COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00192-CV

IN THE INTEREST OF K.H., A CHILD

FROM THE 30TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 12606-JR-A

MEMORANDUM OPINION[1]

In this appeal from the trial court's judgment naming Appellee DFPS sole managing conservator of K.H., Appellant S.H. (Mother) argues in a single issue that the trial court reversibly erred by denying her request for a jury trial. We hold that Mother waived her right to a jury trial and, therefore, will affirm.

In October 2015, and in connection with filing its original petition for protection of a child, for conservatorship, and for termination in a suit affecting the parent-child relationship, DFPS removed then nine-year-old K.H. from

[1]*See* Tex. R. App. P. 47.4.

Mother's care due to concerns about his health or safety and welfare.[2] DFPS returned K.H. to Mother in April 2016 under a monitored return but removed him again in June 2016.

On September 29, 2016—almost a year after K.H.'s initial removal, thirty-nine days before a rescheduled November 7, 2016 final hearing, and with a dismissal date of December 12, 2016—Mother requested a jury trial and paid the jury fee. The State moved the district court for a special setting before December 12, 2016, but the district court denied it because "[t]here [was] no jury week available." K.H.'s attorney ad litem then filed a motion to strike Mother's request for a jury trial, which the associate judge orally granted at the conclusion of the

[2]The affidavit attached to the petition stated that K.H. was diagnosed with epilepsy and encephalopathy secondary to Lennox-Gastaut Syndrome. DFPS relied upon the following facts to show that removal was in K.H.'s best interest:

> 4.1 [K.H.] is a 9 year old boy with medical conditions that require daily medication. [K.H.] is receiving no medication at school where he has frequent seizures. [Mother] does not respond to emergency calls from school staff concerning [K.H.]. There is concern that [K.H.] is not receiving medication or proper medical follow up treatment while in his mother's care.
>
> 4.2 [K.H.] has behavior issues and requires constant supervision at school and at home. Ms. Humphrey has repeatedly left [K.H.] in the care of his elderly grandfather which resulted in Police and Fire Department intervention.
>
> 4.3 [Mother] is uncooperative and refuses to work with school staff or Child Protective Services.
>
> 4.4 There is continuing danger to the physical health of [K.H.] due to the on-going refusal of [Mother] to follow medical advice.

hearing on the motion on November 2, 2016. At the final hearing on November 7, 2016, Mother objected to the bench trial, and the associate judge ultimately named DFPS permanent managing conservator, and Mother possessory conservator, of K.H.

On November 10, 2016, three days after the final hearing, Mother filed a notice of appeal of the associate judge's report, complaining about the associate judge's findings relevant to K.H.'s conservatorship and about the denial of Mother's request for a jury trial. At what the district court thought was a de novo hearing on December 22, 2016, the district court addressed Mother's request for a jury trial and denied it. Mother's attorney later argued that the December 22, 2016 hearing had been noticed as only a scheduling conference, so the district court agreed to conduct a second de novo hearing, although it retained its ruling from the December 2016 hearing on Mother's request for a jury trial. After a two-day, de novo hearing in April 2017, the district court signed a final judgment that reflected the associate judge's earlier rulings on conservatorship and possession. Mother did not object when the trial court proceeded with a bench trial.

Mother argues that the trial court abused its discretion by denying her timely request for a jury trial because no party overcame the presumption that Mother made the request a reasonable time before trial. The ad litem responds that Mother waived her right to a jury trial and, alternatively, that the trial court did

not abuse its discretion.[3] We agree with the ad litem and DFPS that Mother waived her right to a jury trial.

Rule of civil procedure 216 provides that a party may not have a jury trial in any civil suit "unless a written request for a jury trial 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; *see* Tex. Const. art. V, § 10. Thus, a request for a jury trial made in advance of the thirty-day deadline is presumed to have been made a reasonable time before trial. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991). But a party who perfects its right to a jury trial may nevertheless waive that right by failing to act when the trial court proceeds with a bench trial. *In re A.M.*, 936 S.W.2d 59, 61 (Tex. App.—San Antonio 1996, no writ). To complain on appeal that it was denied its right to a jury trial, a party must object to the trial court's action or affirmatively indicate that it intends to exercise its right to a jury trial. *Id.*; *see In re D.R.*, 177 S.W.3d 574, 580 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

At the April 2017 de novo hearing, Mother asserted no objection when the district court proceeded to conduct a bench trial. We see that the district court addressed the issue at the first de novo hearing in December 2016, but we also notice that months later on April 25, 2017, one day before the April 2017 de novo hearing began, Mother filed a "De Novo Hearing Brief for the Court" that

[3]DFPS filed a letter brief agreeing with the ad litem that Mother waived her issue.

specifically identified her request for a jury trial as one of the issues at the upcoming de novo hearing. In its May 2, 2017 letter informing the parties of its decision, the district court stated of Mother's request for a jury trial, "Although this was specified as an issue for appeal, no testimony or argument was presented on this point; therefore, the matter has been waived and is denied." Similar language is contained in the final judgment. Our review is limited to the record on appeal. Considering the conflicting state of the record, the lengthy period of time between the December 2016 and April 2017 de novo hearings, and the well-settled law on this topic, we cannot conclude that Mother was relieved of the requirement to complain when the district court proceeded without a jury at the April 2017 de novo hearing. We overrule Mother's only issue.

Having overruled Mother's issue, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, SUDDERTH, and KERR, JJ.

DELIVERED: October 5, 2017