

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-17-00116-CV**

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**In re S. S.**

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**ORIGINAL PROCEEDING FROM BASTROP COUNTY**

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**MEMORANDUM OPINION**

N.M.S. was born in December 2013 to Relator S.S. (“Mother”) and A.S. (“Father”). Father died in a car accident in March 2016. Mother and Father were married and living together at the time of Father’s death. There were conflicts between Father’s family and Mother before Father’s death, and those conflicts heightened after the accident to such a degree that Mother and Father’s family opted to have separate funeral services. In August 2016, real party in interest and N.M.S.’s paternal grandmother S.B. (“Grandmother”) filed a petition seeking to be named joint managing conservator of N.M.S. with the right to determine her primary residence or, alternatively, to be granted visitation. *See* Tex. Fam. Code §§ 102.004, 153.432.

The trial court held a hearing in October 2016 and heard testimony from Mother, Grandmother, and other relatives. At the hearing, Mother moved to dismiss the petition, asserting that Grandmother’s affidavit did not show that N.M.S. would be significantly impaired if Grandmother did not have access to her. *See id.* § 153.432(c). On February 2, 2017, the trial court signed temporary orders denying Mother’s motion to dismiss and finding that Grandmother had overcome the presumption in favor of a parent’s exclusive right to make decisions for her child

“by providing a preponderance of the evidence that the denial of possession of or access by [Grandmother] to the child the subject of this suit would significantly impair the child’s physical health or emotional well-being.” The court ordered that Grandmother should have possession of N.M.S. from 11:00 a.m. until 7:00 p.m. the second and fourth Saturdays of each month.

Mother then filed her petition for writ of mandamus and motion for emergency relief, asserting that the trial court abused its discretion: in refusing to dismiss Grandmother’s suit on grounds that Grandmother’s affidavit was insufficient; in granting Grandmother visitation rights under the temporary orders; and in refusing to dismiss Grandmother’s suit for conservatorship for lack of standing. *See* Tex. R. App. P. 52. We granted the motion for emergency relief, staying the trial court’s temporary order, and requested a response from Grandmother. *See id.* R. 52.4, 52.10. Having received Grandmother’s response and carefully reviewed the record, we conditionally grant mandamus relief as explained below. *See id.* R. 52.8(c), (d).

### **Standard of Review and Applicable Law**

A grandparent may seek managing conservatorship of her grandchild if “there is satisfactory proof” that the sought order “is necessary because the child’s present circumstances would significantly impair the child’s physical health or emotional development.” Tex. Fam. Code § 102.004(a)(1). A grandparent may also sue for possession or access without regard to whether conservatorship is an issue, attaching to her petition an affidavit containing, “along with supporting facts, the allegation that denial of possession of or access to the child . . . would significantly impair the child’s physical health or emotional well-being.” *Id.* § 153.432(b), (c). A trial court may order the grandparent to have possession of or access to the grandchild if the grandparent “overcomes the

presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." *Id.* § 153.433(a)(2). "The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433." *Id.* § 153.432(c).

A trial court has broad discretion in entering temporary orders related to access to a child. *See In re Scheller*, 325 S.W.3d 640, 642 (Tex. 2010) (per curiam). However, the court may not infringe on a parent's fundamental right to make child-rearing decisions simply because the court believes a better decision exists. *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000)). As long as a parent adequately cares for her child, "there will normally be no reason for the State to inject itself into the private realm of the family." *Troxel*, 530 U.S. at 68; *see In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007) (per curiam). A trial court abuses its discretion if it issues temporary orders giving possession to a grandparent who has not overcome the statutory presumption that a parent acts in her child's best interest. *In re Scheller*, 325 S.W.3d at 646; *In re Derzapf*, 219 S.W.3d at 335 (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004)). Such error is "irremediable" and warrants mandamus relief. *In re Scheller*, 325 S.W.3d at 646; *In re Derzapf*, 219 S.W.3d at 335; *see In re Pacharzina*, No. 03-12-00353-CV, 2012 WL 2161005, at \*1 (Tex. App.—Austin June 14, 2012, orig. proceeding) (mem. op.).

Our task, therefore, is to consider first whether the trial court abused its discretion in refusing to dismiss Grandmother's suit outright and, if not, whether sufficient evidence supports the trial court's findings that Grandmother should be granted visitation under temporary orders.

## **Evidence Presented at Hearing**

There was ample evidence establishing the acrimonious relationship between Mother and Father's family, and the parties' briefing spends significant time discussing those conflicts.<sup>1</sup> However, in our inquiry, we must focus on whether Grandmother overcame the presumption in favor of Mother's parenting decisions and whether N.M.S. will suffer significant impairment of her well-being. The testimony relevant to those issues is as follows:

- Grandmother testified that she was present on the day N.M.S. was born, as well as holidays and birthdays. Grandmother testified that shortly after N.M.S. was born, Mother "went back to work for a little bit," and that Grandmother took care of N.M.S. for some time before Mother and Father decided that Mother would stay home with N.M.S. Grandmother testified that Father was N.M.S.'s primary caretaker and that he worked as a night manager at HEB grocery stores. Grandmother said that Mother could have worked opposite shifts from Father but "didn't want to work." Grandmother testified that although Mother tried to stop Father from spending time with Grandmother, Grandmother babysat N.M.S. at the family's apartment and went with Father to pick N.M.S. up at daycare. Grandmother testified that some weeks she saw N.M.S. and Father two or three times a week and that she regularly saw N.M.S. at least once a week.
- Since Father's death, Grandmother had seen N.M.S. three times—in April, May, and September. Mother canceled a visit set for June, and through the summer did not respond to Grandmother's requests for rescheduling.
- At the earlier visits at Mother's residence, Mother was rigid about when Grandmother could arrive and required Grandmother to stay in the "front area" of the house. When N.M.S. wanted to play with certain toys, she or Karla, N.M.S.'s maternal grandmother, brought them into the front area. N.M.S. was quiet at first, which was "really not her personality. She's very vibrant. She runs around, she laughs, she talks, she plays."

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<sup>1</sup> There was a good deal of testimony about the history of bad blood between Mother and Father's family, including descriptions of Grandmother's alleged interference in Mother and Father's marriage, Grandmother's and Mother's differing versions of Grandmother's going into Mother and Father's apartment after learning of Father's death, testimony about how Grandmother and one of her sons acted toward Mother at Father's services and Mother's reaction to that behavior, and testimony that Mother threw away flowers left on Father's grave by Grandmother. However, none of that is immediately relevant to the questions of Mother's parenting abilities or N.M.S.'s needs.

- At the visit in September at a restaurant, Mother only allowed Grandmother one hour visitation, refusing to leave N.M.S. unattended with Grandmother. Grandmother was told not to bring electronics, but Mother and Karla spent the time looking at their phones or tablets. Mother did not allow N.M.S. to eat the food Grandmother ordered but did not herself order any food for N.M.S. Grandmother brought a bracelet for N.M.S., who went to show it to Mother and then came back and “neatly sat it down and gave it to me.” N.M.S. and Grandmother played together and at the end of the visit, N.M.S. did not want to leave the play area. When N.M.S. tried to get away, Karla picked her up and carried her off “hollering and screaming.” Grandmother noticed a change in N.M.S.’s behavior at the September visit, saying it was “almost like she didn’t know how to talk or interact with peers of her own age. And that’s not her.”
- Asked whether she believed N.M.S.’s emotional well-being would be significantly harmed if Grandmother was not granted access or possession, Grandmother answered, “Yes, ma’am, I do,” but then explained only that N.M.S. was a “daddy’s girl,” that Father provided most of her care and spent the most time with her, that he was very patient with N.M.S. and knowledgeable about her needs. Grandmother did not think Mother was patient with N.M.S. She also said she did not think Mother paid N.M.S. enough attention, describing one incident during a visit when N.M.S. hit her funny bone—although Mother was in the same room, she was looking at her tablet, not watching N.M.S., and did not see it happen.
- Alan, Father’s half-brother and Grandmother’s son, testified that he had often seen Father and N.M.S. together. Although he rarely saw N.M.S. with Mother, he said that Mother lacked patience with N.M.S. and that “I’ve never seen the motherly aspect” of Mother toward N.M.S. Alan had not seen N.M.S. since the funeral and said that before his death, Father had made an effort to be sure N.M.S. knew his family. Alan said N.M.S. has a “fantastic relationship” with Grandmother. Alan believed N.M.S. would be significantly harmed if Grandmother was not granted visitation because, “My concern is that she will totally be stripped of the knowledge of her father, of who he truly was, his character, him as a man, how he was raised, his faith. It would be devastating for her to lose an entire half of her family.” Alan was also concerned that Mother will not be able to provide for all of N.M.S.’s needs, that she would not be patient, and that she had a bad temper.
- Mother testified that she and N.M.S. have a close and loving relationship and that she tried to talk about Father frequently to N.M.S. Mother said she was encouraging N.M.S. to have a relationship with Father’s father and stepmother and would be open to a relationship with Grandmother in the future. She agreed that she had not offered Grandmother visitation in the six months since Father’s death, saying, “I just lost my husband. I was worried about my daughter. [Grandmother] was an important part [of N.M.S.’s live], but she wasn’t a consistent part.”

- Mother admitted that she had assaulted Father in February 2013 and said that she went through counseling to address her anger immediately after that incident. At the time of the hearing, she was in grief therapy due to Father's death.
- Mother testified that before Father's death, Grandmother saw N.M.S. once or twice every few months but did not have a continuous relationship with her. She also said that Grandmother only watched N.M.S. for about three days when N.M.S. was an infant before Mother hired someone else to watch N.M.S. after Grandmother made Mother late for work. Grandmother never cared for N.M.S. overnight or took her to activities on her own. N.M.S. has not asked about Grandmother or asked to see her since Father's death.
- Mother said that during the September visit, N.M.S. ignored Grandmother for much of the visit and that Grandmother sat and took notes for much of the visit, not interacting with N.M.S. until about the last fifteen minutes.
- Karla, N.M.S.'s maternal grandmother, testified that Mother, Father, and N.M.S. lived with Karla and her husband for about nine months after they got married and that she observed both parents as caretakers during that time. She said both parents worked and cared for N.M.S. and that they had a good, affectionate marriage. Karla testified that Grandmother never saw N.M.S. during the nine months the family lived with her and that when Father had a weekend off, he played basketball while Karla watched N.M.S. Grandmother did not come to Karla's house to see N.M.S.
- Karla said that she had not seen Grandmother actually interact with N.M.S. in the last two and one-half years and that N.M.S. is scared of Grandmother. Karla testified that during the September visit, N.M.S. did not want to go to Grandmother and that Grandmother did not play with N.M.S. and instead took notes. Karla said that in Grandmother's earlier visits, N.M.S. stayed with Karla for almost the whole time, only growing comfortable enough to go to Grandmother in the last fifteen minutes. N.M.S. has never asked Karla about Grandmother or asked to see her.
- Karla said that Mother is a "good mom," is attentive, and sees to N.M.S.'s needs, including bringing her to swim class and ballet lessons on the weekends. Karla was afraid that Grandmother would say negative things about Mother to N.M.S. She believed Mother would be open to N.M.S. having some kind of relationship with Grandmother and that side of Father's family once the conflict and negativity stopped.
- Tresha, Father's stepmother, said that Mother was "thoughtful and considerate as a mother," that she was loving and a "good mom," and that N.M.S. was always appropriately attired and taken care of. Asked whether she believed Mother will make good parenting decisions with regard to N.M.S. having a relationship with Father's family, Tresha said, "Yes, I do. I think that there's just strain between [Grandmother] and [Mother]. And I

think once that piece is worked out, then [Mother's] always going to do what's in the best interest" of N.M.S. She and her husband had a good and close relationship with Mother and N.M.S.

- Melissa Hinojosa provided day care for N.M.S. from the middle of January 2014 until February 17, 2014, N.M.S. from about 7:00 a.m. until Mother picked her up at about 3:30 p.m., disputing Grandmother's testimony that she had cared for N.M.S. during that time.

### **Discussion**

In her first issue, Mother contends that the trial court abused its discretion in refusing to dismiss Grandmother's suit, arguing that Grandmother's affidavit was insufficient under the family code. *See* Tex. Fam. Code § 153.432(c) ("The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support" order granting grandparent access). In her third issue, she argues that Grandmother did not have standing to seek conservatorship. *See id.* § 102.004(a) (grandparent may seek managing conservatorship "if there is satisfactory proof to the court that" order is necessary because present circumstances would significantly impair child's health or development).

Grandmother attached to her petition an affidavit asserting that she had had "an extremely close relationship with N.M.S. since her birth" and that she was N.M.S.'s daily caretaker from January 2014 through February 2014. Grandmother asserted that since A.S.'s death, Mother had only allowed Grandmother to see N.M.S. twice under controlled circumstances and that at the end of each visit, N.M.S. became distressed and had to be reassured that Grandmother would come for another visit. Grandmother averred that she believed N.M.S. would suffer significant impairment if denied a consistent relationship with her grandmother and that it was in N.M.S.'s best interest for Grandmother to play a meaningful role in N.M.S.'s life and for N.M.S. to have a relationship with

A.S.'s side of the family. When Mother made a verbal motion to dismiss under section 153.432 during the hearing on temporary orders, the trial court observed:

Looking at Section 153.433, I feel that it's a very, very close call. A very close call as to the standard that has been enunciated by the legislature. I'm not sure what I'm going to do at the final hearing. I'm going to deny the request of [Mother] to dismiss the lawsuit.

The concern I have is that this child whole-heartedly—[Mother], as the mother of the child, has the privilege, if you will, of making the parental decisions of this child. And it's going to be a long road, because the child's father is now deceased. Whole-heartedly, [Mother] has the right to make those parental decisions. But my concern is that—and I'm not saying this as bad—the child deserves to have a healthy relationship with everybody. My slight concern, or major concern, however you want, is that there might be—the relationship with the child—between the child and [Grandmother], if the Court doesn't intervene, there won't be a relationship.

Although it is a close question, we cannot hold on this record that the trial court abused its discretion in determining that Grandmother's affidavit made the bare minimum of allegations necessary under section 153.432. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (in issues related to weighing of facts, "[t]he relator must establish that the trial court could reasonably have reached only one decision" and appellate court cannot disturb trial court's decision, "[e]ven if the reviewing court would have decided the issue differently"). Having reviewed the record presented, we cannot conclude that the trial court abused its discretion in refusing to dismiss the suit at these preliminary stages.<sup>2</sup> As for standing under section 102.004, Mother did not raise this issue before the trial court other than to argue at a brief hearing to re-urge her motion to dismiss under section 153.432 that Grandmother had not properly pled conservatorship. However, the issues

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<sup>2</sup> The trial court will have both the authority and the duty to reconsider at the final hearing whether Grandmother's suit should be dismissed under the applicable statutes.



of when a grandparent has standing under section 102.004 were barely touched upon, and we will not hold that the trial court abused its discretion in refusing Mother's vague oral motion to dismiss Grandmother's conservatorship claim.

In her second issue, Mother asserts that the trial court abused its discretion because Grandmother did not present evidence sufficient to overcome the statutory presumption in favor of Mother's decision-making on N.M.S.'s behalf. We agree.

Both *Derzapf* and *Scheller* presented facts more concerning than the testimony in this case. For instance, in *Derzapf*, the trial court reviewed a twenty-four page report prepared by a psychologist who opined that the children, who had suffered from depression after their mother's death, would benefit from contact with their grandparents and had "lingering sadness" about being cut off from them. 219 S.W.3d at 330. However, the psychologist also explained that the children's sadness had "not manifested as depression or behavioral problems or acting out" or risen "to a level of significant emotional impairment." *Id.* The supreme court held that the grandmother had not proved "that denial of access would 'significantly impair' the children's physical health or emotional well-being" and thus did not meet the "high threshold" set to overcome "the presumption that a fit parent acts in his children's best interest." *Id.* at 333-34. Similarly, in *Scheller*, the grandfather presented evidence that his granddaughters had displayed anger and had isolated instances of bed-wetting and nightmares and that denying him access would impair their development and essentially deny them their only remaining contact with their mother's family. 325 S.W.3d at 643. The supreme court held that such evidence did not satisfy the grandfather's "hefty statutory burden" to overcome the presumption in favor of the father's decision-making. *Id.* at 643-44.

Here, by contrast, Grandmother and Alan testified that they love N.M.S. and that she deserves to have a full picture of her father. They testified about their somewhat vague concerns about Mother's temper, impatience, and inattentiveness and asserted that they had had a consistent relationship with N.M.S. before Father's death. We have no reason to doubt that both Mother and Grandmother deeply love N.M.S. and are devastated by Father's death. However, even taking their testimony as true and disregarding the evidence disputing some of their assertions, this record does not contain evidence approaching the "hefty statutory burden" placed on Grandmother to overcome the presumption in favor of Mother's decision-making. *See id.; In re Derzapf*, 219 S.W.3d at 334. There was no testimony that N.M.S. has been depressed or traumatized by her lack of contact with Grandmother. *See In re Derzapf*, 219 S.W.3d at 330. There was no testimony of nightmares, bed-wetting, or acting out; Mother has promoted a relationship between N.M.S. and her paternal grandfather and step-grandmother; and Mother and N.M.S.'s maternal grandmother and paternal step-grandmother all testified that Mother would be open allowing Grandmother contact with N.M.S. in the future. *See In re Scheller*, 325 S.W.3d at 643-44.

It would likely be best for N.M.S. if she is able to have a relationship with all parties involved. However, Grandmother was required to overcome the presumption that Mother would act in N.M.S.'s best interest by proving by a preponderance of the evidence that denial of Grandmother's access would "significantly impair" N.M.S.'s physical or emotional well-being. *See Tex. Fam. Code § 153.433, In re Derzapf*, 219 S.W.3d at 333. Evidence that six months after her father's death, N.M.S. was shy around Grandmother or other children does not support the court's decision, nor does testimony that Mother looked at her phone or read a tablet during

Grandmother's visitations show a material lack of fitness as a parent. Although the court might have believed it to be a "better decision" to allow Grandmother more regular contact with N.M.S., such good intentions do not alone justify interfering with Mother's child-rearing decisions under the governing legal standards as the Texas Supreme Court has applied them. *See In re Derzapf*, 219 S.W.3d at 334. Viewed under those standards, this record simply lacks evidence that might overcome the presumption in Mother's favor. *See In re Scheller*, 325 S.W.3d at 643-44; *In re Derzapf*, 219 S.W.3d at 333-34.

We conditionally grant mandamus relief and direct the trial court to vacate its February 2, 2017 temporary orders. *See Tex. R. App. P. 52.8(c)*. We are confident that the court will comply with this opinion, and writ will issue only in the unlikely event that it does not.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Filed: March 28, 2017