In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-20-00228-CV

IN THE INTEREST OF E.F., A CHILD

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. DC30-FM2019-0259

Before Sudderth, C.J.; Bassel and Wallach, JJ.
Memorandum Opinion by Justice Bassel

MEMORANDUM OPINION

I. Introduction

This is an ultra-accelerated appeal[1] in which Appellant K.F. (Father) appeals the termination of his parental rights to his son Eric.[2] In two issues, Father challenges the legal and factual sufficiency of the evidence to support the four statutory termination grounds that the referring court found by clear and convincing evidence. Within his sufficiency challenges, Father takes issue with the associate judge's decision to make an audio recording of the contested final termination hearing. Because the associate judge failed to provide a court reporter to record the proceedings, we reverse the termination order and remand the case for a new trial. Because Father did not challenge the referring court's appointment of H.P. (Mother) as Eric's sole permanent managing conservator and because that issue was not subsumed within his appeal of the termination order, we affirm that portion of the order.

II. Background

After the Texas Department of Family and Protective Services placed Eric in foster care, the Department filed its original petition for protection of a child, for conservatorship, and for termination. An associate judge presided over the contested

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[1]*See* Tex. R. Jud. Admin. 6.2(a) (requiring appellate court to dispose of an appeal from a judgment terminating parental rights, so far as reasonably possible, within 180 days after the notice of appeal is filed).

[2]*See* Tex. R. App. P. 9.8(b)(2) (requiring court to use aliases to refer to minors in an appeal from a judgment terminating parental rights).

final termination hearing. Rather than provide a court reporter to make a record, the associate judge made electronic recordings of the proceedings.[3]

Based on the evidence presented at the hearing, the associate judge terminated Father's parental rights to Eric. The associate judge's "Decree of Termination" reflects that she found by clear and convincing evidence that terminating Father's parental rights was in Eric's best interest and that the Department had established by clear and convincing evidence the statutory termination grounds under Subsections (D), (E), and (N) of Texas Family Code Section 161.001(b)(1). *See* Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (N), (b)(2).

Father then filed a request for a de novo hearing before the referring court. *See generally id.* § 201.015 (allowing a party to request a de novo hearing before the referring court). The Department filed a "Notice of Cross Appeal of Associate Judge's Report" to challenge the associate judge's failure to find pursuant to Texas Family Code Section 161.001(b)(1)(O) that Father had failed to comply with the provisions of a court order that specifically established the actions necessary for Father to have Eric returned to him. *See id.* § 161.001(b)(1)(O).

At the outset of the hearing before the referring court (hereinafter the trial court), the Department offered all of the exhibits that were admitted during the contested final termination hearing before the associate judge, as well as the

[3]The proceedings before the associate judge began on May 27, 2020, and concluded on June 1, 2020, so there are two recordings—one from each date.

recordings of that hearing. Father made a hearsay objection to three of the Department's exhibits that contained records from the Wichita Falls and Burkburnett police departments. The trial court overruled Father's objection and admitted all the exhibits. The Department then rested.

The defense then offered brief testimony[4] from the caseworker, Father, and Mother. Both sides then rested.

After hearing the testimony and reviewing the evidence, the trial court took the case under advisement. The trial court later issued a letter ruling followed by a termination order in which the trial court found by clear and convincing evidence that termination of Father's parental rights to Eric was in Eric's best interest and that the Department had established by clear and convincing evidence the statutory termination grounds under Subsections (D), (E), (N), and (O) of Texas Family Code Section 161.001(b)(1).[5] *See id.* § 161.001(b)(1)(D), (E), (N), (O), (b)(2). The trial court appointed Mother as Eric's sole permanent managing conservator.

Father then timely perfected this appeal.

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[4]All the testimony at the de novo hearing totals fewer than seventy pages.

[5]The trial court's original termination order was dated June 7, 2020. The trial court later granted the Department's motion for a nunc pro tunc order and rendered a nunc pro tunc termination order to correct the date to reflect that the termination order was signed on July 7, 2020.

III. Discussion

In his two issues, Father challenges the legal and factual sufficiency of the evidence to support the four statutory termination grounds that the trial court found by clear and convincing evidence. Within his sufficiency argument, Father describes the challenges posed by the associate judge's failure to have a court reporter at the contested final termination hearing as follows:

> Exhibit 26 purports to be audio recordings of the termination trial held before the associate judge. It is clear from the length of the recordings that the trial before the [a]ssociate [j]udge involved more testimony than the de novo trial. However, quite simply, the evidentiary value of Exhibit 26 is nil. That is because[] large portions of the audio recordings are simply inaudible or of such poor quality that one is left to guess what is being asked or answered of almost every witness that was called to testify. To demonstrate these assertions, this writer invites the reader to listen to the recordings by selecting several random sections and trying to ascertain what is being said by whom and to whom. It is respectfully contended that this invitation constitutes a fool's errand.

Because Exhibit 26 was admitted during the de novo hearing, we have attempted to listen to the recordings from the final termination hearing held before the associate judge. The total length of the recordings is two hours and twenty minutes. Even using maximum volume levels for the media player and the speakers, the recordings present the following obstacles: (1) the witnesses' answers and occasionally the attorneys' questions are often barely audible or completely inaudible;[6] (2) during the

[6]Although the Department cites the recordings extensively in its brief, we refuse to make any presumptions regarding what the inaudible responses might have been and will not fill in inaudible words based merely on the context of what can be heard. Based on our review of the recordings, we have no assurance of what was

recordings, someone states that Father was wearing a face mask[7] during his testimony, which further compounds the inability to hear his responses; and (3) in the few parts of the recordings that are audible, it is often unclear who is talking because of the lack of identification when multiple people are speaking or when an objection is made.

We have recently dealt with a similar issue and summarized the guiding law as follows:

> Under the Texas Family Code, when an associate judge presides over a hearing that is neither a jury trial nor a contested final termination hearing, the record may be preserved by a court reporter provided by a party, the associate judge, or the referring court; alternatively, "in the absence of a court reporter or on agreement of the parties," the record may be preserved by some other method approved by the judge, such as an electronic recording. *Id.* § 201.009(a), (b), (c). But when an associate judge presides over a jury trial or a contested final termination hearing, "[a] court reporter *is required* to be provided," and no other means of preserving the record is permitted. *Id.* § 201.009(a) (emphasis added).
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> . . . An appellant complaining of legal or factual insufficiency of the evidence cannot meet its burden on appeal without a proper record. *Englander Co. v. Kennedy*, 428 S.W.2d 806, 807 (Tex. 1968).

In re J.L., No. 02-20-00114-CV, 2020 WL 5242426, at *1–2 (Tex. App.—Fort Worth Sept. 3, 2020, no pet.) (mem. op.).

The Department cites to *Englander*, 428 S.W.3d at 807, in responding to Father's argument about the record and argues that "the burden is on the appellant to

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actually said during large portions of the trial and are therefore not moved to change our conclusion that the recordings are inaudible.

[7]Father was wearing a face mask due to the COVID-19 pandemic.

see that a sufficient record is presented to show error requiring reversal." The Department does not, however, cite to or reference Section 201.009(a), which places a duty on the associate judge to provide a court reporter for a contested final termination hearing. *See* Tex. Fam. Code Ann. § 201.009(a).

Here, Section 201.009 required the provision of a court reporter and prohibited the associate judge from preserving the record by electronic means. *See id.* The associate judge was thus required to provide a court reporter to make a record of the proceedings but failed to do so. *See id.*

Although this case differs from *J.L.*, we reach the same conclusion. *J.L.* involved a direct appeal from a termination trial before an associate judge[8] who recorded the proceedings in lieu of providing a court reporter, and the Department conceded that the associate judge's failure to provide a court reporter as Section 201.009 requires was error. 2020 WL 5242426, at *1–2. We concluded that the appellant did not have a proper record of the proceedings and that we did not have an appellate record that would enable us to review the appellant's sufficiency challenges. *Id.* at *2.

Here, although we have a transcript of the de novo hearing, there is error because the final termination hearing was not recorded as required by Section 201.009(a). Further, that error constitutes reversible error. Father, due to no fault of his own, does not have a proper record as a result of the associate judge's error in not

[8]The same associate judge heard the termination trial in this case.

providing a court reporter, and that error entitles Father to a new trial because the associate judge's inaudible recordings of the final contested termination trial were the key exhibits that were admitted during the de novo hearing. *See* Tex. R. App. P. 34.6(f) (setting forth the circumstances when an appellant is entitled to a new trial when a significant portion of the recording is inaudible).[9] Moreover, the associate judge's error here—deciding to make an audio recording in violation of Section 201.009—"probably prevented the appellant from properly presenting the case to the court of appeals." *See* Tex. R. App. P. 44.1(a)(2).

Accordingly, we sustain Father's inaudible record argument that is contained within Father's sufficiency issues. *See* Tex. Fam. Code Ann. § 201.009(a); Tex. R. App. P. 34.6(f), 44.1(a)(2); *J.L.*, 2020 WL 5242426, at *2; *cf. In re W.G.*, No. 02-16-00312-CV, 2017 WL 3634007, at *2 (Tex. App.—Fort Worth Aug. 24, 2017, orig. proceeding) (mem. op.) (applying Texas Family Code Section 157.161, which requires a record of an enforcement-action hearing except in certain cases, to grant mandamus relief from a contempt order when no reporter's record had been made of the contempt hearing, and recognizing that Section 201.009 requires a court reporter when an associate judge presides over a jury trial or a contested final termination hearing); *In re Carlton*, No. 09-07-241-CV, 2007 WL 1793765, at *1 (Tex. App.—Beaumont June 21, 2007, orig. proceeding) (per curiam) (mem. op.) (applying Section

[9]Father notes in his reply brief the various efforts he made to improve the audibility of the recordings and to try to obtain a better copy of the recordings, but according to Father, his efforts were unsuccessful.

157.161, holding that the unintelligible tape recording of an enforcement hearing was tantamount to no record, and granting habeas relief on the basis that the relator had been deprived of a statutorily required record of the contempt hearing). Because this argument is dispositive, we do not address the merits of Father's two sufficiency issues. *See* Tex. R. App. P. 47.4.

IV. Conclusion

Having sustained Father's challenge to the associate judge's audio recordings of the final termination hearing, we reverse the portion of the trial court's nunc pro tunc order terminating Father's parental rights to Eric, and we remand the case for further proceedings. *See* Tex. R. App. P. 43.2(d). Because Father did not challenge the trial court's appointment of Mother as Eric's sole permanent managing conservator and because that issue was not subsumed within his appeal of the termination order due to the trial court's finding under Section 153.131—that the appointment of Father would not be in Eric's best interest "because the appointment would significantly impair [Eric's] physical health or emotional development"—we affirm that portion of the trial court's nunc pro tunc order. *See In re J.A.J.*, 243 S.W.3d 611, 612–13 (Tex. 2007).

/s/ Dabney Bassel

Dabney Bassel
Justice

Delivered: November 12, 2020