In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00285-CV

IN THE INTEREST OF G.B.

On Appeal from the County Court at Law No. 3
Montgomery County, Texas
Trial Cause No. 13-10-11388 CV

MEMORANDUM OPINION

This is an appeal from an order in a suit affecting the parent-child relationship between G.B.[1] and her mother. In her appeal, G.B.'s mother (Mother) challenges the trial court's final order, which names G.B.'s maternal aunt (Aunt) to serve as G.B.'s permanent managing conservator. Mother raises four issues in her appeal. In issue one, Mother argues that the trial court abused its discretion by failing to grant her motion to dismiss the Texas Department of Family and

[1] We identify minors by their initials to protect their identities. *See* Tex. R. App. P. 9.8.

Protective Services' petition because the court failed to render a final order before the deadline established under section 263.401 of the Texas Family Code for suits filed by the Department that affect the parent-child relationship. In issue two, Mother argues the trial court erred by appointing Aunt as G.B.'s permanent managing conservator at the conclusion of the trial because she was never formally added as a named party in the Department's suit against her. In issues three and four, Mother argues the evidence is insufficient to support the trial court's best interest findings regarding who was named to serve as G.B.'s managing conservator. We affirm the trial court's rulings.

Background

On August 9, 2013, G.B., who was approximately four years old, told her Aunt that her father made her watch movies depicting women taking off their clothes. On the same day, G.B. told her Aunt that her father had touched her in an inappropriate manner. G.B.'s aunt used her cell phone to record her conversation with G.B. about her father having touched her inappropriately. When Mother came to Aunt's house to take G.B. home, G.B.'s aunt related her conversation with G.B. to Mother. After being told of the incident concerning G.B.'s father, Mother took G.B. to a doctor, where she was examined. During the trial, Mother failed to mention to the medical personnel who examined G.B. that G.B. was claiming that

her father had sexually abused her; instead, Mother told them that she was touched inappropriately by someone who was caring for her. Several weeks after the examination occurred, Mother and G.B.'s father had an altercation at Mother's apartment. At Aunt's suggestion, Mother and G.B. left the apartment, and they moved in with Aunt.

After the Department learned that G.B. had claimed that her father sexually assaulted her, it began an investigation. G.B. was interviewed at Children's Safe Harbor,[2] and G.B. was also examined by a sexual assault nurse. The forensic interviewer employed by Safe Harbor, Susana Martinez, interviewed G.B. at Children's Safe Harbor. According to Martinez, G.B. told her that her father touched her inappropriately; G.B. used her hand to demonstrate where her father had touched her. Additionally, a Child Protective Services (CPS) investigator and a Conroe Police investigator, both involved in the investigation into G.B.'s outcry, also testified during the trial. Both testified to their opinions that G.B.'s outcry was valid.

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[2] Children's Safe Harbor is a child advocacy center that allows children to state what happened to them to a social worker while their stories are recorded. Other agencies can then view the recording to avoid repeated interviews about what happened. www.childrenssafeharbor.org (last visited Jan. 8, 2016)

One of the CPS investigators involved in G.B.'s investigation testified that he advised Mother to keep G.B. away from G.B.'s father during the criminal investigation into the father's alleged assault. The testimony from the trial indicates that G.B.'s father, as of the time of the trial, had not been indicted for assault.[3] Approximately two months after Mother and G.B. moved in with Aunt, Mother and G.B. decided to resume living in Mother's apartment, and G.B.'s father was also staying there at night.

Upon learning that G.B. was residing in the apartment with her father, CPS interviewed Mother and G.B.'s father to evaluate whether their living arrangement was appropriate. During this phase of the investigation, an investigator from CPS inspected Mother's apartment. According to the CPS investigator, she learned that G.B.'s father was spending nights at Mother's residence, and that Mother and G.B.'s father stated that they were planning to marry. However, the evidence before the trial court indicates that Mother was married to a man who lived in Mexico, and Mother never indicated that she intended to divorce her husband.

The inspection of the home where Mother and G.B. were living revealed that they were living in a trailer that had been converted into duplex apartments. Mother's apartment consisted of one room, which had two twin-sized mattresses

[3] While G.B.'s father appeared though an attorney at trial, he did not testify during the trial.

that were pushed together on the floor. The apartment did not have a living area or a sofa. Mother told the CPS investigator that she, G.B., and G.B.'s father all slept on the mattresses, and that she slept in between them.

Following its investigation into the living arrangement of G.B.'s parents, the Department removed G.B. from her parents' custody, and G.B. was temporarily placed with her father's relatives. A few days after G.B. was removed from Mother's apartment, the relatives with whom G.B. was temporarily placed indicated that they did not want to serve as G.B.'s temporary custodians. At that point, the Department placed G.B. in foster care.

When the Department sued for custody of G.B., it asked the trial court to name the Department as G.B.'s temporary managing conservator and to terminate the rights of parents.[4] The parties tried the case to the bench in a proceeding that began on May 19, 2015. On the third day of the trial, Mother's attorney requested a mistrial because the trial court had not notified the Attorney General of the trial

[4] The suit actually began as an action filed by the Texas Attorney General against G.B.'s father, seeking to require that G.B.'s father pay child support. Approximately one month after the Attorney General sued for child support, the Department filed a petition to intervene in the suit; in its petition in intervention, the Department sought to terminate Mother's and G.B.'s father's parental rights. The record shows that Mother and G.B.'s father were served with the Department's petition to intervene. In response to the petition in intervention filed by the Department, Mother and G.B. filed written answers, denying the allegations of the Department's petition.

setting. On the morning of May 22, 2015, an assistant attorney general appeared in court on behalf of the Attorney General, and requested that the claims asserted by the Attorney General be dismissed. When none of the parties objected, the trial court granted the request, dismissing the claim advanced by the Attorney General for child support.

The Department also requested permission to amend it pleadings, indicating that the State wanted to abandon its claim seeking to terminate Mother's and G.B.'s father's rights. The trial court granted the Department's request, which then left the claims advanced by the Department seeking to have G.B.'s aunt named as her permanent managing conservator and seeking to require that G.B.'s parents pay child support.

On May 22, 2015, the trial court started the trial over, without objection. In all, ten witnesses testified during the course of the trial, which ended on June 18, 2015. When the trial ended, the trial court rendered an order appointing Aunt as G.B.'s permanent managing conservator and appointing Mother and G.B.'s father as possessory conservators. G.B.'s father did not appeal from the trial court's final order, but Mother filed a timely notice of appeal.

Standards of Review

First, we address the standards that relate to the trial court's application of two sections of the Family Code to G.B.'s case, one that contains a deadline by which a suit filed by the Department must be commenced, and the other that allows the Department to ask the trial court to name a child's relative as the child's managing conservator. *See* Tex. Fam. Code Ann. § 263.401(a) (West Supp. 2015) [5] (requiring a court to grant a motion to dismiss the Department's suit asking to be named conservator of a child unless trial had commenced on the merits by the first Monday after the anniversary of the date the court rendered a temporary order appointing the department as the child's temporary managing conservator); *id*. § 263.404 (West Supp. 2015) (governing final orders appointing department as managing conservator of a child without terminating a parent's parental rights). As the court's rulings concern the application of these statutes to undisputed facts, we apply a *de novo* standard of review to Mother's first and second issues. *See In re Dep't of Family and Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009).

In her third and fourth issues, which concern the court's refusal to appoint her as managing conservator and the court's decision to appoint Aunt as G.B.'s permanent managing conservator, Mother asserts the evidence is insufficient to

[5] Throughout the opinion we cite to the current versions of the statutes, as the 2015 amendments do not affect the outcome of this case unless noted otherwise.

support the trial court's best interest findings. As the trial court's decisions regarding what was in G.B.'s best interest concern matters involving disputed facts, we apply an abuse of discretion standard to these rulings. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *In the Int. of N.L.D.*, 412 S.W.3d 810, 816-18 (Tex. App.—Texarkana 2013, no pet.).

Dismissal

Section 263.401(c) of the Texas Family Code mandates a dismissal of the Department's suit affecting a parent-child relationship "[i]f the court grants an extension [] but does not commence the trial on the merits before the dismissal date[.]" Tex. Fam. Code Ann. § 263.401(c) (West Supp. 2015). In G.B.'s case, the trial court granted a 180 day extension of the initial deadline, and Mother does not argue that the trial court abused its discretion by granting the 180 day extension. Additionally, Mother does not contend that the trial did not commence prior to the extended deadline of May 23, 2015. Instead, Mother argues that section 263.401(c) required the trial court to not only commence the trial prior to section 263.401(c)'s deadline, but to render its final order by May 23, 2015, the deadline established by section 263.401(c) as applied to the facts in G.B.'s case.[6] We do not agree with

[6] In her brief, Mother relies on a version of section 263.401 that existed in 2007, which the Legislature amended effective June 15, 2007. Act of May 27, 2007, 80th Leg., R.S., ch. 866, §§ 2, 5, 7, 2007 Tex. Gen. Laws 1837, 1837-838. Prior to the

Mother's argument that the version of the statute that applies to G.B.'s case required the trial court to render its final order on or before the statutory deadline. *See id.* While section 263.401(c) requires the trial to be *commenced* by the deadline to avoid the suit being dismissed, it does not require the final order to be *rendered* on or before the deadline expires. *See id.*

In G.B.'s case, the trial on the merits commenced on May 22, 2015, the day before the extended deadline expired. Mother's argument that section 264.401 requires the final order to be rendered within the deadline for commencing the trial is without merit, and her first issue is overruled.

Parental Presumption

In her third issue, Mother argues the evidence admitted during the trial was legally and factually insufficient to overcome the presumption that her appointment as G.B.'s permanent managing conservator was in G.B.'s best interest. According to Mother, the Department presented no evidence to show that placing G.B. with Mother would significantly impair G.B.'s physical health or emotional development.

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section's amendment, the statute required the final order to be rendered by the deadline, but the amended statute requires only that the trial commence by the deadline. *Compare* Act of May 27, 2007, 80th Leg., R.S., ch. 866, §§ 2, 5, 2007 Tex. Gen. Laws 1837, 1837-838 *with* Tex. Fam. Code Ann. § 263.401 (West Supp. 2015).

Section 153.002 of the Texas Family Code states that the child's best interest "shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." Tex. Fam. Code Ann. § 153.002 (West 2014). The Family Code creates a rebuttable presumption that the appointment of the child's parents as joint managing conservators is in the child's best interest. *Id.* § 153.131(b) (West 2014). However, a trial court may appoint a nonparent, including the Department, if 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[.]" *Id*. § 153.131(a) (West 2014). As evidence, the nonparent must "offer evidence of specific actions or omissions of the parent that demonstrate an award of custody to the parent would result in physical or emotional harm to the child." *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990).

There is evidence in the record from which the trial court could have reasonably inferred that naming Mother as G.B.'s managing conservator would significantly impair her physical health or emotional development. Ten witnesses testified over the course of the seven day trial, nine of whom were called by the Department. While the question of whether G.B.'s father had sexually abused G.B. was one of the disputed facts during the trial, the evidence allowed the trial court to

reasonably conclude that G.B.'s father had abused her. *See* Tex. Fam. Code Ann. § 105.003(a) (West 2014) (authorizing family law proceedings to be conducted as civil cases generally); *id*. § 153.004 (West 2014) (allowing the court to consider evidence of sexual abuse that occurred within two years preceding the filing of the suit in determining whether to appoint a party as a managing conservator); Tex. R. Civ. P. 262 (authorizing rules that govern jury trials to govern bench trials); *Alexander v. Rogers*, 247 S.W.3d 757, 764 (Tex. App.—Dallas 2008, no pet.) (allowing the factfinder, as the sole judge of the weight and credibility of the evidence, to accept or reject Mother's claims of physical abuse by the child's father in deciding managing conservatorship of the children).

The evidence before the trial court includes testimony indicating that G.B. displayed symptoms of trauma that are common in sexually abused children. The testimony further shows that G.B. regressed in her behavior following her supervised visits with Mother. Additionally, even though a CPS investigator advised Mother not to allow G.B.'s father to be around G.B., the testimony shows that Mother allowed G.B.'s father to sleep in the same room where G.B. was required to sleep after Mother was aware of G.B.'s outcry. The trial court was entitled to believe the account of the alleged assault provided by G.B. to Susana Martinez, who interviewed G.B. at Children's Safe Harbor. Given the trial court's

right to infer that G.B.'s allegations were credible, the trial court could reasonably view Mother's decisions to allow G.B.'s father to sleep in the same room with G.B. after she was informed of G.B.'s outcry as decisions that had endangered G.B.'s emotional and physical well-being.

When the case was tried, Mother and G.B.'s father were apparently no longer living together, and the trial court could reasonably infer that Mother might allow her current boyfriend to have access to G.B. if Mother were to be named as G.B.'s managing conservator. The evidence showed that Mother and her current boyfriend were living in a one-room trailer apartment that consisted of a kitchen, bathroom, and bedroom. The bedroom consisted of two beds separated by a small space. The home had no sofas or toys, and a pest problem that caused Mother and her boyfriend to sleep with sheets over their heads to avoid crawling insects. Mother admitted that she would allow G.B. to sleep in the same bedroom with Mother and boyfriend if G.B. were allowed to stay with her at night. From the evidence, the trial court could reasonably infer that if given rights as G.B.'s possessory guardian, Mother would require that G.B. sleep in the same room where her current boyfriend would also be sleeping.

When CPS became aware that Mother had a new boyfriend, it sought to determine whether her new boyfriend presented a threat to G.B.'s safety or well-

being. However, when CPS sought to evaluate Mother's new boyfriend, he failed to comply with the request made by CPS to evaluate him, and he also failed to comply with their request that he attend parenting classes.

Although Mother expressed a desire to obtain a more suitable living arrangement, she presented no evidence that she had secured housing that would allow G.B. to sleep in another room. According to the CPS caseworkers, Mother failed to display a sufficient understanding of G.B.'s needs; additionally, Mother's therapist indicated that Mother needed to demonstrate that she had the ability to exercise good judgment. From the evidence as a whole, the court could reasonably infer that Mother would expose G.B. to sleeping in a room with Mother's boyfriend or with future boyfriends if it named her as G.B.'s managing conservator.

The evidence before the trial court allowed the trial court to infer, by a preponderance of the evidence, that appointing Mother as G.B.'s managing conservator would significantly impair G.B.'s physical health or her emotional development. The evidence supporting the trial court's finding that Mother's appointment as managing conservator was not in G.B.'s best interest is substantial, and the evidence is not so weak or so contrary to the overwhelming weight of the evidence that the trial court's implied findings should be set aside. *See In re W.M.*,

172 S.W.3d 718, 724-25 (Tex. App.—Fort Worth 2005, no pet.). We overrule issue three.

Appointment of Aunt as Permanent Managing Conservator

In issue two, Mother argues the trial court erred by appointing Aunt as G.B.'s permanent managing conservator because Aunt was not named as a party to the proceedings. Following the trial, the trial court found that it would not be in G.B.'s best interest to appoint either of her parents as her managing conservator; instead, the trial court appointed Aunt to be G.B.'s managing conservator. *See* Tex. Fam. Code Ann. § 263.404.

Under section 263.404(a) of the Texas Family Code, a trial court may render a final order appointing the Department as the managing conservator of a child without terminating the right of the parent if the court finds that appointing the parent would not be in the child's best interest, and "it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator." *Id.* § 263.404(a). Section 263.404(a) allows a court where there is no qualified relative or other person to appoint the Department as a last resort, but Mother argues the trial court could choose only the Department as G.B.'s managing conservator because Aunt was never formally named as a party to the Department's suit.

We disagree with Mother that a qualified relative is required to be formally named as a party when the suit is one that is initiated by the Department. In deciding who should be appointed a child's managing conservator, the child's best interest "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. Under section 263.3026 of the Texas Family Code, the Department can seek to have the trial court award the "permanent managing conservatorship of the child to a relative or other suitable individual[.]"*Id.* § 263.3026(a)(3) (West 2014). In its pleadings, the Department requested that the trial court name a relative as the child's managing conservator. At trial, in opening statement, the Department indicated that it wanted the trial court to name Aunt as G.B.'s permanent managing conservator. Mother did not object, claim surprise, or request a continuance based on the Department's opening statement asserting that Aunt should be named as G.B's permanent managing conservator.

As the petitioner, the Department was required to prove that it was in G.B.'s best interest to have Aunt be appointed as her permanent managing conservator. *Id.* § 263.3026(a)(3). The evidence before the trial court indicated a favorable home study had been completed that supported G.B.'s placement with Aunt. The testimony at trial includes Aunt's testimony that she wanted to be given custody of

G.B., and the evidence supports the trial court's implied finding that naming Aunt as G.B.'s managing conservator offered her a safe and stable placement.

Mother cites several cases to support her argument that appointing a non-party as G.B.'s managing conservator was error. *See Lewelling,* 796 S.W.2d at 167 (awarding managing conservatorship to intervening paternal grandparents in divorce was error when non-parent seeking custody fails to identify some act or omission of the parent which shows naming of the parent as managing conservator would significantly impair the child's physical health or emotional development); *In re Marriage of Campbell,* No. 06-08-00088-CV, 2009 WL 483602, at *5 (Tex. App.—Texarkana Feb. 27, 2009, no pet.) (mem. op.) (granting visitation to non-party, paternal grandmother, in divorce was abuse of discretion in the absence of evidence showing intervention of grandmother and in the absence of evidence that the children's denial of access to grandmother would significantly impair their emotional well-being); *Landry v. Nauls,* 831 S.W.2d 603, 606 (Tex. App.—Houston [14th Dist.] 1992, no writ) (awarding managing conservatorship to paternal grandmother when grandmother was not party to the suit filed by father to establish paternity and to be named managing conservator was error absent a finding that conservatorship by parents would significantly impair child's emotional and physical health). However, the cases cited by Mother are not cases

in which the trial court named the Department to be the child's temporary managing conservator. Moreover, when the trial court names the Department as the temporary managing conservator, the Department is tasked by statute with preparing a permanency plan that relates to the child's care. *See* Tex. Fam. Code Ann. § 263.3025 (West Supp. 2015) (requiring the Department to prepare a permanency plan for the child that the Department has been appointed temporary managing conservator); *Id.* § 263.3026(a)(3) (detailing goals of the permanency plan including "award of permanent managing conservatorship of the child to a relative or other suitable individual"); *Lewelling*, 796 S.W.2d at 165-66; *In re Marriage of Campbell*, 2009 WL 483602, at *1-2; *Landry*, 831 S.W.2d at 604. In this case, the Department's permanency plan supported naming Aunt to be G.B.'s permanent managing conservator.

Under section 262.114(a) of the Family Code, when it takes possession of a child, the Department is required to identify and evaluate relatives as potential caregivers to determine if they could offer the child a suitable placement. *See* Tex. Fam. Code Ann. § 262.114(a) (West Supp. 2015). In G.B.'s case, the Department conducted, approved, and filed a home-study evaluation of Aunt. Based in part on that study, the Department asked the trial court to appoint Aunt as G.B.'s permanent managing conservator. *See id.* § 263.404. When the Department seeks

to have the court name a managing conservator without terminating the parents' rights, sections 263.3026 and 263.404(a) of the Family Code allow the Department to ask a court to place the child who is temporarily in its custody with a relative. *See id*. §§ 263.3026, 263.404(a).

We conclude the Family Code allowed the trial court to name Aunt as G.B.'s managing conservator even though she was never formally named as a party in the proceedings. *See In re C.S.*, 264 S.W.3d 864 (Tex. App.—Waco 2008, no pet.) (affirming appointment of child's maternal great-uncle and great-aunt as managing conservators of child in suit initiated by the Department). We overrule issue two.

In issue four, Mother argues the evidence is legally and factually insufficient to support the trial court's finding that appointing Aunt as G.B.'s permanent managing conservator was in G.B.'s best interest. In determining whether the appointment of a permanent managing conservator is in a child's best interest, there is a "strong presumption that the best interest of a child is served by keeping the child with a parent." *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006); *see* Tex. Fam. Code Ann. § 153.131(b). Additionally, courts presume that a prompt and permanent placement of a child in a safe environment is in the child's best interest. Tex. Fam. Code Ann. § 263.307(a) (West Supp. 2015). In reviewing whether the trial court's decision to name Aunt as G.B.'s permanent managing conservator is

supported by sufficient evidence, we consider the three presumptive factors and thirteen non-exhaustive factors that are identified in section 263.307 of the Texas Family Code. *See id.* § 263.307(b) (West Supp. 2015).

In G.B.'s case, the trial court could reasonably determine from the evidence adduced at trial that G.B.'s prompt and permanent placement with Aunt was in G.B.'s best interest. Aunt provided a home where G.B. was not required to share a bedroom with her father, who she claimed abused her, or any unrelated adult males. As part of the Department's study of their home, Aunt and her husband had submitted to evaluations by the Department that were favorable, and the trial court could reasonably view a placement with Aunt as a stable and permanent placement.

Mother's past decisions about G.B.'s sleeping arrangements are also factors the trial court could reasonably consider and rely on in deciding who to name as G.B.'s managing conservator. While the facts of the assault were disputed, the trial court had sufficient evidence to decide the outcry, from G.B.'s perspective, was valid, allowing the trial court to infer that Mother's decision to allow her father to sleep in the same room with G.B. was irresponsible and harmful to G.B.'s emotional well-being.

Other evidence in the record also supports the trial court's decision to name Aunt as G.B.'s managing conservator. The CPS caseworker and CASA witness testified that they favored placing G.B. in Aunt's custody. Mother's CPS-appointed therapist did not recommend that Mother receive full custody of G.B. While Mother had taken advantage of the counseling services offered to her, she appeared unwilling to accept G.B.'s outcry as valid at the time of the trial, and she also failed to make concrete plans to provide G.B. with a room that would prevent her from being exposed to sleeping in the same room as other unrelated adult males. Given Mother's testimony, the trial court could reasonably reject Mother's testimony that she had plans to provide G.B. with her own room. The trial court could reasonably view Mother's failure to provide G.B. with a suitable sleeping arrangement after learning of G.B.'s outcry and after she received counseling as evidence indicating that Mother had poor judgment regarding parenting G.B. The trial court could reasonably infer from the testimony before it that Mother had not acquired the skills she needed to provide G.B. with an environment free from the risk presented to her by the sleeping arrangements that Mother apparently believed were acceptable. While Mother produced a witness to show that she had friends who could help her with G.B., that testimony does not indicate the trial court erred when it decided to name Aunt as G.B.'s managing conservator.

We conclude the evidence supports the trial court's finding that naming Aunt as G.B.'s permanent managing conservator was in G.B.'s best interest. We further conclude that Mother's arguments claiming the evidence is insufficient to support the trial court's findings are without merit. We overrule issue four.

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

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on November 10, 2015
Opinion Delivered January 14, 2016

Before Kreger, Horton, and Johnson, JJ.