Affirmed and Opinion Filed November 6, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00805-CV

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

On Appeal from the 301st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-13-17972

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Whitehill

In this suit affecting parent–child relationship (SAPCR), the trial court conducted a bench trial and signed an order appointing Mother sole managing conservator and Father possessory conservator of their child, G.N.M. The order further required Father's possession of G.N.M. to be supervised. The court also signed a separate protective order that did not grant Father all the relief he requested regarding a document that an expert witness produced at trial.

Father appeals. A focal point in Father's appeal is whether the trial court abused its discretion in its custody ruling where Father is a registered sex offender with a history of other youth-sex improprieties. Based on this record, we hold that the trial court did not abuse its discretion and affirm.

I. BACKGROUND

Mother filed this SAPCR in September 2013 when G.N.M. was four years old. She alleged that Father was G.N.M.'s presumed father and asked the court to (i) appoint her G.N.M.'s sole managing conservator, (ii) appoint Father G.N.M.'s possessory conservator, and (iii) deny Father any possession of G.N.M. or, alternatively, grant Father only supervised possession of G.N.M.

Father filed a counter-petition asking the court to appoint him and Mother as joint managing conservators. He also sued Mother for defamation.

The trial court held a one-day bench trial, during which licensed professional counselor Maria Molett produced to Mother a document Father wrote detailing a sexual assault he had committed. The document was admitted into evidence.

The judge later signed an order that:

- found that Father was G.N.M.'s biological father;
- appointed Mother as G.N.M.'s sole managing conservator;
- appointed Father as G.N.M.'s parent possessory conservator; and
- granted Father supervised visitation with G.N.M. for two hours on the first, third, and fifth weekends of each month.

The order granted Father no relief on his defamation claim.

The judge also signed a protective order concerning all documents Molett had produced in the litigation. The order provided that the documents (i) "may be used or shown only to the parties to this case, their attorneys and judges and court personnel" and (ii) "shall [not] be released, disseminated, shown to, or copied, nor contents revealed to, any other person, firm or corporation."

Father filed a motion for partial new trial and for rehearing regarding the protective order. Father asked the court to order Mother to (i) return all copies of the Molett documents to Father and (ii) delete any electronic copies. The trial court held a hearing and denied the motion.

Father timely appealed.

II. ISSUES PRESENTED

Father presents three issues:

1. The trial court abused its discretion by ordering Father's possession of G.N.M. to be supervised because there was insufficient evidence that Father was a danger to the child.

2. The trial court abused its discretion in its conservatorship appointments because Mother did not rebut the presumption that the parents should be appointed joint managing conservators.

3. The trial court erred by allowing Mother to retain possession of certain federally protected information beyond the end of this SAPCR.

III. ANALYSIS

A. Issue One: Did the trial court abuse its discretion by requiring Father's possession of G.N.M. to be supervised?

1. Standard of Review and Applicable Law

We review a trial court's order regarding child possession and visitation for abuse of discretion. *In re L.C.L.*, 396 S.W.3d 712, 716 (Tex. App.—Dallas 2013, no pet.). A trial court abuses its discretion if it acts arbitrarily and unreasonably without reference to any guiding principles. *Id*. Under this standard, legal and factual sufficiency of the evidence are not independent grounds of error but are factors relevant to our abuse of discretion assessment. *Id*. If some substantive and probative evidence supports the trial court's judgment, we will not substitute our judgment for the trial court's. *Id*. The trial court is in the best position to observe the witnesses and their demeanor, and we give the court great latitude in determining a child's best interest. *In re N.F.M.*, No. 05-15-01232-CV, 2016 WL 6835721, at *3 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.).

"The best interest of the child shall always be the primary consideration of the court in determining . . . possession of and access to the child." TEX. FAM. CODE § 153.002. In determining a parent possessory conservator's terms and conditions for possession of a child, the court shall be guided by the guidelines in Family Code Chapter 153, Subchapter E. *Id.* § 153.192(b). Those guidelines direct the trial court to consider "(1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor." *Id.* § 153.256. An order that restricts or limits a parent's possession of or access to a child may not exceed those necessary to protect the child's best interest. *Id.* § 153.193.

The supreme court has identified other factors that can be relevant to a best interest determination, such as (i) the child's desires, (ii) the child's present and future emotional and physical needs, (iii) present and future emotional and physical danger to the child, (iv) the parent's parental abilities, (v) the programs available to assist a parent promote the child's best interest, (vi) the parent's plans for the child, (vii) the stability of the home, (viii) the parent's acts or omissions that may indicate the parent–child relationship is not a proper one, and (ix) any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). This list is not exhaustive, and not all of the *Holley* factors apply in every case. *In re E.A.D.P.*, No. 05-15-01210-CV, 2016 WL 7449369, at *4 (Tex. App.—Dallas Dec. 28, 2016, no pet.) (mem. op.).

2. The Evidence

The evidence, viewed in the light favorable to the order, supported the following facts:

G.N.M. was born in 2009. At that time Mother was 29 and Father was 32.

In 2013, Father and Mother were living together and were engaged to be married. But at the beginning of the year Father began to think about having sex with M., the teenage daughter

of Mother's first cousin. Father's written description of the events that followed was admitted into evidence. He wrote that when he was planning to have sex with M., he felt a thrill that he could "pull this off, controlling [M.] in to wanting me and then to keep everything quiet afterwards." He also wrote, "I felt it was a perfect 'f' you to [Mother]." M. visited Father and Mother's home Memorial Day weekend and spent the night. Father and M. had sex that weekend while Mother was asleep in the next room. M. was 16 years old at the time. Father bought M. an iPod so that they could communicate without her parents' knowledge.

Mother moved out of the shared residence in early or mid-September 2013. About a week later, Father was arrested for sexually assaulting M. Father pled guilty, and in November 2014 the criminal judge signed an order of deferred adjudication imposing a nine-year period of community supervision. Father testified that he is a registered sex offender for life.

In late 2015, the criminal court modified the conditions of Father's community supervision so that he could have unsupervised contact with his biological children. That modification order also allowed him to have supervised visits with the children of A., a woman Father married at some point after October 2013.

Other evidence showed that Father had been a high school teacher and had sex with a female high school student while he was a teacher at this school. The record suggests that the student was not a minor when the incident occurred. Father voluntarily surrendered his teacher's certificate. He also acknowledged that he was responsible for the fact that he is no longer certified as a teacher in Texas. Mother testified that Father told her that the student had made up the allegations against him and that they were false. She did not learn that the allegations were true until Father said so at a hearing in this case.

Mother's second cousin E. also testified at trial. She said that she knew Father when she was about 12 or 13 years old. He made E. feel uncomfortable by asking her questions about her

sex life and whether she was "sexually involved at the time." After that E. tried to stay away from Father and to avoid one-on-one contact with him at family functions.

The court admitted a printout of an internet page bearing the heading "TxDPS Sex Offender Registry," which identified Father by name and other identifying information. The page recited: "RISK LEVEL MODERATE." The court also admitted a similar printout from "www.texaspredators.com" that identified Father and recited "Sexual Offender Risk Mod."

Mother testified that she believes Father is not a good influence on G.N.M. She also testified that G.N.M. is more defiant and is very disrespectful after visits with Father. She thinks that G.N.M. should not be alone with Father because Father is very manipulative. She wants Father's access to be supervised for G.N.M.'s emotional safety.

Father, however, relies heavily on the testimony of Maria Molett, who is a licensed professional counselor/supervisor and a licensed sex offender treatment provider/supervisor. Molett had about 30 years' experience in working with sex offenders. Father became Molett's client before he was placed on deferred adjudication. She performed a risk assessment on Father and determined that he was in the low-risk category. She also determined that he was an excellent candidate for probation and treatment. Her assessment did not suggest that Father is sexually attracted to boys. In her opinion, Father was not a physical or sexual threat to G.N.M. Nor did she see anything in the data she collected indicating that Father had any sexual thoughts or deviant fantasies about G.N.M. Molett opined that Father had done very well in his treatment so far. And she said that studies show that the recidivism rate for sex offenders who receive treatment is "less than five percent, something like that."

Father also points out that Mother conceded she was not alleging that (i) Father is violent toward G.N.M. or (ii) she was afraid he would sexually molest G.N.M.

3. Application of the Law to the Facts

Based on the evidence, we conclude that a reasonable trial court could have determined that the trial court's orders regarding possession and visitation were the minimum restriction necessary to protect G.N.M.'s best interest.

Specifically, the child's age and developmental status are relevant factors. FAM. § 153.256(1). Here, G.N.M. was six years old at the time of trial. Mother's testimony that G.N.M. was defiant and disrespectful after visits with Father indicated that G.N.M. was susceptible to Father's influence.

The parent possessory conservator's circumstances are also relevant. *Id.* § 153.256(2). Here, Father is a registered sex offender. He had sex with M., a 16-year-old year girl who was related to Father's live-in fiancée. After that, he attempted to keep the assault secret. He also gave M. an iPod so they could communicate without her parents' knowledge.

Especially relevant to our analysis is Father's statement that he felt his sexual assault of M. "was a perfect 'f' you" to Mother. The trial court could have reasonably inferred from this statement facts justifying a supervision requirement. For example, the court could have inferred that Father was willing to manipulate and hurt people, even minors, to make someone else suffer. The court also could have inferred that Father harbored malice towards Mother and wanted to hurt her. We conclude that this statement indicated potential emotional or physical danger to G.N.M. and Father's poor parental abilities. *See Holley*, 544 S.W.2d at 372.

The trial court also could have reasonably concluded that the evidence of Father's dishonesty necessitated that his possession of G.N.M. be supervised so that there would always be a witness to Father's conduct. Father's conduct in (i) setting up surreptitious communications with M. and (ii) lying to Mother about his having sex with a high-school student, support an inference that he would not be honest about any misconduct he might commit while with G.N.M.

Additionally, apart from Father's sexual assault of M., the evidence also supports an inference that Father voluntarily surrendered his teacher's certificate after he had sex with a young woman who was a student at the high school where Father taught. And another of Mother's female relatives testified that Father tried to engage her in conversations about sex when she was 12 or 13 years old, leading her to avoid him at family gatherings.

Although Molett testified that Father is not physically or sexually a threat to G.N.M., the trial court is in the best position to observe the witnesses and their demeanor and we give the court great latitude in determining a child's best interest. *In re N.F.M.*, 2016 WL 6835721, at *3. It was the trial court's prerogative to give Molett's testimony the weight it deemed proper.

Moreover, in the context of a supervision requirement, the question is not merely whether a parent is physically dangerous to the child, but rather whether the child's best interest as a whole requires the parent's possession to be supervised by another person. The evidence that Father is willing and able to manipulate younger people, that he is dishonest, and that he viewed his assaulting M. as an "'f' you" to Mother reasonably supports a conclusion that G.N.M.'s best interest will be served by required Father's possession to be supervised. The evidence also supports a reasonable determination that no lesser restriction will suffice to protect G.N.M.'s best interest.

Given the above, we cannot say that no reasonable trial court could have decided this case as this trial judge did. Thus, the trial court did not abuse its discretion by requiring Father's possession of G.N.M. to be supervised. We overrule Father's first issue.

B. Issue Two: Did the trial court abuse its discretion by appointing Mother sole managing conservator and Father parent possessory conservator rather than appointing both parents joint managing conservators?

1. Standard of Review and Applicable Law

We review a conservatorship decision for abuse of discretion. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007).

The Family Code defines "joint managing conservatorship" as "the sharing of the rights and duties of a parent by two parties, ordinarily the parents, even if the exclusive right to make certain decisions may be awarded to one party." FAM. § 101.016.

There is a rebuttable presumption that the child's best interest is to have the parents appointed joint managing conservators. *Id.* § 153.131(b). A finding of a history of family violence involving the child's parents removes this presumption. *Id.*

When, as in this case, parents do not file an agreed parenting plan, the trial court may appoint the parents joint managing conservators only if the appointment is in the child's best interest, considering the following factors:

> (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)

Father invokes certain provisions in § 153.131(a), but they are inapplicable. Section 153.131(a) provides that "a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child" unless (i) a prohibition in § 153.004 applies or (ii) appointment of the parents or parents would not be in the child's best interest because the appointment would significantly impair the child's physical health or emotional development. *Id*. § 153.131(a). Mother—"a parent"—was appointed G.N.M.'s sole managing conservator, so § 153.131(a)'s additional requirements were not triggered in this case.

2. Application of the Law to the Facts

The trial court did not find a history of family violence, which would have removed the presumption favoring parents' appointment as joint managing conservators. *See id*. § 153.131(b). Thus, the question presented is whether the trial court could reasonably have concluded that the evidence rebutted § 153.131(b)'s presumption that G.N.M.'s best interest would be served by appointing Mother and Father joint managing conservators. *See In re E.R.C.*, 496 S.W.3d 270, 285 (Tex. App.—Texarkana 2016, pet. denied) (parent seeking sole managing conservatorship had to show either a history of family violence or that joint managing conservatorship was not in child's best interest), *cert. denied*, 137 S. Ct. 834 (2017).

We recounted the relevant evidence in Part III.A.2 above and need not repeat it here. The evidence supports implied findings that (i) G.N.M. is susceptible to Father's negative influence, (ii) Father is a registered sex offender for life because he sexually assaulted Mother's 16-year-old relative, (iii) Father is the kind of person who is willing to hurt young and vulnerable people to make others suffer, and (iv) Father is dishonest and is a poor role model.

In terms of the § 153.134(a) factors, the trial court could have reasonably concluded from the evidence that (i) appointing Father joint managing conservator would not have benefited G.N.M. in terms of his physical, psychological, or emotional needs and development and (ii)

Father lacked the ability to give first priority to G.N.M.'s welfare. *See* FAM. § 153.134(a)(1)–(2). The court also could have reasonably concluded that Father could not encourage and accept a positive relationship between Mother and G.N.M. *See id.* § 153.134(a)(3).

Although Father introduced expert testimony that he was not a danger to G.N.M., the trial court was entitled to weigh that evidence and give it whatever weight it deemed proper. Additionally, the expert's evidence did not bear strongly on the specific question of whether Father should be a managing or a possessory conservator.

Father further argues that a link between a parent's conduct and harm to a child may not be based on evidence that raises only surmise or speculation of possible harm, citing *Taylor v. Taylor*, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.). But the question in *Taylor* was whether there was legally sufficient evidence that appointing the child's father as managing conservator would result in serious physical or emotional harm to the child, an inquiry necessitated by § 153.131(a). That subsection is not involved in Father's second issue, which turns on a broad best interest of the child inquiry and not on the likelihood of serious harm to G.N.M.

In sum, the trial court could have reasonably concluded that the evidence (i) rebutted the presumption that G.N.M.'s best interest would be served by appointing Father and Mother as joint managing conservators and (ii) showed that G.N.M.'s best interest would be served by appointing Mother sole managing conservator and Father possessory conservator.[1] Accordingly, we overrule Father's second issue.

[1] The final order gave Father many of the same conservatorship rights it gave Mother. The exceptions are that the order gave Mother the following exclusive rights: (i) to designate G.N.M.'s primary residence within Dallas County and contiguous counties, (ii) to consent to medical, dental, and surgical treatment involving invasive procedures, (iii) to consent to psychiatric and psychological treatment, and (iv) to receive, give receipt for, hold, or disburse child-support funds. *See generally* FAM. § 153.132.

C. Issue Three: Did the trial court err by issuing a protective order that allowed Mother to keep certain documents beyond the end of this SAPCR?

Father argues that trial court erred by denying his request to compel Mother to return or destroy all copies of Molett's documents regarding Father's treatment. According to Father, (i) Molett's documents were protected and confidential under federal law (the Health Insurance Portability and Accountability Act of 1996, or HIPAA), and (ii) a specific federal regulation, 45 C.F.R. § 164.512(e)(1)(v)(B), required the trial court to order Mother to return or destroy the documents at the end of this SAPCR.

We conclude that Father has shown neither error nor harm.

The sole legal authority Father cites to support his argument is 45 C.F.R. § 164.512(e)(1)(v)(B). But that provision does not of its own force require the return or destruction of documents; it is merely part of a larger regulatory scheme found in § 164.152(e)(1).

Read as a whole, § 164.512(e)(1) identifies circumstances under which a "covered entity" may disclose protected health information during a judicial or administrative proceeding. 45 C.F.R. § 164.512(e)(1); *see also In re Collins*, 286 S.W.3d 911, 917–18 (Tex. 2009) (orig. proceeding) (discussing § 164.512(e)(1)). One such circumstance is when the covered entity receives satisfactory assurances that the party requesting the protected health information has made reasonable efforts to secure a "qualified protective order." *See* 45 C.F.R. § 164.512(e)(1)(ii)(B). The regulation's definition of "qualified protective order" includes the subsection Father relies on, subsection (e)(1)(v)(B):

> (v) For purposes of [§ 164.512(e)(1)], a qualified protective order means, with respect to protected health information requested [by subpoena, discovery request, or other lawful process], an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. § 164.512(e)(1)(v).

Thus, § 164.512(e)(1) addresses the kind of protective order to be sought *before* a covered entity discloses protected health information—it does not require courts to grant a qualified protective order after protected health information has been disclosed under the present circumstances. Accordingly, even if Father were correct that the end of this SAPCR is "the end of the litigation or proceeding" under § 164.512(e)(1)(v)(B) properly construed, nothing in § 164.512(e)(1) obliged the trial court to order the return or destruction of documents Molett had already produced.

Moreover, Father assumes but does not demonstrate that Molett is a "covered entity" and the document in question is "protected health information." Thus, he has not shown that § 164.512(e)(1) applies to this case at all.

For the foregoing reasons, we conclude that Father has not shown error.

Furthermore, even had Father shown error, he has not shown any injury. Under the protective order, Mother cannot disseminate Molett's documents to anyone besides the parties, their lawyers, judges, and court personnel. Moreover, she cannot use the documents except "in, and for the purposes of" this action. Under the circumstances, Father has not shown that the trial court's order regarding these materials causes him harm.

We overrule Father's third issue.

IV. CONCLUSION

Having overruled Father's issues, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

160805F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

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

No. 05-16-00805-CV

On Appeal from the 301st Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-13-17972.
Opinion delivered by Justice Whitehill.
Justices Francis and Myers participating.

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

It is **ORDERED** that appellee Brigette Cox recover her costs of this appeal from appellant Gregory Neal McSwain.

Judgment entered November 6, 2017.