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COMMENTARY

Should Courts Umpire Third Party Custody Disputes?

Elisa Reiter and Daniel Pollack | **February 23, 2024**

Third party custody can happen if parties agree to such a delegation of rights, as well as when a child's biological parents have their parental rights terminated, when said parents are declared unfit to care for their child, or when parents choose to give up their parental rights voluntarily. In Texas, in a post-*In re C.J.C.* world, how do we grapple with custody issues regarding minor children when the best candidate for conservatorship is not a parent? In the recent case of *In the Interest of*

I.S.P.,[1] the First District Court of Appeals dealt with such issues. The key question: How can an attorney prove standing and privity, particularly when a child is not yet six months of age when litigation begins?

I.S.P.'s father died prior to the child's birth. Within days of the birth, his paternal grandmother filed a suit affecting the parent-child relationship, seeking possession of or access to I.S.P. The paternal grandmother alleged that I.S.P.'s mother abused alcohol and drugs during the mother's pregnancy. The grandmother also alleged that denying her access to I.S.P. would "significantly impair" I.S.P.'s physical health and/or emotional well-being. The mother filed a motion to dismiss the paternal grandmother's pleadings, arguing that the paternal grandmother lacked standing. The mother also took the party line established in the Texas Supreme Court's holding in *In re C.J.C.*: that a parent has a constitutional right to determine who will be allowed to be around his or her child. The mother also asserted that the supporting affidavit attached to the paternal grandmother's pleadings was full of hearsay, and further, that the grandmother had no firsthand knowledge as to the mother's conduct during pregnancy. The trial court granted the mother's motion to dismiss. Following the dismissal of her suit affecting the parent-child relationship, the paternal grandmother appealed.

While there are certain circumstances in which a grandparent may seek possession of, or access to, a grandchild, such a grandparent must satisfy the requirements set out in Tx.Fam. Code Section 153.432(a). Pursuant to that provision, a grandparent must complete an affidavit, based on the grandparent's knowledge or belief, setting out supporting facts that will substantiate the grandparent's allegations that denial of access to and/or possession of a child would significantly impair the child's physical

health and/or emotional well-being. The burden of proof is on the grandparent to establish their case by a preponderance of the evidence. The trial court stands as a gatekeeper, and must make a threshold determination as to whether the facts alleged in the grandparent's supporting affidavit, if true, would be enough to support relief as set out in Tx.Fam. Code Section 153.433. If a parent objects to a grandparent being awarded access to or possession of a grandchild, then the statute provides, in pertinent part:

"(b) An order granting possession of or access to a child by a grandparent that is rendered over a parent's objections must state, with specificity that:

(1) at the time the relief was requested, at least one biological or adoptive parent of the child had not had that parent's parental rights terminated;

(2) the grandparent requesting possession of or access to the child has overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that the denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and

(3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:

(A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;

(B) has been found by a court to be incompetent;

(C) is dead; or

(D) does not have actual or court-ordered possession of or access to the child."

In I.S.P., the grandmother's supporting affidavit contained allegations that:

1. Mother had popped pills and used drugs and alcohol during her pregnancy.
2. Mother admitted to using marijuana during her eighth month of pregnancy.
3. Mother placed the child's prenatal health at risk by her conduct.
4. Denying paternal grandmother access would impair I.S.P.'s physical and emotional health.

In turn, the mother attacked the paternal grandmother's standing. To be successful, jurisdiction and venue requirements must be satisfied in every case. The mother argued that she had not voluntarily relinquished custody and control of the child to paternal grandmother for a six-month period prior to the grandmother filing suit (an impossibility, as the child was days old when grandmother initiated the case). The mother argued that the grandmother's supporting affidavit was based on "information and belief" rather than on personal knowledge. Even if the grandmother could establish standing, the mother argued that the paternal grandmother could not, and had not, established facts proving that denying the grandmother access to and possession of her grandson would significantly impair the child physically or emotionally.

In this instance, the appellate court concluded that while the grandmother's statements were simple, the trial court should not have needed more information to conclude that the mother had indeed abused drugs, imbibed alcohol, and engaged in conduct that could significantly impair I.S.P.'s physical health and/or emotional development. The court of appeals issued a memorandum opinion, reversed the trial court's dismissal of the grandmother's case, and remanded the case for further action.

It is a given that the Due Process Clause of the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," as held by the Texas Supreme Court in 2020 in *In re C.J.C*. While courts must presume that fit parents act in the best interests of their children, we must ask whether judges are becoming lax when confronted with evidence that a parent (1) has addiction issues and/or (2) suffers from impaired judgment to such a degree as to constitute a threat to their child's physical or emotional development. *In re C.J.C.* certainly establishes precedent that a grandparent, or any non-parent seeking access to or possession of a minor child has a "'hefty statutory burden' to overcome the fit-parent presumption." Third parties to the parent-child relationship, such as grandparents, must allege that:

1. The child's physical health or emotional development was, and shall continue to be, significantly impaired if the grandparent (or some other third party with standing) is not granted access to or possession of the child.

2. The person seeking access must allege "specific, identifiable behavior or conduct" of the parent that will likely cause the child significant impairment.
3. The identifiable behavior may include:
    a. Serious neglect;
    b. Physical abuse;
    c. Abandoning the child;
    d. Drug or alcohol abuse; and/or
    e. Immoral behavior.

For example, the use of illegal drugs during pregnancy may support a significant impairment finding. In another case, the 14th Court of Appeals held that a grandmother had standing in a similar situation, where the mother's use of marijuana during pregnancy was proven by a drug test reflecting a positive result for marijuana. Even in an era where fewer criminal cases are being prosecuted for possession of marijuana, and when many states have legalized the use of marijuana for more than medicinal purposes, use of marijuana during pregnancy "can support [a] finding that she [the mother] has endangered [the] physical or emotional well-being of the child." There are, however, similar cases where appellate courts reached a different conclusion.

Past misconduct may be insufficient to support a finding of a parent's lack of fitness. However, past misconduct may be indicative of future actions, omissions, or poor decision making. If a parent redeems themselves after the child's birth, past bad conduct may be ignored, or mitigated. It's insufficient to show that the grandparent can be a superior custodian—the statutory burden is significant. The court of appeals disagrees with the mother's contention in *In re I.S.P.* that the

grandmother's supporting affidavit is conclusory. The simple allusion to a mother smoking marijuana in her eighth month of pregnancy establishes a rebuttable fact. While the trial court may have wanted more facts, the appellate court finds that "more detail is not needed to aid the understanding that abusing drugs and alcohol during pregnancy can cause significant impairment."

In *I.S.P.*, the paternal grandmother successfully established via her supporting affidavit sufficient specific facts to support her contention that denying her access to or possession of the child would significantly impair his physical health or emotional well-being. This simple memorandum opinion may rally advocates who seek to obtain access to and possession of children for grandparents and/or other third parties. The constitutional and statutory arguments that laid the foundation for the Texas Supreme Court's opinion in *In re C.J.C.* stands as precedent, but some may argue that those arguments are out of touch with our changing world.

Children do not come with an owner's manual. Parents learn and grow alongside their children. Should a third party or grandparent seek conservatorship over the objection of the children's parents, such a litigant must present facts in a verified affidavit, persuasively indicating that the child's parent is unfit. Such an affidavit is but the first step in what often proves to be a case that should unify families, but often serves to divide them.

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