# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-16-00117-CV

IN THE INTEREST OF M.F.M., A CHILD

On Appeal from the 222nd District Court
Deaf Smith County, Texas
Trial Court No. DR-14L-171, Honorable Roland D. Saul, Presiding

November 14, 2017

## MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, the father of M.F.M.[1] appeals from the trial court's order in a suit affecting the parent-child relationship. We will reverse the order of the trial court and remand it for further proceedings consistent with our opinion.

### Background

M.F.M. was born to the unmarried mother and father in 2008. At the time of the final hearing, M.F.M. was almost eight years old. M.F.M. lived with her mother and

[1] To protect the child's privacy, we will refer to the parties only by their relationship with the child, and the child by her initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2017); TEX. R. APP. P. 9.8(b).

maternal grandmother for most of her life.[2] M.F.M.'s mother died in September 2013. M.F.M. continued to live with her grandmother after her mother's death. Her father visited occasionally.[3]

In August 2014, the father filed his original petition in suit affecting the parent-child relationship, seeking sole managing conservatorship of M.F.M. After a hearing in January 2015, the trial court signed temporary orders, granting the grandmother and the father temporary joint managing conservatorship of M.F.M. and giving the grandmother the exclusive right to designate the child's residence. The court also ordered the father to pay monthly child support of $500.[4] In her counter-petition, the grandmother asked the court to appoint her the sole managing conservator of M.F.M., asserting that appointment was in the child's best interest. The father requested that he be appointed sole managing conservator because he is the remaining biological parent.

At the conclusion of the hearing, the court appointed the grandmother and the father as joint managing conservators, giving the grandmother the exclusive right to designate the child's residence, and found such placement was in the child's best interest. The court stated, "I do think that taking the child from the grandmother and forcing her to go with a father, whom she barely knows, would be detrimental to the child. The father should have standard visitation." This appeal followed.

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[2] The grandmother testified "CPS" placed M.F.M. with her because the Department had "no way of contacting" the father. She also said the father's testimony that he communicated with the mother every ten days or so was "[n]ot true."

[3] The grandmother told the court the father visited "in February one time, 2014, to come see if my daughter passed away. That's about it."

[4] The record indicates this was an agreed amount.

## Analysis

The father challenges the trial court's order through three issues. We will begin with the father's second issue wherein he contends the trial court abused its discretion by appointing the grandmother, a nonparent, as joint managing conservator without addressing the parental presumption.

### Standard of Review

We review the trial court's determination of conservatorship under an abuse of discretion standard. *In the Interest of De La Pena,* 999 S.W.2d 521, 526 (citing *Gillespie v. Gillespie,* 644 S.W.2d 449, 451 (Tex. 1982)). We will reverse a trial court's conservatorship determination only if the decision is arbitrary and unreasonable. *In re J.J.G.,* No. 01-16-00104-CV, 2017 Tex. App. LEXIS 7729, at *24 (Tex. App.—Houston [1st Dist.] Aug. 15, 2017, no pet.) (mem. op.) (citing *In re J.A.J.,* 243 S.W.3d 611, 616 (Tex. 2007)).

An abuse of discretion does not occur as long as some evidence of a substantive and probative character exists to support the trial court's decision. *Whitworth v. Whitworth,* 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.). *See also In re Marriage of Vick,* No. 07-15-00019-CV, 2016 Tex. App. LEXIS 11975, at *3 (Tex. App.—Amarillo Nov. 3, 2016, no pet.) (mem. op.) (reversing portion of judgment setting child-support obligation of wife). In determining whether the trial court abused its discretion, we consider whether the trial court had sufficient evidence upon which to exercise its discretion and, if so, whether it erred in the exercise of that discretion. *In the Interest of C.G.,* No. 04-13-00749-CV, 2014 Tex. App. LEXIS 8826, at *12 (Tex.

App.—San Antonio Aug. 13, 2014, no pet.) (mem. op., citations omitted) (citing *In re P.M.G.,* 405 S.W.3d 406, 410 (Tex. App.—Texarkana 2013, no pet.)). "A trial court has no discretion to determine what the law is or in applying the law to the facts and, consequently, the trial court's failure to analyze or apply the law correctly is an abuse of discretion." *In the Interest of B.F.,* No. 07-16-00282-CV, 2017 Tex. App. LEXIS 2712, at *9 (Tex. App.—Amarillo Mar. 29, 2017, no pet.) (mem. op.) (citing *In re American Homestar of Lancaster, Inc.,* 50 S.W.3d 480, 483 (Tex. 2001) (orig. proceeding)).

When, as in this case, no findings of fact or conclusions of law are filed, "we imply all necessary findings to support the trial court's judgment." *In the Interest of C.G.,* 2014 Tex. App. LEXIS 8826, at *11 (citing *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *In re B.N.B.,* 246 S.W.3d 403, 406 (Tex. App.—Dallas 2008, no pet.)). If a reporter's record is included in the record on appeal, the implied findings may be challenged for legal and factual sufficiency. *Id.* (citations omitted). "Legal and factual insufficiency are not independent grounds for asserting error; they are merely relevant factors in assessing whether a trial court abused its discretion." *Id.* (citations omitted). In a legal sufficiency review, "we view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not." *Id.* at *12 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). In a factual sufficiency review, "we view the evidence in a neutral light and ask whether the evidence supporting the verdict is so outweighed by the contrary evidence as to render the verdict manifestly unjust." *Id.* (citing *Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 761 (Tex. 2003)).

Although trial courts are "afforded broad discretion in deciding family law questions, the legislature has explicitly limited the exercise of that discretion when a nonparent seeks to be appointed as managing conservator." *In re M.J.C.B., Jr. and M.C.B.,* No. 11-14-00140-CV, 2014 Tex. App. LEXIS 12387, at *2-3 (Tex. App.—Eastland Nov. 14, 2014, no pet.) (mem. op.) (citing *Lewelling v. Lewelling,* 796 S.W.2d 164, 168 (Tex. 1990)). When a court determines conservatorship between a parent and a nonparent, "a presumption exists that appointing the parent as the sole managing conservator is in the child's best interest; this presumption is deeply embedded in Texas law."[5] *Id.* at *3 (citing TEX. FAM. CODE ANN. § 153.131; *Lewelling,* 796 S.W.2d at 166).

The statutory language in Section 153.131(a) "creates a strong presumption in favor of parental custody and imposes a heavy burden on a nonparent." *In re M.J.C.B.,*

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[5] In a case in which a nonparent seeks appointment as a joint managing conservator, the presumption that a parent should be appointed or retained as managing conservator of the child may also be rebutted if the court finds that:

> (1) the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, licensed child-placing agency, or the Department of Family and Protective Services for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit; and
>
> (2) the appointment of the nonparent, agency, or Department of Family and Protective Services as managing conservator is in the best interest of the child.

*In the Interest of J.M.W.,* No. 09-08-00295-CV, 2010 Tex. App. LEXIS 1817, at *9-10 (Tex. App.—Beaumont Mar. 11, 2010, pet. denied) (mem. op.) (citing TEX. FAM. CODE ANN. § 153.373). Here, suit was filed 11 months after the mother died.

The presumption is subject to the prohibition in Section 153.004 involving a history of domestic violence. The record here contains no evidence of domestic violence and accordingly, section 153.004 is inapplicable here. TEX. FAM. CODE ANN. § 153.004.

*Jr. and M.C.B.,* 2014 Tex. App. LEXIS 12387, at *3 (citing *Lewelling,* 796 S.W.2d at 167). "Evidence showing that the nonparent would be a better custodian of the child does not suffice, and close calls should be decided in favor of the parent." *Id.* (citation omitted). The nonparent may rebut the presumption with "affirmative proof, by a preponderance of the evidence, that appointing the parent as managing conservator would significantly impair the child, either physically or emotionally." *In re M.J.C.B., Jr.* and *M.J.B.,* 2014 Tex. App. LEXIS 12387, at *3 (internal citations omitted) (citing *Gray v. Shook*, 329 S.W.3d 186, 197 (Tex. App.—Corpus Christi 2010), aff'd in part and rev'd in part, 381 S.W.3d 540 (Tex. 2012)).

Courts generally require the nonparent to "present evidence that a parent's conduct would have a detrimental effect." *Id.* (citing *Gray,* 329 S.W.3d at 197; *Lewelling,* 796 S.W.2d at 167). That evidence must support a logical inference that the parent's "specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed*." In the Interest of S.M.D.,* 329 S.W.3d 8, 16 (Tex. App.—San Antonio 2010, pet. denied) (citing *Whitworth*, 222 S.W.3d at 621). Such evidence usually includes a showing of "physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior on the part of the parent." *In re A.D.A.,* No. 11-12-00002-CV, 2012 Tex. App. LEXIS 8701, at *8 (Tex. App.—Eastland Oct. 18, 2012, no pet.) (mem. op.) (citing *Gray,* 329 S.W.3d at 197). *See also In re M.W.,* 959 S.W.2d 661, 666 (Tex. App.—Tyler 1997, writ denied) (citation omitted) (noting same).

Application

As support for his contention the trial court abused its discretion, the father asserts the trial court considered best interests of the child but failed to include the statutorily-required parental presumption in that consideration. *See* TEX. FAM. CODE ANN. § 153.131(a).

The father testified that he and the child's mother had a two-year dating relationship. When the couple broke up, M.F.M. lived with the mother while the father went back to Mexico. M.F.M. was approximately eight months old at that time. The father admitted he did not provide financial support for M.F.M. from the time of the break up in 2009 until he was ordered to pay child support in 2014.[6] The father testified that before the mother died, it was the mother's responsibility to provide for all of the child's needs "because she had her." He told the court he maintained regular telephone contact with the mother and M.F.M. for a period of time but was unaware the mother died until some months after her passing. He did acknowledge he was aware M.F.M. lived with the grandmother and had gone to her home to confirm the death of the mother. He did not attempt to take custody of M.F.M. at that time.

Thus, the record is clear that from the time of the father's breakup with the mother, the father knew where M.F.M. lived but chose to leave her in the care of the mother and grandmother. The record contains conflicting testimony as to the father's contact with the child. He testified he called every fifteen days or so while he was in Mexico but the grandmother testified he did not. The record shows the father failed to

[6] It appears from the record the father made one child support payment of $500 after being ordered to do so monthly.

support M.F.M. and left her with the grandmother after her mother's death. Accordingly, the record shows the father was not involved with the child before the mother died and only he asserted he made efforts to retrieve the child after her death.

The father did, however, testify to his plans for M.F.M. and his willingness and ability to care for her. He told the court he was now married, both he and his wife are employed, they live in a two-bedroom apartment and have a room for the child. Photographs of that room were admitted. The father also testified he and his wife had the ability to support M.F.M., had spoken with doctors for her care, and had determined the school she would attend. The father's wife also testified, telling the court she loved M.F.M. and would like for the child to live with her and the father. She told the court she believed the father loved the child and was able to care for her and financially provide for her. The wife also testified to visits with the child during the pendency of the case.

The grandmother testified her husband worked while she stayed home with M.F.M. She told the court M.F.M. was eight years old, had lived with her since 2010, had attended the same school during the past two years, and had done very well. She denied the father had maintained contact with M.F.M. and told the court the father knew from at least February 2014 that M.F.M. lived with her. He came to her home looking for the mother at that time and voluntarily left M.F.M. in her care.

A counselor testified she met with M.F.M. seven times. She described M.F.M. as "a pretty happy, fun-loving, very open child." She told the court M.F.M. "had recently started visits with her biological father, who she refers to, to me, as Manuel. And she was experiencing some conflictual feelings and some confusion and things of that

nature." The counselor also testified M.F.M. told her "her dad has said that they're going to take her away from grandma without grandma knowing. That made her feel unsafe and scared to go." Also, M.F.M. told her counselor her father's wife "wasn't very nice to her" and "hated her and her family" and that her father "didn't like her grandmother or her family or cousins." The counselor said, "[a]nd so she -- she felt really conflicted, because she's, like, 'I love these people. I've been living with them. They're my family. But I meet this person, and he doesn't love my family, and I feel very confused." M.F.M. also told her counselor she felt like the father was "trying to win me" by buying her many things.

The counselor told the court she met with the grandmother. She agreed M.F.M. seemed well-adjusted to living with the grandmother and had told the counselor she had lived with her grandmother "[b]asically, my whole life." The counselor further noted the passing of a mother is "very significant to a child on an attachment level, an emotional level, even school attendance and participation level." And so the fact that [M.F.M.] had family that was there who was maternal, who she had been around, was a very, very good place for her to be because of the fact that mom dying was able to be grieved." The counselor opined that "remaining with grandmother is probably going to be the best thing . . . the fact that she doesn't feel currently bonded to her dad . . . would put her at risk." She recommended M.F.M. remain living with the grandmother and "continue with visitation with her—her father Manuel to be able to continue to curry that relationship . . . it's in her best interest to grow a relationship with her father."

During cross-examination, the counselor testified, "I believe that due to the lack of bond that she has with [the father], I think that it would emotionally be detrimental to

her at this time for her to go primarily live with him." She also told the court that while she wanted M.F.M. to have a relationship with her father, she thought "it could potentially significantly impair [M.F.M.] because she would lose everything that she knows and move to a place where she doesn't know anything other than the people she lives in the home with."

The evidence before us is similar to several cases in which the courts found the evidence insufficient to rebut the presumption set out in section 153.131. *See* TEX. FAM. CODE ANN. 153.131.

In *Gray,* 329 S.W.3d at 197, the court found the evidence of possible harm to the child was simply the "uprooting" of the child rather than a specific, identifiable act or omission or conduct of the father. While the evidence did show the child suffered from "some separation anxiety" and the anxiety had caused "recurring vomiting in the past," this evidence was not so significant as to meet the requisite standard. The court found the evidence was insufficient to meet the heavy burden to overcome the statutory presumption because it raised "only speculative harm." *Id.* at 198.

Likewise, in *In re M.J.C.B., Jr. and M.C.B.,* 2014 Tex. App. LEXIS 12387, at *4-5, the court concluded none of the four witnesses who testified at trial offered any evidence that would indicate the children's physical or emotional development would be significantly impaired if the father was appointed managing conservator even though the children had lived with the maternal grandmother "on and off" throughout most of their lives and the children did not know the father. The evidence there also showed the father was "financially stable, was gainfully employed, and had a home . . . that had

been approved by the Department after a home study was conducted." *Id.* at *7-8. Consequently, the court determined the trial court abused its discretion in failing to appoint the father as a managing conservator of the children. *Id.* at *8.

The court in *In re A.D.A.*, 2012 Tex. App. LEXIS 8701, at *9-12 relied in part on *Gray* in reaching the conclusion that the evidence before it was insufficient to overcome the presumption. There, a psychologist was called to testify about A.D.A.'s psychological, counseling and special education needs. *Id.* A.D.A. was described as a "highly functioning autistic" child. *Id.* The psychologist testified that removal of A.D.A. from familiar surroundings would be "traumatic" and "could set him back from where he is today." *Id.* The psychologist also described the accidents A.D.A. had when he was "very anxious and nervous." *Id.* Despite this testimony, the court concluded there was no evidence of acts or omissions by the father that would significantly impair the physical health or emotional development of the child. *Id.* at *13-14. The appellate court determined the maternal aunt failed to present evidence sufficient to rebut the presumption and accordingly, the trial court abused its discretion in finding otherwise. *Id.* at *14.

Reviewing the entire record under the requisite standards, we conclude that although the trial court had before it evidence that it would likely be difficult for M.F.M. to be removed from her grandmother's home, the evidence did not support a finding that appointment of the father as M.F.M's sole managing conservator would significantly impair M.F.M.'s physical health or emotional development. We acknowledge the testimony of the counselor in which she pointed specifically to the death of M.F.M.'s mother as being significant with regard to attachment, explicitly noted the child's lack of

bond with the father, and clearly told the court it would "emotionally be detrimental to [M.F.M.] at this time for her to go primarily live with him." However, this evidence does not rise to the level of significant impairment to the child's physical or emotional development as required under the statute. *See In the Interest of De La Pena,* 999 S.W.2d at 527-28 (finding evidence that aunt might be a better custodian of the child insufficient to rebut the parental presumption). *See also Lewelling,* 796 S.W.2d at 165 (requiring the nonparent to 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 and finding insufficient evidence despite past abuse of mom by dad, child living most of his life with grandparents, and evidence of mom's unemployment, lack of money, admission to a mental facility, and crowded living conditions); *In re S.W.H.,* 72 S.W.3d 772, 777 (Tex. App.—Fort Worth 2002, no pet.) (evidence of severe drug addiction and incarceration four years prior insufficient when evidence failed to show specific act or omission demonstrating physical or emotional harm to the child). There is no evidence here of any specific actions or omissions by the father that show awarding custody of M.F.M. to him would result in physical or emotional harm to the child. We must conclude the trial court abused its discretion.

We sustain the father's second issue. Because our determination as to the second issue is dispositive of the appeal, we do not address the father's remaining issues.

## Conclusion

We reverse the order of the trial court and remand the cause to the trial court for rendition of judgment that the natural parent, the father, be named as managing conservator. TEX. FAM. CODE ANN. 153.131. The trial court may find it necessary to hold further hearings on matters relating to visitation rights. *Lewelling*, 796 S.W.2d at 168-69.

Per Curiam