NUMBER 13-19-00213-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN THE INTEREST OF S.K. AND L.K., CHILDREN

On appeal from the 267th District Court
of Victoria County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Hinojosa

On June 25, 2020, we issued a memorandum opinion and judgment in this appeal. The next day, the Texas Supreme Court handed down its opinion in *In re C.J.C.*, __ S.W.3d __, No. 19-0694, 2020 WL 3477006 (Tex. June 26, 2020) (orig. proceeding), which concerns dispositive issues raised in this appeal. On our own motion, we withdraw our earlier opinion and judgment and substitute this opinion and judgment in their stead.

Appellant T.K. (Father) appeals the trial court's judgment appointing appellee L.R. a possessory conservator of Father's minor children, S.K. and L.K.[1] In three issues, which we treat as one, Father argues that the trial court abused its discretion in appointing L.R. as a possessory conservator because the evidence supporting its decision was legally and factually insufficient. We affirm in part and reverse and render in part.

I. BACKGROUND

A. Department Intervention

On May 3, 2016, the Department of Family and Protective Services (the Department) filed suit to terminate Father and C.C.'s (Mother) parental rights to S.K. and L.K. The petition was supported by an affidavit of removal alleging that L.K. was born on May 28, 2015, with opiates in his system. Mother and Father entered into a family-based safety plan with the Department which resulted in S.K. and L.K being placed with their maternal grandmother L.R. The affidavit alleged that Mother continued to use "illegal drugs" after L.K.'s birth and that Father was verbally abusive toward Mother.

On June 27, 2016, the trial court awarded temporary managing conservatorship to the Department, and the children remained in L.R.'s care. The trial court later ordered Mother and Father to complete the services required by their respective family service plans. On March 16, 2017, L.R. filed a petition in intervention seeking to be named the children's sole managing conservator.[2] L.R.'s petition alleged that she had standing to

[1] To protect the identity of the minor children, we refer to the children and their relatives by their initials or an alias. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(a).

[2] The trial court dismissed L.R.'s earlier pro se petition to intervene.

intervene in the case under the general standing statute of the Texas Family Code on two bases: she had actual care, control, and possession of the children for at least six months ending not more than ninety days preceding the date of the filing of the petition; and she had been certified as a foster parent, and the children were placed by the Department in her home for at least twelve months ending not more than ninety days preceding the date of the filing of the petition. *See* TEX. FAM. CODE ANN. § 102.003(a)(9), (12). L.R. filed an affidavit supporting her standing allegations. She later filed an amended petition in intervention requesting alternatively that the trial court appoint her as a possessory conservator of the children.

While the case was pending, Father discontinued his relationship with Mother and worked toward completion of his family service plan. The children remained in L.R.'s care until August 21, 2017, when the trial court ordered that the children be returned to Father pursuant to § 263.403 of the family code. *See id*. § 263.403 (permitting the court to retain jurisdiction during monitored return of children to parent).

B. Bench Trial

The case proceeded to a bench trial on November 14, 2017. The Department did not pursue termination of parental rights at that time. Instead, the Department recommended that the trial court grant Father sole managing conservatorship of the children and award L.R. possessory conservatorship. L.R. pursued only possessory conservatorship, which Father opposed. The following witnesses testified at trial: Department caseworker Marlinda Oviedo, Court Appointed Special Advocate (CASA)

Kelly Blevins, Father, and L.R.

Oviedo testified that Mother did not complete her court ordered services, including the requirement that she complete a drug and alcohol assessment. Oviedo stated that Mother did not visit the children regularly and attended some visits while she was under the influence of a controlled substance. Father, on the other hand, successfully completed his service plan, which included a psychological evaluation, individual counseling, and anger management. Oviedo testified that the children were bonded to Father and were happy when they learned that they were going to live with Father.

According to Oviedo, the children resided with L.R. from July 2015 through August 2017. When they were originally placed with L.R., L.K. was a month old and S.K was a year old. Oviedo stated that the children were "really well bonded to [L.R.]" and "seemed very well adjusted and at home with her." L.R. provided the children with a safe environment and performed all the duties that a parent would. Oviedo believed that it was in the children's best interest for Father to be appointed the sole managing conservator and for L.R. to be appointed a possessory conservator. It was Oviedo's opinion that the children's emotional well-being would be harmed if L.R. did not have visitation. Oviedo explained that children that are removed from their long-time caregiver can exhibit disruptive and aggressive behaviors and regression. Oviedo did not believe Father would permit L.R. regular visitation, unless ordered by the trial court.

Blevins, the CASA assigned to the case, visited the children once a month. She confirmed that the children were very bonded to L.R. Blevins stated that L.R. provided for

all the children's needs, was loving and caring toward them, and used appropriate discipline. Blevins agreed that it was in the children's best interest to reside with Father while allowing L.R. to have regular visitation. Blevins believed it would be harmful to the children's emotional well-being if they did not continue to have regular contact with L.R. because she has been their primary caretaker.

Father testified that he had no intention to cut off his children's contact with L.R. However, Father was concerned that L.R. might permit Mother to have contact with the children. It was Father's opinion that L.R. should not be able to interfere with his decisions concerning where the children reside and the specific weekends and holidays that they have visitation with L.R.

L.R. testified that she would like to have weekend visitations with the children to coincide with those weekends when she has possession of the children's half-sister. She also requested to have visitation for alternating holidays. L.R. stated that the children are always excited for their visits, particularly because they are able to see their half-sister. It was L.R.'s belief that Father would not allow regular visitation if it was not court-ordered. L.R. maintained that she did not plan on having a relationship with Mother.

C. Trial Court's Ruling

The trial court signed a judgment dismissing the Department and designating Father as the children's sole managing conservator. The trial court designated L.R. as a possessory conservator, finding that it was in the children's best interest. The trial court did not appoint Mother as a managing or possessory conservator, finding that doing so

would not be in the best interest of the children and would endanger their physical or emotional welfare. Father now appeals.

II. DISCUSSION

In what we treat as his sole issue, Father argues that the trial court abused its discretion in appointing L.R. as a nonparent possessory conservator.

A. Standard of Review

In determining issues of conservatorship and possession and access, the primary consideration is always the best interest of the children. *See* TEX. FAM. CODE ANN. § 153.002; *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002); *Brandon v. Rudisel*, 586 S.W.3d 94, 102 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Trial courts have wide discretion with respect to determining the best interest of a child in conservatorship matters. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *In re K.A.M.S.*, 583 S.W.3d 335, 340–41 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Therefore, we review a trial court's conservatorship decisions for abuse of discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (en banc). A trial court abuses its discretion if its decision is arbitrary and unreasonable. *In re J.A.J.*, 243 S.W.3d at 616; *In re J.J.G.*, 540 S.W.3d at 55.

Under an abuse of discretion standard, legal and factual insufficiency are not independent grounds of error; instead, they are factors in deciding if the trial court abused its discretion. *In re J.J.G.*, 540 S.W.3d at 55. A trial court does not abuse its discretion when it bases its decision on conflicting evidence so long as some evidence of

substantive and probative character supports its decision. *Id*. Under this standard, we consider whether the trial court: (1) had sufficient information upon which to exercise its discretion, and (2) erred in its application of discretion. *See id*.; *Stamper v. Knox*, 254 S.W.3d 537, 542 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

B. The Fit-Parent Presumption

Because it is dispositive, we first address Father's argument that the evidence does not "show that [he] is an unfit parent to overcome the presumption that [he] acts in his children's best interest."

In *Troxel v. Granville*, the United States Supreme Court held unconstitutional a Washington statute requiring a fit parent to permit visitation with her children's grandparents. 530 U.S. 57 (2000). The Court recognized that the United States Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id*. at 66. To protect that right, a plurality in *Troxel* applied "a presumption that fit parents act in the best interest of their children." *Id*. at 68. The fit-parent presumption is deeply imbedded in Texas law, *In re C.J.C*., 2020 WL 3477006, at *5 (citing *In re V.L.K*., 24 S.W.3d 338, 341 (Tex. 2000)), and has been codified in the family code:

> [U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

TEX. FAM. CODE. ANN. § 153.131(a). By its plain language, the statutory presumption is

inapplicable to issues of possessory conservatorship. *Id*.; *see Blackwell v. Humble*, 241 S.W.3d 707, 723 (Tex. App.—Austin 2007, no pet.) (holding that because parents were named joint managing conservators, the trial court's appointment of a grandmother and uncle as possessory conservators did "not run afoul of section 153.131's presumption that it is in a child's best interest for her parent or parents to be appointed managing conservator"). Further, the general standing statute under which L.R. intervened in this case does not require that L.R. overcome the fit-parent presumption.[3] *See id*. § 102.003(a).

The Texas Supreme Court addressed the application of the general standing statute and the fit-parent presumption to a non-parent seeking conservatorship in *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012) (per curiam). Like L.R., Shook was a grandmother who intervened in a pending suit to seek managing conservatorship of her grandchild pursuant to § 102.003(a)(9). *Id*. at 541–42. The court noted that Shook "pled and established general standing to file a suit for conservatorship . . . as someone who has had care, control, and possession of a child for the designated time." *Id*. at 543. Without reference to the statute governing grandparent standing, the court held that Shook had standing to seek conservatorship of her grandchild because she met the requirements of

[3] Those statutes concerning grandparent standing and access do include a parental presumption. *See* TEX. FAM. CODE ANN. §§ 102.004(a)(1) (conferring grandparents standing to file an original suit requesting managing conservatorship if there is satisfactory proof that "the child's present circumstances would significantly impair the child's physical or emotional development"), 102.004(b) (conferring standing to a grandparent with substantial past contact with a child to intervene in a pending suit to seek possessory conservatorship if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development), 153.432 ("Suit for Possession or Access by Grandparent"). However, as previously noted, L.R. intervened pursuant to the general standing statute.

§ 102.003(a)(9). *Id*. As relevant here, the court further concluded that, on remand, the trial court could name Shook a possessory conservator even if she failed to overcome the statutory fit-parent presumption. *Id*.

In *In re H.S.*, the Texas Supreme Court concluded that the general standing provision found in § 102.003(a)(9) of the family code, which allowed only nonparents who have exercised "actual care, control, and possession" of a child for at least six months to seek conservatorship or possession stood "[i]n stark contrast to the Washington statute at issue in *Troxel*[.]" 550 S.W.3d 151, 161–62 (Tex. 2018). Accordingly, the court held that the standing threshold in subsection (a)(9) "does not unconstitutionally interfere with parents' fundamental liberty interest in raising their children." *Id*. at 163. The court observed that its holding was consistent with other jurisdictions:

> Courts in other jurisdictions have also "declined to treat *Troxel* as a bar to recognizing *de facto* parenthood or other designations used to describe third parties who have assumed a parental role." *Conover v. Conover*, 450 Md. 51, 146 A.3d 433, 445–46 (2016) (collecting cases). These courts recognize the distinction between ordinary third parties and those "who have played an unusual and significant parent-like role in a child's life." *C.E.W. v. D.E.W*., 845 A.2d 1146, 1149 (Me. 2004); *see also Conover*, 146 A.3d at 453 (reasoning that treating *de facto* parents as distinct from other third parties is not only consistent with *Troxel*, but also considers "the benefits a child gains when there is consistency in the child's close, nurturing relationships"); *M.J.S. v. B.B*., 172 A.3d 651, 656 (Pa. Super. Ct. 2017) (holding that grandmother, who shared with her daughter the responsibility of raising her grandchild and who satisfied the child's "daily physical, emotional, and financial needs for his entire life," was much more than a "glorified baby-sitter" and could sue for custody as a person who stood in loco parentis to the child).

Id. at 162 (internal footnote omitted). Applying these principles, the court noted that "[t]he Family Code recognizes that a narrow class of nonparents, who have served in a parent-

like role to a child over an extended period of time, may come to court and seek to preserve that relationship, over a parent's objections." *Id*. at 163. Accordingly, the court held that "[the grandparents in this case] fall into that class, although [the court] express[ed] no opinion on whether [they] are entitled to conservatorship or visitation rights with respect to [the child]." *Id*. at 163.

In *In re C.J.C.*, the court considered the application of the fit-parent presumption to an order appointing the deceased mother's fiancé as possessory conservator. 2020 WL 3477006, at *2. The Texas Supreme Court conditionally granted mandamus relief in favor of the child's biological father who opposed any court-ordered visitation with the fiancé. *Id*. Like L.R. and the grandparents in *Shook* and *In re H.S.*, the fiancé had general standing to seek possessory conservatorship because he had exercised actual care, control, and possession of the child for at least six months preceding her mother's death. *Id*. at *3; *see* TEX. FAM. CODE ANN. § 102.003(a)(9).

The court noted that the statutes at issue "place[] no burden on [the fiancé] to overcome a fit-parent presumption." *In re C.J.C.*, 2020 WL 3477006, at *8. Nevertheless, relying on *Troxel*, the court stated that it would "read any best-interest determination in which the court weighs a fit parent's rights against a claim to conservatorship or access by a nonparent to include a presumption that a fit parent acts in his or her child's best interest." *Id*. at *10. The court explained, "When a nonparent requests conservatorship or possession of a child, the child's best interest is embedded with the presumption that it is the fit parent—not a court—who makes the determination whether to allow that request."

Id. Because none of the parties alleged that the child's biological father was unfit, the court held that the trial court abused its discretion in ordering the fiancé be named as the child's possessory conservator. *Id*.

C. Analysis

Pursuant to *In re C.J.C.*, we must read the trial court's best interest determination to include a fit-parent presumption. *Id*. at *10. In other words, to have properly exercised its discretion in ordering visitation over Father's objection, there must have been sufficient evidence presented to the trial court to overcome the presumption that Father acts in his children's best interest. *See id*. We find no such evidence in the record.

The Department recommended that the trial court award Father sole managing conservatorship, and the parties presented no evidence that Father contributed to the conditions necessitating the Department's intervention. Further, there was no evidence that Father's decisions concerning L.R.'s level of access to the children would impair the children's emotional well-being. Rather, the record established only that the children's emotional well-being would be impaired if they had no access to L.R. And, except for unfounded speculation, there was no evidence that Father intended to prevent L.R. from having a meaningful relationship with the children. In sum, there was insufficient evidence to support a finding that Father was unfit and would not act in his children's best interest. *See In re C.J.C.*, 2020 WL 3477006, at *10; *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006). Therefore, the trial court abused its discretion in awarding L.R. possessory conservatorship. *See In re J.J.G.*, 540 S.W.3d at 55. We sustain the Father's sole issue.

III. CONCLUSION

We reverse that part of the trial court's judgment appointing L.R. a possessory conservator of the children and render judgment denying L.R.'s petition in intervention. We affirm the remainder of the judgment.

LETICIA HINOJOSA
Justice

Delivered and filed the
13th day of August, 2020.