

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00479-CV

BRIAN ANTHONY KOENIG, Appellant

V.

KATHERINE MAUREEN KOENIG, Appellee

On Appeal from the 1-A District Court
Jasper County, Texas
Trial Cause No. 29687

MEMORANDUM OPINION

Appellant Brian Anthony Koenig appeals from the trial court's divorce decree that named appellee Katherine Maureen Koenig joint managing conservator of the parties' minor children and gave her the exclusive right to establish the primary residence of the children. In three issues, Brian argues that the trial court's order was against the great weight and preponderance of the evidence and manifestly unjust, the trial court's order discriminated against him because of his gender, and the trial court erred in admitting hearsay evidence at trial. We affirm the trial court's judgment.

BACKGROUND

The parties married on March 24, 2001. During the marriage, the parties had two children, G.E.K. and C.N.K. On February 20, 2009, Katherine filed a petition for divorce, in which she alleged that the marriage had become insupportable and sought appointment as joint managing conservator with the exclusive right to designate the children's primary residence. Brian filed a counter-petition for divorce, in which he contended that Katherine was at fault and sought to be designated as the conservator with the exclusive right to designate the primary residence of the children.

The case went to trial before the bench. Katherine testified that the marriage had become insupportable and there was no reasonable expectation of reconciliation. According to Katherine, when she and Brian married, both were employed outside their home in Denton. Katherine later went to work for a company in Lubbock, and Brian did not work outside the home. Katherine explained that Brian ceased working outside the home in February of 2002.

The parties resided in Lubbock until October of 2006, when they moved to Jasper. Katherine explained that after the birth of G.E.K., the parties "agreed that we wanted one of us to stay with the children. And I would've preferred to have stayed with the children myself, but he hated his job. He worked further away and I made more money[,] so we went along with him staying home with the children while I continued to work." Katherine believed that Brian would return to work after G.E.K. was old enough to communicate, and the parties would then send G.E.K. to a daycare center, private sitter, or preschool. G.E.K. was four years old when Katherine became pregnant with C.N.K.,

and Brian was still staying home with G.E.K. at that time. Katherine explained after C.N.K. was born and the family moved to Jasper, she and Brian discussed Brian returning to the workforce. Katherine testified that with only one income, money was “[v]ery tight all the time,” and she asked Brian “[m]any, many, many times” to return to work, and she ultimately begged Brian to do so. Katherine testified, “I wouldn’t consider [Brian] a primary caregiver. I view him more as the baby-sitter than the primary caregiver. I mean, I feel like I am the one that has supported everything in that family for the past seven and a half or eight years.”

Katherine testified that she normally works from approximately 5:30 a.m. to 4:30 p.m. Monday through Thursday, and she leaves earlier on Fridays if possible. She explained that when she arrived home from work, the house would be filthy, and she often spent her Sundays cleaning the house. Katherine estimated that she bore ninety to ninety-five percent of the responsibility for cleaning the house, and that she often either cooked dinner for the family or picked up fast food on her way home from work. Katherine opined that although she was the breadwinner, she was also the children’s primary caregiver. According to Katherine, when Brian was responsible for bathing the children, he would sometimes wait three days to bathe C.N.K., who was wearing diapers.

When asked what her concerns were for the children if Brian was named primary conservator with the exclusive right to establish the children’s residence, Katherine testified as follows:

Well, I think one thing is just them growing up to be just well-rounded people. . . . I do not want my children to grow up and think they can live off everybody their whole life. That’s one thing.

For an example – and I guess this is kind of the straw that broke the camel’s back with me – back in January . . . I was brushing my daughter’s hair. And she’s a very bright girl. She’s very smart. And she . . . told me she didn’t like school, and she was . . . in the first grade at that time. . . .

I said, “Well, you’ve got a long ways to go, you know. You still have to get out of high school and go to college.” And at the time she was talking about being a doctor or a vet. . . . I said, “Then, you know, if you want to do that, you’re going to have to go to medical school or veterinary school.

And she goes, “Well, Mommy, I don’t want to do any of that anymore. I just want to stay home and watch kids like Daddy does.” And I told her, “Well, . . . that’s still a job. . . . [Y]ou’re going to have to clean the house, keep the house clean.”

And then she goes, “Well, Mommy, Daddy doesn’t do that; you do that.”

And I said, “You still have to make the meals and, you know, have supper ready and everything.” She said, “Well, Mommy, Daddy doesn’t do that[.]”

Brian’s counsel lodged a hearsay objection to the testimony, and Katherine’s counsel responded that the testimony was not offered for the truth of the matter asserted, but instead to show the child’s state of mind. The trial court overruled the objection.

According to Katherine, Brian had accused her of having an affair with a co-worker, K.L., but she denied doing so. Katherine maintained that she and K.L. were merely good friends, and that she had considered asking K.L.’s seventeen-year-old daughter to watch G.E.K. and C.N.K., but abandoned that plan after Brian accused her of an affair. Katherine testified that a female babysitter, J.S., has been watching the children. Katherine stated that she and K.L. did not have a sexual relationship, and they had never been affectionate toward each other in front of the children. According to Katherine, the babysitter takes G.E.K. to school after Katherine drops off the children, spends the day with C.N.K., and picks up G.E.K. from school. Katherine explained that

she usually leaves work between 4:00 and 4:30 p.m., and she generally does not work on weekends. Katherine testified that the babysitter is willing to watch the children on weekends if needed, and Katherine's parents would also come to town and watch the children if needed. When asked why she felt it would be in the children's best interest for her to establish their primary residence, Katherine testified as follows:

. . . I have been the only one to support them, I mean, in virtually every way. I mean, I'm the one that takes them to their play dates. I'm the one that takes them to the birthday parties. I'm the one that goes up and does the conferences with the teachers. I'm the one that financially provides for them. I take them shopping. I'm their mother. . . . I love those kids more than anything in the world; and I always will. I'm the one that's going to comfort them when they're upset. I'm the one that's going to always be there no matter what.

. . . [T]hese kids are not growing up with a role model, with him. I need my kids to grow up and be good members of the community and society, and . . . we are so isolated out there. [Brian] does not want any friends. He does not want any . . . relationships outside of the house. . . . I do not want my children to be isolated like that. I mean, it's very important for them to have relationships and have friends and want to make something out of their lives. And I just don't see that happening with him. But with me . . . they'll get that.

Katherine testified that after she and Brian separated, Brian moved into his parents' home in Alvin.

The babysitter, J.S., testified that she has been keeping G.E.K. and C.N.K. for approximately four months. She explained that Katherine brings the children between 5:30 and 6:00 a.m. According to the babysitter, Katherine calls frequently to check on the children. The babysitter testified that Katherine always promptly picks up the children when her workday ends. According to the babysitter, the children are happy and healthy.

During cross-examination, J.S. testified that she operates an “enlisted” childcare facility from her doublewide trailer. J.S. explained that she is not permitted to keep more than three children who are not related to her. J.S. testified that she does not charge people for keeping their children, but “[t]hey help me with what I need.” J.S. testified, “I could take the money, but I don’t take the money. Because I don’t want to be bothered with all the hassle that comes with it.” In addition, J.S. explained that she receives Social Security disability payments, and she cannot tolerate “a lot of noise” and does not like to be around “a lot of people.” The babysitter also explained that she has been diagnosed with “nervousness,” for which she takes Prozac.

Katherine’s mother, Donna Allen, testified that after Katherine and Brian separated, she and her husband came to stay with the children for a few weeks. According to Donna, when Brian left, the entire house was filthy. Donna opined that Brian “didn’t do anything willingly, and he didn’t do anything well.” Katherine’s father, Keith Allen, testified that he would be concerned that G.E.K. and C.N.K. would not grow up to be goal-oriented people if Brian raised them.

Brian testified that the housekeeping he did immediately after Katherine filed for divorce was not indicative of the kind of housekeeping he did during the course of the marriage. Brian opined that he should receive primary custody of the children because living with him would allow the children’s lives to remain as normal as possible. According to Brian, he and Katherine agreed in 2002 that he would stay home to care for G.E.K. Brian explained that he took his job as the children’s caretaker very seriously, and he fed, diapered, cleaned, and cooked for the children all day while Katherine

worked. Brian testified that he has a good relationship with the children, and the children are happy and healthy.

According to Brian, before he and Katherine separated, he would awaken G.E.K. and C.N.K., and he and C.N.K. would take G.E.K. to the bus. Brian would then come back inside with C.N.K., and after feeding C.N.K. breakfast, Brian and C.N.K. would clean house, C.N.K. would play or Brian would read to C.N.K., and he would make lunch for C.N.K. After lunch, Brian would do chores and play with C.N.K., and he would meet G.E.K.'s bus and help G.E.K. with homework. After finishing homework, G.E.K. would play outside and wait for Katherine to come home. If items were needed for the household, Brian would go to the store. Brian testified that he prepared supper “[m]ost of the time,” and he vacuumed, mopped, did the dishes, and generally kept the house. Brian opined that Katherine was claiming that the house was filthy because she wanted to “get rid of” him. According to Brian, the children were healthy and well cared for, and he is the person best suited to continue to care for them.

Brian explained that Katherine's plan to continue having J.S. care for the children concerns him. In addition, Brian testified that he is concerned that someone has been telling the children negative things about him, and he denied teaching the children to be lazy and unmotivated. Brian testified that he agreed to the terms of the temporary orders because “I just wanted to keep things as normal as I could for the kids.” After he and Katherine separated, Brian moved to his parents' home in Alvin, and Brian explained that he intends to reside with the children at his parents' home until he can afford to get a place of his own. Brian testified that he is currently working as a laptop repair

technician, and his regular work hours are 7:30 a.m. to 4:30 p.m. Brian explained that his parents could take the children to school and care for them while he attends night classes.

Brian's mother, Susan Koenig, testified that at her home, G.E.K. and C.N.K. have their own rooms, and both children have television sets, clothes, and toys there. Susan testified that the children are happy in the home, and "they're happy to be with Brian when he's home and they're happy with us when he's not home. . . ." Susan explained that she is very supportive of Brian's attempt to obtain primary custody of the children. Susan also testified that Brian is not an inactive, unmotivated person; rather, he is extremely helpful around her house, and "[h]e's always got to find something to do." In addition, Susan explained that when she visited Brian and Katherine's home in Jasper, the home was sanitary, and the children were provided with nutritious food. Susan testified that although she was concerned about Brian being able to re-enter the workforce, she believed Brian caring for the children while Katherine worked was good for the children.

Brian's father, Mark Koenig, testified that he is retired, so he has time to care for the children, as well as the physical ability to do so. Mark testified that he believes the children are better off with their father than being cared for by a babysitter who has psychiatric problems.

The trial court entered a final decree of divorce that appointed Katherine as a joint managing conservator with the exclusive right to designate the children's primary residence. The trial court filed findings of fact and conclusions of law, wherein the court

found that it was in the children's best interest for Katherine to have the right to designate the children's primary residence.

ISSUES ONE AND TWO

In his first issue, Brian complains that the evidence was factually insufficient to support the trial court's order awarding Katherine joint managing conservatorship with the exclusive right to establish the children's primary residence. In his second issue, Brian contends that the trial court favored Katherine because of her gender in making its conservatorship determination. *See* TEX. FAM. CODE ANN. § 153.003 (Vernon 2008) (The trial court must consider the parties' qualifications without regard to gender in determining whether to appoint a party as joint managing conservator and the terms and conditions of conservatorship.). We address these issues together.

We review conservatorship orders for abuse of discretion. *In re A.C.S.*, 157 S.W.3d 9, 20 (Tex. App--Waco 2004, no pet.). Factual insufficiency is not an independent ground for appeal in child custody suits; rather, it is a factor to be considered when determining whether the trial court abused its discretion. *In re A.C.S.*, 157 S.W.3d at 20; *In re K.E.L.*, No. 09-08-00014-CV, 2008 WL 5671873, at *2 (Tex. App.--Beaumont Feb. 26, 2009, no pet.) (mem. op.). "A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to guiding principles." *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.--Fort Worth 2002, pet. denied) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)). As long as some substantive, probative evidence exists to support the trial court's decision, the trial court does not abuse its discretion. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.--

Houston [1st Dist.] 1993, writ denied). The trial court is in a better position to evaluate the evidence “since it faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent.” *In re J.R.D.*, 169 S.W.3d 740, 743 (Tex. App.--Austin 2005, pet. denied). A trial court does not abuse its discretion in appointing either parent as managing conservator of a child when the evidence supports the appointment of either parent. *Garza v. Garza*, 718 S.W.2d 825, 827 (Tex. App.--Corpus Christi 1986, no pet.).

The trial court’s primary consideration when deciding conservatorship issues is the best interest of the children. TEX. FAM. CODE ANN. § 153.002 (Vernon 2008); *In re V.L.K.*, 24 S.W.3d 338, 342 (Tex. 2000). The Texas Supreme Court has identified a non-exhaustive list of factors that a court can consider in determining what is in the children’s best interest. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The *Holley* factors include the following: (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 those individuals to promote the best interest of the child, (6) the plans for the child by these individuals, (7) the stability of the home, (8) 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 a parent’s acts or omissions. *Id.*

The trial court heard conflicting testimony from both Brian and Katherine, as well as other witnesses, concerning which parent should have the exclusive right to establish the children’s primary residence. The record contains evidence concerning the *Holley*

factors; *i.e.* that both Brian and Katherine are good parents who offered stability and provided for their children's physical and emotional needs, and the record does not contain evidence that either parent committed acts or omissions or presented any danger to the children. In addition, the record contains evidence that Katherine was the breadwinner. Nothing in the record suggests that the trial court considered the parties' gender in determining the issue of conservatorship. Therefore, the trial court did not abuse its discretion by appointing Katherine as a joint managing conservator with the exclusive right to determine the children's primary residence. *See Holley*, 544 S.W.2d at 371-72; *Garza*, 718 S.W.2d at 827; *see generally* TEX. FAM. CODE ANN. §§ 153.002, 153.003. We overrule issues one and two.

ISSUE THREE

In his third issue, Brian asserts that the trial court erred by permitting Katherine to offer hearsay testimony concerning G.E.K.'s "opinion of the father, the child's viewpoint of the father's parenting skills, and the child's viewpoint of the father as a role model[.]" As discussed above, the trial court overruled Brian's hearsay objection to Katherine's testimony that G.E.K. wanted to simply stay home and watch children like her father does, and that G.E.K. said her father did not clean the house or cook meals.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). Katherine's testimony concerning G.E.K.'s statements was not offered to prove that Brian did not clean the house or cook meals. Rather, it was offered to show G.E.K.'s state of mind while Brian was caring for her; therefore, it was not hearsay.

However, even if the testimony had been hearsay, the result would be the same. Rule 803(3) of the Texas Rules of Evidence provides a hearsay exception for “[a] statement of the declarant’s then existing state of mind [or] emotion. . . .” TEX. R. EVID. 803(3). Katherine’s testimony concerned G.E.K.’s state of mind with respect to mental impressions she formed during the time Brian was caring for her while Katherine worked. For all of these reasons, the trial court did not err in permitting the testimony. *See* TEX. R. EVID. 801(d), 803(3). Accordingly, we overrule issue three and affirm the trial court’s judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on August 9, 2010
Opinion Delivered September 9, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.