



**IN THE
TENTH COURT OF APPEALS**

No. 10-19-00473-CV

IN RE S.Q.

Original Proceeding

MEMORANDUM OPINION

In the underlying case, the Department of Family and Protective Services (the Department) took possession of five children—"Child-1," "Child-2," "Child-3," "Child-4," and "Child-5"—from their parents.¹ "Mom" is the mother of all of the children. "M.O." is the father of Child-1 and Child-2. "S.Q." is the alleged father of Child-3, and "N.B." is the alleged father of Child-4 and Child-5. By the time that the trial court held the full adversary hearing, Child-1 and Child-2 had been returned to Mom; however,

¹ To protect the children's identities, we use aliases to refer to the children, their parents, and other family members. *See* TEX. R. APP. P. 9.8(a), (b).

Child-3, Child-4, and Child-5 remained in the Department's possession. At the conclusion of the full adversary hearing, the trial court signed a temporary order appointing the Department as temporary managing conservator of Child-3, Child-4, and Child-5.

This original proceeding ensued. In this original proceeding, S.Q. seeks mandamus relief from the trial court's temporary order following the adversary hearing. S.Q. complains that the trial court abused its discretion by appointing the Department as temporary managing conservator of Child-3 and by not placing Child-3 with him. We requested a response to S.Q.'s petition for writ of mandamus. No response has been filed.

Chapter 262 of the Family Code sets forth the procedures and substantive requirements by which the Department may take possession of a child when necessary to protect that child's health and safety. Under that chapter, the Department is granted authority in urgent circumstances to remove a child from his or her home without prior notice. *See* TEX. FAM. CODE ANN. §§ 262.101, 262.104. Soon after the child is taken into the Department's possession, however, a full adversary hearing must be held. *Id.* § 262.201(a). At the conclusion of the adversary hearing, the trial court must return the child to the parents, conservators, guardians, caretakers, or custodians entitled to possession

unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that:

- (1) there was a danger to the physical health or safety of the child, including a danger that the child would be a victim of trafficking under Section 20A.02 or 20A.03, Penal Code, which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;
- (2) the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and
- (3) reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

Id. § 262.201(g). A trial court's decision to allow the Department to maintain custody of a child following an adversary hearing is reviewable through a petition for writ of mandamus. *See In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613, 614-15 (Tex. 2008) (orig. proceeding); *see also In re J.D.S.*, 494 S.W.3d 387, 389 (Tex. App.—Waco 2015, no pet.).

The following evidence was presented at the full adversary hearing in this case. Amanda Klawinsky, a special investigator for the Department, testified that on June 4, 2019, Mom and N.B. took their son Child-5 to the emergency room because Child-5, who was then about eleven months old, had been suffering from a cold. While Child-5 was being examined at the hospital, it was discovered that his right clavicle had also recently been fractured. Dr. Katherine Snyder, a child-abuse pediatrician and medical director for the Child Abuse Resource and Education (CARE) Team at Dell Children's Medical

Center, testified that the fracture had likely occurred sometime between about the first of May 2019 and the third week of May 2019. Klawinsky testified that neither Mom nor N.B. had any explanation for the injury, however, even though N.B. testified that he and Mom, his common-law wife, were living together in a home with all five of the children at that time. Klawinsky testified that the hospital therefore called the Department that evening.

This was not the first time that the Department had been contacted about Child-5 suffering an unexplained injury. Dr. Snyder testified that in December 2018, the Dell Children's Medical Center CARE Team, "a medical team who completes comprehensive medical evaluations of children when there are symptoms of abuse or neglect," had received a referral to review a case involving Child-5. Child-5, who was then about six months old, had arrived at the hospital where imaging of his head had shown two separate brain injuries—an acute subdural hemorrhage on his left side and then older bilateral subdural hemorrhages. Dr. Snyder explained that the types of trauma that might have caused those injuries include Child-5 being involved in a high-speed motor-vehicle accident, falling out of a window in a multi-story building, being violently shaken by an adult, or having significantly impacted a hard or soft surface. Like with the fractured clavicle, however, neither Mom nor N.B. could provide a plausible explanation for the cause of Child-5's brain injuries. After completing a medical review of Child-5's case, the

CARE Team thus concluded that it had concerns that Child-5 had suffered abusive head trauma.

Klawinsky testified that the Department had therefore decided to conduct a removal of all five of the children from Mom's and N.B.'s home in December 2018. The Department accordingly placed Mom's and S.Q.'s then two-year-old daughter Child-3 in S.Q.'s possession. Klawinsky believes that S.Q. was a safe and appropriate placement for Child-3 during that time. While Child-3 was in S.Q.'s possession, Child-3 neither sustained any injuries nor had any other issues. Mom also testified that although it was not as often as she would have liked, she had been able to visit Child-3 while Child-3 was in S.Q.'s possession.

S.Q. confirmed at the adversary hearing that Child-3 had been placed with him by the Department on or about December 8, 2018. S.Q. testified that Child-3 had then been returned to Mom's possession by the Department on or about February 21, 2019. S.Q. and Mom had thereafter reached an agreement to share possession of Child-3. Both S.Q. and Mom testified that based on their agreement, S.Q. began taking possession of Child-3 for four days every week—usually Saturday through Tuesday. This agreed possession schedule continued until the underlying case began.

Klawinsky testified that on the evening of June 4, 2019, after discovering that Child-5 had suffered yet another unexplained injury (the fractured right clavicle), the Department decided to conduct a second emergency removal of the children. The

Department, however, still had no concerns about S.Q. Jennifer Smith, an investigative supervisor for the Department, testified that the Department therefore intended to again place Child-3 with S.Q. According to Smith and Klawinsky, however, when Department caseworkers attempted to contact S.Q. by phone on the night of June 4, they could not reach him. Smith agreed at the adversary hearing that the Department's inability to reach S.Q. that night was not because S.Q. was avoiding the Department. Smith acknowledged that it had been the "wee hours of the morning" by the time that the Department had called S.Q. The children nevertheless needed to be taken someplace and settled that night. Mom testified that all of the children, including Child-3, were therefore placed with her aunt, the children's maternal great-aunt.

Smith testified that the Department located S.Q. soon thereafter and was prepared to place Child-3 in S.Q.'s possession at that time. Smith acknowledged that if the Department had reached S.Q. on the night of June 4, and had therefore placed Child-3 with S.Q. that night, S.Q. and Child-3 would not be parties to the underlying case. Smith explained, however, that even though the Department wanted to place Child-3 in S.Q.'s possession, an objection regarding such placement had been made to the trial court at that point. Child-3 was therefore ordered to remain in her maternal great-aunt's possession, and S.Q. was allowed only to resume the Saturday-through-Tuesday visitation schedule that he had enjoyed with Child-3 before the removal. Smith was then asked why the Department is not dismissing Child-3 from the underlying suit now that

S.Q., a non-offending parent, is available to take Child-3 into his care. Smith replied that the Department is not dismissing Child-3 from the underlying suit because there are concerns that Child-3 will end up back in the home with Mom and N.B. Smith testified that it is nevertheless the Department's position that it is in Child-3's best interest to be placed with S.Q. at this time. The court-appointed special advocate (CASA) testified that she also believes that it is in Child-3's best interest to be placed with S.Q. at this time. The CASA stated that she believes that S.Q., a non-offender in this case, is a safe and appropriate placement for Child-3.

Smith testified that in deciding that it is in Child-3's best interest to be placed with S.Q., the Department looked at everything collectively. Smith stated that she was initially concerned because S.Q. had tested positive for marijuana. When Smith talked to S.Q. about the drug test results, however, S.Q. told her that he had visited Colorado in March 2019 and had used marijuana legally while there. S.Q. provided bank statements to confirm that he had been in Colorado. S.Q. also admitted to Smith that he has used marijuana recreationally, but he assured Smith that Child-3 has never been with him when he has used marijuana and that he has never been under the influence of marijuana while Child-3 was in his care. Smith stated that S.Q. has assured her that he understands that "drugs and children don't mix" and that he has stopped using marijuana.

S.Q. testified that he has not used marijuana since this case began and that he has been honest with the Department about his past marijuana use. S.Q. explained that he

has had sleeping problems since his teenage years because of anxiety. He has therefore used marijuana to help him sleep and to also alleviate his work stress. S.Q. confirmed, however, that he has never been under the influence of marijuana or any other drug when caring for Child-3 and that there is no marijuana or any other drugs in his home. S.Q. stated that if Child-3 is placed with him, he is committed to being drug-free. He is planning to cope with his anxiety through exercise, which has helped him in the past. He stated that he would also be willing to see a doctor, take classes, and/or submit to random drug testing, if necessary, for Child-3 to be placed with him.

Smith therefore noted at the adversary hearing that there is no evidence that S.Q. has ever used drugs around children or that he has been under the influence of drugs around children. Smith emphasized that S.Q. has further stated that he knows that his past marijuana use was not the right thing to do and that he is going to change. Licensed professional counselor Allison Porteau also testified and compared S.Q.'s past marijuana use to parents who consume alcohol. Porteau stated that as long as S.Q.'s marijuana use is in the past and as long as his marijuana use is the extent of his past drug use, then S.Q.'s marijuana use would not cause her any concerns in placing Child-3 with S.Q.

Smith and the CASA further testified that each of them has had the opportunity to observe S.Q. with Child-3 throughout this case. Smith and the CASA stated that Child-3 seems bonded to S.Q. The CASA stated that Child-3 always speaks positively about S.Q. S.Q.'s sister ("Sister") also testified that she has observed S.Q.'s parenting of Child-3 and

has no concerns about Child-3 being in S.Q.'s care. Sister confirmed that S.Q. is appropriately affectionate with Child-3 and that she has never seen S.Q. be violent with Child-3. When she has visited S.Q.'s home, she has observed that S.Q. has been well prepared for Child-3 to be there.

Smith testified that the Department has also visited S.Q.'s home during this case and that the home is appropriate. S.Q. testified that he lives with his brother ("Brother"). Sister testified that Brother has three children—ages seven, eight, and nine years old, respectively—of whom Brother has possession each week from Saturday evening to Wednesday morning. Sister has no concerns about Brother's children living in the home. Neither does Sister have any concerns about Brother's care of his children.

Smith testified that the Department has met with Brother and does not have an issue with Brother living in the home despite his criminal history. Brother committed the offense of assault with bodily injury in 2011. Brother's probation was extended because of his issues with marijuana use. Brother was sent to intensive outpatient treatment for his marijuana use, which he completed in April 2019. Having successfully completed treatment, Brother was able to be taken off of probation. Smith testified that at this point, there is nothing indicating that Brother's past marijuana use is affecting the care of any of the children. Brother has never been a perpetrator of abuse or neglect in the Department's system. The Department also noted that law enforcement has not been called out to S.Q.'s and Brother's home.

S.Q. testified that he prefers to have Child-3 with him when Brother's children are at the home because he wants Child-3 to have a relationship with her cousins. S.Q. stated that Child-3 is very much bonded with her cousins and S.Q.'s family generally. Sister confirmed at the adversary hearing that Child-3 is very close to S.Q.'s family and that Child-3 has a good relationship with her cousins. Sister noted that she, her daughter, and Child-3 have a particularly close relationship. Sister's daughter refers to Child-3 as her best friend. Additionally, Sister testified that she, Brother, and S.Q. are three of nine siblings and that all of the siblings' families frequently get together. S.Q. stated that Child-3 goes to these family get-togethers with him and that she enjoys it.

S.Q. further noted at the adversary hearing that all of his siblings live locally and are a support to him. S.Q. testified that he has been consistently employed and that he pays his twin sister to care for Child-3 when he is working. S.Q. and Sister testified that S.Q.'s twin sister is willing to continue to care for Child-3 if Child-3 is placed with S.Q. Sister further stated that she has also sometimes helped with caring for Child-3 and that she would continue to support S.Q. with anything that he needed.

In his petition for writ of mandamus, S.Q. contends that the Department did not satisfy all of the requirements of section 262.201(g) of the Family Code to remove Child-3 from S.Q.'s home and to refuse to return Child-3 after the full adversary hearing. We agree. In particular, no evidence was presented at the adversary hearing that would satisfy a person of ordinary prudence and caution that reasonable efforts were made to

enable Child-3 to return to S.Q.'s home but that there was a substantial risk of a continuing danger if Child-3 was returned to S.Q.'s home. *See* TEX. FAM. CODE ANN. § 262.201(g)(3). Instead, the evidence showed that S.Q. was a non-offender in this case and that it is in Child-3's best interest to be placed with him. Therefore, Child-3 must be returned to S.Q.'s possession. *See id.*; *see also id.* § 262.201(n).

We conditionally grant S.Q.'s mandamus petition. A writ will issue only if the trial court fails to (1) vacate the portion of the temporary order following adversary hearing, signed on July 24, 2019, appointing the Department as temporary managing conservator of Child-3; (2) order the return of the present possession of Child-3 to S.Q.; and (3) notify this Court in writing that it has done so within seven days of the date of this opinion.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Petition granted
Opinion delivered and filed July 29, 2020
[OT06]

