Opinion issued April 28, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00619-CV

BRENT THOMAS MCPHERSON, Appellant

V.

RUTH HOLLYER, Appellee

On Appeal from the 245th District Court
Harris County, Texas
Trial Court Case No. 2008-20953

MEMORANDUM OPINION

This is an appeal from the trial court's order concerning the conservatorship of a minor child, C.M. Following a hearing before the trial court, the trial court appointed C.M.'s maternal grandmother, Ruth Hollyer, sole managing conservator of the child. The trial court appointed the child's biological parents, Brent T.

McPherson and Caroline Hollyer, possessory conservators of the child. McPherson appeals the trial court's order. In three points of error, McPherson argues: (1) the trial court erred in rejecting the mediated settlement agreement between him and Ruth Hollyer; (2) there is no evidence in the record to rebut the statutory presumption that it was in C.M.'s best interest to appoint him as managing conservator of C.M.; and (3) there is no evidence in the record supporting the trial court's decision to restrict his possessory rights.

We affirm.

Background

In April 2008, Ruth Hollyer filed a petition requesting that she be appointed the sole managing conservator of C.M. McPherson filed a counter-petition requesting that he be appointed the sole managing conservator of C.M.

McPherson and Ruth Hollyer attended mediation. Caroline Hollyer was not present at the mediation, nor is there any evidence that she was aware of it. McPherson and Ruth Hollyer entered into a mediated settlement agreement, awarding McPherson sole managing conservatorship of C.M. and awarding Ruth Hollyer possessory conservatorship.[1] The parties agreed that any time that the trial

[1] The settlement agreement is not a part of the appellate record. What information there is about the contents of the settlement agreement is derived from testimony at the hearing to establish conservatorship.

court might award to Caroline Hollyer for visitation or possession would be taken from the time allotted to Ruth Hollyer for her possession.

At the hearing to establish conservatorship, McPherson and Ruth Hollyer asked the trial court to enter the settlement agreement as an order. Caroline Hollyer was at the hearing and did not consent to the entry of the settlement agreement. The trial court rejected the settlement agreement, and the parties proceeded to present evidence concerning who should be awarded conservatorship of C.M.

There was conflicting testimony at the hearing about where C.M. had lived over the years. McPherson testified that C.M. had lived with him and Caroline Hollyer for the first year of her life. After that year, they all moved in with McPherson's father. Shortly thereafter, Caroline Hollyer moved out. Some time later, McPherson began attending college in Galveston, where he obtained an apartment. He also testified that C.M. had lived with his mother since C.M.'s first year.

Caroline Hollyer testified that C.M. had lived with Ruth Hollyer all of C.M.'s life. Ruth Hollyer testified that C.M. had lived with her since C.M. was one year old. All the parties agreed that C.M. had health insurance under Ruth Hollyer's insurance. Ruth testified that she was only able to put C.M. on her insurance because C.M. lived with her.

All the parties agreed that, from August 2008 until the hearing, C.M. resided with McPherson's mother. Ruth Hollyer testified that McPherson picked up C.M. from daycare for an agreed-upon visitation period and later refused to return C.M. to her. McPherson denied that C.M. had ever lived with Ruth Hollyer, so there was no reason to return C.M. to her.

Ruth Hollyer testified that the period that McPherson took possession of C.M. and kept her at his mother's home was traumatic for C.M. and C.M. expressed that to Ruth Hollyer. C.M. also exhibited physical reactions to the trauma including a swollen lip from continuously biting her lower lip.

McPherson also testified that he was still in school at the time of the hearing, that he would continue to live in Galveston for at least a couple of days out of the week, that his mother would take care of C.M. while he was not there, and that he would reside with his mother and C.M. while he was there. Because he did not have a job while he was in school, he would give his mother money when he could from scholarships, retention funds, grants, and student loans. He had a job from "2003 to almost 2005" and after that did some work giving private baseball lessons and working at his father's baseball camps during the summer. He admitted that he had never given Ruth Hollyer money for C.M.'s care, but testified that he had given his mother money.

McPherson's mother was not a party to the suit, did not testify, and did not seek any assignment of custody for C.M. There was no other testimony about whether McPherson's mother had the means to provide for C.M. beyond what McPherson occasionally provided her. Additionally, there is no evidence of McPherson's mother's ability to provide care for C.M. or even that she wanted to be C.M.'s primary caretaker while McPherson was in school.

In contrast, Ruth Hollyer testified that she had been working for Shell Oil Company for 30 years as an engineering associate. She was the party to first bring this action and asked the court to assign her as the sole managing conservator. She testified that she had provided for C.M. since C.M. was one, including enrolling her in day care, obtaining and paying for health insurance, and taking her to doctor's appointments.

At the end of the hearing, the trial court appointed Ruth Hollyer as the sole managing conservator and appointed McPherson and Caroline Hollyer as possessory conservators.

Mediated Settlement Agreement

In his first point of error, McPherson argues that the trial court erred by rejecting the mediated settlement agreement entered into by McPherson and Hollyer.

A party claiming error on appeal must present a concise argument for the contentions made with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). This party bears the burden of showing the record supports the contentions raised. *In re J.M.C.A.*, 31 S.W.3d 692, 699 (Tex. App.—Houston [1st Dist.] 2000, no pet.). The mediated settlement agreement that McPherson argues the trial court erred by rejecting is not a part of the record.

The Texas Rules of Appellate Procedure establishes a limited number of documents that must be included in the clerk's record. TEX. R. APP. P. 34.5(a). Anything more must be designated by the parties. TEX. R. APP. P. 34.5(b). Additionally, any party can seek supplementation of the clerk's record and, at least until the time the case is set for submission, the supplement will be accepted. *Id.* ; *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366 (Tex. 1998) (holding that, after submission, courts have more discretion in denying supplementation).

The parties never filed a designation of the record in this case. As a result, the original clerk's record consisted only of the items enumerated in Rule 34.5(a). Subsequently, no party filed a request for supplementation. Instead, McPherson attaches the document as an appendix to his brief. Attachments of documents as exhibits or appendices to briefs do not constitute a formal inclusion in the record on appeal and cannot be considered. *Sowell v. The Kroger Co.*, 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Because the document central to McPherson's argument is not a part of our appellate record, any error in the trial court's rejection of it has been waived. We overrule appellant's first point of error.

Appointment of Grandmother as Sole Managing Conservator

In his second point of error, McPherson argues that there is no evidence in the record to rebut the statutory presumption that it was in C.M.'s best interest to appoint him as managing conservator of C.M.

A. Standard of Review & Applicable Law

We review a trial court's decision on conservatorship for an abuse of discretion and reverse the trial court only if we determine, from reviewing the record as a whole, that the trial court abused its discretion. *Monroe v. Alternatives in Motion*, 234 S.W.3d 56, 64 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules or principles. *Id.* at 64–65. We view the evidence in the light most favorable to the trial court's decision and indulge every legal presumption in favor of its judgment. *Holley v. Holley*, 864 S.W.2d 703, 706 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Under an abuse of discretion standard, legal insufficiency is not an independent reversible ground, but is a relevant factor in assessing whether the trial court abused its discretion. *Mai v. Mai*, 853 S.W.2d 615, 618 (Tex. App.—

Houston [1st Dist.] 1993, no writ). To determine whether there has been an abuse of discretion because the evidence is legally insufficient to support the trial court's decision, we consider: (1) whether the trial court had sufficient evidence upon which to exercise its discretion and (2) whether it erred in its application of that discretion. *In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied).

Under the first prong, we apply the applicable sufficiency review. *Id.* In a legal sufficiency review, we consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not disregard it. *Id.* at 827; *Brown v. Brown*, 236 S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The factfinder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Wilson*, 168 S.W.3d at 819. When there is conflicting evidence, it is the province of the factfinder to resolve such conflicts. *See id.* at 820. The final test is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

Under the second prong, we consider whether, based on the evidence, the trial court's decision was arbitrary, unreasonable, or without reference to guiding rules or principles. *In re T.D.C.*, 91 S.W.3d at 872.

In determining conservatorship and possession issues, the best interest of the child is always the primary consideration. TEX. FAM. CODE ANN. § 153.002 (West 2008); *Lenz v. Lenz*, 79 S.W.3d 10, 14 (Tex. 2002). Furthermore, "public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage." TEX. FAM. CODE ANN. § 153.001(a) (West 2008). The burden of proof in conservatorship cases is a preponderance of the evidence. *Id.* § 105.005 (West 2008); *Monroe*, 234 S.W.3d at 65.

B. Analysis

There is a rebuttable presumption "that the appointment of the parents of a child as joint managing conservators is in the best interest of the child." TEX. FAM. CODE ANN. § 153.131(b) (West 2008). The presumption that the best interest of the child is served by awarding custody to a natural parent is deeply embedded in Texas law. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000), *In re K.R.P.*, 80 S.W.3d 669, 674 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). That presumption is

rebutted, however, if the evidence at trial establishes that the appointment "would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development." TEX. FAM. CODE ANN. § 153.131(a). This "does not necessarily require proof of a parent's blameworthy conduct as a prerequisite to appointment of a nonparent as managing conservator." *In re R.T.K.*, 324 S.W.3d 896, 902 (Tex. App.—Houston [14th Dist.] 2010, pet. filed). Instead, the statute addresses only the effect of a parent's appointment on the child. *Id.*

There was conflicting testimony at the hearing about where C.M. had lived over the years. McPherson testified that C.M. had lived with him and Caroline Hollyer for the first year of her life. After that year, they all moved in with McPherson's father. Shortly thereafter, Caroline Hollyer moved out. Some time later, McPherson began attending college in Galveston, where he obtained an apartment. He also testified that C.M. had lived with his mother since C.M.'s first year.

Caroline Hollyer testified that C.M. had lived with Ruth Hollyer all of C.M.'s life.

Ruth Hollyer testified that C.M. had lived with her since C.M. was one year old. All the parties agreed that C.M. had health insurance under Ruth Hollyer's

insurance. Ruth testified that she was only able to put C.M. on her insurance because C.M. lived with her.

All the parties agreed that, from August 2008 until the hearing, C.M. resided with McPherson's mother. Ruth Hollyer testified that McPherson picked up C.M. from daycare for an agreed-upon visitation period and later refused to return C.M. to her. McPherson denied that C.M. had ever lived with Ruth Hollyer, so there was no reason to return C.M. to her.

Ruth Hollyer testified that the period that McPherson took possession of C.M. and kept her at his mother's home was traumatic for C.M. and C.M. expressed that to Ruth Hollyer. C.M. also exhibited physical reactions to the trauma including a swollen lip from continuously biting her lower lip.

McPherson also testified that he was still in school at the time of the hearing, that he would continue to live in Galveston for at least a couple of days out of the week, that his mother would take care of C.M. while he was not there, and that he would reside with his mother and C.M. while he was there. Because he did not have a job while he was in school, he would give his mother money when he could from scholarships, retention funds, grants, and student loans. He had a job from "2003 to almost 2005" and after that did some work giving private baseball lessons and working at his father's baseball camps during the summer. He admitted that

he had never given Ruth Hollyer money for C.M.'s care, but testified that he had given his mother money.

McPherson's mother was not a party to the suit, did not testify, and did not seek any assignment of custody for C.M. There was no other testimony about whether McPherson's mother had the means to provide for C.M. beyond what McPherson occasionally provided her. Additionally, there is no evidence of McPherson's mother's ability to provide care for C.M. or even that she wanted to be C.M.'s primary caretaker while McPherson was in school.

In contrast, Ruth Hollyer testified that she had been working for Shell Oil Company for 30 years as an engineering associate. She was the party to first bring this action and asked the court to assign her as the sole managing conservator. She testified that she had provided for C.M. since C.M. was one, including enrolling her in day care, obtaining and paying for health insurance, and taking her to doctor's appointments.

On appeal, McPherson does not challenge any of the trial court's findings of fact, including:

> 4. The Court finds by clear and convincing evidence that the child, [C.M.], has lived with Petitioner, RUTH HOLLYER, the child's Maternal Grandmother, for the majority of the child's life from the time the child was one (1) year[] old until the Summer of 2008, for a period of approximately four (4) years.
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> 5. The Court finds by clear and convincing evidence that Petitioner[,] RUTH HOLLYER, has supported the child financially

> the majority of the child's life. The Court finds by clear and convincing evidence that Respondent, BRENT MCPHERSON, although he has been employed at various times, has not supported the child, [C.M.], financially during any period of time that the child was in possession of Petitioner, RUTH HOLLYER . . . .
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> . . .
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> 11. The Court finds by clear and convincing evidence that the appointment of Petitioner, RUTH HOLLYER, as sole managing conservator of the child would be in the best interest of the child, [C.M.]; and that appointment of the parents, CAROLINE HOLLYER and BRENT MCPHERSON, as sole managing conservator of the child, [C.M.] would not be in the best interest of the child because the appointment would significantly impair the child's health or emotional development.

An unchallenged finding, when supported by the evidence, is binding on an appellate court. *In re K.R.P.*, 80 S.W.3d at 675.

There was conflicting evidence about where C.M. had resided from the age of one until the summer of 2008. When there is conflicting evidence, it is the province of the factfinder to resolve such conflicts. *See Wilson*, 168 S.W.3d at 820. Because McPherson does not challenge the finding that C.M. lived with Ruth Hollyer from the age of one until the summer of 2008 and because nothing in the record suggests the trial court could not have resolved the conflicting testimony this way, we are bound by this finding. *See In re K.R.P.*, 80 S.W.3d at 675.

McPherson admitted that he had worked at least periodically over the years and that he had never given Ruth Hollyer money for C.M.'s care. There is evidence in the record, then, to support the trial court's finding that "although he

has been employed at various times, [he] has not supported the child, [C.M.], financially during any period of time that the child was in possession of Petitioner, RUTH HOLLYER." Accordingly, this finding is also binding.

There is no evidence to suggest that Ruth Hollyer is unfit to care for and raise C.M., as she had done from the time C.M. was one. Additionally, Caroline Hollyer has not sought sole or joint managing conservatorship of C.M. We are left to determine, then, whether there is sufficient evidence in the record to support the finding that appointing McPherson the sole managing conservator of C.M. would significantly impair C.M.'s health or emotional development.

In *In re K.R.P.*, we held that it is not unreasonable for a trial court to conclude "that a separation of the child from the only person who was consistently cared for her for the majority of her life would 'significantly impair' the child's emotional development." *Id.* at 677. Similarly, the Fourteenth Court of Appeals held in *In re R.T.K.* that the trial court could have reasonably concluded "that removal of R.T.K. from 'the only home he has known' would significantly impair his emotional development." 324 S.W.3d at 905.

Additionally, while not determinative, failure of a parent to financially support a child is a factor to be considered by the trial court in awarding custody. *Clements v. Schaeffer*, 360 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1962, no writ); *see also Thomas v. Thomas*, 852 S.W.2d 31, 36 (Tex. App.—Waco 1993,

no writ) (considering father's failure to provide financial support for child for three year period in affirming award of sole managing conservatorship to maternal grandmother).

Viewing the evidence in the light most favorable to the trial court's ruling, the evidence established that C.M. lived with Ruth Hollyer from the age of one until the age of five. C.M. exhibited emotional and physical trauma when she was taken away from Ruth Hollyer by McPherson to live at McPherson's mother's home. McPherson did not provide any child support to Ruth Hollyer during this time, even though he was employed at least occasionally during this time. Instead, Ruth Hollyer provided for C.M., including enrolling her in day care, obtaining and paying for health insurance, and taking her to doctor's appointments.

Additionally, the evidence at the hearing established that, while C.M. was purportedly in McPherson's care from August 2008 until the time of the hearing, C.M. was in fact being cared for primarily by McPherson's mother. McPherson lived in Galveston for at least two days out of each week. His mother would take care of C.M. while he was not there, and he would reside with his mother and C.M. while he was there. There is no evidence regarding McPherson's mother's ability or willingness to care for C.M. in McPherson's stead. McPherson was able to provide support for C.M. only periodically, using what money remained from scholarships, retention funds, grants, and student loans.

We hold that the trial court did not abuse its discretion in finding that appointing McPherson as sole managing conservator of C.M. would not be in her best interest because the appointment would significantly impair her health or emotional development. *See* TEX. FAM. CODE ANN. § 153.131.

We overrule appellant's second point of error.

McPherson's Possessory Rights

In his third point of error, appellant argues that there is no evidence in the record supporting the trial court's decision to restrict his possessory rights and that the trial court should have granted "standard possession under the Texas Family Code Guidelines."

A party claiming error on appeal must present a concise argument for the contentions made with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). In the one paragraph devoted to this point of error, appellant fails to provide a specific citation to any portion of the record or any legal authority. Instead, appellant refers generally to argument in his second point of error.

Appointment of a non-parent as a sole managing conservator is a distinct inquiry from restricting a parent's rights as a possessory conservator. They are governed by separate statutory requirements. *Compare* TEX. FAM. CODE ANN. §§ 153.131–.138, .371–.377 (West 2008 & Supp. 2010) *with* TEX. FAM. CODE

ANN. §§ 153.191–.317 (West 2008 & Supp. 2010). Authority for one does not stand in for the other.

"The failure to adequately brief an issue, either by failing to specifically argue and analyze one's position or provide authorities and record citations, waives any error on appeal." *In re B.A.B.*, 124 S.W.3d 417, 420 (Tex. App.—Dallas 2004, no pet.) We hold that McPherson has waived any error in the trial court's restriction on his possessory right.

We overrule appellant's third point of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.