Lowth v. Lowth

2003 | Cited 0 times | Court of Appeals of Texas | December 23, 2003

Affirmed

MEMORANDUM OPINION

This is an appeal from the trial court's order regarding the conservatorship of a minor child, C.W.L. After a bench trial, the trial court appointed both parents joint managing conservators and gave the father the exclusive right to establish the child's primary domicile and the right to make educational decisions on behalf of the child. The mother now appeals the trial court's judgment. We affirm.

Factual Background

Donna Lowth and Daniel Lowth were married in 1993, and C.W.L. was born on March 31, 1996. Daniel filed for divorce in February 2001 requesting the court to appoint both parents joint managing conservators of C.W.L. Donna filed a counter-petition for divorce in March 2001 asking the court to appoint her sole managing conservator. Approximately two days after Daniel filed for divorce, Donna reported an alleged incident of physical abuse by Daniel, which she claimed occurred two days earlier. As a result, a Galveston County assistant district attorney applied for and was granted an ex parte protective order. After hearing evidence presented by both parties, the associate judge dissolved the protective order on March 27, 2001, and the presiding judge adopted the associate judge's ruling on June 4, 2001.

The case proceeded to trial before the court in September 2002. The trial court ultimately concluded it would be in the best interest of the child to appoint both parents joint managing conservators, but granted appellee the exclusive rights to determine the child's primary residence and make educational decisions on his behalf ("the exclusive rights"). Upon appellant's request, the trial court entered findings of fact and conclusions of law in support of its order. Appellant challenges the following findings:

7. The Court finds that it is in the [c]hild's best interest that Daniel S. Lowth and Donna Lowth be appointed Joint Managing Conservators of the minor child.

8. The Court finds that it is in the child's best interest that child's primary domicile be established by Daniel Lowth.

9. The Court finds that it is in the child's best interest that Daniel S. Lowth be named the parent . . .

to make educational decisions.

10. The Court finds that it is in the child's best interest that in the event that Donna Lowth moves a distance of greater than 100 miles from Galveston that Daniel S. Lowth shall retain the right to make all medical decisions.

12. The Court finds that it is in the child's best interest that all other rights and duties enumerated in the Family Code are to be shared by the parties.

16. The Court finds that it is in the child's best interest and based upon the individual circumstances of the parties that in the event that Donna Lowth moves to a place other than Galveston she shall bear the cost of travel.

Appellant contends the trial court erred in appointing appellee joint managing conservator with the exclusive rights. Appellant also contends the trial court erred by disregarding evidence of alleged violence committed by appellee in contravention of the guidelines and prohibitions provided in the Family Code. Appellant claims the trial court's actions were an abuse of discretion, error as a matter of law, and that the court's findings of fact were not supported by legally or factually sufficient evidence.

I. Trial Court's Findings of Fact

We first address appellant's challenge to the trial court's findings of fact. Appellant claims the evidence is legally and factually insufficient to support the findings made by the trial court. When reviewing the trial court's findings of fact, the findings have the same weight as a jury's verdict. In re P.M.B., 2 S.W.3d 618, 621 (Tex. App.CHouston [14th Dist.] 1999, no pet.); In re K.R.P., 80 S.W.3d 669, 673 (Tex. App.CHouston [1st Dist.] 2002, no pet.). If findings are not challenged, they are binding on the parties and this court. In re K.R.P., 80 S.W.3d at 673. When challenged, however, findings are not conclusive if there is a complete reporter's record, in which case, the findings are conclusive only if supported by the evidence. Id. The trial court's fact findings are reviewed for legal and factual sufficiency of the evidence under the same standards applied when reviewing evidence supporting jury findings. Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994).

When reviewing legal sufficiency, we consider all the evidence in the light most favorable to the party in whose favor the verdict was rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998). In order to find the evidence factually insufficient to support a finding of fact, it must be so weak or the evidence to the contrary so overwhelming as to be manifestly wrong and unjust. Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In re Z.B.P., 109 S.W.3d 772, 777 (Tex. App.CFort Worth 2003, no pet.). When examining a factual sufficiency challenge, we must consider all the evidence that both supports and controverts the finding. Dyson,

692 S.W.2d at 457; In re Z.B.P., 109 S.W.3d at 777.

At trial, Daniel testified he was heavily involved in C.W.L.'s upbringing. From the time C.W.L. was a few months old until he and Donna separated, Daniel would care for the child for extended periods of time while Donna traveled for work. Many times, Daniel would keep the child for two weeks out of a month while Donna was absent. Daniel also testified that he had been employed by the Galveston Fire Department for over twelve years as a firefighter. Additionally, Daniel is a long-term resident of the Galveston area with many relatives that live in the area who are heavily involved in C.W.L.'s life. These relatives are also able to provide support for Daniel in caring for C.W.L.

The court also heard testimony from several witnesses who confirmed appellee's good relationship with C.W.L. These witnesses included appellee's mother and niece, a co-worker, a neighbor of appellee's mother, and a mother of a child whose son played on a t-ball team coached by Daniel. Further, Daniel testified he believed Donna had a lot to offer C.W.L. and that he "would allow undeniable access, total access to him anytime . . . ."

Donna, on the other hand, testified that Daniel was a violent and abusive husband and addicted to marijuana. She claimed Daniel physically abused and threatened her several times, and he attempted suicide on one occasion. This suicide attempt was the first time Donna notified the police. The second time occurred approximately two days after Daniel filed the petition for divorce. On this occasion, Donna claimed Daniel charged her and knocked her over "like a football tackle." Donna testified she should be appointed sole managing conservator because she could provide a safer and more stable environment for C.W.L.

Donna changed jobs after the parties separated, and her new job requires less travel. This new job allows her to maintain a flexible schedule in order to participate in some of C.W.L.'s after-school activities. There was also some testimony that if Donna had the opportunity to accept a better-paying job in another city, she would move with C.W.L. because "[she] can provide the best for him."

Donna called two witnesses in support of her contentions, Dr. Ted Jolly and Peggy Gallagher. Dr. Jolly is a psychologist and family therapist who provided family counseling to the parties in an effort to reconcile their marriage. Dr. Jolly testified as to both parties' claims of violence against the other and that he had witnessed Daniel looming over Donna in a threatening manner during a counseling session. Dr. Jolly was also counseling the parties during the alleged attempted suicide and he testified Daniel called him once or twice during the episode. He advised the police to take Daniel to a mental hospital for an evaluation. There was conflicting testimony about how many times Dr. Jolly treated Daniel after this incident. Dr. Jolly believed he had seen him possibly once or twice, while Daniel testified that he never returned. Nevertheless, Dr. Jolly had not treated Daniel for more than two years prior to the date of trial.

Peggy Gallagher is a friend of Donna's who lives with her and helps care for C.W.L. She testified

regarding the relationship between Donna and C.W.L. and Donna's abilities to care for the child. Peggy also testified that when C.W.L. returned from staying with his father, he was angry and not the usual well-behaved child.

In considering the legal sufficiency challenge, we find there is more than a scintilla of evidence to support the trial court's findings that the best interest of the child is served by appointing appellee joint managing conservator with the exclusive rights. Therefore, we overrule appellant's legal sufficiency challenge.

With regard to the factual sufficiency challenge, we cannot say the evidence supporting the findings is so weak as to be manifestly wrong and unjust. There is ample evidence to support the trial court's decision appointing both parents joint managing conservators and giving appellee the exclusive rights. Therefore, appellant's factual sufficiency challenge is overruled.

II. Abuse of Discretion

In her second point of error, appellant claims the trial court abused its discretion in naming appellee joint managing conservator with the exclusive rights. We review a trial court's decision regarding custody, control, and possession of a child under an abuse of discretion standard. Burkhart v. Burkhart, 960 S.W.2d 321, 323 (Tex. App.CHouston [1st Dist.] 1997, writ denied). The judgment will be reversed only when it appears from the record as a whole that the trial court abused its discretion. Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982). A trial court abuses its discretion when it acts in an unreasonable or arbitrary manner, or when it acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241B42 (Tex. 1985). There is generally, however, no abuse of discretion when there is some evidence to support the trial court's decision; thus, a trial court abuses its discretion when it could reasonably have reached only one decision. Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992); In re K.R.P., 80 S.W.3d 669, 674 (Tex. App.CHouston [1st Dist.] 2002, no pet.). Under an abuse of discretion review, legal and factual insufficiencies are not independent grounds for asserting error, but are relevant factors to consider when determining whether the trial court abused its discretion. In re J.E.P., 49 S.W.3d 380, 386 (Tex. App.CFort Worth 2000, no pet).

A trial court's primary consideration in any conservatorship case shall always be the best interest of the child. Tex. Fam. Code Ann. § 153.002 (Vernon 2002); Pena v. Pena, 986 S.W.2d 696, 698 (Tex. App.CCorpus Christi 1998, pet. denied). The trial court is in the best position to determine what is in the best interest of the child because it has the opportunity to view the parties and their witnesses, observe their demeanor, and evaluate the claims made by each parent. Coleman v. Coleman, 109 S.W.3d 108, 111 (Tex. App.CAustin 2003, no pet.). Indeed, the trial court is the sole judge of the weight and credibility of the evidence. Id. After reviewing all the evidence presented in this case, we hold there is sufficient competent evidence to support the trial court's decision that the best interest of the child would be served by appointing appellee joint managing conservator with the exclusive

rights. See Gillespie, 644 S.W.2d at 451. Upon consideration of the entire record, we cannot say the trial court abused its discretion. Appellant's second point of error is overruled.

III. Error as a Matter of Law

Appellant also alleges the evidence conclusively proves that appointing Daniel joint managing conservator was not in C.W.L.'s best interest. In support of her contention, Donna relies on the evidence previously discussed and, in particular, on a portion of the court's judgment that requires Daniel to attend anger management therapy and to submit to a substance abuse assessment. The trial court also made specific findings that the child's best interest was served by requiring Daniel to attend anger management therapy and submit to drug abuse testing. Donna argues this conclusively proves appointing Daniel joint managing conservator with exclusive right to determine the child's primary residence and to make educational decisions was not in C.W.L.'s best interest.

We have held there was sufficient competent evidence supporting the trial court's determination that the best interest of the child would be served by appointing his father joint managing conservator with the exclusive rights and that the trial court's decision was not an abuse of discretion. Thus, the trial court's judgment on those issues will not be disturbed. We overrule appellant's claim that the evidence established, as a matter of law, that appointing Daniel joint managing conservator was not in C.W.L.'s best interest.

IV. Allegations of Family Violence

Finally, appellant argues that because she presented uncontroverted testimony of physical abuse by appellee against her during the marriage, the Family Code prohibits the trial court from creating a joint managing conservatorship.

The trial court is given wide latitude in determining custody issues. Gillespie, 644 S.W.2d at 451. The Family Code, however, places certain restrictions on the trial court's discretion when there are allegations of abuse. Tex. Fam. Code Ann. § 153.004 (Vernon 2002). Section 153.004 of the Family Code requires the trial court to consider evidence of "the intentional use of abusive physical force by a party against the party's spouse" and further provides that the trial court may not appoint joint managing conservators if credible evidence is presented of a history and pattern of past or present physical abuse by one parent directed against the other parent. Id. It is the trial court's job to determine whether such credible evidence was presented. Coleman, 109 S.W.3d at 111. When the parties testify to different versions of the same encounter, the trial court is the sole judge of the weight and credibility of the evidence. Id.

Donna asserts that a history and pattern of abuse was established by her "undisputed" testimony and the testimony of Dr. Jolly. Donna claims she was abused on twelve to fifteen occasions, and even though she has not experienced any "physically intimidating encounters" with Daniel since they

separated, she is still afraid that he is going to be violent towards her. These claims, however, were not undisputed as Donna alleges. Daniel specifically denied each allegation of abuse when asked by Donna's counsel. Additionally, Daniel testified that Donna was also violent toward him.

Dr. Jolly's testimony consisted primarily of accounts of violence allegedly committed by both parties against each other. He also testified that during one of the counseling sessions, he was afraid Daniel would become violent because Daniel was looming over Donna in a threatening way. Dr. Jolly was ready to call 9-1-1 if Daniel did, in fact, become violent. He testified that Daniel did not necessarily deny Donna's allegations of violence, but that Daniel always responded that she was not telling the facts correctly and then he would make accusations toward Donna. Dr. Jolly recommended during counseling that Daniel seek anger management therapy and if Daniel had not sought such treatment since his recommendation, Daniel still needed to seek help.

There is nothing in the record to demonstrate the trial court did not consider the evidence presented by Donna relating to Daniel's alleged abuse. Indeed, the trial court did not place any restrictions on the admission of such testimony. In this case, since the evidence was conflicting, nothing in the record undisputedly shows a history or pattern of violence. See Burns v. Burns, 116 S.W.3d 916, 920 (Tex. App.CDallas 2003, no pet. h.); In re A.B.B., 785 S.W.2d 828, 834 (Tex. App.CAmarillo 1990, no pet.). The trial court is the exclusive judge of the weight and credibility of the evidence. Coleman, 109 S.W.3d at 111. The trial court reasonably could have found the evidence presented was not of such weight and credibility to prove appellant's contentions regarding physically abusive behavior by appellee.

Donna also alleges that because the trial court ordered Daniel to attend anger management therapy and submit to drug testing, the trial court must have determined credible evidence was presented of a history and pattern of physical abuse. We disagree. Even if we assume the trial court found Daniel had an anger problem, that does not necessarily establish that he was also physically abusive. Moreover, even if we accept Dr. Jolly's interpretation of the incident as true, the behavior witnessed by Dr. Jolly does not rise to the level of a history and pattern of physical abuse required to trigger the Section 153.004 prohibition against appointment of joint managing conservators. The term "history or pattern" is not defined in the Texas Family Code; thus, we will give the terms their ordinary meaning. Tex. Gov't Code Ann. § 311.011 (Vernon 2002). Dr. Jolly witnessed one "looming" incident in his office and testified Donna described two pushing incidents and one incident in which Daniel threatened her. We cannot say this constitutes enough credible evidence to prove a history or pattern of past or present physical abuse. The trial court could have reasonably concluded there was not a history or pattern of past or present physical abuse and therefore it was not bound by the prohibition found in Section 153.004 from appointing joint managing conservators. We conclude the trial court did not abuse its discretion in appointing appellee joint managing conservator with the exclusive rights. Appellant's last point of error is overruled.

Conclusion

Lowth v. Lowth

2003 | Cited 0 times | Court of Appeals of Texas | December 23, 2003

We hold the trial court did not abuse its discretion in appointing appellee joint managing conservator with the exclusive rights, the trial court's findings are supported by the evidence, and the court properly complied with Section 153.004 of the Family Code. Accordingly, we affirm the judgment of the trial court.