Affirmed and Memorandum Opinion filed April 7, 2016

In The

Fourteenth Court of Appeals

NO. 14-15-00869-CV

IN THE INTEREST OF I.M.T., A CHILD

On Appeal from the 312th District Court
Harris County, Texas
Trial Court Cause No. 2010-45148

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

This appeal arises from a suit to terminate the parent-child relationship between Ivan[1] and his parents. Appellant is Ivan's paternal uncle, who intervened in the suit asking to be named his managing conservator. The trial court terminated Mother's and Father's parental rights and appointed the Texas Department of Family and Protective Services (the Department) as Ivan's managing conservator. Mother and Father do not appeal. Appellant raises four issues concerning the appointment of the Department, not him, to be managing conservator. We affirm.

[1] We use fictitious names to refer to the children discussed in this opinion. Adults are referred to by their first names only. *See* Tex. R. App. P. 9.8(b)(2).

BACKGROUND

Ivan and two of his siblings, Freddie and Adriana, were removed from Mother's care following the death of their three-week-old half-sister in November 2013. The death was suspected to have been caused by physical abuse. Father was not the baby's father and is not implicated in her death. He did not live with Mother and Ivan when the baby died.

Mother and Father had an existing case concerning paternity and child support for Ivan. The trial court signed an order in February 2011 establishing the parent-child relationships. The Department filed a motion to modify that order, seeking conservatorship of Ivan and termination of Mother's and Father's parental rights. *See* Tex. Fam. Code Ann. § 156.002(b) (entity with standing to sue under section 102 of the Family Code may file motion to modify order); *id.* § 102.003(a)(6) (authorizing the Department to file suit).

In October 2014, appellant filed a countermotion to modify, seeking to be named sole managing conservator of Ivan. Construing the countermotion as a plea in intervention, the Department moved to strike the intervention. The court denied the motion to strike.

Trial to the associate judge began on May 28, 2015. At that time, the court accepted Mother's irrevocable affidavit voluntarily relinquishing her parental rights and naming the Department as managing conservator. The witnesses who testified at trial were appellant, his common-law wife (Racheal), Father, the Department caseworker, Ivan's guardian ad litem (referred to as the CASA), Ivan's therapist, Ivan's school counselor, and the owner of a drug and alcohol screening agency who analyzed the results of appellant's and Racheal's drug tests. The trial took place over several months and in the middle of trial, the judge appointed Racheal as the

managing conservator for a two-month period to see how things would work out. When Racheal and appellant tested positive for drugs, Ivan was removed again.

On September 25, 2015, the district judge signed the final decree terminating Mother's and Father's parental rights and appointing the Department to be Ivan's permanent managing conservator.

ANALYSIS

I. Standard of review

Conservatorship determinations are governed by a preponderance-of-the-evidence standard. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). The appointment of a conservator is subject to review for abuse of discretion and may be reversed only if the decision is arbitrary and unreasonable. *Id.* (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).

II. Managing conservatorship

A. Who may be appointed

A managing conservator is the person or entity who, by court order, has been awarded custody of a child and may determine the child's primary residence. *See* Tex. Fam. Code Ann. § 153.371(1); *In re C.A.M.M.*, 243 S.W.3d 211, 215 n.7 (Tex. App.—Houston [14th Dist.] 2007, no pet). The managing conservator has nearly sole authority to make decisions for the child. *See* Tex. Fam. Code Ann. § 153.371(2)–(11). A managing conservator must be (1) a parent, (2) a competent adult, (3) the Department, or (4) a licensed child-placing agency. *Id.* § 153.005(a). If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a competent adult, the Department, or a licensed child-placing agency. *Id.* § 161.207(a).

A parent who voluntarily relinquishes his parental rights may designate a competent person, the Department, or a licensed-child-placing agency to be the child's managing conservator. Tex. Fam. Code Ann. § 153.374(a). The designee—in this case, the Department—shall be appointed managing conservator unless the court finds the appointment would not be in the best interest of the child. *Id.* § 153.374(b); *accord id.* § 161.207(a) (". . . . An agency designated managing conservator in an unrevoked or irrevocable affidavit of relinquishment shall be appointed managing conservator.").

B. Evidentiary showing required for appointment

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child. *Id.* § 153.002. Prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest. *Id.*§ 263.307(a).

Courts may consider the following non-exclusive factors to determine the child's best interest: the child's desires; the child's current and future physical and emotional needs; current and future emotional and physical danger to the child; parental abilities of the persons seeking custody; programs available to assist those persons seeking custody to promote the best interest of the child; plans for the child by the individuals or agency seeking custody; stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). As noted, this list of factors is not exhaustive, and evidence is not required on all the factors. *In re D.R.A.*, 374 S.W.3d 528, 533 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

III. Analysis

A. Best interest

Appellant raises four issues. Because each in effect challenges the sufficiency of the evidence to support the trial court's appointing the Department, not him, as Ivan's managing conservator, we treat them as a single issue.

1. Ivan's needs and desires

At the time of his baby sister's death, Ivan, then six years old, was living with appellant (one of Father's brothers) and appellant's common-law wife, Racheal, even though Mother had custody of Ivan. The Department had concerns about Ivan's placement with Racheal due to her previous assault charge.[2] However, no better placement was available. Father was not a suitable placement for Ivan due to his extensive criminal history and substance abuse. No other relatives could take Ivan, and neither of two volunteer placement agencies had an available bed. For those reasons, and because he was not in immediate danger, the Department allowed Ivan to remain in appellant's and Racheal's home.

A couple of weeks later, appellant's and Father's brother, Manuel, and his wife agreed to take in Ivan. The trial court approved the move in December 2013. Ivan was ultimately moved five times over the next twenty months. Based on Racheal's trial testimony, the trial court allowed Ivan to be placed back with Racheal on July 8, 2015. The Department and the CASA objected to that placement. The trial court said it was giving Racheal two months to demonstrate "whether [she is]

[2] In January 2012, Racheal was charged with misdemeanor assault causing bodily injury for striking a bouncer at a night club. She pleaded nolo contendere in August 2012 and was placed on deferred adjudication community supervision for six months. She was discharged from supervision and the charge was dismissed in March 2012. Racheal denies she hit the bouncer.

trustworthy or not." The court added: "There is a placement change. It is [Racheal]. It is not to [appellant]. It is to Racheal . . . ."

By all accounts, Ivan loved appellant and Racheal. He adored his teenaged half-brother, Matt, who lived in their home. (Matt is the son of Racheal and Father.) His therapist testified Ivan was more animated and seemed happier when he lived with them. As discussed below, however, the trial court ordered Ivan removed from appellant's and Racheal's home on August 13, 2015, due largely to drug test results showing appellant and Racheal to be heavy, perhaps chronic, marijuana users.

During the nearly two-year life of this case in the trial court, Ivan was placed in six homes. All but one belonged to relatives who turned out to be unable or unwilling to take care of him, including appellant and Racheal. The testimony at trial was undisputed that Ivan needed a stable, permanent home. The Department's goal was unrelated adoption. As of September 2015, Ivan was living with an adoptive foster parent.

2. Appellant and Racheal

a. Substance abuse

A caregiver's drug use can qualify as a voluntary, deliberate, and conscious course of conduct endangering the child's well-being. *See In re S.R.*, 452 S.W.3d 351, 361 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Continued drug use may be considered as establishing an endangering course of conduct. *Id.* at 361–62.

On July 30, 2015, three weeks after Ivan was placed with Racheal, the trial court signed an order directing appellant and Racheal to, among other things, submit to a drug test at their expense that day. They completed the drug test as ordered, and they both tested positive for high amounts of marijuana. According to Bruce Jeffries, owner of the agency that performed the tests, the results indicate they smoked

marijuana within the month preceding the test. Ivan lived with them for three of those four weeks. The results belied appellant's testimony earlier in the trial that he had not used an illegal substance in around three years. Appellant said his drug usage during this case was "just a poor judgment call."

Due in part to that drug use, the Department opened a case against appellant with respect to his own children who lived in his and Racheal's house. That investigation was pending when trial concluded in this case.

b. Dishonesty and secrecy

A potential caregiver's dishonesty is not in a child's best interest. *See In re S.K.*, 198 S.W.3d 899, 908 (Tex. App.—Dallas 2006, pet. denied) (considering mother's dishonesty about employment and living situation in best-interest analysis); *Thomas v. Thomas*, 852 S.W.2d 31, 35 (Tex. App.—Waco 1993, no writ) (father's history of criminal conduct, drug and alcohol use, and dishonesty factored into trial court's not naming him managing conservator).

Appellant testified about his home in July. Among other things, he said:

- They just moved into this house. They lived in their previous house for nine years.
- The residents were him, Racheal, and their five children.
- The house had four bedrooms. He and Racheal shared the master bedroom, his two daughters shared a bedroom, and there would be adequate space for the four boys (including Ivan).
- Their rent was "about $700" monthly, and appellant was completing some repairs on the house as part of his rent. Shortly thereafter, appellant said he misspoke and rent was actually $1,250, which was the amount of the voucher they received from a public housing program.
- The house needed "just minor things, like a fresh coat of paint." Racheal had already painted the house.

- Nothing in the house posed a safety hazard.

Most of those statements were discovered to be false. The Department and the CASA made an unannounced visit to the home a few days after Ivan moved in, in the middle of trial. They arrived as certain family members were returning from swimming. Those people said they needed to change their clothes, but they did so in the living room, not the bedroom, which the CASA found unusual. The door to one room was locked, and the Department and CASA were not permitted to enter that room. Racheal said it was the master bedroom, and she did not want them to see it because it was messy. It appeared everybody in the house slept on pallets in a front room rather than the bedrooms. Other people were in the home. When asked, they refused to identify themselves. The Department and the CASA soon learned that, contrary to what they had been told, appellant and Racheal did not own or lease the home.

Appellant complains the Department did not conduct a home study and did not show any exigent circumstances to warrant removing Ivan from their home. As a factual matter, he is wrong. Racheal testified the Department conducted a home study on her and appellant's home in August 2014. He cites no authority to suggest the Department was required to conduct a second home study. Indeed, the Department is required to conduct a home study of only "the most appropriate substitute caregiver." Tex. Fam. Code Ann. § 262.114; *see In re G.B. II*, 357 S.W.3d 382, 383–84 (Tex. App.—Waco 2011, no pet.) (Department was not required to conduct home study on all possible relative placements).

He also cites no authority suggesting the Department bears the burden to show exigent circumstances before moving a child from a temporary placement. To the contrary, the standard for continuation of a placement is whether it "is appropriate for meeting the child's needs" and "continues to be in the best interest of the child."

Tex. Fam. Code Ann. § 263.306. As discussed, the trial court acted within its discretion in deciding living with appellant and Racheal is not in Ivan's best interest.

c. Risk of allowing Mother or Father to see Ivan

If a relative of a parent whose rights have been terminated is appointed managing conservator of a child, there is a risk the relative will improperly allow the parent to visit the child. Such a risk is relevant to the conservatorship decision. *See In re T.T.*, 228 S.W.3d 312, 325 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (appointing Department managing conservator instead of relative in part because relative said "she did not think she could follow the rules regarding visitation and parent access to the children").

Racheal and Father are the parents of Matt, Ivan's half-brother. Matt was sixteen or seventeen at the time of trial. When Matt was five or six years old, Father voluntarily relinquished his parent-child relationship with him. Still, Father was a consistent presence in Matt's and Racheal's lives for the next decade. For the first six years or so, Racheal limited Matt's contact with Father. Usually they had supervised visits or phone conversations. Racheal allowed Matt to start visiting Father unsupervised, sometimes for the weekend, when Matt was twelve or thirteen. She said she felt comfortable with unsupervised visits at that age because Matt had a cell phone and was old enough to let her know if anything was wrong.

Despite Racheal's assurances, the Department and the CASA were concerned she and appellant would allow Father to see Ivan.[3] Father is twice-connected to appellant and Racheal: he is appellant's brother, and he is the father of Racheal's son, Matt. As a result, there was a significant risk that, by chance or design, they would allow Father to see Ivan. The fact that Father's rights with respect to Ivan are

[3] On July 8, 2015, in its order placing Ivan with appellant and Racheal, the trial court instructed that "Father's contact is to be through CPS. Mother is to have no contact."

terminated would not allay that risk. His rights are terminated as to Matt, and Racheal allowed him regular contact with Matt for ten years.

In summary, the evidence was that Ivan's life was turned upside down for nearly two years, and he needed a permanent home. The Department could provide him such a home. By contrast, appellant and Racheal swore they did not use any illegal substances but in fact used marijuana heavily. They said their house was safe and appropriate for Ivan, but it was not. Finally, their behavior for the past number of years suggested they would permit Ivan to see Father.

We hold the trial court did not abuse its discretion in appointing the Department, rather than appellant, to be Ivan's managing conservator. We overrule each of appellant's issues.

CONCLUSION

We affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby.