Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00062-CV

IN THE INTEREST OF K.M., B.M. and A.B.M., Minor Children

From the 150th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-CI-09419
Honorable Aaron Haas, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Irene Rios, Justice
Beth Watkins, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: May 11, 2022

AFFIRMED

Appellant Father complains, in three distinct issues, about the trial court's order changing his biological children's last names. Finding no reversible error, we affirm.

BACKGROUND

Father and his ex-wife, Mother, are the parents of K.M.[1] (born 2006), A.B.M. (born 2004), and B.M. (born 2002). The two divorced in 2011 after Father was sentenced to fifty years in prison; the trial court appointed Mother sole managing conservator of the children. In 2019, Mother and Stepfather filed a petition to change the last names of the three children.

[1] To protect the privacy of the minor children, we use initials and pseudonyms to refer to the children and their parents. TEX. FAM. CODE ANN. § 109.002(d).

At a hearing on the petition, the trial court heard argument from Father, telephonically, as well as Mother and Stepfather's attorney, in person. The trial court noted the petition lacked a required attachment—each child's written consent to the change of name. The reporter's record indicates that all three children were present at the hearing but may not have been in the courtroom while a record was being made. The trial court agreed to grant the name changes after each child provided a written consent. The supplemental clerk's record[2] reflects the children signed written consent forms and Mother and Stepfather filed them. The trial court signed the order granting the name changes that same day. After Father filed his notice of appeal, Mother passed away; Stepfather remains an appellee.

ANALYSIS

Failure to Consider Answer and Attachments

Applicable Law

In his first issue on appeal, Father complains that the trial court failed to consider his answer or the materials attached to it. Pleadings "are not evidence, unless offered and admitted as evidence by the trial court." *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.). "Nor are documents attached to pleadings evidence." *Id*. at 725. "Thus, instruments attached to pleadings are not evidence unless they are introduced as such at trial." *Id*. "Simply attaching a document to a pleading neither makes the document admissible as evidence, dispenses with proper foundational evidentiary requirements, or relieves a litigant of complying with other admissibility requirements." *Id*.

[2] The appellant must properly request—and in some circumstances pay for—the appellate record before the trial court clerk is required to file it. TEX. R. APP. P. 35.3(a). But once the appellant has properly requested the appellate record, the trial and appellate courts become jointly responsible for ensuring that it is filed. TEX. R. APP. P. 35.3(c). Here, while the written consent forms signed by the children were shown on the trial court's docket sheet, they were not included in the original clerk's record. Under Rule 35.3(c), we requested inclusion of those documents in a supplemental clerk's record. *See In re Ryan*, 993 S.W.2d 294, 298 (Tex. App.—San Antonio 1999, no pet.).

The court may, on its own, judicially notice an adjudicative fact "that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." TEX. R EVID. 201(b). The court must judicially notice such an adjudicative fact "if a party requests it and the court is supplied with the necessary information." *Id*. R. 201(c)(2).

Application

After Mother and Stepfather filed the name change petition, Father filed a "Letter Styled as an Answer to Original Petition for Name Change of Minor Children." In that document, Father complained that Mother had prevented him from communicating with the children in violation of the divorce decree and requested that the children be polled, in camera and then on the record, about the name change. The attachments included: Texas Department of Criminal Justice correspondence notifying Father of Mother's placement on Father's "negative mailing list" at her request; Father's appeal of that placement; TDCJ correspondence notifying Mother of the denial of that appeal; a photo of Father with the children; and a letter Mother wrote him after he was incarcerated.

At the hearing, the trial court acknowledged it had not reviewed Father's filing[3] but invited Father to explain his position. Father did not offer the pleading or attachments into evidence or ask the trial court to take judicial notice of them. But Father did lay out what he characterized as his "sole argument" against the name change: Mother put her name on his negative mailing list, preventing him from communicating with the children in violation of the divorce decree, and he believed the children would not want to change their last name if they had remained in contact

[3] The Local Rules for the Bexar County Civil District Courts "provide for a centralized, rotating docket system for non-jury civil matters." *In re J.V.O.*, No. 04-20-00346-CV, 2021 WL 3742678, at *4 (Tex. App.—San Antonio Aug. 25, 2021, no pet.) (mem. op.) (internal quotation marks omitted).

with him. Although Father argues the trial court failed to give his answer and attachments "full regard" or "the respect of weighted consideration," the record of the hearing reveals that Father apprised the trial court of the contents of both.

Because pleadings and attachments are not evidence, and Father did not ask the trial court to either admit or take judicial notice of them, the trial court did not err in not considering them. *Ceramic Tile Int'l*, 137 S.W.3d at 724–25; *see also* TEX. R. EVID. 201. But even if it had, such error was harmless where Father ably articulated his "sole" argument against the name change. TEX. R. APP. P. 44.1. We overrule Father's complaint that the trial court failed to consider his answer and its attachments.

Written Consent to Name Change Not Attached to Petition

Applicable Law

In his next issue on appeal, Father complains that the trial court erred in ordering the name changes because Mother and Stepfather failed to attach to their petition each child's written consent to the name change as required by the Texas Family Code. Under Texas Family Code section 45.002(b), "[i]f the child [whose name is to be changed] is 10 years of age or older, the child's written consent to the change of name must be attached to the petition." TEX. FAM. CODE ANN. § 45.002(b).

Application

Here, the children were born in 2002, 2004, and 2006. Each child, then, was "10 years of age or older" when the trial court granted the name change. The Texas Family Code therefore required each child's "written consent to the change of name" to be attached to the name change petition. *See id*. Father is correct that written consent from each child was not attached to the petition. On this record, however, we find such error harmless.

Texas Rule of Appellate Procedure 44.1(a) provides, "[n]o judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a). Here, the record reflects that the written consent of each child was presented to the trial court and made a part of the record before the trial court signed its name change order. Father has presented no argument that he was injured by this sequence of events. *See Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009) (placing burden of establishing harm on appellant). We cannot see how this error probably caused the rendition of an improper judgment or probably prevented Father from properly presenting the case to the court of appeals. *See, e.g.*, *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) ("The [harmless error] rule applies to all errors."). We therefore decline to reverse the trial court's judgment on Father's second issue.

Inability to Meaningfully Participate

Applicable Law

In his final issue on appeal, Father complains he was denied the ability to meaningfully participate in the name change hearing. "As a constitutional matter, a litigant cannot be denied access to the civil courts merely because of his status as an inmate." *In re A.W.*, 302 S.W.3d 925, 928 (Tex. App.—Dallas 2010, no pet.). "However, an inmate does not have an absolute right to appear in person in every court proceeding." *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003). The right of a prisoner to have access to the courts "entails not so much his personal presence as the opportunity to present evidence or contradict the evidence of the opposing party." *In re D.D.J.*, 136 S.W.3d 305, 314 (Tex. App.—Fort Worth 2004, no pet.) (internal quotation marks omitted). If a trial court finds that a pro se inmate "in a civil action is not entitled to leave prison to appear

personally in court, then the prisoner should be allowed to proceed by affidavit, deposition, telephone, or other effective means." *Lann v. La Salle County*, No. 04-02-00005-CV, 2003 WL 141040, at *1 (Tex. App.—San Antonio Jan. 22, 2003, no pet.) (mem. op.). Pro se litigants are held to the same standards as licensed attorneys and are subject to preservation-of-error requirements. *Nabelek v. Bradford*, 228 S.W.3d 715, 717 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Application

Father argues that his presence "telephonically" rather than in person, and with "no visual acuity" impaired his ability to participate in the hearing. He argues that appearing telephonically rendered him unable to "rebut and question the children personally, especially in the absence of their signing a consent." But Father did not seek to question or poll the children at the hearing, which is a prerequisite to a successful complaint on appeal. TEX. R. APP. P. 33.1; *see also Rice v. Lewis Energy Grp.*, No. 04-19-00234-CV, 2020 WL 6293454, at *7 (Tex. App.—San Antonio Oct. 28, 2020, no pet.) (mem. op.) ("An objection is timely if it is asserted at the earliest opportunity or interposed at a point in the proceedings when the trial court has an opportunity to cure any alleged error."). Indeed, when the trial court asked him "did you want to say anything else?", he replied, "No, I don't have anything else to say." The fact that Father represented himself does not excuse his failure to timely bring his complaint to the trial court's attention. *Nabelek*, 228 S.W.3d at 717. We overrule Father's final appellate issue.

CONCLUSION

Having overruled each of Father's appellate complaints, we affirm the trial court's order.

Beth Watkins, Justice