

NO. 12-12-00058-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE: §
AMBER NICOLE SULLENDER, § *ORIGINAL PROCEEDING*
RELATOR §

MEMORANDUM OPINION

In this original mandamus proceeding, Amber Nicole Sullender challenges the trial court's order granting Brenda Denise Turner possession of and access to Amber's two sons. Brenda is the children's grandmother. We agree with Amber that the trial court clearly abused its discretion in denying Amber's motion to dismiss. We also agree that Amber does not have an adequate remedy at law. Accordingly, we conditionally grant the requested mandamus relief.

FACTUAL AND PROCEDURAL BACKGROUND

Aaron Sullender was Brenda's only child. Aaron and Amber were married in January 2009. Aaron was killed in a work-related accident in October 2011. At the time of his death, Aaron and Amber had two sons, who were two years old and almost seven months old.

On December 6, Brenda filed an original petition for grandparent possession or access with the following affidavit attached:

AFFIDAVIT IN SUPPORT OF POSSESSION OR ACCESS BY GRANDPARENT

BRENDA DENISE TURNER appeared in person before me today and stated under oath:

"My name is BRENDA DENISE TURNER. I am above the age of eighteen years, and I am fully competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

“Based on the following facts. I allege that denial of possession of or access to ANDREW MASON SULLENDER and ALEXANDER DALE SULLENDER by BRENDA DENISE TURNER would significantly impair the children’s physical health or emotional well-being.

“I am the mother of AARON MATHEW SULLENDER, who died on October 18, 2011.

“At the time of Aaron’s death he was married to AMBER NICOLE SULLENDER, having been married three years in January, 2012. Since before the birth of their oldest son, Andrew, and continuing until the date of Aaron’s death, Aaron and Amber and both children spent almost every weekend at my home usually from Friday through Sunday and sometime until Monday.

“Since the date of my son Aaron’s death on October 18, 2011, I have only been allowed [to] visit with the children in the presence of Amber, the first time for an hour, the second time an hour & 15 minutes and on Thanksgiving at my dad’s home for about 2½ hours. I don’t understand why Amber won’t allow me to have more contact with my grandchildren, or why she won’t allow me to have possession without her being present. I am sure the oldest child doesn’t understand what is happening. His dad is gone and he isn’t allowed to visit with his grandmother. I am very concerned about his emotional well-being. The youngest child is too young to know what is going on. I am their grandmother and I have been in the lives of both my grandchildren since birth and feel it is in the best interest of the children to be able to have regular contact with me.

/s/Brenda Denise Turner

The trial court held an evidentiary hearing on Brenda’s petition on January 19, 2012. Before the hearing began, Amber sought to have the trial court dismiss Brenda’s petition, but the court denied her motion. On February 2, the trial court signed a temporary order granting Brenda possession of or access to her two grandchildren on the first and third Saturday and Sunday of each month from 9:00 a.m. to 6:00 p.m. and additionally on each Wednesday from 6:00 p.m. to 9:00 p.m. The next day, Amber filed a petition seeking a writ of mandamus from this court. She also sought a stay of the trial court’s order. We granted a stay of the temporary order on February 3, 2012.

AVAILABILITY OF MANDAMUS

Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Dep’t of Family & Protective Servs.*, 273 S.W.3d 637, 643 (Tex. 2009). The trial court abuses its discretion if it grants temporary access to grandchildren when a grandparent fails to overcome the presumption that a parent is acting in the child’s best interest 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. See *In re*

Scheller, 325 S.W.3d 640, 643 (Tex. 2010); *see also* TEX. FAM. CODE ANN. § 153.433(a)(2) (West Supp. 2011). Because a trial court's temporary orders that divest a parent of possession to their children cannot be remedied by appeal, mandamus relief is appropriate. *See In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007).

GRANDPARENT ACCESS

Amber argues that the trial court clearly abused its discretion in refusing to dismiss Brenda's petition because Brenda did not allege facts, supported by affidavit, that would authorize a court to order grandparent access. She also contends that appeal is not an adequate remedy.

Applicable Law

The relationship between parent and child is constitutionally protected. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *Id.*, 530 U.S. at 66, 120 S. Ct. at 2054. So long as a parent adequately cares for 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. *Id.*, 530 U.S. at 68-69, 120 S. Ct. at 2061. In our state, a court cannot order grandparent access when there is no evidence that the child's mother is unfit, no evidence that the child's health or emotional well-being will suffer if the court defers to the parent's decisions, and no evidence that the parent intended to exclude the grandparent's access completely. *See In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006).

Analysis

Section 153.432(c) of the Texas Family Code states as follows:

(c) In a suit [by a biological or an adoptive grandparent for possession of or access to a grandchild], the person filing the 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. 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.

TEX. FAM. CODE ANN. § 153.432(c) (West Supp. 2011).

In the affidavit attached to her petition, Brenda stated that she was concerned about the emotional well-being of the older child. However, she also stated that she had access to her two grandchildren following Aaron's death. Second, she stated that she was able to visit them three times during the forty-eight days between Aaron's death and the filing of her original petition. Third, she did not allege that Amber is an unfit mother. And fourth, Brenda specifically stated in her affidavit that the two children did not understand or know what was going on. These allegations do not show that Brenda has been denied possession or access, that Amber is an unfit mother, or that either child's physical health or emotional well-being will be significantly impaired if Brenda is not granted additional visitation. *See* TEX. FAM. CODE ANN. § 153.432(c); *see also In re Mays-Hooper*, 189 S.W.3d at 778. Therefore, Brenda failed to make any allegations that, if true, would overcome the strong presumption in favor of Amber. *See id.* §§ 153.432(c), 153.433(a)(2) (parent presumed to act in best interest of child). Because Brenda failed to make the necessary allegations supported by facts, the trial court should have granted Amber's motion to dismiss Brenda's original petition rather than conducting the evidentiary hearing and clearly abused its discretion in not doing so. Further, mandamus is available because the trial court's temporary order cannot be remedied by appeal. *See In re Derzapf*, 219 S.W.3d at 335.

CONCLUSION

Having concluded that the trial court clearly abused its discretion by granting temporary orders allowing Brenda to have possession of and access to the two grandchildren and that Amber does not have an adequate remedy by appeal, we ***conditionally grant*** mandamus relief. We trust that the trial court will promptly vacate its temporary order of February 2, 2012, granting Brenda possession of and access to her grandchildren, and issue an order dismissing Brenda's original petition. The writ will issue only if the trial court fails to comply with the court's opinion and order ***within ten (10) days*** after the date of the opinion and order. The trial court shall furnish this court, within the time for compliance with the court's opinion and order, a certified copy of its order evidencing such compliance. Our ***stay*** of the trial court's order issued February 2, 2012, ***is lifted***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered July 11, 2012.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
ORDER

JULY 11, 2012

NO. 12-12-00058-CV

AMBER NICOLE SULLENDER,

Relator

v.

HON. CHARLES R. MITCHELL,

Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by **AMBER NICOLE SULLENDER**, Relator. Said petition for writ of mandamus having been filed herein on February 3, 2012, and the same having been duly considered, because it is the opinion of this Court that the petition is meritorious, it is therefore **CONSIDERED, ADJUDGED** and **ORDERED** that the petition for writ of mandamus be, and the same is, hereby ***conditionally granted.***

And because it is further the opinion of this Court that the trial judge will act promptly and vacate his temporary order of February 2, 2012, granting Brenda Denise Turner possession of and access to her grandchildren, and issue an order dismissing Brenda Denise Turner's original petition, the writ will not issue unless the Honorable Charles R. Mitchell, Judge

of the 273rd Judicial District Court, San Augustine County, fails to comply with this Court's order *within ten (10) days* from the date of this order.

It is further ORDERED that **BRENDA DENISE TURNER**, pay all costs incurred by reason of this proceeding.

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.