In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00142-CV

IN THE INTEREST OF A.D.T., A CHILD

On Appeal from the 106th District Court
Garza County, Texas
Trial Court No. 14-01-6851, Honorable Carter T. Schildknecht, Presiding

October 16, 2019

OPINION

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

Appellant, Cassidy Reyna, appeals the trial court's order modifying its March 19, 2014 conservatorship order to appoint A.D.T.'s paternal grandparents, Ronald and Metta Perry, joint managing conservators with the exclusive right to designate the primary residence of the child. Cassidy challenges the Perrys' standing to bring suit and contends that there was no evidence that the child's circumstances had materially and substantially changed. We modify the judgment and affirm.

Factual and Procedural Background

Since Cassidy's issues relate to the sufficiency of the evidence, the factual and procedural background will be more fully explored in the analysis below. However, we will provide some basic context here.

On March 19, 2014, the trial court entered an order, following the filing of a petition by the Attorney General, that named Cassidy managing conservator of A.D.T. with the exclusive right to determine the child's primary residence. At the time that this order was entered, A.D.T. was approximately one-and-a-half years old and Cassidy and A.D.T. resided in Lubbock. Cassidy and A.D.T. remained in Lubbock for approximately one year after the 2014 order was entered. They then moved to Post, where they resided with Cassidy's brother for approximately a year. However, in the eleven months following Cassidy's residence in Post, she and A.D.T. moved multiple times, staying with family or in shelters. In addition, Cassidy dated multiple men with violent criminal histories and allowed many of these men to have contact with A.D.T. In 2016, A.D.T. began exhibiting outbursts and became defiant to staff at one of the shelters. Children's Protective Services began an investigation and developed a safety plan for Cassidy in November of 2016.

On January 19, 2017, the Perrys filed their petition seeking modification of A.D.T.'s conservatorship. By their petition, the Perrys alleged standing as grandparents and sought modification of the prior order based on a material and substantial change in A.D.T.'s circumstances since the previous conservatorship order. *See* TEX. FAMILY CODE ANN. §§ 102.004 (West 2019), 156.101 (West 2014). By their petition, the Perrys sought

to be named as the party with the exclusive right to determine A.D.T.'s primary residence. The trial court entered temporary orders that granted the Perrys the right to establish the child's residence, while affording the child's biological parents the right to supervised visitation. After holding a final hearing, the trial court issued its final order which named the parties joint managing conservators with the Perrys retaining the right to determine A.D.T.'s primary residence and Cassidy continuing under supervised visitation. Subsequently, Cassidy filed motions to vacate the judgment for lack of standing and for new trial. After these motions were overruled by operation of law, Cassidy timely filed notice of appeal.

Cassidy presents two issues in her appeal. By her first issue, she contends that the trial court erred in failing to dismiss the modification because the Perrys lacked standing under the standard required by the Texas Family Code. She contends, by her second issue, that the trial court abused its discretion by finding a material and substantial change in A.D.T.'s circumstances.

Issue One: Standing

By her first issue, Cassidy contends that the trial court erred in not dismissing the Perrys' modification petition on the basis that the Perrys lacked standing under Family Code section 102.004. As applicable to the present case, to have standing, the Perrys must show that modification "is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development . . . ." TEX. FAMILY CODE ANN. § 102.004(a)(1).

Standing is implicit in the concept of subject matter jurisdiction and is a threshold issue in a child custody proceeding. *In re S.S.J.-J.*, 153 S.W.3d 132, 134 (Tex. App.—San Antonio 2004, no pet.). Whether a party has standing to pursue a cause of action is a question of law that we review de novo. *Mauldin v. Clements*, 428 S.W.3d 247, 262 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *In re S.S.J.-J.*, 153 S.W.3d at 134. The party asserting standing bears the burden of proving that issue. *In re S.M.D.*, 329 S.W.3d 8, 13 (Tex. App.—San Antonio 2010, pet. dism'd).

In assessing standing, a reviewing court should look to the pleadings but may consider relevant evidence of jurisdictional facts when necessary to resolve the jurisdictional issues raised. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). In the present modification case, we must review the entire record for satisfactory proof that the child's circumstances would significantly impair his physical or emotional well-being.[1] *In re S.M.D.*, 329 S.W.3d at 13. This is accomplished by the petitioner showing evidence of predicate facts that existed at the time the petition was filed and that are proven by a preponderance of the evidence. *Id.* When, as here, the trial court does not enter findings of fact and conclusions of law, the reviewing court implies the findings that are necessary to support the judgment and reviews the entire record to determine whether these implied findings are supported by any evidence. *Id.*

To establish standing, the Perrys had to show that a modification of A.D.T.'s conservatorship "is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development . . . ." TEX. FAMILY

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[1] We acknowledge that standing for a modification can be obtained when both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. TEX. FAMILY CODE. ANN. § 102.004(a)(2).

CODE ANN. § 102.004(a)(1). This significant impairment language creates a strong presumption in favor of parental custody and imposes a heavy burden on a nonparent. *Lewelling v. Lewelling*, 796 S.W.2d 164, 166-67 (Tex. 1990). Standing is not sufficiently established by proof that the nonparent would simply be a better custodian than the parent. *Id.* at 167. For a nonparent to overcome the presumption that it is in the child's best interest to be in a parent's custody, there must be evidence of specific and identifiable conduct by the parent that is likely to cause harm to the child's physical health or emotional development. *Gray v. Shook*, 329 S.W.3d 186, 196 (Tex. App.—Corpus Christi 2010), *aff'd in part and rev'd in part by*, *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012) (per curiam). Because of the fact-intensive nature of reviewing custody issues, an appellate court must afford great deference to the factfinder on issues of credibility and demeanor because the child's and parent's behavior, experiences, and circumstances are conveyed through words, emotions, and facial expressions that are not reflected in the record. *Chavez v. Chavez*, 148 S.W.3d 449, 458 (Tex. App.—El Paso 2004, no pet.).

When no findings of fact or conclusions of law are made, the reviewing court must presume the trial court made all fact findings necessary to support its judgment. *Garcia v. Gomez,* No. 07-06-00403-CV, 2008 Tex. App. LEXIS 8897, at *3-4 (Tex. App.—Amarillo Nov. 26, 2008, no pet.) (mem. op.) (citing *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 667 (Tex. 1987)). No findings of fact or conclusions of law were requested or made in the present case. A reviewing court must uphold these implied findings if they are supported by the record and correct under any theory of law applicable to the case. *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co.*, 223 S.W.3d 1, 21 (Tex. App.—El Paso 2005, pet. denied). In deciding whether some record evidence supports

the implied findings, “it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature.” *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (quoting *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (1950)). However, when the record includes a reporter’s record, the sufficiency of the evidence supporting the implied findings of fact may be challenged. *Garcia*, 2008 Tex. App. LEXIS 8897, at *4 (citing *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)).

In the present case, the record reflects that, at the time of the March 19, 2014 order, A.D.T. was approximately a year-and-a-half old, Cassidy and A.D.T.’s father were separated, and Cassidy and A.D.T. lived in Lubbock. According to Cassidy’s testimony, she and A.D.T. resided in Lubbock for a year after the March 19, 2014 order was entered. Cassidy and A.D.T. then moved to Post where they lived for another year. At this point, Cassidy began moving A.D.T. regularly. Cassidy admitted to moving at least seven times between the March 19, 2014 order and the filing of the Perry’s modification petition, including living in, at least, five different shelters. However, when we consider the evidence that is most favorable to the trial court’s implied finding that Cassidy moved A.D.T. excessively, we see that, according to her own testimony, she moved the child at least nine times during that eleven-month period.[2] Further, because Cassidy never owned or leased any of the places in which she stayed, she and A.D.T. were subject to the whims of the owner of these residences regarding whether and for how long they

[2] According to Cassidy’s testimony, she moved from Post to (1) Seguin where she lived with her stepmother, then to (2) a shelter in Seguin, then to (3) Houston where she lived with her brother, followed by stays at (4), (5), (6) three different emergency shelters, then back to (7) living with stepmother in Seguin, then back to the (8) Seguin shelter, and finally to (9) a crisis center in New Braunfels.

could stay, which increased A.D.T.'s instability. From October of 2016 to January of 2017, Cassidy had A.D.T. stay with two workers at the shelter. Because of these additional placements, A.D.T. stayed at two more places during this eleven-month period, bringing the total number of places he stayed to at least eleven. "[T]he state maintains a paramount interest in fostering a stable home environment for children." *In re Marriage of Chandler*, 914 S.W.2d 252, 254 (Tex. App.—Amarillo 1996, no pet.). Frequent moves are acts that may constitute significant impairment of a child's physical health or emotional development. *In re C.L.J.S.*, No. 01-18-00512-CV, 2018 Tex. App. LEXIS 9753, at *9 (Tex. App.—Houston [1st Dist.] Nov. 29, 2018, no pet.) (mem. op.); *see S.H.R. v. Dep't of Family & Protective Servs.*, 404 S.W.3d 612, 648 (Tex. App.—Houston [1st Dist.] Apr. 20, 2012, no pet.) (frequent moves without adequate support left child with inadequate housing). Considering this evidence, we conclude that the evidence supports the trial court's implied finding that the frequency with which Cassidy moved A.D.T. significantly impaired his physical health and emotional development and justified the Perrys' standing to bring this modification suit.

In addition to the instability that she caused A.D.T. by moving so frequently, Cassidy admitted that she was unable to care for A.D.T. At the final hearing, Cassidy testified that she contacted the Perrys in November or December of 2016 and asked them if they could care for her children.[3] This was during the same timeframe that Cassidy testified to having the shelter workers take A.D.T. into their custody. According to Cassidy's testimony, she asked the workers to care for A.D.T. because she was unable

[3] Throughout the time discussed in this opinion, Cassidy was the primary custodian of her daughter. However, this case does not address that parent-child relationship.

to care for him at that time. Consequently, the record reflects that Cassidy acknowledged that she was unable to care for A.D.T. within months of the Perrys filing suit to modify A.D.T.'s custody.

In addition to the frequency of moves, the record reflects that Cassidy dated at least four men over the three years between the initial order and the filing of the modification petition. In each of these instances, Cassidy exposed A.D.T. to these men. More significantly, all four of these men had prior charges and findings of violence. Cassidy posted pictures on Facebook that indicated that she was engaged to one of these men, who was serving time in prison for aggravated robbery. At the time of trial, Cassidy lived with and was engaged to another man who had been previously convicted of aggravated assault causing deadly bodily injury. Cassidy's decisions to repeatedly expose A.D.T. to men with violent criminal histories is a relevant factor in determining whether her custody significantly impaired A.D.T.'s physical health and emotional development.

The circumstances in which A.D.T. found himself while in Cassidy's custody resulted in physical and emotional disturbances. Early childhood development is a relevant factor for a trial court to consider in assessing whether a child's physical health and emotional development is affected by a party's custody. *In re L.D.F.*, 445 S.W.3d 823, 831 (Tex. App.—El Paso 2014, no pet.). Testimony was presented that A.D.T. exhibited significant behavioral issues when he was in Cassidy's custody.[4] By contrast, since he has been with the Perrys, his behavior has improved.

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[4] Specifically, one of the shelter workers, who holds a master's degree in emotional disturbance in children, testified that A.D.T. exhibited, "out-of-control behavior. Unruly, undisciplined, lack of empathy

Considering the evidence that supports the trial court's implied finding that Cassidy's sole managing conservatorship had probably resulted in significant impairment to A.D.T.'s physical health and emotional development, we conclude that the trial court did not err in determining that the Perrys had standing to seek modification. The frequency with which Cassidy moved A.D.T. caused extreme instability in A.D.T.'s home life. Cassidy also admitted that she was unable to care for A.D.T. very near the time the Perrys filed for modification. Cassidy's decisions to expose A.D.T. to violent men on a regular basis indicates Cassidy's bad judgment, which is a relevant factor in a trial court's determination of whether a party's custody significantly impairs a child's physical health or emotional development. *In re C.L.J.S.*, 2018 Tex. App. LEXIS 9753, at *9. Finally, A.D.T. exhibited significant behavioral problems when he was in Cassidy's custody and these behavioral issues have significantly improved during his time with the Perrys. Considering all of this evidence that supports the trial court's determination of the Perrys' standing, we affirm the trial court's ruling and overrule Cassidy's first issue.

Issue Two: Material and Substantial Change

By her second issue, Cassidy contends that the Perrys did not meet their burden to prove that the circumstances of A.D.T. or a conservator had materially and substantially changed since the trial court entered its March 19, 2014 Order in Suit Affecting Parent-Child Relationship.

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towards anyone and anything that was there, had irregular eating habits, refused any solid reprimands from any staff and/or any other adults in the facility, was obstinate, defiant . . . ." Ron Perry testified that, when they first got custody of A.D.T., "[h]e was four, disobedient, just kind of a little wild child."

A trial court's order modifying conservatorship will not be disturbed on appeal unless the appellant can show an abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Wood v. O'Donnell*, 894 S.W.2d 555, 556 (Tex. App.—Fort Worth 1995, no writ). A trial court abuses its discretion when it acts arbitrarily and unreasonably and without reference to guiding principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). The trial court's exercise of discretion will withstand appellate scrutiny unless clearly abused. *In re Marriage of Hamer*, 906 S.W.2d 263, 265 (Tex. App.—Amarillo 1995, no writ).

A trial court may modify a conservatorship order if modification would be in the best interest of the child and the circumstances of the child, a conservator, or another party affected by the order have materially and substantially changed since the date of the rendition of the prior order. TEX. FAMILY CODE ANN. § 156.101(a)(1)(A). In determining whether a material and substantial change of circumstance has occurred, the factfinder is not limited by rigid or definite guidelines; rather, the determination is fact-specific and must be determined by the circumstances as they arise. *Arredondo v. Betancourt*, 383 S.W.3d 730, 734 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Material changes may include the marriage of a party, "poisoning" of a child's mind by a party, changes in home surroundings, mistreatment of a child by a parent or step-parent, or a parent otherwise becoming an improper person to exercise custody. *Id.* at 734-35. A material and substantial change in circumstances may be proven by either direct or circumstantial evidence. *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Because custody cases are so fact-intensive, great deference must be afforded to the factfinder on issues of credibility and demeanor. *Chavez*, 148 S.W.3d at 458.

As previously indicated, when no findings of fact or conclusions of law are made, we must presume the trial court made all fact findings necessary to support its judgment. *Garcia,* 2008 Tex. App. LEXIS 8897, at *3-4 (citing *Zac Smith & Co.*, 734 S.W.2d at 667). We will uphold these implied findings if they are supported by the record and correct under any theory of law applicable to the case. *Marrs & Smith P'ship*, 223 S.W.3d at 21. In reaching this decision, "it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature." *Worford*, 801 S.W.2d at 109. However, when the record includes a reporter's record, the sufficiency of the evidence supporting the implied findings of fact may be challenged. *Garcia*, 2008 Tex. App. LEXIS 8897, at *4 (citing *BMC Software Belgium, N.V.*, 83 S.W.3d at 795).

In the present case, the record reflects that, Cassidy moved A.D.T. at least nine times during an eleven-month period and allowed A.D.T. to be moved two additional times when he was temporarily placed with others. "[T]he state maintains a paramount interest in fostering a stable home environment for children." *In re Marriage of Chandler*, 914 S.W.2d at 254. In support of this interest, frequent changes in the child's home environment has been considered a material and substantial change in circumstances that justifies a modification of conservatorship. *See Champenoy v. Champenoy*, No. 01-12-00668-CV, 2013 Tex. App. LEXIS 7961, at *12-13 (Tex. App.—Houston [1st Dist.] June 27, 2013, no pet.) (mem. op.) (moving child to three different residences in a four-month period and five different residences within a year); *In re Marriage of Chandler*, 914 S.W.2d at 254 (moving child at least four times in seventeen-month period); *Eason v. Eason*, 860 S.W.2d 187, 190 (Tex. App.—Houston [1st Dist.] 1993, no writ) (moving child

nine times over four years). Because Cassidy never owned or leased any of the places in which she stayed, she and A.D.T. were subject to the whims of the owner of these residences regarding whether and for how long they could stay.

Cassidy seemingly acknowledged that there had been a material and substantial change in A.D.T.'s circumstances when she admitted that she was incapable of caring for him within months of the Perrys filing their petition for modification. We note that this was not simply an off-handed statement as evidenced by the fact that Cassidy had two women that she barely knew take custody of A.D.T.

In addition, frequently exposing children to different men is a factor in assessing whether circumstances have materially and substantially changed. *See Champenoy*, 2013 Tex. App. LEXIS 7961, at *12-13 (conservator engaged to two different men with only three months separating the engagements); *Eason*, 860 S.W.2d at 190-91 (conservator lived with two different men in four years). As previously noted, Cassidy dated at least four men over the three years between the initial order and the filing of the modification petition, and each of these men had a history of violence. In each of these instances, Cassidy exposed A.D.T. to these men. While the record does not reflect that any of these men harmed A.D.T., choosing to expose the child to men with violent histories reflects a material and substantial change of circumstance.

The reasons for the rule requiring a material and substantial change in circumstances include deference to the doctrine of res judicata and recognition of the value of preserving stability in a child's environment. *Randle v. Randle*, 700 S.W.2d 314, 316 (Tex. App.—Houston [1st Dist.] 1985, no writ). In the present case, A.D.T.'s stability

is preserved by modifying his conservatorship. Considering the frequency of Cassidy's moves and her decision to expose A.D.T. to men with violent histories, we conclude that at least some evidence of a substantial and probative character exists to support the trial court's implied finding of a material and substantial change in circumstances since the March 19, 2014 order.

We overrule Cassidy's second issue.

Ron Perry's Standing

At argument in this case, the Perrys acknowledged that the trial court erred in determining that Ron Perry had standing to seek a modification because he is not sufficiently related to A.D.T. While Metta Perry is related to A.D.T. as his paternal grandmother, Ron Perry is not related to A.D.T. within the third degree of consanguinity, as required for standing under Texas Family Code section 102.004.[5] TEX. FAM. CODE ANN. § 102.004. Ron is A.D.T.'s step-grandfather and, as such, lacks standing to seek a modification under section 102.004. *In re E.C.*, No. 02-13-00413-CV, 2014 Tex. App. LEXIS 10199, at *5-6 (Tex. App.—Fort Worth Sept. 11, 2014, no pet.) (mem. op. on reh'g); *In re A.M.S.*, 277 S.W.3d 92, 98-99 (Tex. App.—Texarkana 2009, no pet.).

Because Ron Perry did not have standing in this case, the portions of the trial court's order pertaining to Ron are void. We modify the trial court's order to remove all references to Ron Perry.

[5] "Two individuals are related to each other by consanguinity if: (1) one is a descendant of the other; or (2) they share a common ancestor." TEX. GOV'T CODE ANN. § 573.022(a) (West 2012).

Conclusion

Concluding that Ron Perry lacked standing to bring this modification suit, we modify the trial court's order to remove all references to Ron Perry. However, having concluded that Metta Perry established that she possessed standing to bring the present suit for modification of A.D.T.'s conservatorship and that such a modification was authorized by a material and substantial change of circumstance, we affirm the trial court's modification order as modified. *See* TEX. R. APP. P. 43.2(b).

Judy C. Parker
Justice