



In The

Fourteenth Court of Appeals

NO. 14-22-00384-CV

IN THE INTEREST OF R.C., A CHILD

**On Appeal from the 313th District Court
Harris County, Texas
Trial Court Cause No. 2020-01940J**

MEMORANDUM OPINION

Appellant A.E.M. (Mother) challenges the trial court's final order terminating her parental rights to her son R.C. (Rami)¹ following the bench trial that occurred after the case was removed from the trial court's jury docket. In three issues, Mother contends the trial court erroneously removed her case from the jury docket over her objection, that the best-interest-of-the-child finding for her termination was not supported by factually or legally sufficient evidence, and that the best-interest-of-the-child finding for the appointment of H.K. and D.K. (Foster

¹ We use pseudonyms and personal pronouns to refer to the parties, the child, and other family members. See Tex. Fam. Code Ann. § 109.002(d); Tex. R. App. P. 9.8.

Parents or Intervenors) as joint managing conservators of Rami was not supported by factually or legally sufficient evidence.

Foster Parents filed their appellees' brief responding to each of Mother's three issues on appeal. The Department of Family and Protective Services (the Department), having been terminated as managing conservator, however, is not aligned with Foster Parents on appeal, and filed a brief solely aimed at supporting Mother's challenge to the court's refusal to permit a jury trial. We reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

*Removal Affidavit.*² On September 24, 2020, the Department received an out of state referral based on Mother's negligent supervision of Rami. Previous drug tests revealed both Mother and Rami tested positive for amphetamines and marijuana at the birth of Rami. Meconium analysis also determined that Rami, as a newborn, was positive for methamphetamines. Mother reported she has an out-of-state prescription for both marijuana and amphetamines and admitted currently using marijuana. Mother also confirmed methamphetamine use several months before Rami's birth.

After the Department made contact with Mother and Father, both parents agreed to submit to drug testing but failed to follow through. The Department's plans to place Rami with the alleged paternal grandparents ceased when the Department learned Mother and Father were untruthful and were planning to abscond with Rami to another state. The Department's investigation revealed that Mother and Father's accounts about how long they had lived in Texas, where they

² The background facts set forth in this section are based on facts provided in the affidavit by the Department's investigator, Bernadette Martelle, which both was attached to the Department's Petition to Terminate and admitted into evidence.

were living, and their criminal backgrounds were inaccurate. The affidavit notes that that Mother had been charged with six criminal offenses in Montana, many of which resulted in convictions, including “Endangering Welfare of a Child”, “Family Member Assault”, and “Aggravated Burglary”. The Department sought temporary managing conservatorship of Rami.

Petition to Terminate Parental Rights and Activity During Pendency of the Suit. On October 6, 2020, the Department filed its petition to terminate Mother’s parental rights and an emergency motion for a protective order. That same day the court issued a protective order and placed Rami with the Foster Parents. On October 20, after a full adversarial hearing, the Department was granted Temporary Managing Conservatorship of Rami.

A family service plan was ordered for both parents. Rami’s father ultimately relinquished his parental rights. Mother engaged with the Department and participated in some of the requirements in the family service plan, but she failed some drug tests and missed others. Additionally, her conduct during her visits with Rami and at hearings posed concerns about her fitness, and her appearance with black eyes posed concerns about her resolve to avoid the threat of domestic violence. At the final hearing, Mother requested possessory conservatorship and requested that Rami’s aunt and uncle be appointed managing conservators.

Rami’s maternal aunt and uncle were not parties to the termination case, but shortly before trial became the Department’s preferred option for placement. Maternal aunt and uncle had been approved for placement by agencies in both Texas and Florida. Maternal aunt is a pediatric nurse who retired from the U.S. Navy, and is the mother of three daughters under 10 years of age. Maternal aunt indicated an eagerness to care for and adopt Rami. The Department contended that placement with maternal aunt and uncle would fulfill the Department’s goal of

family placement. Maternal Aunt has maintained contact with Foster Parents throughout the duration of the trial court proceedings and came to an agreement with Foster Parents, regardless of the ultimate placement, to keep each other involved and up to date on Rami's well-being.

Foster Parents have cared for Rami for his entire life. Foster Mother and Father are both employed, financially stable, and are the parents of two school-age daughters with flexibility to work at home, giving them the ability to attend to Rami's special medical needs.³ Rami looks forward to daily activities with the Foster Parents' daughters.

In November 2021, after caring for Rami in the first year of his life, Foster Parents filed a petition in intervention. Shortly after filing their intervention, Foster Parents filed a notice of jury demand and paid the required fee.

Trial setting. On February 24, 2022, following five permanency hearings in the case, the trial court made a docket notation indicating the case was set for jury trial on March 29, 2022. On March 11, the Department filed and served on all parties a Notice of a Jury Trial setting for March 29, 2022 at 9:00 a.m. The same day, Foster Parents amended their petition seeking to terminate Mother's parental rights and seeking appointment as sole managing conservators of Rami.

On March 15, Mother and the Department filed motions in limine and the court held a pretrial conference to address those motions and other pretrial matters. In reference to the upcoming trial and the development that Foster Parents were willing to withdraw their jury demand, the following exchanged occurred:

³ Rami suffers from severe medical conditions that require regular treatment from specialized doctors including a cardiologist (for Rami's bicuspid aortic valve), an ophthalmologist (ptosis of Rami's right eye), and a genealogist (for Rami's neurological genetic mutation anticipated to cause Rami migraines and severe balance issues). Also, to address pronation in Rami's feet, Rami is required to wear leg braces every day for two hours to correct his pronated feet. Rami also must regularly participate in speech, occupational, physical, and feeding therapy.

The Court: It's going to be in the 313th; the big courtroom with me.

[Department's Counsel]: Okay. Yes, Your Honor. And then, also, if we could inquire, Your Honor, where -- would we be doing the voir dire in the 313th, as well, or will that be somewhere else?

The Court: We can do it in the 313th.

[Department's Counsel]: And we would request about 70 to 75 people, Judge, for a panel.

The Court: Okay. 17, did you say?

[Department's Counsel]: No, ma'am. 70. 7-0 to 75, Your Honor. I do believe with the number of parties, the number of attorneys, as well as the number of possible witnesses -- and, again, given the pandemic -- it's better to be [sic] a larger proposed panel, than a smaller panel.

[Foster Parents' Counsel]: I visited with my clients, as has Ms. Tran. We are willing to go ahead and do a Bench trial. So, before we go through all the, you know, voir dire issues and that kind of thing, if -- obviously, other parties can rely on that, but we are -- we're willing to go forward with a Bench trial.

The Court: Okay. Okay.

...

[Mother's Counsel]: Judge, in regard to the issue of whether or not we proceed forward with a jury trial, that's an issue I would like to discuss with my client. ...

The Court: Okay.

...

The Court: Is there anything else? Do you-all want to come back before our trial?

[Mother's Counsel]: Yes, Judge. Just for clarification, if we proceed forward with a jury trial, that would be in person, correct?

The Court: Yes. But I think the Intervenors (Foster Parents) are withdrawing their request to have a jury trial. It was their request. So when do you-all want to come back? What is the date of dismissal?

[Department's Counsel]: ... April 9th.

...

[Department's Counsel]: The jury trial setting, Your Honor, is March 29th. So, I don't know if there would be some date next week for a pretrial setting.

...

The Court: And then the pretrial. ... Trial will be on March 30th, right?

[Father's Counsel]: I think you-all have the 29th.

The Coordinator: We initially had the 29th for jury trial, but I don't think that date is good for you, Judge. So, I was suggesting the 30th.

The Court: Yes. Let's do the 30th.

The Coordinator: How long do you-all estimate the trial will be?

[Department's Counsel]: Probably a week, if we went. And I will say --

The Coordinator: No. I'm talking about a Bench trial. We're not doing the jury trial anymore.

[Department's Counsel]: Just to be clear, Your Honor, I still need to confer with my client, as well, about the jury trial withdrawal. A day, two days.

[Foster Parents' Counsel]: I would say, yes, two days at most for a Bench trial.

The Court: Okay⁴

On March 21, the trial court continued its pretrial conference and Mother's counsel urged her objection to proceeding without a jury.

[Mother's Counsel]: Yes, Judge. I had an opportunity to speak with my client. And she's still in favor of pursuing a jury charge [sic] pursuant to Texas Rules of Civil Procedure 220. You know, if a jury charge -- a jury demand is filed, the other parties have the authority to

⁴ The Department has referred to and placed in the appendix to its brief uncertified copies of documents showing that (1) on March 18, 2022, Mother filed a written objection to the Foster Parent-Intervenors' Request to Remove Jury Case from the Jury Docket, and (2) that three days later, on March 21, Intervenors filed a motion in limine. Because these items are not included in the record, we reach our decision today without regard to these items.

rely on that demand. And it would require all parties to waive the jury trial. In this case my client still wants to proceed with a jury.

The Court: How would your client be adversely affected?

[Mother's Counsel]: She was relying on going and presenting her case in front of a jury in this instance. In speaking with her, that's still her position.

The Court: That's how she would be adversely affected --

[Mother's Counsel]: Yes, Judge.

The Court: -- is her wanting to be in front of a jury?

The Department subsequently indicated that it waived its right to a jury. Foster Parents indicated that they had waived their request, but that they were prepared to try the case before the bench or a jury. At the conclusion of the hearing, the judge announced, "Well, I think I'm going to deny the mother's motion to insist on a jury trial and we can proceed with a Bench trial."

On March 25, 2022, Mother filed her Motion for Reconsideration and Continuance asking the court to put the case back on the jury docket, or alternatively for continuance.

Trial began via Zoom on March 29. Mother's counsel and Mother announced present at the start of trial. Before calling its first witness, the Department inquired if the court was going to rule on Mother's motion. Mother's counsel re-urged the court to resolve the case with a jury and to continue the case to permit it to be placed "back on the jury docket." The court promptly responded and denied both the motion for continuance and the jury request.

Mother's counsel remained present throughout trial, while Mother did not personally appear at various times.

At the conclusion of the final hearing the court signed a final order terminating Mother's parental rights under Family Code 161.001(b)(1)(D), (E),

and (O), removing the Department as Temporary Managing Conservator and appointing Foster Parents as Joint Managing Conservators of Rami.

II. JURY TRIAL

In her first issue, Mother complains that the trial court abused its discretion when it refused to allow a jury trial over her objection after Foster Parents requested a bench trial. The Department joins her in this point of error and requests a new trial.

We review the trial court's denial of a jury trial for an abuse of discretion. In our review, we consider the entire record. *In re Montelongo*, 586 S.W.3d 513, 518 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The test for abuse of discretion is whether the trial court's decision was “arbitrary, unreasonable, and without reference to guiding principles.” *In re A.L.M.-F.*, 593 S.W.3d 271, 282 (Tex. 2019) (quoting *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996)).

The Texas Rules of Civil Procedure set out clear procedures for parties to request a jury trial in the first instance, and procedures for parties wishing to keep a jury trial when the requesting party seeks to withdraw that request. In this case we look to both procedures and consider whether the court could have properly found that no jury demand had ever been made, and whether the trial court erred in overruling Mother's objection to the withdrawal.

Could the trial court's refusal to permit a jury trial over Mother's objection be based on deficiencies in Foster Parents' jury demand or placement on the jury docket?

A party invokes the right to a jury trial through compliance with Rule 216, which provides that to ensure a jury trial in a civil case there must be “a written request for a jury trial” that is “filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than

thirty days in advance.” Tex. R. Civ. P. 216. Texas courts hold that the “reasonable time before trial” requirement is presumed satisfied when a party makes the request in advance of the thirty-day deadline. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991).

In this case, Foster Parents filed a formal demand for a jury trial on November 18, 2021 and paid the required fee. These facts are not in dispute. The record illustrates that during pretrial proceedings, the parties and the court were operating under the belief that the jury demand was proper. Indeed, the parties and the court were discussing motions in limine and voir dire, which, by definition, assumes a jury trial. No party argues that the jury demand was untimely, or that a non-jury trial was set within thirty days of the demand. Similarly, no party contends that the date by which timeliness should be measured is any date other than the date the final hearing on the merits actually began in this case, roughly four and a half months after the jury demand was made.

The Department and Foster Parents implicitly disagree whether any further steps are required to “perfect” a jury demand so that other parties can reasonably rely on the original requesting party’s jury demand and expect the case to be tried by a jury. Foster Parents contend that a non-requesting party cannot rely on the jury demand until the clerk places the case on “The Jury Docket”. See Tex. R. Civ. P. 218. The Department argues that the demand, the timeliness of the demand, and the payment of the jury fee are sufficient to trigger the non-requesting parties’ expectation of a jury trial, and that the placement of the case on the jury docket, a ministerial act by the clerk, plays no substantial role in the analysis of whether the jury demand is perfected. We conclude that the Mother and the Department were entitled to rely on the timely jury demand along with other circumstances indicating that the case was to be tried by a jury. Most notably, Foster Parents

have overlooked that the case docket sheet contains an entry on February 24, 2022, with the notation: “Pretrial 3-15-22, Jury is March 29 Tues DOD 4-9-21 Day” effectively illustrating the case was on the court’s jury docket as of February 24, 2022. See *Rhyne*, 925 S.W.2d at 666 (finding a court’s order stating case was to be tried by jury trial was sufficient to create reliance); see also Tex. Fam. Code § 101.026 (in cases such as this, pronouncements may be made orally in the presence of the court reporter or in writing, “including on the court’s docket sheet or by a separate written instrument”); see also *In re G.X.H.*, 627 S.W.3d 288, 298 (Tex. 2021).

The record shows that Foster Parents requested a jury trial and paid the required fee in a timely manner, imposing on the court’s clerk the ministerial duty to place the case on the court’s jury docket. Whether the clerk discharged that duty is not dispositive of the issue of the validity of the jury demand, although we note, the case was in fact placed on the court’s jury docket. Under these circumstances, the trial court erred in denying Mother a jury. Therefore, we next consider whether the trial court erred with respect to its application of the rules governing withdrawal of a jury demand.

Was the requesting party’s withdrawal erroneously permitted over the objection of an adversely interested party?

If the party who requested the jury trial waives or withdraws the request, that party must comply with Texas Rule of Civil Procedure 220. In pertinent part, the Rule states:

When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested.

If a jury demand is withdrawn, a non-requesting party must object to the withdrawal in order to preserve his right to a jury trial. *Green v. W. E. Grace Mfg.*

Co., 422 S.W.2d 723, 726 (Tex. 1968) (“[U]ntil an objection is registered to the withdrawal of a case from the jury docket, the non-demanding party has no right to have the case remain on that docket. It is the objection itself that establishes the right.”)

Both Department and Mother alerted the trial court to their right to object by requesting an opportunity to consult with their respective clients on the subject. Mother then followed-up multiple times after the hearing by objecting to the withdrawal and obtaining a ruling from the trial judge. After Foster Parents withdrew their jury request, the trial court gave mixed signals to the parties of its understanding of their right to object and have the case retained on the jury docket. The trial court seemed to acknowledge the right when assenting to the requests of both counsel for Mother and the Department to consult with their respective clients before waiving the right. However, the trial court appeared to overlook their right as non-demanding parties later when it responded to counsel’s question about whether a jury trial would be in person (or conducted remotely), when it stated, “Yes. But I think the [Foster Parents] are withdrawing their request to have a jury trial. *It was their request.*” (emphasis added). At the next hearing, when Mother objected to the withdrawal, the court requested that her counsel explain how Mother was affected or harmed by removing the case from the jury docket. While such inquiry is not inherently unreasonable, Mother’s response should have been immaterial to the court’s decision on the jury issue, as Mother was not required to show harm.

Foster Parents also contend that Mother waived the right to a jury trial because “she failed to show up for trial in any meaningful way.” The last sentence in Rule 220 states, “Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury.” Tex. R. Civ. P. 220; *see also In re Marriage of*

Harrison, 557 S.W.3d 99, 135 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The record indicates that Mother appeared on the first day of trial, but did not remain present for much of the proceedings thereafter. However, her counsel was present for the entirety of the trial. A represented party’s lackluster participation is not the same as an unrepresented party’s failure to appear. *In re Montelongo*, 586 S.W.3d at 518. Foster Parents’ argument does not account for Mother’s counsel’s presence. This court recognizes that “for purposes of Rule 220, a represented party appears for trial when the party’s lawyer is present, even if the party is not personally present.” *Id.* We find the trial court abused its discretion when it overruled Mother’s objection to the withdrawal of the case from the jury docket.

Was Mother harmed by the trial court’s erroneous denial of a jury trial?

“The wrongful denial of a jury trial is harmful when the case contains material fact questions.” *Rhyne*, 925 S.W.2d at 667. The issues at trial included resolving whether the evidence supported a finding by clear and convincing evidence three predicate grounds for termination, a finding that termination was in the best interest of the child, and a finding that assigning managing conservatorship to Foster Parents was in the best interest of the child. These questions all present fact-intensive questions; significantly, courts have found the denial of a jury trial in parental termination cases harmful. *See E. E. v. Tex. Dep’t of Family & Protective Services*, 598 S.W.3d 389, 397 (Tex. App.—Austin 2020, no pet.) (denial of jury trial was harmful error because “there were material fact issues as to whether termination of the mother’s parental rights was in the best interest of the child,” and an instructed verdict would have been improper); *G.W. v. Tex. Dep’t of Family & Protective Services*, No. 03-14-00580-CV, 2015 WL 658466, at *4 (Tex. App.—Austin Feb. 11, 2015, no pet.) (denial of jury trial harmful error when

evidence would have precluded a directed verdict against a father in a parental termination action in light of father’s best interest testimony); *In re M.N.V.*, 216 S.W.3d 833, 835 (Tex. App.—San Antonio 2006, no pet.) (father in parental termination action “had an arguable basis that material issues of fact exist as to the best interest of the child,” so the denial of a jury was harmful error). This case presents no exception. Appellee has an arguable basis for challenging the finding that termination was in the best interest of the child, and the finding that assigning managing conservatorship to Foster Parents was in the best interest of the child. Because there were material fact questions, denying a jury trial was harmful to Mother.

We sustain Mother’s first issue.

III. CONCLUSION

Having found that the trial erroneously overruled Mother’s objection to the withdrawal of the case from the jury docket, and improperly permitted the presentation of evidence to the trial court as the sole factfinder, we reverse the final order and remand for further proceedings.

/s/ Randy Wilson
Justice

Panel consists of Justices Spain, Poissant, and Wilson.