

**NO. 12-16-00284-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*IN RE:* §  
*MARY MISTELLE RYAN,* § *ORIGINAL PROCEEDING*  
*RELATOR* §

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***MEMORANDUM OPINION***

Mary Mistelle Ryan seeks mandamus relief from the trial court's temporary order designating Lorna Ryan as sole managing conservator of T.E.R.<sup>1</sup> We conditionally grant the writ.

**BACKGROUND**

Mary and Lorna were married in Connecticut in 2009. During their marriage, they decided to adopt a child. T.E.R. has lived with both of them in a parent-child relationship since his birth in March 2013. But, because same-sex marriage was not recognized in Texas at the time of the adoption, Lorna initiated the formal adoption proceedings and became T.E.R.'s legal parent in January 2014.

In August 2016, Mary filed a petition for divorce. In her petition, she requested that she and Lorna be appointed joint managing conservators of T.E.R. Lorna filed a counter-petition for divorce and sought sole managing conservatorship. The court set a hearing regarding temporary orders. Following the hearing, the court's letter ruling appointed Lorna sole managing conservator and did not appoint a possessory conservator. Mary filed a motion to reconsider the temporary orders seeking possessory conservatorship of T.E.R. The trial court denied that motion at a hearing. This original proceeding followed.

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<sup>1</sup> The respondent is the Honorable Chad W. Dean, Judge of the County Court at Law, Rusk County, Texas.

### PREREQUISITES TO MANDAMUS

Mandamus is an extraordinary remedy that is available only when the trial court has clearly abused its discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–37 (Tex. 2004) (orig. proceeding). A clear abuse of discretion occurs when a trial court “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. *Id.* Therefore, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ. *Id.* at 840. Because temporary orders are not appealable, mandamus is an appropriate remedy when a trial court abuses its discretion in issuing temporary orders in a suit affecting the parent-child relationship (SAPCR). *See In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding).

### TRIAL COURT’S TEMPORARY ORDERS

In her sole issue, Mary contends the trial court abused its discretion when it rendered its temporary orders based on the parental presumption instead of the best interest of the child.

#### Applicable Law

In a SAPCR, the trial court may make a temporary order for the temporary conservatorship of the child. TEX. FAM. CODE ANN. § 105.001(a)(1) (West 2014). The trial court may also appoint a sole managing conservator or may appoint joint managing conservators. *Id.* § 153.005 (West 2014). If a managing conservator is appointed, the court may appoint one or more possessory conservators. *Id.* § 153.006(a) (West 2014).

The best interest of the child is the primary consideration of a trial court in determining issues of conservatorship and possession of and access to the child. *Id.* § 153.002 (West 2014). Trial courts have wide latitude in determining a child’s best interest. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). Texas courts typically utilize the so-called *Holley* factors in cases requiring a best interest analysis. *In re S.A.H.*, 420 S.W.3d 911, 926 (Tex. App.—Houston [14th Dist.] 2014, no pet.). These factors include (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the

plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976). Proof of best interest is not limited to these factors, nor do all factors always apply in every case. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

### **Analysis**

The trial court’s temporary orders appointed Lorna sole managing conservator of T.E.R. and did not appoint a possessory conservator. The trial court denied Mary’s request to be appointed a possessory conservator because she “failed to rebut the strong parental presumption.”

The presumption that the best interest of the child is served by awarding conservatorship to the child’s parent is deeply embedded in Texas law. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). This presumption is based upon the natural affection usually flowing between parent and child. *Id.* (citing *Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787, 790 (1955)). The presumption has been codified in the Texas Family Code. TEX. FAM. CODE ANN. § 153.131(a) (West 2014). However, by the statute’s express language, the parental presumption applies only to the appointment of a managing conservator. *Id.*; see *Shook v. Gray*, 381 S.W.3d 540, 543 (Tex. 2012) (court may name grandmother possessory conservator even if she failed to overcome parental presumption for managing conservatorship).

Under the terms of the adoption, Lorna is T.E.R.’s parent and Mary is not. Therefore, the court did not abuse its discretion in applying the parental presumption and appointing Lorna managing conservator. See TEX. FAM. CODE ANN. § 153.131(a). But, whether to appoint a possessory conservator should be determined by what is in the child’s best interest. See *id.* § 153.002. And even if Mary failed to overcome the parental presumption that Lorna should be named managing conservator, she may still be named possessory conservator if that would be in T.E.R.’s best interest. See *Shook*, 381 S.W.3d at 543. The trial court did not determine whether appointing Mary as possessory conservator would be in T.E.R.’s best interest. Because the trial court did not apply the correct legal standard in determining temporary conservatorship of T.E.R., it abused its discretion. See *NCNB Tex. Nat’l Bank v. Coker*, 765 S.W.2d 398, 400

(Tex. 1989) (holding that applying incorrect legal standard was abuse of discretion resulting in mandamus relief).

**DISPOSITION**

For the reasons set forth above, we conclude that Mary is entitled to mandamus relief. Accordingly, we ***conditionally grant*** Mary's petition for writ of mandamus and direct the trial court to vacate its September 13, 2016 temporary orders of conservatorship. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within ten days of the date of the opinion and order***. The trial court shall furnish this court, within the time for compliance with this court's opinion and order, a certified copy of the order evidencing such compliance.

**BRIAN HOYLE**  
Justice

Opinion delivered November 30, 2016.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)



## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

## ORDER

NOVEMBER 30, 2016

NO. 12-16-00284-CV

MARY MISTELLE RYAN,

Relator

V.

HON. CHAD W. DEAN,

Respondent

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### ORIGINAL PROCEEDING

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ON THIS DAY came to be heard the petition for writ of mandamus filed by **MARY MISTELLE RYAN**; who is the relator in Cause No. 2016-08-280, pending on the docket of the County Court at Law of Rusk County, Texas. Said petition for writ of mandamus having been filed herein on October 11, 2016, and the same having been duly considered, because it is the opinion of this Court that the petition for writ of mandamus be, and the same is, *conditionally granted*.

And because it is further the opinion of this Court that the trial judge will act promptly and vacate his order of September 13, 2016, granting temporary orders of conservatorship; the writ will not issue unless the **HONORABLE CHAD W. DEAN** fails to comply with this Court order *within ten (10)* days from the date of this order.

It is further ORDERED that **LORNA RYAN**, real party in interest, pay all costs incurred by reason of this proceeding.

Brian Hoyle, Justice.

*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*