

## Question 1 – February 2020 – Selected Answer 1

In determining whether a trial court's decision was correct, the abuse of discretion standard is often applied. A court is deemed to have abused its discretion, and thus incorrectly decided a case, when it rules in an arbitrary manner without regard for established law/precedent.

(1) The decision to name the parties JMCs was not correct. The main factor looked at when determining issues of conservatorship is the best interests of the child. Under the Texas Family Code ("TFC"), there is a rebuttable presumption that the best interests of a child ("BIOC") are served when appointing both parents as JMCs. This presumption is rebutted, however, when there is credible evidence to show a history or pattern of family violence by one of the parents. If this is the case, the court may not appoint the parents as JMCs. Further, if the instance(s) of family violence occurred within the two years preceding the date suit was filed, or while the suit was pending, there is a rebuttable presumption that the parent who committed family violence should not be allowed unsupervised access to the child unless it is deemed to be in the child's best interests and the court provides guidelines to ensure the safety of the child and victim during such periods of access. Other factors considered when determining the BIOC include whether evidence suggests the child's physical health and emotional development would be significantly impaired if the requesting party is granted access or conservatorship.

Here, the facts indicate that Husband (H) became abusive during his marriage to Wife (W) (anytime between 2010 and 2019). W filed for divorce in August 2019, seeking sole managing conservatorship ("SMC") and supervised visitation for H because of his violence behavior and alcohol abuse. H's petition asked for HMC and equal access to the children. At the February 2020 final hearing, W introduced into evidence a police report regarding H's arrest for public intoxication and physical assault of W in front of the children. While no charges were ultimately filed (which is often the case in matters involving domestic violence), the court shall nevertheless consider this evidence in determining conservatorship and access to the child. Because there is credible evidence to show a history or pattern of family violence, the court should not have named the parties joint managing conservators.

(2) The Court's decision to award H access pursuant to a Standard Possession Order, without considering the history of recent family violence, was incorrect. As discussed above, if a parent has a history or pattern of family violence -- particularly within the two years preceding the suit or while the suit is pending -- there's a rebuttable presumption that awarding that parent unsupervised access and/or possession is not in the BIOC. This presumption may be overcome by a preponderance of the evidence

that access/possession is in the BIOC and the court is able to provide guidelines that would ensure the safety and well-being of the child and victim. While the court did order H take anger management classes, this would unlikely be sufficient to ensure the BIOC, in light of the facts above. Thus, the terms of H's access and possession were incorrectly decided by the court.

(3) The court's decision to deny W's motion to interview the children was incorrect with regard to the 14 year old. Under the TFC, a child 12 years of age or older is entitled to have his preference heard by the court. This testimony can be in the form of writing or oral testimony. Since the judge did not afford the 14 yr old this opportunity, the decision was incorrect.

(4) The court was incorrect in naming grandmother a possessory conservator with access to the children. Under the TFC, a Grandparent has standing to seek conservatorship and/or access if it first shown that the present circumstances of the child significantly impair their physical health and emotional well-being, and/or lack of access to the child's grandparent would result in such significant impairment. Further, the parent who is the Grandparent's child must have either died, been imprisoned for 2+ years or lost their conservatorship. Here, there are no facts to suggest that the Grandmother had standing, much less grounds to be named possessory conservator

### **Question 1 – February 2020 – Selected Answer 2**

1. The court likely did not err in naming Husband and Wife joint managing conservators.

When determining the conservator, the court will begin with the presumption that it is in the best interest of the child to be in the conservatorship of parents before evaluating any factors that make such placement not in the best interest of the child. As conservator, an individual is granted legal rights to make decisions for the child as well as physical possession. While these rights are usually combined, they may be separated.

Factors that may be used to rebut such presumption include abandonment of the child, risk of harm to the child if placed with the parent, and in some instances criminal convictions.

Here, Wife has asserted that Husband is unfit to be a conservator due to his "violent behavior and alcohol abuse" as documented through a police report for husband's arrest on public intoxication and physical assault of Wife. Although husband was

arrested for such activities, there were no charges and no conviction resulting from the altercation.

While convictions for drug and alcohol abuse and domestic violence may be used as clear and convincing evidence of unfitness, mere arrest records do not meet the same burden. Here, Husband was not charged and as such the arrest record is not granted as much weight as a conviction would be had such a conviction resulted.

Based on the foregoing, there are not enough factors limiting Husband's legal conservator rights as to the decisions for his children to overcome the presumption. As such, the court likely did not err as to naming Husband and Wife joint managing conservators.

2. The court may have erred in granting Husband's access and possession if such contact with Husband would be harmful to the children's physical health or emotional development.

As discussed above, there is a presumption that a parent is the best conservator for a child, which is rebuttable by a multitude of factors on the grounds of the best interest of the child. Here, there are no direct factors that detail an abandonment or harm to the children.

However, the physical assault of Wife in front of the children should be evaluated as a factor against Husband, as such activity can be harmful to the emotional development of the children. Along with the alcohol abuse, the court could find that joint managing conservator is not the best situation for the children. Further, as Husband was ordered to take anger management classes, the court has made a determination that Husband is not a fully safe individual for the children to be around. As such, the provision of Husband's unsupervised access to the children may not have been in the children's best interest.

3. The court erred in denying the Wife's motion to interview the children as to the 14 year old, as the child is old enough to provide a preference for parental custody and living arrangements.

The standard for issues regarding children is overwhelmingly reliant upon the best interests of the child. When it comes to older children, specifically those 12 and older,

this best interest test enables the child to provide a preference as to their living situation and give their opinions in court as to which parent or guardian they would like to reside with. This may be provided by written affidavit or in chambers of the court.

Here, Wife requested the judge to interview the children regarding their preference as to primary residence, which was denied as to both. While the 9 year old's preference is not taken into consideration due to infancy, the 14 year old should have been presented the right to give preference as to primary residence. As such, the court erred by not providing an opportunity for the 14 year old to be heard as to their preferences.

4. The court also erred in providing the Grandmother possessory conservator with access to the children, as there are no factors regarding prior physical possession or physical and/or mental damage to the children should Grandmother not be granted such conservatorship.

As discussed above, the baseline adjudication for naming a conservator is to start with the presumption that the parents are the best individuals for the role. While this presumption is rebuttable, it requires a finding of unfitness, abandonment, or other deliberate acts that may be or have been harmful to the child to intervene in the parent-child relationship.

While Grandmother, due to her lineal relationship, does have standing to bring a suit to intervene in the parent-child relationship, she has not brought a suit for such possession here and rather merely presented her request as a witness in determining Husband's possessory conservator rights. While the court has discretion to award possessory conservator to any party it deems is in the best interest of the child, it must overcome the presumption that the parents shall be given such placement.

In this case, the Grandmother only presented information that she would be willing to care for the children during the Husband's period of possession, enabling her to step into the shoes of the Husband. However, she has not challenged Wife's possessory rights to the children (nor challenged at all to Husband, as she merely acted as a witness rather than seeking rights to the children). As such, should the Husband be deemed unfit for possessory conservatorship, Wife should instead take a greater conservator role or be giving sole conservatorship.

Further, even if Grandmother had brought suit to assert her rights in the parent-child relationship and request possession, Grandmother has not presented any facts in her favor. There is no information regarding whether Grandmother had prior physical possession of the children, nor any information regarding harm to the children's emotional and physical wellbeing should she be denied such placement. As such, the court should not have named Grandmother a possessory conservator even for the limited amount of time awarded.