NUMBER 13-15-00099-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF L.D.J. III, A.Y.J., W.F.J., AND C.J., CHILDREN

On appeal from the 206th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

This appeal arises from a child custody dispute between a mother and a paternal grandmother after the untimely death of the children's father. By five issues, appellant Blanca Estela Jones appeals the trial court's order appointing appellee Helen Jones as the sole managing conservator of her four children under sections 153.131 and 153.373 of the Texas Family Code. *See* TEX. FAM. CODE ANN. §§ 153.131, 153.373 (West, Westlaw through 2015 R.S.). We reverse and remand.

I. BACKGROUND

Dean Jones committed suicide in the summer of 2014. He is survived by his wife Blanca and their four children, L.D.J. III, A.Y.J., W.F.J., and C.J. (collectively, "the children"). After Dean's death, Blanca petitioned the trial court to be appointed managing conservator of the children. Helen, the children's paternal grandmother, cross-petitioned to be appointed the same. The trial court then held a hearing to determine who should receive the appointment—the mother or the grandmother. The evidence presented at the hearing showed the following.

Prior to his death, Dean served as the chief financial officer for a multi-national corporation. This job required Dean to travel outside the United States frequently. Dean met Blanca in Reynosa, a city located in Mexico, and the two began a romantic relationship. After entering into a relationship with Dean, Blanca immigrated to the United States, gave birth to their first three children, married Dean, and established a family residence in McAllen. Helen, a retired school teacher, also lived in McAllen.

Thereafter, Blanca, while pregnant with their fourth child, traveled to Mexico for what she anticipated would be a quick trip to obtain a United States visa. However, immigration officials denied Blanca's request for a visa on the basis that she had previously been unlawfully present in the United States for one year or more. *See* 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West, Westlaw through 2015 R.S.) (providing that an alien who is unlawfully present in the United States for one year or more is ineligible to receive a visa and ineligible to be admitted to the United States).

Having been denied legal entry into the United States, Blanca spent the next fourteen months living in Mexico waiting for a visa while her three children stayed in the United States with Dean. Although Dean refused to travel in Mexico with the children due

to safety concerns, he travelled by himself on a monthly basis to visit Blanca and their newly-born (fourth) child.

With Blanca legally unable to return to the United States and Dean usually burdened by work and travel, Helen assumed a more active role in the day-to-day lives of her three grandchildren. During Blanca's absence, Helen purchased a new home in Fredericksburg, Texas and moved the children there to live with her. Although Blanca communicated with Dean about the children by telephone, Blanca never spoke to Helen due to a strained relationship between the two. It is not disputed that Helen took good care of the children and provided a stable home environment during Blanca's absence.

Approximately one year after Blanca was denied a visa, Dean petitioned the United States Attorney General for Blanca's return to the United States, alleging that Blanca's absence constituted an "extreme hardship" on him as defined by section 212(a)(9)(B)(v) of the Immigration and Nationality Act. *See* 8 U.S.C.A. § 1182(a)(9)(B)(v) (providing that an immigrant alien otherwise ineligible to be admitted to the United States may, at the sole discretion of the Attorney General, be issued a visa if the immigrant alien is married to a U.S. citizen and refusal of admission would result in an "extreme hardship" to the citizen spouse). To support his claim of extreme hardship, Dean explained to immigration authorities that:

> The anxiety and stress are enormous. Wondering when my wife [Blanca] can return [to the United States], questions from our young children regarding what has happened to her, traveling between [the United States and Mexico], and the financial costs of maintaining our current lifestyle all aggregate to create continuous stress and anxiety. Stress can and it does take a toll on the long-term health of an individual. I have significant difficulty sleeping, routine headaches and more frequent colds and viral illness. My performance at work is dropping due to the effect of stress and the additional days I must take off to meet the many demands of my separated family.

In the spring of 2014, immigration authorities answered Dean's plea for his wife's return by issuing Blanca a visa. After a fourteen-month wait, Blanca legally reentered the United States with her youngest child and promptly traveled to Fredericksburg to reunite with her three children. Because school was still in session, Blanca and Dean allowed the two children who were enrolled in school to remain with Helen until the summer to complete the school year. Blanca and Dean then returned to McAllen with their two other children.

With school out for summer, Blanca and Dean travelled back to Fredericksburg to pick up the two school-age children. However, for reasons not apparent from the record, Dean stayed in Fredericksburg while Blanca returned to McAllen with all four children. The next day, Dean committed suicide.

Soon after Dean's death, Helen obtained an order from a judge in the Fredericksburg area authorizing her to take possession of all four of Blanca's children, including Blanca's youngest child. On the authority of this order, Helen travelled to McAllen, took possession of the children, and returned to Fredericksburg where the children remained pending a trial of this matter.

After a bench trial, the trial court appointed Helen as the sole managing conservator of the children. Specifically, the trial court found that appointing Helen as conservator was in the best interest of the children and that:

1. Blanca "voluntarily relinquished actual care, control, and possession" of the children to Helen; and

2. Blanca would "significantly impair the [children's] physical health or emotional development" if she were to be appointed conservator.

This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's determination regarding conservatorship for an abuse of discretion. *See Gray v. Shook*, 329 S.W.3d 186, 195 (Tex. App.—Corpus Christi 2010), *aff'd in part and rev'd in part*, 381 S.W.3d 540 (Tex. 2012). A trial court abuses its discretion if its decision is "arbitrary or unreasonable" or if it "fails to analyze or apply the law correctly." *Id*. The trial court does not abuse its discretion if "there is some evidence of a substantive and probative character to support the decision." *Id*.

"Under an abuse-of-discretion standard, legal and factual insufficiency are not independent grounds of error, but rather are relevant factors in assessing whether the trial court abused its discretion." *Id*. When, as here, an appellant challenges the legal and factual sufficiency of the evidence in a case where the proper standard is abuse of discretion, "we engage in a two-prong analysis: (1) whether the trial court had sufficient information upon which to exercise its discretion; and (2) whether the trial court erred in its application of discretion." *Gardner v. Gardner*, 229 S.W.3d 747, 751 (Tex. App.—San Antonio 2007, no pet.).

Evidence is legally insufficient if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *See Danet v. Bhan*, 436 S.W.3d 793, 797 (Tex. 2014) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)). Evidence is factually insufficient if the evidence that supports a vital fact is so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

III. APPLICABLE LAW

Deeply embedded in Texas family law is the presumption that awarding conservatorship to the child's natural parent is in the best interest of the child. *See Gray*, 329 S.W.3d at 195. A nonparent may rebut this presumption. *Id*. at 196. However, the nonparent carries a "heavy burden" in doing so. *Id*. As relevant here, the nonparent may rebut the presumption favoring parental conservatorship if the nonparent proves by a preponderance of the credible evidence that:

1. the parent "voluntarily relinquished actual care, control, and possession" of the child to a nonparent for a year or more, *see* TEX. FAM. CODE ANN. § 153.373, or;

2. appointment of the parent as the conservator would "significantly impair the child's physical health or emotional development," *see* TEX. FAM. CODE ANN. § 153.131.

When a nonparent and a parent are both seeking managing conservatorship, any "close calls" go to the parent. *See Gray*, 329 S.W.3d at 196.

IV. ANALYSIS

On appeal, Blanca generally contends that the trial court abused its discretion in appointing Helen, a nonparent, as conservator because the evidence is insufficient to rebut the presumption favoring parental conservatorship under either statutory circumstance set out above. Specifically, Blanca asserts there is no evidence that: (1) she ever voluntarily relinquished care, control, and possession of the children to Helen; or (2) she would significantly impair the physical health or emotional development of the children. We address each statutory circumstance separately below.

A. Voluntarily Relinquished?

As previously noted, the presumption favoring parental conservatorship applies unless there is evidence of relinquishment by a parent to a nonparent. *See* TEX. FAM.

CODE ANN. § 153.373. Relinquishment may be shown by evidence of a parent's intent to surrender care, control, and possession of the child to a nonparent. *See Critz v. Critz*, 297 S.W.3d 464, 473 (Tex. App.—Fort Worth 2009, no pet.). However, relinquishment of a child by one parent to another parent does not rebut the parental presumption. *See* TEX. FAM. CODE ANN. § 153.373*; see also In re A.D.A.*, No. 11-12-00002-CV, 2012 WL 4955270, at *3 (Tex. App.—Eastland Oct. 18, 2012, no pet.) (mem. op.) (holding that relinquishment by one parent to the other parent does not rebut the parental presumption in a parent-versus-nonparent custody dispute).

To rebut the parental presumption based on relinquishment, Helen argued that Blanca had only sparse contact with the children while she resided in Mexico. Helen further argued that she had to assume a parental role for the children in Blanca's absence. Helen testified that she clothed, fed, and sheltered the children, enrolled them in school, secured medical insurance, and provided an overall stable home environment for them. However, whether Helen assumed a parental role in Blanca's absence is no evidence that Blanca intended to relinquish the children to Helen as opposed to Dean—i.e., the children's other parent who was alive at the time Blanca resided in Mexico. Instead, the record shows that Dean and Blanca arranged for Dean to retain care, control, and possession of the children while Blanca obtained her United States visa in Mexico; that Blanca maintained communication with the children through Dean by telephone and not through Helen; and that Blanca wasted no time reuniting with Dean and her children in the United States after obtaining her visa. Furthermore, it is undisputed that Blanca has asserted a right of conservatorship over her children since Dean's untimely death in the summer of 2014. Because we find no evidence that Blanca intended to relinquish care, control, and possession of the children to anyone other than Dean while she resided in

Mexico, we conclude that Helen failed to rebut the parental presumption favoring Blanca as the conservator of the children. *See* TEX. FAM. CODE ANN. § 153.373; *Gray*, 329 S.W.3d at 195; *see also In re A.D.A*., 2012 WL 4955270, at *3 (holding that the nonparent, who served as the child's legal custodian up until the time of the child's mother's death, failed to rebut the parental presumption favoring the child's surviving father where there was no evidence that the surviving father intended to relinquish care, control, and possession of the child to anyone other than child's mother and where the surviving father immediately sought custody of the child upon learning of the child's mother's death).

We conclude that the trial court abused its discretion in appointing Helen as conservator on the basis that Blanca voluntarily relinquished her children to a nonparent under family code section 153.373. *See* TEX. FAM. CODE ANN. § 153.373.

B. Significant Impairment?

As previously noted, to rebut the parental presumption, a nonparent must prove that appointing the parent as conservator would significantly impair the child's physical health or emotional development. *See* TEX. FAM. CODE ANN. § 153.131. The nonparent generally must point to some specific, identifiable behavior by the parent that is likely to significantly impair the physical or emotional development of the child, such as physical abuse, drug or alcohol abuse, immoral conduct or other criminality, severe neglect, or abandonment. *See Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990); *see also Gray*, 329 S.W.3d at 197 (citing *May v. May*, 829 S.W.2d 373, 376 (Tex. App.—Corpus Christi 1992, writ denied)); *Critz*, 297 S.W.3d at 474.

Here, the record is devoid of any evidence of a substantive or probative character indicating that Blanca engaged in specific, identifiable behavior that would significantly impair the physical or emotional development of the children. Unlike other cases in which

reviewing courts have sustained a trial court's finding of significant impairment, there is no evidence that Blanca physically abused the children, abused drugs or alcohol, or engaged in any criminal behavior that could threaten the safety of the children; and there is no evidence that Blanca neglected to care for the children while they were in her possession.[1] *Cf. Compton v. Pfannenstiel*, 428 S.W.3d 881, 886–87 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (concluding that the evidence supported a finding of significant impairment based on mother's drug use, recent criminal arrests, and neglect of her children).

Furthermore, although Blanca lived in Mexico temporarily without her children, there is no credible evidence that she resided there with the intent to abandon them. Instead, Blanca maintained communication with the children through Dean and promptly reunited with them after obtaining legal status in the United States. *Cf*. *Danet v. Bhan*, 436 S.W.3d 793, 797 (Tex. 2014) (concluding that the evidence supported a finding of significant impairment based, in part, on mother's unjustified abandonment of her child in Texas and on her failure to visit or maintain communication).

Nevertheless, Helen sought to establish significant impairment by proving that the children were, according to her testimony, "better off" living with her in Fredericksburg than with Blanca in McAllen, and that uprooting the children from their familiar environment in Fredericksburg would work a detriment to their development. Specifically, Helen testified that she believed that she provided a more stable home environment and that the Fredericksburg area offered better educational opportunities. However, even if

[1] To the contrary, the record shows that Helen reported Blanca to the Texas Department of Family and Protective Services (TDFPS) in the summer of 2014 and that TDFPS, after conducting an investigation, found no evidence that Blanca physically neglected the children—despite Helen's protestation that neglect had occurred.

true, this evidence does not support a finding that Blanca would significantly impair the physical health or emotional development of her children. *See In re H.R.L.*, 458 S.W.3d 23, 30 (Tex. App.—El Paso 2014, no pet.) (observing that the nonparent's burden to prove significant impairment is not met by evidence that shows she would be a "better custodian of the child or that she has a strong and on-going relationship with the child); *see also In re J.C.*, 346 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (concluding that, although the record contained some testimony that uprooting the child from maternal grandparents would exacerbate her separation anxiety, it did not establish that such harm would cause a significant impairment to the child's emotional development); *Gray*, 329 S.W.3d at 198 (same); *Danet*, 436 S.W.3d at 797 (declining to hold that removal of a child from a stable environment would, in itself, be sufficient to establish that a change in custody would substantially impair the child's physical health or emotional development).

Having carefully examined the entire record, we conclude that the evidence is legally insufficient to prove that Blanca would significantly impair the physical or emotional development of her children. Therefore, the trial court abused its discretion to the extent that it appointed Helen as conservator based on a finding of significant impairment under family code section 153.131. TEX. FAM. CODE ANN. § 153.131.

C. Summary

The trial court abused its discretion in appointing Helen as conservator because the evidence is legally insufficient to prove that Blanca voluntarily relinquished her children to a nonparent or would significantly impair their physical health or emotional development. *See* TEX. FAM. CODE ANN. §§ 153.131, 153.373. We sustain Blanca's issues on appeal.

V. CONCLUSION

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
26th day of January, 2017.