Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00866-CV

IN THE INTEREST OF C.D., a Child

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2018-PA-02739
Honorable Peter A. Sakai, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 3, 2020.

AFFIRMED

Appellant D.D. ("Mother") appeals the trial court's final order in a suit affecting the parent-child relationship that appoints her possessory conservator of her child, C.D., and appoints the child's father, H.T. ("Father"), as permanent managing conservator. We affirm.

BACKGROUND

Mother has two children C.D. and L.M.R. by different fathers. L.M.R. was born in March 2018. At the time, Mother was living with C.D., who was five years old, and L.M.R.'s father, to whom she was married. C.D.'s Father lived in California and was not involved with the child. In June 2018, the Texas Department of Family and Protective Services (the "Department") became involved to address Mother's suicidal ideations and suicide attempts, illegal drug use, and domestic violence between Mother and her husband. On December 5, 2018, the Department

removed the children because Mother had overdosed on drugs and had been admitted to a mental health facility. The Department also filed a suit seeking the termination of Mother's and Father's parental rights. Father filed an answer acknowledging paternity to C.D., and later the maternal grandmother, J.G. ("Grandmother"), intervened in the suit. After removal, the Department placed the children first with Grandmother, and in June 2019, the Department placed C.D. with Father in California.

On September 10, 2019, the case proceeded to a bench trial. When the trial began, Mother's attorney advised the court that Mother intended to relinquish her parental rights. Mother believed that relinquishment would allow her to visit her children. She testified that she would rather relinquish her parental rights in order to visit them "even though . . . I'm mentally unstable because my children . . . have been taken from me." She also testified that she "became homeless because of this case, and . . . made some bad decisions." The trial court granted a short recess to allow Mother to confer with her counsel, and, when trial resumed, Mother withdrew her affidavit of relinquishment. The trial court then adjourned until September 25, 2019.

When trial resumed, the court orally granted an agreed motion to sever the claims regarding C.D. and L.M.R. into separate suits.[1] As to C.D., the Department had reached an agreement with Father that he have permanent managing conservatorship of the child. The Department sought to limit Mother to possessory conservatorship. The court heard testimony from the Department's caseworker, Mother, Mother's boyfriend, Mother's counselor, and a police officer. After the trial concluded, the trial court signed a final order appointing Father as C.D.'s permanent managing conservator and Mother and Grandmother as possessory conservators. The

[1] The order was later committed to writing. The case concerning L.M.R. proceeded to a final judgment, in which Mother was appointed as a possessory conservator of the child. Mother appealed and we affirmed. *See In re L.M.R.*, No. 04-19-00892-CV, 2020 WL 1695505, at *3 (Tex. App.—San Antonio Apr. 8, 2020, no pet. h.) (mem. op.).

trial court found that appointing Mother as a possessory conservator was in C.D.'s best interest. It ordered Mother to have possession of and access to C.D. for four hours per day during the periods when C.D. was in the possession of Grandmother. The order grants Grandmother possession in California for one weekend per month and additional possession during vacation and holiday periods. The order requires Grandmother to supervise Mother's visitation and prohibits phone contact between Mother and C.D.

Mother now appeals, arguing the trial court abused its discretion by failing to appoint her as a managing conservator.

STANDARD OF REVIEW

We review a trial court's determination as to conservatorship for an abuse of discretion. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). "Under that standard, legal and factual sufficiency of the evidence are not independent grounds for asserting error, but are relevant in assessing whether the requisite abuse of discretion is present." *In re E.M.T.*, No. 04-18-00805-CV, 2019 WL 1370323, at *2 (Tex. App.—San Antonio Mar. 27, 2019, no pet.) (mem. op.). "A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles." *In re M.G.N.*, 491 S.W.3d 386, 406 (Tex. App.—San Antonio 2016, pet. denied). A trial court does not abuse its discretion if it bases its decisions on conflicting evidence or if "there is some evidence of substantive and probative character to support the trial court's decision." *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). We defer to the trial court's credibility determinations, review the evidence in the light most favorable to the order, and indulge every presumption in favor of the trial court's ruling. *In re E.M.T.*, 2019 WL 1370323, at *2; *In re I.G.W.*, No. 04-17-00161-CV, 2018 WL 3265292, at *1 (Tex. App.—San Antonio July 5, 2018, no pet.) (mem. op.). The trial court's conservatorship

decision must be supported by a preponderance of the evidence. TEX. FAM. CODE ANN. § 105.005; *see In re J.A.J.*, 243 S.W.3d at 616.

APPLICABLE LAW

The primary consideration in determining conservatorship and possession of and access to a child is the best interest of the child. TEX. FAM. CODE ANN. § 153.002; *see also Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (identifying nonexclusive factors that may be considered in determining best interest). The trial court may appoint a sole managing conservator or joint managing conservators. TEX. FAM. CODE ANN. § 153.005(a). Family Code section 153.131 provides:

> (a) Subject to the prohibition in Section 153.004 [which pertains to restrictions on conservatorship where there is a history of family violence or sexual abuse], unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Id. § 153.131. Additionally, section 153.134(a) provides:

> (a) If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, 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.

DISCUSSION

Mother cites to Family Code section 153.131(a) to argue "the record contains factually insufficient evidence of significant impairment, either emotionally or physically" to C.D. to support the trial court's decision to deny her managing conservatorship. *See* TEX. FAM. CODE ANN. 153.131(a). Section 153.131(a), however, is inapposite because it concerns situations in which neither parent is appointed as a managing conservator. *See id.* Here, however, Father was appointed as C.D.'s sole permanent managing conservator, and section 153.131(b) provides the relevant "rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child." TEX. FAM. CODE ANN. § 153.131(b). Section 153.131(b) does not require the trial court to specifically link its best-interest finding to the child's physical health or emotional development, but instead requires consideration of the nonexhaustive factors listed in section 153.134(a) when, as here, there is no agreed parenting plan filed with the trial court. *Compare id.* § 153.131(a), *with id.* § 153.131(b), *and id.* § 153.134(a); *see In re A.C.D.*, No. 05-16-00779-CV, 2016 WL 6835725, at *10 (Tex. App.—Dallas Nov. 3, 2016, no pet.) (mem. op.) (considering the section 153.134(a) factors as well as the *Holley* factors, which overlap, when reviewing a trial court's decision to award managing conservatorship to only one parent); *In re Marriage of Butts*, 444 S.W.3d 147, 155–56 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (considering the section 153.134(a) factors, even though the parties did not specifically discuss them, when reviewing a trial court's decision to award managing

conservatorship to only one parent).[2] Mother does not specifically discuss the section 153.134(a) factors.

We hold that the trial court did not abuse its discretion by denying Mother joint managing conservatorship because there is sufficient evidence to overcome the presumption that joint managing conservatorship would be in C.D.'s best interest. *See* TEX. FAM. CODE ANN. § 153.131(b); *see also id.* § 153.134(a); *Holley*, 544 S.W.2d at 371–72. There is substantial evidence that Mother's appointment as a joint managing conservator would not benefit C.D.'s physical, psychological, or emotional needs and development and that Mother was unable to give first priority to the welfare of C.D. *See* TEX. FAM. CODE ANN. § 153.134(a)(1), (2); *see also Holley*, 544 S.W.2d at 372 (listing as relevant best-interest factors "the emotional and physical needs of the child now and in the future," "the emotional and physical danger to the child now and in the future," and "the parental abilities of the individuals seeking custody").

The Department's caseworker testified that Mother was hospitalized in December 2018, for a drug overdose, and in April and May 2019, for suicidal ideations. In June 2018, Mother was hospitalized after a suicide attempt, and in July 2019, Mother sought hospital care for anxiety. Grandmother reported to the caseworker that Mother had additional suicide attempts, and Mother's therapist testified that Mother discussed with him a specific suicidal ideation.

Mother testified that her depression began five years before trial when she realized the hardships of raising a child alone. Mother's therapist diagnosed Mother with depressive disorder and bipolar disorder. According to the therapist, Mother acknowledged that it was sometimes

[2] In the separate appeal regarding L.M.R., we looked to section 153.131(a) because, there, neither parent was awarded managing conservatorship. *See In re L.M.R.*, 2020 WL 1695505, at *2. We held the trial court did not abuse its discretion by finding that it would not be in L.M.R.'s best interest if Mother were appointed as a managing conservator because the appointment would significantly impair L.M.R.'s physical health or emotional development. *See id.* at *3; *see also* TEX. FAM. CODE ANN. § 153.131(a).

unsafe for her to be around her children. The therapist testified that Mother discussed releasing custody of her children because she did not want the responsibility of being a mother. According to the therapist, Mother displayed a pattern of periodic instability. Mother suffered from manic episodes on more than half of the occasions that the therapist saw her, including an episode in June 2019, related to an arrest.

City of San Antonio Detective James Burnette and Mother's boyfriend at the time of trial, Guillermo Miguel Jaramillo, testified regarding the details of Mother's June 2019 arrest. Jaramillo testified that he called 9-1-1 after Mother had taken his rifle to a city park. Burnette responded to the 9-1-1 call. He encountered Mother seated in her car in the parking lot. Mother was intoxicated and refused to leave the car. Burnette and his partner removed Mother from her car and arrested her. In the process, Mother spat on Burnette's partner, referred to the partner by a racial epithet, and threatened to kill the officers. Mother also asked Burnette to shoot her. Burnette testified that he located an unloaded rifle on the floorboard of Mother's car. After her arrest, Mother was jailed for three days.

Mother's therapist testified that Mother had been stable for the sixty days preceding trial and that Mother's psychiatric medication played an important, but not exclusive role, in keeping Mother stable. However, the therapist cautioned: "Some of the times when medication is missed or stability is not present, there is a . . . chance or risk factor for . . . stress or frustration to be present with [the] children." Mother testified on September 25, 2019, that she was stable, but on September 9, 2019, Mother testified that she was "mentally unstable" because her children had been taken.

According to the caseworker, Mother tested positive for marijuana in January 2019, and completed a drug treatment program the following month. However, Mother tested positive for drugs after she completed the program and was enrolled in a second drug treatment program at

the time of trial. Mother admitted to the caseworker that she used fake urine to try to cheat a drug test.

Mother and L.M.R.'s father were married but separated. The caseworker characterized the relationship as "on-and-off again" and testified that it was marred by at least four instances of domestic violence since the case started. At the time of trial, Mother was in a relationship with Jaramillo and was living with him. According to the caseworker, Mother left Jaramillo and stayed at a woman's shelter for a brief period of time. Earlier in the case, Mother had stayed in different homes, and Mother acknowledged that she became homeless because of the case. To the caseworker's knowledge, Mother had at least five different jobs during the case.

Mother and Grandmother were C.D.'s primary caregivers for the first six years of his life. During that time, C.D. lived with Grandmother. C.D. had no relationship with Father until the child was placed with Father in California in June 2019. After placement, C.D. made an outcry to his teacher and Father that he wanted to kill himself; however, according to the caseworker, at the time of trial, C.D. was well adjusted and was doing very well with Father. C.D. was involved in soccer and summer camp and spent time outdoors and with his extended family. According to the caseworker, Mother would cry on phone calls with C.D. and make promises to visit California that she could not keep. In addition, Mother would cancel visitations with C.D. prior to his move to California because she was too emotional to visit.

On this record, we cannot say that the trial court's conservatorship determination was arbitrary, unreasonable, or an abuse of discretion because there is some evidence of substantive and probative character to overcome the presumption that joint conservatorship was in C.D.'s best interest. *See* TEX. FAM. CODE ANN. § 153.131(b); *see also id.* § 153.134(a); *Holley*, 544 S.W.2d at 371–72.

CONCLUSION

We affirm the trial court's judgment.

Rebeca C. Martinez, Justice