



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-17-00156-CV**

IN THE INTEREST OF J.M., A  
CHILD

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FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NO. 323-102617-15

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**MEMORANDUM OPINION<sup>1</sup>**

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In a single ground, Appellant Father R.S. appeals the trial court's order appointing M.A., a nonparent, as the permanent managing conservator of R.S.'s child, J.M. We affirm.

**Background**

J.M., who was nine years old at the time of trial, moved from New Jersey to Texas with her Father in the spring of 2010. They left behind J.M.'s mother, who was homeless and suffered from a drug problem. J.M. was in Father's sole

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<sup>1</sup>See Tex. R. App. P. 47.4.

care once they moved to Texas, and by the time of trial, Mother could not be located.

### **I. Father's medical and criminal history**

Father had problems, too. He suffered from bipolar disorder, depression, and schizophrenia, for which he took a number of medications, including Haldol and Trazodone. At trial, Father attributed his need to take medication on the stress caused by the Child Protective Services (CPS) investigations.

Father's criminal history included:

- a June 1994 conviction for misdemeanor assault causing bodily injury with a 90-day sentence;
- a March 1995 conviction for assault causing bodily injury with a 60-day sentence;
- two August 2001 convictions for misdemeanor assault causing bodily injury and two 30-day jail sentences;
- a December 2004 sentence of two years' deferred adjudication for felony assault causing bodily injury to a family member; and
- a March 2016 misdemeanor conviction for assault causing bodily injury with a 75-day jail sentence.

### **II. 2012 Investigation**

The first CPS investigation of Father began in August 2012, when, according to CPS Investigator Mary Houseman, Father went to the Child Study Center (CSC) seeking help for J.M., who had been diagnosed with autism. Although she was five years old at the time, J.M. was not potty-trained and could not feed herself.

While at CSC, Father got into a confrontation with someone and he and J.M. were transferred to Cook Children's Medical Center (Cook's). Once at Cook's, Father became upset when hospital staff recommended transferring J.M. to a hospital in Dallas for an inpatient program. Houseman testified that Father became upset at this prospect because he could not afford transportation to the Dallas facility, even though Houseman explained to him that Medicaid would provide him with transportation. Father then left Cook's with J.M. against the advice of the medical staff.

According to Houseman, Father admitted on the day of the incident that he had not been taking his medication, explaining to her that picking up his prescriptions and scheduling his medical appointments was difficult while J.M. was home from school for the summer. Houseman drove Father to pick up his prescriptions, and in the days following the incident, Houseman attempted to get help for Father and J.M. Initially she could not find a facility that would treat J.M. due to her autism diagnosis, and, according to Houseman, when she tried to follow up with Father a week later, he wanted nothing to do with her.

Even so, Houseman and her supervisor continued trying to locate resources to assist Father and J.M. Houseman testified that she contacted New Jersey's Child Protective Services in an attempt to determine where the autism diagnosis originated, but she could not find any record of an official diagnosis of autism.

While the investigation was still open, on September 22, 2012, CPS received a report that J.M. had been taken into custody after Father was arrested on a mental health warrant following an altercation with a neighbor. On an emergency petition seeking conservatorship and termination of Father's parental rights, the Department of Family and Protective Services (Department) was appointed temporary sole managing conservator of J.M. CPS subsequently issued "reason to believe" dispositions against Father for medical neglect, physical neglect, and neglectful supervision. According to Houseman, CPS's "reason to believe" dispositions were based on the inability to locate a source for the autism diagnosis, Father's aggressive behavior toward CSC and Cook's, and Father's decision to leave Cook's against medical advice.

In the ensuing year, while J.M. lived in foster care, Father successfully completed the service plan imposed by the trial court and CPS, which included individual counseling, parenting classes, anger management classes, a psychological evaluation, filial therapy, and a nutrition class. As a result, in August 2013, the Department agreed to a monitored return of J.M. to Father, and Father was appointed as a temporary possessory conservator. The monitored return went well, and in December 2013, Father was appointed permanent managing conservator pursuant to the Department's request. The Department's petition seeking to terminate Father's parental rights was dismissed without prejudice.

### **III. 2015 investigation and the instant case**

No further problems were reported until Father got into another altercation with a neighbor on December 12, 2015, and was arrested for aggravated assault. At trial, Father testified that he and J.M. had been outside playing baseball and were walking back to their house when “about ten” neighbors came outside. According to Father, someone hit J.M., so he hit one of the neighbors with the baseball bat. During the altercation, J.M.’s arm was broken, although from the record it is unclear exactly how, and she was taken back into custody by the Department that evening. Termination proceedings were initiated thereafter.

J.M. was placed with a foster family, and a new service plan was put into place. The plan required Father to complete a drug assessment, provide contact information of a support system for him and J.M., take anger management and parenting classes, participate in individual counseling, attend supervised visitation with J.M., attend parent support group meetings, remain in contact with the caseworker, obtain and maintain employment, provide proof of residency, and refrain from any criminal activities.

In the criminal proceeding, Father pleaded guilty to simple assault and was released in March 2016, after having served 83 days’ confinement. J.M. remained in foster care until May 2016, when the trial court appointed M.A., a family friend of Father and J.M., as the temporary possessory conservator of J.M.

## **A. The Department's case at trial**

At trial in April 2017, the Department recognized that Father had completed most of the required services, but it argued that it was not in J.M.'s best interest that Father remain a primary managing conservator. In addition to Houseman's testimony regarding the 2012 investigation, the court heard testimony from Christina McDonald, the CPS caseworker, and Kimberly Lipscomb, a licensed clinical social worker. McDonald and Lipscomb's testimony focused primarily on Father's issues with anger management, his inappropriate behavior around J.M., their doubts that J.M. had autism, and J.M.'s outcry in 2016 of sexual abuse.

### **1. Observations during filial therapy sessions**

Of the seven filial, or play, therapy sessions that Father participated in during supervised visitations with the guidance of Lipscomb, only one went smoothly. Despite repeated warnings and reminders by Lipscomb and McDonald that Father should not discuss the pending CPS case with J.M., Father repeatedly did so during the supervised visitations. Lipscomb described Father's behavior in this regard as "highly inappropriate." On at least one occasion, when Father raised his voice at McDonald in front of J.M., security was summoned. Lipscomb and McDonald both testified that, on that occasion, J.M. became visibly disturbed by her father's behavior, started to cry, and told Lipscomb that Father's anger upset her. According to McDonald, Father called

her later that day, admitted he had become aggressive, and apologized for getting upset and behaving aggressively in front of J.M.

Lipscomb testified to the following observations of Father and J.M. during visitation sessions:

- He brought a DVD player to many sessions so that J.M. could watch videos. Lipscomb testified that this was not appropriate, considering that Father and J.M. only saw each other for one hour, once a week.
- Father was not receptive to her suggestions, such as a suggestion that he be “a little bit more gentle with [J.M.]” when they played games together.
- Father asked J.M. about her diet and whether she was having frequent bowel movements. This made J.M. uncomfortable, according to Lipscomb’s observations.
- Father asked J.M. why she was afraid or scared at times when Lipscomb observed that J.M. was not showing any signs of fear.
- Father gave “minimal” responses when J.M. excitedly counted to ten in Mandarin Chinese and Spanish at a visit.
- Father asked J.M. to show Lipscomb that she could do a flip and Lipscomb felt this was inappropriate because J.M. was wearing a dress at the time. Lipscomb did note that J.M. was wearing shorts underneath her dress.
- When Father led J.M. in prayer at the end of at least one visit, this appeared to make J.M. uncomfortable.
- J.M. seemed very engaged with Lipscomb, not with Father, and Father appeared “like he was just not there . . . like his mind was somewhere else.”
- At a visitation shortly before Christmas, Father brought dolls for J.M., but he did not play with the dolls with J.M. Instead, he was distracted by his attempts to set up the DVD player and to arrange a phone call with a family member. When Father gave J.M. the phone to speak with the family member, J.M. did not look engaged.
- When Lipscomb questioned whether J.M. had autism, Father responded that he would no longer receive social security disability payments for J.M.

if she was not diagnosed with autism. Lipscomb testified that Father also told her that he had been struggling financially since J.M. was removed from his care because he was no longer receiving her social security income.

Overall, Lipscomb felt that Father had made minimal progress toward the goals of being able to interact with J.M. appropriately and that further sessions were “highly unlikely” to improve the situation.

## **2. Autism diagnosis**

According to Father, J.M. was diagnosed with autism by a doctor in 2010 when she was two years old. As a result, J.M. received social security disability payments.

However, McDonald testified that J.M. had a psychological evaluation during the case and was not diagnosed with autism. Lipscomb also testified that J.M. did not show some of the typical signs of autism, including repetitive movements, delays in school, and an inability to socialize appropriately with peers and adults. Lipscomb described J.M. as “very social” and, in fact, both Lipscomb and McDonald testified that J.M. was doing well in school. Father also admitted that J.M. had always done well in school.

## **3. July 2016 outcry of sexual abuse and McDonald’s conclusions**

McDonald testified that, during a monthly visit to M.A.’s home on July 12, 2016, J.M. told McDonald “that she felt scared going to her visit because her father . . . did something to her and he touched her with clothes on and he got on top of her and he started going up and down.” J.M. also told McDonald that she



did not want to talk about it with Father because she did not want him to be mad at her, and that Father had told J.M. not to tell anyone about the incident. McDonald described J.M. as crying and very nervous when she reported this and testified that after J.M. told her this, she appeared relieved and “that she was about to start the healing process.”

Later, in December 2016, Father contacted McDonald by phone about the sexual abuse allegations. McDonald described Father as “very irate and upset because a detective ha[d] called him regarding a sexual abuse allegation against him.” According to McDonald, Father threatened to sue everyone involved in the investigation, “especially CPS,” and then hung up.

Based in part on this incident and by the time of trial four months later, McDonald felt that Father still could not control his anger and that his actions were unpredictable to the point that he could harm J.M. McDonald expressed concerns that Father had not demonstrated any “lifestyle changes” since the first time the Department had become involved during the 2012 investigation. In McDonald’s view, Father had not demonstrated an ability to properly nurture J.M., he did not listen to J.M., and he tried to overfeed her. McDonald further testified that Father could not demonstrate that he had a consistently adequate support system, explaining that his support system would “constantly” change. Although she admitted that Father’s home was appropriate for himself and J.M., McDonald felt that he had not demonstrated that he could provide J.M. a safe and stable living environment.

#### **4. Placement with M.A.**

J.M. went to live with M.A. in May 2016 after spending six months in foster care. At first, M.A. experienced problems with J.M. According to M.A., J.M. was very quiet and did not get along well with other people. She also reported that J.M. would go to the bathroom on herself and did not know how to clean herself properly. By the time of trial, however, she was, by all accounts, thriving.

At trial, both M.A. and McDonald described J.M. as having become more outgoing. McDonald described J.M. as a “new child” after living with M.A. M.A. testified that J.M. was excelling at school, learning different languages, and gaining confidence that she did not have before. According to McDonald, J.M. had a very open relationship with M.A., was comfortable talking to M.A., and felt comfortable and safe living with M.A. and M.A.’s five-year-old son. McDonald also emphasized M.A.’s ability to appropriately discipline J.M. by redirecting her, taking away privileges, and making her read or do chores. She also commended M.A.’s actions in making therapy and medical appointments for J.M. immediately upon placement with her.

#### **B. Father’s case at trial**

In his testimony, Father strove to show the trial court that he had learned from his mistakes. He acknowledged that he “didn’t do the right thing” when he got into an altercation and hit the neighbor with a baseball bat. He testified that he had since moved to a new apartment and had acquired a new sense of

respect for his neighbors. He also reported that he was consistently taking his medications.

Father claimed that he had benefitted from the parenting classes and had made plans for J.M.'s return to his care. He planned for J.M. to attend a school near his apartment, although he could not remember the name of the school. He informed the court that he had two full closets of clothes ready for J.M. and a refrigerator full of food. He testified that he could name six people who were part of his support system and who attended the same church he attended.

Three of Father's acquaintances testified in support of him. Jonathan Sanders met Father and J.M. at the YMCA, and their children went to the same school. Sanders vouched for the cleanliness and appropriateness of Father's home and testified that, in the past, Father was "always there for [J.M.]. He taught her, he worked with her, he had patience with her." According to Sanders, J.M. was happy, always clean, and always appropriately dressed. According to Sanders, Father had candidly admitted to Sanders some of the mistakes he had made in his past, but he assured Sanders that J.M. gave him a reason to live and a purpose for his existence. Sanders described Father and J.M.'s relationship as a good father-daughter relationship.

Louis Holloway, a family friend of Father's, testified that he used to see Father and J.M. multiple times a week on the bus and at neighborhood events, and that on those occasions they appeared to have a good relationship, and that J.M. was happy, well-groomed, and well-respected. He described Father and

J.M. as laughing, joking, and playing, and he testified that he “never [saw Father] get mad at her at all.” According to Holloway, he saw no reason to be concerned about Father’s ability to take care of J.M. On redirect examination, Holloway admitted that he had only known Father and J.M. about six months prior to the December 2015 incident.

Jamie Jefferson testified that she had known Father and J.M. for three years after meeting them on a bus. She interacted with the pair on bus rides, where she and J.M. would discuss school. According to Jefferson, J.M. always appeared happy, clean, and appropriately dressed and groomed. As far as Jefferson could tell, Father and J.M. had a great relationship.

#### **IV. The trial court’s decision**

At the end of the trial, the trial court found that appointment of Appellant as a managing conservator would not be in J.M.’s best interest, appointed M.A. as the sole permanent managing conservator, and appointed Appellant as a possessory conservator. The trial court ordered that Appellant would have possession of the child only at times mutually agreed upon in advance by M.A. and Appellant or pursuant to a supervised visitation order allowing an hour of supervised visitation every other weekend.

## Discussion

In his sole ground, Appellant argues that the trial court abused its discretion by finding that the appointment of M.A. as the permanent managing conservator was in J.M.'s best interest.

### I. Standard of review and applicable law

We review the trial court's conservatorship determination for abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). A trial court abuses its discretion if it acts arbitrarily and unreasonably or without reference to guiding principles. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011); *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). A trial court also abuses its discretion when it does not analyze or apply the law properly. *Iliff*, 339 S.W.3d at 78. Legal and factual sufficiency are not independent grounds of error in modification cases, but they are relevant factors in deciding whether the trial court abused its discretion. *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g).

A court's primary consideration in determining the issue of conservatorship must always be the best interest of the child. Tex. Fam. Code Ann. § 153.002 (West 2014); *J.A.J.*, 243 S.W.3d at 614. Courts may use a nonexhaustive list of factors to determine the child's best interest. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976); *T.D.C.*, 91 S.W.3d at 873. Those factors include

- (A) the desires of the child;
- (B) the emotional and physical needs of the child now and in the future;

- (C) the emotional and physical danger to the child now and in the future;
- (D) the parental abilities of the individuals seeking custody;
- (E) the programs available to assist these individuals to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (G) the stability of the home or proposed placement;
- (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
- (I) any excuse for the acts or omissions of the parent.

*Holley*, 544 S.W.2d at 371–72 (citations omitted).

There is a strong presumption that keeping a child with a parent is in the child’s best interest. *In re R.R.*, 209 S.W.3d 112, 116 (Tex. 2006). To overcome the statutory parental presumption, the evidence must support the logical inference that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions, will probably cause significant impairment to the child’s physical health or emotional development if the court appoints the parent managing conservator. *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990); *In re S.T.*, 508 S.W.3d 482, 491–92 (Tex. App.—Fort Worth 2015, no pet.). This is a heavy burden that is not satisfied by merely showing that the nonparent would be a better custodian of the child. *Lewelling*, 796 S.W.2d at 167. “Close calls” should be decided in favor of the parent. *Id.* at 168.

Acts or omissions that constitute significant impairment include but are not limited to physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior by the parent. *S.T.*, 508 S.W.3d at 492. Other considerations may include parental irresponsibility, a history of mental disorders, frequent moves, bad judgment, child abandonment, and an unstable, disorganized, chaotic lifestyle that has and will continue to put the child at risk. *Id.*

Here, testimony at trial supported the trial court's conclusion that appointment of Father as a managing conservator would significantly impair J.M.'s physical health or emotional development, especially in light of Father's struggles to manage his anger. The trial court heard evidence of specific acts and behavior indicating that Father's anger-management issues had already hindered J.M.'s physical health and emotional development.

Father's inability to control his anger led to two altercations between Father and neighbors that resulted in Father's arrest. During the second altercation, J.M. sustained a broken arm, and Father was convicted of assault and served time in jail. The evidence also showed that these were not isolated instances and that Father had four prior convictions for assault.

When J.M. was five and in Father's sole care, she was not potty-trained and could not feed herself. Although Father attributed this to a past diagnosis of autism, which enabled Father to receive social security disability payments for J.M., the Department could not find any source for that diagnosis, and evidence

presented to the trial court cast doubt on such a diagnosis. According to the testimony, J.M. did not exhibit some of the typical symptoms of autism—repetitive movements, delays in school, and an inability to socialize appropriately—but instead was characterized as “very social” and excelling at school—to the point that she had learned two foreign languages. From the testimony, J.M. appeared to be thriving in her placement with M.A.

Father argues that the trial court made its decision based only on Father’s past conduct, rather than focusing on the present. Father cites our sister court’s decision in *May v. May*, 829 S.W.2d 373, 377 (Tex. App.—Corpus Christi 1992, writ denied) (op. on reh’g), to support his argument, but *May* actually lends support to the trial court’s finding here. In *May*, the reviewing court upheld the trial court’s finding that appointment of the father as a managing conservator would endanger the children’s physical or emotional health where the only evidence concerning his fitness was that the father had used and sold drugs two years before the trial in the home where his children resided with him and their mother. *Id.* The court explained that the trial court could “logically infer that serious violations of the law by the parent . . . would set an unacceptable standard for the children to follow and significantly impair their emotional development.” *Id.* at 377–78.

Here, the trial court not only heard evidence of Father’s past transgressions and multiple convictions for assault, one of which involved physical harm to J.M., but it also heard evidence of Father’s interactions with



J.M., McDonald, and Lipscomb. The trial court heard testimony of J.M.'s 2016 outcry to McDonald in which J.M. alleged that Father had engaged in sexually inappropriate behavior with J.M., leaving her afraid to visit with him. It also heard of J.M.'s negative reaction to Father's angry outburst during a visitation session. McDonald and Lipscomb both testified about Father having lashed out at them to the point that they felt the need to call security personnel for assistance. Lipscomb also testified in detail to her observations of J.M. and Father's interactions during supervised visitation sessions, describing Father's behavior during those sessions as "highly inappropriate" and as making J.M. appear uncomfortable.

This evidence was sufficient to rebut the parental presumption and allow the trial court to conclude that appointing Father managing conservator of J.M. was not in J.M.'s best interest. We therefore overrule Father's sole ground on appeal.

### **Conclusion**

Having overruled Father's sole ground on appeal, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth  
BONNIE SUDDERTH  
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DELIVERED: October 12, 2017