Fort Worth 2010, no pet.) (citing *In re Barber*, 982 S.W.2d 364, 366 (Tex. 1998)). The trial court is in the best position to observe the witnesses and their demeanor, and we give the court great latitude when determining the best interest of the child. *In re S.E.K.*, 294 S.W.3d at 930.

DISCUSSION

At the outset we note that at the time Father filed his original petition in this suit, he had not been adjudicated as N.F.M.'s father in any prior proceeding. No presumption of paternity applied under family code section 160.204 because Father was neither married to Mother nor continuously residing in a household with N.F.M. for the first two years of her life. *See* TEX. FAM. CODE ANN. § 160.204(a)(1)–(5). Nor had he established a father-child relationship with N.F.M. pursuant to family code Chapter 160. *See, e.g., id.* § 160.201. Neither Mother nor Father expressly sought an adjudication of Father's paternity in this suit. *See id.* § 160.201(3). Mother's counter-petition, however, recited that Father is N.F.M.'s father and pleaded that Father is obligated to support N.F.M. Father's petition alleges that he is N.F.M.'s father. Assertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983); *see also In re L.C.L.*, 396 S.W.3d 712, 718 (Tex. App.—Dallas 2013, no pet.) (applying rule in family law case). No evidence was presented at trial contrary to these admissions. The trial court's final order names Father and Mother as "parent" joint conservators. The trial court's final order also declares that Father, as parent joint conservator, has the rights and duties specified in the family code as rights and duties of a "parent." *See, e.g., id.* § 151.001. In a non-jury trial, where no findings of fact or conclusions of law are filed or requested, we must presume that the trial court made all the necessary findings to support its judgment. *See Sink v.*

Sink, 364 S.W.3d 340, 343–44 (Tex. App.—Dallas 2012, no pet.). Consequently, if the trial court's implied findings are supported by the evidence, we must uphold its judgment on any theory of law applicable to the case. *Id.*; *see also In re W.C.B.*, 337 S.W.3d 510, 513 (Tex. App.—Dallas 2011, no pet.) (implying findings to support judgment in suit to modify conservatorship). Based on the parties' judicial admissions, the evidence presented at trial, and the trial court's implied findings, we conclude that the trial court adjudicated Appellant to be N.F.M.'s father. *See, e.g.*, TEX. FAM. CODE ANN. § 160.623 (in proceeding to adjudicate paternity, court shall render order adjudicating child to be child of man admitting paternity if admission meets requirements of section and "there is no reason to question the admission").

Next we address Father's sole issue alleging that the trial court abused its discretion in designating Mother as parent joint managing conservator with the exclusive right to designate the child's primary residence. Father contends that the great weight and preponderance of the evidence is contrary to the trial court's order. He argues the evidence establishes the following:

- Child Protective Services became involved with Mother and the children because of family violence involving Meija and Mother, in the child's presence;
- Mother refuses to acknowledge that she tried to commit suicide. She has been diagnosed with major depressive disorder, and is mentally unstable;
- Mother has had only supervised visitation since her suicide attempt, and the court's temporary orders continued the supervised visitation during the pendency of this case;
- Mother is financially unstable, struggling to pay her rent and utilities. Mother has moved four or five times in the last two years, and CPS sometimes paid her rent;
- Mother has not complied with the court's temporary orders to pay child support to Father;
- Mother was arrested for a number of unpaid traffic tickets before the CPS case was closed, and has been in two car accidents, including one in which Mother took "unnecessary risk driving while sleepy";
- During the investigative portion of the case, CPS made a finding that it had reason to believe the child was subject to neglectful supervision;

- The closure of the CPS case "does not mean that the events did not occur, or that there is no concern";
- Cervantes had no concerns about the child's long-term placement with Father and his family;
- Mother disapproves of Father's plan for the child's academics because she has not attended teacher conferences; and
- Father has never seen proof that Mother actually complied with CPS's requirements, including therapy.

All of these arguments and the relevant evidence, however, were presented to and considered by the trial court at trial. The court also heard evidence that (1) Mother complied with the instructions given to her by CPS; (2) CPS considered Mother to be capable of caring for her children at the time it closed its file; and (3) Mother has cared for her other child without incident since CPS closed its file. Mother contradicted Father's contention that she disapproves of his choice of a school for the child:

> Q. Do you have any problems with [the child] attending the academy where she's going to school right now?
>
> A. No. [Father and I] had actually talked about putting her there before she was even born since that's where all of his brothers attended.
>
> Q. And you consider that to be a good school?
>
> A. Yes.

Mother testified that she took a two-year class in child care around the time of N.F.M.'s birth. She worked and took classes when N.F.M. was born. At the time they lived together, Father was not working and "didn't want to do anything but smoke weed with his cousin," while Mother supported the family. Mother also testified that she did not know where Father, his girlfriend, and N.F.M. were living at the time of trial, leading to difficulties when she attempted to visit N.F.M.

Mother gave direct testimony about the purported suicide attempt, and also answered questions on the subject on cross-examination and from the trial court. No evidence was offered

at trial to support the associate judge's finding that Mother "disclosed to [Father] that she had tried to commit suicide," and Mother consistently denied any such intention. Mother testified that she has "a stable job" and a place for her family to live on her mother's property. She is employed as a medical assistant, working 9:00 a.m. to 5:00 p.m. Monday through Friday. She explained to the court that she built a double garage on her mother's property into "a little house for us" with a kitchen, living room, bedroom, and bathroom. Although Mother is working, she testified that her mother could help with getting N.F.M. to and from school. Mother would like to raise her two daughters together.

Despite the temporary orders, Father testified he allowed Mother to visit with N.F.M. more often than the orders required, at times unsupervised, because he "wanted to keep that mother and daughter relationship going. That's always going to be her daughter." Father also testified about his work as a diesel mechanic, explaining that his work schedule "is kind of difficult," and irregular. He relies on his girlfriend and his mother to assist with N.F.M.'s care and transportation while he is at work.

The court's comments to the parties at the end of trial reflect that the court gave full consideration to the testimony of each witness, and to each of Father's arguments. The court concluded, "you two seem like two very nice people who love this child," but noted that both parties had made mistakes attributable to their youth and immaturity. The court accepted Mother's explanation that she did not attempt suicide: "you did something really stupid. Okay. That's what happened. I don't think you tried to kill yourself, but I definitely think you were trying to—it was an outcry for some help," which Mother then received. The court noted that when Mother and Father first lived on their own after the child's birth, Mother "was doing the heavy lifting," by working, going to school, and taking care of the child.

The court also noted that Father relied on the assistance of his parents to care for the child when she was in his custody. The court stated that the evidence did not establish any need for Mother's visitation to be supervised at the time Father filed this suit, and explained that the associate judge's temporary orders seemed "a bit heavy-handed to me based on the testimony that's before me today." The court also cited the importance of keeping the two siblings together. The court noted that Father had no right to demand documented proof that Mother had complied with CPS's requirements, especially in light of Cervantes's testimony on the subject. And the court noted that Father had "overasked for what you needed" in his original petition in this suit. The court found that appointing Mother as joint managing conservator with the right to designate the child's primary residence was in the child's best interest.

The trial court's ruling is supported by the evidence. The record reflects that the evidence presented at trial touched on all of the relevant factors in family code section 153.134 for determining whether an appointment of the parents as joint managing conservators is in the child's best interest. Both parents participated in child rearing before the filing of the suit. *See* TEX. FAM. CODE ANN. § 153.134(4). The court questioned the parties about the geographical proximity of their residences and the location of the child's school and activities, determining that with assistance from Mother's and Father's mothers, standard possession was appropriate and feasible. *See id.* § 153.134(5). Each parent acknowledged the importance of the child's positive relationship with the other. *See id.* § 153.134(3). Father permitted Mother additional access to the child during the pendency of the suit to "keep that mother and daughter relationship going," while Mother acknowledged that she is "very" appreciative of what Father has done for N.F.M., adding, "he's her dad." Although the parents had disagreements regarding the logistics of visitation, they agreed on a plan for N.F.M.'s schooling, and Father presented evidence of N.F.M.'s progress and positive reports from the school. *See id.* § 153.134(2) (ability of parents

to give first priority to child's welfare and reach shared decisions in child's best interest). At the time of trial, N.F.M. had spent four of her six years with Mother and two with Father, indicating that a continued relationship with both parents would benefit her needs and development. *See id.* § 153.134(1). The court and both parents also considered keeping N.F.M. and her sister together to be an important factor. *See id.* § 153.134(7) ("any other relevant factor"). And the court recognized the support of both Mother's and Father's families in caring for N.F.M. *Id.*

In contrast, there was no evidence that continuation of the long-expired CPS restrictions were in N.F.M.'s best interest. Despite being advised by CPS that the restrictions had expired, Father continued to insist that Mother's visitation be supervised and her access to N.F.M. be limited. The two-year extension of the restrictions caused discord between Mother and Father and uncertainty and disruption in N.F.M.'s routine. The trial court's unexplained delay was one source of the problem, and neither Mother nor Father sought a written ruling on the temporary orders or requested a de novo hearing before the trial court. *See* TEX. FAM. CODE ANN. § 201.015 (West Supp. 2016) (party may request de novo hearing of associate judge's ruling before referring court). Although any past harm could not be cured by the trial court's order, the record demonstrated that termination of the restrictions was in N.F.M.'s best interest.

The record reflects that the trial court heard conflicting evidence, made credibility determinations, considered the appropriate statutory factors, and made rulings supported by the evidence presented at trial. *See In re M.M.M.*, 307 S.W.3d at 849. The record reflects evidence of a substantial and probative character to support the trial court's order. *See In re S.E.K.*, 294 S.W.3d at 930. We conclude the trial court did not abuse its discretion.

CONCLUSION

We overrule Father's single issue. We affirm the trial court's judgment.

/Carolyn Wright/
CAROLYN WRIGHT
CHIEF JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF N.F.M.,
A CHILD,

No. 05-15-01232-CV

On Appeal from the 330th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-13-22299.
Opinion delivered by Chief Justice Wright; Justices Fillmore and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Jacqueline Hernandez recover her costs of this appeal from appellant Diego Manrique.

Judgment entered November 3, 2016.