NUMBER 13-19-00124-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE YASEMIN TURAN

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Hinojosa[1]

Through this original proceeding, relator Yasemin Turan seeks to compel the trial court to vacate its temporary orders allowing paternal grandparents, Norma Sonia Castaneda (Sonia) and Robert Castaneda,[2] access and visitation to relator's minor child, H.F.C. *See* TEX. FAM. CODE ANN. § 153.433. By memorandum opinion issued on May

[1] *See* TEX. R. APP. P. 52.8(d) ("When granting relief, the court must hand down an opinion as in any other case," but when "denying relief, the court may hand down an opinion but is not required to do so."); *see also id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] Robert Castaneda, paternal grandfather and real party in interest, is referred to in the record as either Robert or Roberto Castaneda. Sonia and Robert's deceased son, the father of the minor child, H.F.C., is referred to in the record as Roberto Jaime Castaneda, Robert James Castaneda, or Bobby Castaneda. For clarity, we refer to the paternal grandfather as Robert and the decedent as Roberto Jaime.

16, 2019, this Court denied relator's petition for writ of mandamus. *See In re Turan*, No. 13-19-00124-CV, 2019 WL 2167373, at *1 (Tex. App.—Corpus Christi–Edinburg May 16, 2019, orig. proceeding) (mem. op.). Relator has now filed a motion for reconsideration and motion to supplement the record. We grant the motion for reconsideration and to supplement the record, withdraw our previous memorandum opinion, and issue this memorandum opinion in its stead. After full consideration of the merits, we conditionally grant mandamus relief.

I. BACKGROUND

Sonia and Robert filed an original petition seeking possession or access to minor child H.F.C. under § 153.432 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 153.432. Their "First Amended Petition for Grandparent Possession or Access" states that they are the parents of decedent Roberto Jaime Castaneda, a parent of the child, and that they "have had a relationship with the child since prior to the death of Roberto Jaime Castaneda." The petition asserts that it is in H.F.C.'s best interests that Sonia and Robert be granted possession or access; that at least one of H.F.C.'s parents had not had that parent's rights terminated; and that denial of possession or access would significantly impair H.F.C.'s physical health or emotional well-being. The petition is supported by affidavits from Sonia and Robert, which are identical in substance, detailing their long-standing relationship with H.F.C. Sonia's affidavit states:

> Robert Castaneda and I are the parents of [Roberto Jaime] Castaneda, deceased. [Roberto Jaime] Castaneda was the father of H.F.C. [Roberto Jaime] Castaneda [passed] away on June 15, 2013. Since that date, we have managed to stay close to our granddaughter, [H.F.C.]. We have a very close relationship with her. My husband and I were in the delivery room when she was born. We used to see [her] approximately four (4) times a week, lately we have only been allowed to see [her] twice a week

> when [we] take her to church. Prior to June 2018, we would always be together and spent many hours together.
>
> My late son also had another child, [B.J.C.], who [H.F.C.] is very close to and loves to be with when she visits our home. They both know they are brother and sister and are very close. My husband and I are asking the court to enter an [o]rder allowing us possession and access to our granddaughter, [H.F.C.] to ensure that she continues to have a relationship with her brother and us.
>
> A*s* I stated, lately her mother has denied us access to [H.F.C.] and we have not been able to see her as we [used] to. We are asking that the court enter a Standard Possession Order allowing us possession and access of [H.F.C.]. Our granddaughter will be emotionally and mentally affected if possession continues to be denied.
>
> I am herewith attaching copies of photographs that depict our close relationship with [H.F.C.].

The trial court held an evidentiary hearing at which relator, Sonia, and Robert testified. According to the testimony adduced at the hearing, relator met H.F.C.'s father when she was eighteen or nineteen years old and she became pregnant with H.F.C. Relator and H.F.C.'s father broke up shortly after H.F.C.'s birth when relator was approximately twenty years old. H.F.C.'s father had another child with a different woman at approximately the same time, so H.F.C. has a half-brother that she sees when she visits Sonia and Robert.

After H.F.C.'s birth, relator lived with her parents and they assisted her with H.F.C. Relator had a good relationship with Sonia and Robert, and they saw H.F.C. frequently. In fact, Sonia obtained a job for relator at her place of employment and they worked together for numerous years. In general, Sonia and Robert typically saw H.F.C. three to four times per week and she spent the night with them every other weekend.

However, during the year prior to the hearing, the relationship between relator and Sonia and Robert began to deteriorate. Relator had obtained a college degree, started a

new job at a different place of employment, and became engaged to be married. Based upon testimony at the hearing, it is apparent that relator and Sonia had a disagreement in May of that year regarding who had the right to make decisions for H.F.C., or what was best for H.F.C. with regard to such issues as her participation in gymnastics, a summer program at the Boys and Girls Club, or the appropriate amount of time for H.F.C. to spend with her grandparents. After that dispute, relator began reducing the time that Sonia and Robert spent with H.F.C. until at the time of the hearing, they were only taking her to and from church twice each week.

Relator testified that she wanted Sonia and Robert to be part of H.F.C.'s life and that H.F.C. loved them. She stated that she allowed H.F.C. to have substantial contact with her grandparents because she thought that it was important and "healthy" for her to have a relationship with them. Relator testified that she was acting in her daughter's best interest in allowing her to see her grandparents. She testified that she never denied Sonia and Robert access to H.F.C. She acknowledged, however, that she did not want H.F.C.'s grandparents to tell her what to do, "period," and that she has told H.F.C. that she is her mother, and not Sonia.

Sonia testified generally that she and Robert spent more time with H.F.C. than relator had estimated, stating that they saw H.F.C. five times each week and two nights each weekend. She asserted that H.F.C. spent more time with them than she did with relator. However, Sonia concurred with relator's testimony that the time that they spent with H.F.C. diminished after the dispute with relator in May. Sonia testified that since then, they have seen H.F.C. only on Wednesdays and Sundays when they take her to church. She testified that she believes H.F.C. wants to be with them and thinks that

H.F.C. is "gravitating" toward her grandparents. Sonia testified that H.F.C. has told her that relator does not like Sonia and Robert, but H.F.C. wishes that she could spend more time with them and wishes her grandparents would get along with her mother. Sonia stated that H.F.C. is afraid to tell relator the way she feels. Sonia also testified that relator is a good mother and affirmatively stated that she was not trying to take H.F.C. away from relator. Robert also testified. He concurred generally with Sonia's testimony that they wished to have more time with H.F.C. and that relator was a good mother.

After the hearing, the trial court entered temporary orders in favor of Sonia and Robert. The court's order states that Sonia and Robert "have had a long-standing relationship with the child, the subject of this suit," and that Sonia, Robert, and relator "have consensually over the years established this relationship." Concluding that H.F.C. "would be physically and emotionally impaired" without access, the trial court ordered that it was in H.F.C.'s best interest for Sonia and Robert to have possession of H.F.C. on the second and fourth Saturday of each month beginning at 1:00 p.m. and ending the following Sunday at 6:00 p.m., and on every Wednesday beginning at 5:00 p.m. and ending at 8:00 p.m.

This original proceeding ensued. Relator attacks the trial court's temporary orders by three issues contending: (1) the trial court abused its discretion because there was insufficient evidence to overcome the presumption of the parent's exclusive right to make decisions for her child as her fundamental right; (2) the trial court abused its discretion because it clearly stated that the relator was a fit and able parent, thus admitting that no significant impairment existed as to parent or child; and (3) mandamus is the appropriate remedy. This Court requested that Sonia and Robert file responses to relator's motion

for reconsideration and the petition for writ of mandamus; however, no responses were filed. *See* TEX. R. APP. P. 52.4, 52.8.

II. MANDAMUS

To obtain relief by writ of mandamus, a relator must establish that the trial court committed a clear abuse of discretion and that there is no adequate remedy by appeal. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). The relator bears the burden of proving both requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam); *Walker*, 827 S.W.2d at 840. As it pertains to this case, mandamus relief is available if a trial court grants a grandparent's request for temporary access to grandchildren where the grandparent fails to prove by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being. *See In re Scheller*, 325 S.W.3d 640, 643 (Tex. 2010) (orig. proceeding) (per curiam); *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding) (per curiam); *In re J.M.G.*, 553 S.W.3d 137, 140 (Tex. App.—El Paso 2018, orig. proceeding).

III. GRANDPARENT POSSESSION OR ACCESS

The relationship between parent and child is constitutionally protected, and parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). There is a presumption that a fit parent acts in the best interest of her children. *Troxel*, 530 U.S. at 68; *In re Derzapf*, 219 S.W.3d at 333. "[S]o long as a parent adequately cares for his or her

children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69; *see In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (orig. proceeding) (per curiam). Thus, the United States Supreme Court held in *Troxel* that a trial court's order for grandparent access unconstitutionally infringed on the parent's fundamental liberty interest where there was no evidence that the parent was unfit, that the children's health and well-being would suffer, or that the parent intended to exclude grandparent access entirely. *Troxel*, 530 U.S. at 68–75.

Here, Sonia and Robert, as paternal grandparents, filed a suit to seek possession or access to minor child H.F.C. under § 153.432 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 153.432. This section allows a grandparent to request possession or access to a grandchild by filing an original suit or a suit for modification. *See id.* The parties filing suit "must execute and attach an affidavit on knowledge or belief that contains, along with supporting facts, the allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-being." *Id.* § 153.432(c). "The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433." *Id.* Under § 153.433:

> (a) The court may order reasonable possession of or access to a grandchild by a grandparent if:
>
> (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;

(2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and

(3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:

(A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;

(B) has been found by a court to be incompetent;

(C) is dead; or

(D) does not have actual or court-ordered possession of or access to the child.

Id. § 153.433. Thus, consistent with *Troxel*, § 153.433 of the Texas Family Code requires that a grandparent seeking court-ordered possession or access to overcome the presumption that a parent acts in his or her child's best interest by proving by a preponderance of the evidence that denial of access to the child would significantly impair the child's physical health or emotional well-being. *See id.* § 153.433(a)(2); *In re Derzapf*, 219 S.W.3d at 333. This requirement exists to prevent a court from interfering with child-rearing decisions made by a parent simply because the court believes that a "better decision" could have been made. *See In re J.P.C.*, 261 S.W.3d 334, 337 (Tex. App.—Fort Worth 2008, no pet.) (quoting *Troxel*, 530 U.S. at 73). Under the statute, a trial court must presume that a fit parent acts in his or her child's best interest, and the court abuses its discretion if it grants access to a grandparent who has not met this standard. *In re Derzapf*, 219 S.W.3d at 333. This has been described as a high threshold burden. *See*

In re Scheller, 325 S.W.3d at 643; *In re Derzapf*, 219 S.W.3d at 335. A trial court abuses its discretion if it issues temporary orders giving possession to a grandparent who has not overcome the statutory presumption of § 153.433 that a parent acts in her child's best interest. *See In re Scheller*, 325 S.W.3d at 646. Such error is "irremediable" and warrants mandamus relief. *See id*.; *In re Nelke*, 573 S.W.3d 917, 924 (Tex. App.—Dallas 2019, orig. proceeding).

IV. ANALYSIS

Our analysis is driven by the constraints of the Texas Family Code. We examine whether Sonia and Robert's affidavits and the testimony adduced at the hearing on the temporary orders were sufficient to show by a preponderance of the evidence that denying them access to H.F.C. would significantly impair her physical health or emotional well-being. The Texas Supreme Court has made it clear that this is a "hefty statutory burden," and it has rejected petitions seeking grandparent possession or access in cases presenting far more dire circumstances than are present in the underlying case. *In re Scheller*, 325 S.W.3d at 644.

In *Scheller*, the supreme court found that a grandfather failed to satisfy his burden to be granted access rights to his grandchildren. *See id.* at 641. In that case, the grandfather, who was the only surviving member of the grandchildren's maternal family, presented evidence that the grandchildren displayed anger and one grandchild experienced instances of isolated bed wetting and nightmares; in addition, witnesses who had seen the grandfather with the children testified that, from their experiences, denying him access to his granddaughters would impair the children's physical or emotional development. *Id.* at 641–43. The supreme court held that this evidence was not enough

to meet the statutory burden and that the evidence showed nothing more than the children's "understandable sadness" resulting from losing a family member and missing their grandparents. *Id.* at 644. The court noted that the children's father had taken "responsible, precautionary measures" to ensure that his daughters were able to cope with their grief, such as sending his older daughter for counseling and participation in grief therapy groups, and further noted that the father appeared to be willing to allow the grandfather to see the grandchildren. *See id.* The court held that the trial court abused its discretion in granting a temporary order for access to and possession of the grandchildren because the grandfather did not meet the "hefty statutory burden" required to prove that he was entitled to grandparent access rights. *Id.*

Similarly, in *Derzapf*, the supreme court held that the grandchildren's depression and "lingering sadness" from lack of contact with their grandparents did not sufficiently demonstrate significant harm to the children because the court-appointed psychologist testified that their sadness did not "manifest[] as depression or behavioral problems or acting out" so as to "rise to a level of significant emotional impairment." 219 S.W.3d at 330, 332–33. There, the court reviewed a twenty-four-page report prepared by a psychologist who opined that the children would benefit from contact with their grandparents. *Id.* at 330. The supreme court held that the grandmother had not proven "that denial of access would 'significantly impair' the children's physical health or emotional well-being" and thus she did not meet the "high threshold" to overcome "the presumption that a fit parent acts in his children's best interest." *Id.* at 333–34.

In *Mays-Hooper*, the supreme court also held the trial court erred in granting grandparent access where the trial court "did not indicate any reason" to interfere with the

parent-child relationship, and the mother "articulated several reasons for not wanting to turn her son over to her mother-in-law[,]" including "differences about church attendance, what to say about [the father's] death, and alleged inattention by her mother-in-law." 189 S.W.3d at 778.

Here, the record is almost wholly devoid of facts pertaining either directly or indirectly to H.F.C.'s physical or emotional well-being and there is nothing to show that denial of access would significantly impair her physical health or emotional well-being. Although Sonia testified that H.F.C. had shown a change in her emotional well-being since their time together had been reduced, she supported this opinion only with her testimony that H.F.C. wished to spend more time with her grandparents and she wished Sonia and Robert would "get along" with relator. This testimony is not enough to meet the statutory requirements and the standard established by the Texas Supreme Court. *See In re Scheller*, 325 S.W.3d 640; *In re Derzapf*, 219 S.W.3d at 335*; In re Mays-Hooper*, 189 S.W.3d at 778; *see also In re J.M.T.*, 280 S.W.3d 490, 493 (Tex. App.—Eastland 2009, no pet.) (concluding that evidence was insufficient where "[i]t essentially consists of an affirmative response from an interested witness (one of the grandparents seeking access to the child) to a question that tracked the language of the statute"). There was, for instance, no testimony that H.F.C. has been depressed or traumatized by her lack of contact with her grandparents. *See In re Derzapf*, 219 S.W.3d at 330. Further, Sonia and Robert remain in contact with H.F.C. and relator has indicated that she will allow such contact in the future. *See In re Scheller*, 325 S.W.3d at 643–44 (holding that the trial court abused its discretion by ordering grandparent access, in part, because the parent was willing to allow grandparent access under certain conditions); *see also Murphy v.*

Renteria, No. 03-18-00014-CV, 2019 WL 578576, at *2 (Tex. App.—Austin Feb. 13, 2019, no pet.) (mem. op.).

Sonia and Robert were required to overcome the presumption that relator would act in H.F.C.'s best interest by proving by a preponderance of the evidence that denial of their access would "significantly impair" H.F.C.'s physical or emotional well-being. *See* TEX. FAM. CODE ANN. § 153.433, *In re Derzapf*, 219 S.W.3d at 333. Although the trial court might have believed it to be a "better decision" to allow Sonia and Robert more regular contact with H.F.C., such good intentions do not alone justify interfering with relator's child-rearing decisions under the governing legal standards as the Texas Supreme Court has applied them. *See In re Scheller*, 325 S.W.3d 640; *In re Derzapf*, 219 S.W.3d at 335*; In re Mays-Hooper*, 189 S.W.3d at 778. Viewed under those standards, this record simply lacks evidence that might overcome the presumption in relator's favor. *See In re Scheller*, 325 S.W.3d at 643–44; *In re Derzapf*, 219 S.W.3d at 333–34.

In sum, the foregoing testimony fails to rebut the presumption that relator is acting in H.F.C.'s best interest because it does not support a conclusion that denial of access or possession by Sonia and Robert would significantly impair H.F.C.'s physical health or emotional well-being. Thus, the trial court erred in granting temporary orders allowing Sonia and Robert possession and access to H.F.C. And, as discussed previously, appeal is an inadequate remedy to resolve this error and mandamus relief may issue. *See In re Scheller*, 325 S.W.3d at 643; *In re Derzapf*, 219 S.W.3d at 335; *In re J.M.G.*, 553 S.W.3d at 140. Accordingly, we sustain relator's first and third issues and, having done so, need not address her second issue. *See* TEX. R. APP. P. 47.1, 47.4.

V. Conclusion

The Court, having examined and fully considered the petition for writ of mandamus, the record, and the applicable law, is of the opinion that relator has met her burden to obtain mandamus relief. We conditionally grant mandamus relief and direct the trial court to vacate its December 6, 2018 temporary orders and to proceed in accordance with this opinion. Our writ will issue only if the trial court fails to comply. If evidence is presented as the litigation develops that overcomes the statutory presumption, the trial court may reconsider the issue. *See*, *e.g.*, *In re Scheller*, 325 S.W.3d at 644.

LETICIA HINOJOSA
Justice

Delivered and filed the
2nd day of October, 2019.