Opinion issued June 1, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00322-CV

MARIA TURRUBIARTES, Appellant

V.

JOSE PABLO OLVERA, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Case No. 2014-70680

MEMORANDUM OPINION

This is an appeal from a dispute between divorcing parents over the managing conservatorship of their children. The trial court awarded sole managing conservatorship to the father and possessory conservatorship to the mother. The mother appeals, contending that the trial court erred by (1) departing from the

presumption of joint managing conservatorship for both parents; (2) violating her equal protection rights; (3) violating the International Covenant on Civil and Political Rights by denying her equal access before the court; and (4) failing to issue findings of fact and conclusions of law.

We abated the appeal and ordered the trial court to file findings of fact and conclusions of law. The trial court complied with our order, and the clerk has supplemented the record on appeal to include the trial court's findings and conclusions. We hold that some evidence supports the trial court's order naming the father as the managing conservator and the mother as a possessory conservator. We further hold that the mother has not demonstrated that the trial court violated her equal protection rights or denied her equal access before the court. We therefore affirm.

Background

Maria Turrubiartes and Jose Olvera have three children, who were born before Maria and Jose married in February 2013. The couple separated in October 2014, following an altercation between Maria and a next-door neighbor. The altercation related to Maria's friendship with her neighbor's husband and Jose's accusations of adultery made to the neighbor and Maria. Maria left with the three children.

The trial court heard testimony from Maria and Jose in connection with determining the conservatorship of their children.

Jose testified that, from the time of the separation until trial, Maria had refused to disclose to Jose the location of the children's residence. On one occasion, Maria's brother-in-law went to Jose's house and threatened to kill him or have him killed if he attempted to visit the children where Maria was living. Without informing Jose, Maria withdrew the children from the school they had been attending in Tomball. She then enrolled them in a different school in Magnolia. She refused to disclose to Jose the location of the children's new school. Maria also told the school that Jose was not allowed to take the children from school.

Jose discovered where the children were enrolled in school about a month later. For the year before trial, Jose visited the children during their school lunchtimes twice a week, but he could not otherwise see the children because Maria refused to provide their address and had arranged that he could not take them from school. He also feared retaliation from her brother-in-law.

Before Maria left with their children, Jose was the parent that assisted the children with their homework. Jose stated that he had taken the children to the doctor. Jose denied that he ever "laid hands on [Maria] during the marriage." Jose requested that he be appointed primary managing conservator because Maria drove

the children without a driver's license and he was concerned about the children's safety.

Maria testified that, since the separation, she and the three children have lived with her sister and brother-in-law. In contrast to Jose's testimony, Maria testified that she had not kept Jose from seeing the children, that he "has every right to enter the house," and that their son "had been calling him." She could not recall a specific time that she had permitted Jose to see the children but stated that nothing was stopping him from visiting them. Maria requested "custody to be 50/50 because we're both parents." She stated that Jose had "never really taken care" of the children and denied that Jose had taken the children to the doctor.

Maria denied that she had an affair with her neighbor. She testified that she left because Jose had burned her and the children's clothes and accused her of adultery. Maria is an undocumented immigrant and has lived in the United States since 2006. She drives without a driver's license. Maria has never been the subject of any deportation proceedings, nor has she been involved in any traffic accidents. She testified that her attorney has a report of domestic violence that she made in October 2014, but no report was introduced at trial. She did not testify as to any domestic violence before she and Jose separated. Maria planned to apply for legal status in the month following trial.

Maria testified that she has the children in therapy in Montgomery County and did not inform Jose about it. Since the separation, Maria's nephew has helped the children with their homework. Maria denied that Jose used to help the children with their homework. Maria stated that Jose did "nothing" for the children.

Relevant to this appeal, the trial court found:

- The wife of a male neighbor and Maria engaged in a dispute, subsequent to which Maria vacated her home with the children, without notice to Jose.
- Maria's brother-in-law threatened Jose's life if Jose came on the brother-in-law's property to see the children.
- After separating from Jose, Maria withdrew the children from their school and moved them to another school that would not allow Jose to remove the children.
- Maria did not give Jose the address of where she and the children were living.

The trial court also found that Maria is an undocumented immigrant driving without a driver's license, that she had been living in Houston for nine years without incident, that she had never been arrested by police or immigration officials while driving with or without the children, and that Maria did not provide any documentation showing that she has applied for protection under the Violence Against Women Act.

The trial court concluded that:

- The physical, psychological or emotional needs and development of the children would not benefit from the parents' appointment as joint managing conservators;

- Maria and Jose lack the ability to give first priority to the welfare of the children and reach shared decisions in the children's best interests; and

- Neither parent can encourage and accept a positive relationship between the children and the other parent.

The trial court noted that the children's desires and geographical proximity were not determinative of the case because the children were under the age of 12 and it heard no evidence as to any geographic hardship. The trial court also considered "other relevant factors," including that Maria had failed to keep Jose informed concerning the children's whereabouts, welfare, medical and mental health treatment, and the location of the school where the children were enrolled. The trial court further found that Maria "has not established a residence of her own and has a lack of stability, due to her immigration status. Maria has no driver's license and is limited in ways to support the children."

The trial court granted a divorce and divided the community assets. The trial court appointed Jose as the children's sole managing conservator and Maria as their possessory conservator, with rights pursuant to the expanded version of the standard possession order. The trial court required that Maria have a licensed driver pick up and return the children when she surrendered her periods of possession.

Discussion

On appeal, Maria challenges the sufficiency of the evidence supporting the trial court's conservatorship determination. She further challenges that determination as violating her equal protection rights and her rights under international law.

I. Conservatorship

Maria complains that legally and factually insufficient evidence supports the trial court's order granting sole managing conservatorship to Jose.

A. Standard of Review

We review a determination of sole managing conservatorship in place of joint managing conservatorship for abuse of discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982); *Burkhart v. Burkhart*, 960 S.W.2d 321, 323 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). The trial court is in the best position to consider and weigh the credibility of the witnesses; thus, we give wide latitude to its determinations on custody and visitation. *Gillespie*, 644 S.W.2d at 451.

Under an abuse of discretion standard, legal and factual sufficiency challenges to the evidence are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion. *Dunn v. Dunn*, 177 S.W.3d 393, 396 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). We ask whether the record presents legally and factually sufficient evidence to support the

trial court's exercise of its discretion. *Id.* In an appeal after a bench trial in which the trial court entered findings of fact and conclusions of law, the trial court's findings have the same weight as a jury verdict. *In re K.R.P.*, 80 S.W.3d 669, 673 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). In a bench trial, the trial court is the "sole judge of the credibility of the witnesses and the weight to be given their testimony." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). The trial court may believe one witness, disbelieve others, and resolve inconsistencies in any witness's testimony. *Id.* at 697.

In determining whether there is legally sufficient evidence to support the finding under review, we examine the record for evidence and inferences that support the challenged finding, considering evidence favorable to the finding if a reasonable factfinder could, and disregarding evidence contrary to the finding unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827–28 (Tex. 2005). We will not substitute our judgment for that of the factfinder if the evidence falls in the zone of reasonable disagreement. *Id.* at 822.

In determining a question of factual sufficiency, we weigh and consider all of the evidence in the record. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We sustain a factual sufficiency challenge if the challenged finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See id.*

B. Applicable Law

There is a rebuttable presumption that it is in the children's best interest for both parents to be named joint managing conservators. TEX. FAM. CODE ANN. § 153.131(b) (West 1997). To rebut this presumption, a trial court must find that appointment of a parent would "significantly impair the child's physical health or emotional development." *Id.* § 153.131(a); *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). Additionally, "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship[.]" TEX. FAM. CODE ANN. § 153.002.

A second Family Code provision governs the appointment of joint managing conservators. Under section 153.134, if a written agreed parenting plan is not filed with the trial court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:

> (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
>
> (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
>
> (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
>
> (4) whether both parents participated in child-rearing before the filing of the suit;

(5) the geographical proximity of the parents' residences;

(6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and

(7) any other relevant factor.

TEX. FAM. CODE ANN. § 153.134 (West 2015).

C. Analysis

Maria contends that the trial court placed sole managing conservatorship with Jose due to her undocumented immigration status and therefore abused its discretion in determining conservatorship. The trial court concluded, however, that the needs of the children would not be met by appointing the parents as joint managing conservators because the parents lacked the ability to give first priority to the welfare of the children and share in decision making. Although the trial court found it relevant that Maria's undocumented status impacted Maria's ability to secure a stable residence and a driver's license, the court did not determine that Maria's undocumented status rebutted the presumption of joint managing conservatorship.

The trial court heard evidence from which it reasonably could have concluded Maria could not meet the emotional and physical needs of their children as a joint managing conservator, primarily in that she refused to reveal the location of the children to their father, removed the children from their school and placed

them in another school to hide their whereabouts from their father, and enlisted her brother-in-law to threaten the father. She directed the school to prohibit the father from leaving with the children. Maria disputed that she denied Jose access to the children, but the trial court could have credited Jose's testimony over Maria's in resolving this conflicting evidence.

Evidence that one parent has systematically deprived the other parent of access to the children without justification is a reasonable basis for concluding that joint conservatorship would not be in the best interests of the children. *See Allen v. Allen*, 475 S.W.3d 453, 458 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (mother preventing children from seeing their father was guiding consideration in making possession and access determinations); *In re Marriage of Chandler*, 914 S.W.2d 252, 254 (Tex. App.—Amarillo 1996, no writ) (affirming order divesting parent of managing conservatorship in part due to interference with other parent's relationship with child).

Viewing the evidence in a light favorable to the trial court's order, we hold that the trial court did not abuse its discretion in naming Jose sole managing conservator of the children and Maria possessory conservator and that legally and factually sufficient evidence supports its determination. *See Gillespie*, 644 S.W.2d at 449; *Allen*, 475 S.W.3d at 458.

II. Equal Protection

Maria moved for a new trial in the trial court, contending that the trial court's custody disposition violated her rights under the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment. She argues on appeal that the trial court erred in denying her motion for new trial.

A. Applicable Law

The United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Texas Equal Rights Amendment states: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a. Equal protection challenges under the state constitution are analyzed in the same way as those under the federal constitution. *Bell v. Low Income Women of Tex*., 95 S.W.3d 253, 266 (Tex. 2002). Like the federal constitution, the equal protection clause of the state constitution directs government actors to treat similarly situated persons alike. *Sanders v. Palunsky*, 36 S.W.3d 222, 224–25 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

B. Analysis

Maria contends that the trial court's decision to grant Jose sole managing conservatorship was based on her national origin and her status as an undocumented immigrant, in violation of the Equal Protection Clause and the

Texas Constitution. Jose, however, presented evidence that Maria had prevented him from seeing the children by refusing to provide him with her home address and by moving the children to another school with the intent that he could not find them or see them. Regardless of a parent's immigration status or national origin, preventing the other parent from knowing the whereabouts and welfare of the children, disrupting the children's school routine by withdrawing them from school without informing the other parent, and refusing the other parent access to the children by threat and concealment is evidence that rebuts the presumption in favor of appointing parents as joint managing conservators. Maria adduced no evidence that a parent with legal immigration status would be regarded any differently than she was in light of evidence that the parent had deprived the other parent of access to the children. Nor did Maria adduce any evidence that would justify her concealment of the children from Jose once she separated from him. Accordingly, we hold that Maria has not demonstrated that the trial court's refusal to grant a new trial violated the federal or state equal protection clauses.

III. International Covenant on Civil and Political Rights

Finally, Maria contends that the trial court's ruling violated international law. The International Covenant on Civil and Political Rights provides that, "All persons shall be equal before the courts and tribunals." International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 173. Treaties

automatically have effect as domestic law only if the treaty is "self-executing" and is ratified on those terms. *Medellin v. Texas*, 552 U.S. 491, 505, 128 S. Ct. 1346, 1356 (2008). The Covenant that Maria invokes is not a self-executing treaty and did not create a domestic private right of enforcement. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735, 124 S. Ct. 2739, 2767 (2004) ("the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in federal courts"); *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006); *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001). Accordingly, we reject Maria's contention that the trial court's order must be set aside based on the International Covenant on Civil and Political Rights.

Conclusion

We affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Keyes, Bland, and Huddle.