In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00438-CV

IN THE INTEREST OF K.B. AND K.R.B., CHILDREN

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2014-513,337, Honorable Ruben Gonzales Reyes, Presiding

April 12, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, the father of K.B. and K.R.B.,[1] challenges the trial court's order terminating his parental rights to his children. We will affirm the trial court's order.

Background

Appellant is the father of the two children involved in this proceeding. K.B. was almost nine years old by the time of the 2016 final hearing; K.R.B. was then nearly five. The Texas Department of Family and Protective Services removed K.B. and K.R.B.

[1] To protect the children's privacy, we will refer to the children by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2011); TEX. R. APP. P. 9.8(b).

from their home in October 2014, after allegations of domestic violence in the home and reports that the children were dirty. Appellant, then homeless, did not live in the home with the children. They were placed with relatives.

Appellant's rights to his children were terminated, in part, because he failed to complete any of the court-ordered services set forth in the Department's service plan. Also, appellant was arrested multiple times during the pendency of the case for public intoxication, possession of a controlled substance and possession of drug paraphernalia. Appellant rarely kept in contact with the Department and did not visit his children. *See* TEX. FAM. CODE ANN. §161.001(b)(1)(N), (O) (West 2016).

The sufficiency of the evidence supporting the trial court's order is not challenged in this appeal. Rather, appellant seeks to challenge the associate judge's ruling on his counsel's request for appointment of a guardian ad litem for appellant. The circumstances leading to the ruling occurred when the associate judge resumed the final hearing after a several-month recess taken at the request of the parties for reasons unrelated to this appeal.[2]

At the outset of the resumed hearing, appellant's appointed counsel told the court appellant had "informed [counsel] this morning that he had fired me on three different occasions" and counsel sought to determine the status of his representation on the record. After discussion with the court, however, appellant opted to continue with counsel representing him. After further discussion both on and off the record, counsel

[2] During the recess, the children's mother decided to relinquish her rights to her children. When the hearing resumed, her parental rights were terminated pursuant to her voluntary relinquishment. She has not appealed.

orally asked the court to "appoint a guardian ad litem for my client for mental deficiencies," and allow counsel to withdraw. Counsel said he had "not been able to effectively represent and communicate with my client based upon our conversations."

The associate judge denied counsel's motion, explaining that guardianship proceedings were conducted in other courts under required procedures after proper pleadings and notice, and that she lacked authority to appoint a guardian for an adult. The court also denied counsel's motion to withdraw. Neither motion was raised again during the hearing.

The proceeding continued.[3] The Department's caseworker testified, and appellant testified. At the hearing's conclusion, the court announced its ruling finding termination in the children's best interest and finding it proper under subsections 161.001(b)(1)(N) and 161.001(b)(1)(O). *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(N), (O), § 161.001(b)(2).

The day after the hearing but before the associate judge signed a written order, appellant filed a short written motion for appointment of a guardian ad litem. The judge denied that motion. The same day, appellant requested a *de novo* hearing for the purpose of challenging the court's findings regarding termination of his parental rights. No mention was made in the written request for *de novo* hearing of the denial of the request for a guardian ad litem.

[3] On appeal, counsel notes what he characterizes as "unusual behavior" by appellant, pointing out that appellant occasionally responded to cross-examination in "an unconventional way." We note the examples counsel cites, but note also that appellant's testimony generally was cogent and reflected a clear understanding of the proceedings, and that appellant generally responded to questions appropriately.

At the *de novo* hearing before the district court, the parties addressed appellant's mental health, specifically noting his need for counseling and for help managing his anger. However, there was no discussion of or request made for appointment of a guardian ad litem for appellant. The Department presented witnesses to prove the grounds it alleged and to show termination of appellant's parental rights was in the best interest of the children. Appellant testified at the *de novo* hearing, admitting to his arrests, his failure to complete all of the tasks set forth in his service plan and his inability to provide a home for his children. He expressed to the court a desire to "see my kids" and "to be in my kids' life."

At the conclusion of the hearing, the district court stated that its findings were "based upon the evidence that was presented, including, but not limited to the conflicting testimony and the credibility of the witnesses who were called to testify." It found clear and convincing evidence that "it is in the best interest of the children" that the father's rights be terminated. The court also found clear and convincing evidence supported termination on the grounds set forth by the Department. The district court judge signed an order of termination about a week after the *de novo* hearing, setting forth the same grounds of termination as in the associate judge's order. This appeal followed wherein appellant challenges the associate judge's denial of his request for appointment of a guardian ad litem.

Analysis

We review the trial court's decision regarding appointment of a guardian ad litem under an abuse of discretion standard. *In re Guardianship of Alabraba,* 341 S.W.3d

577, 579 (Tex. App.—Amarillo 2011, no pet.); *In the Interest of L.M.,* No. 2-09-323-CV, 2010 Tex. App. LEXIS 6422, at *3 (Tex. App.—Fort Worth Aug. 5, 2010, pet. denied) (mem. op.). To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles. *In re Guardianship of Alabraba,* 341 S.W.3d at 579 (citations omitted). *See also Low v. Henry,* 221 S.W.3d 609, 614 (Tex. 2007); *Cire v. Cummings,* 134 S.W.3d 835, 838-39 (Tex. 2004).

We find no abuse of discretion here for several reasons.

First, as we see the record, the oral motion for appointment of a guardian ad litem was made in connection with counsel's motion to withdraw. While counsel told the court he was unable to effectively represent and communicate with his client, after the court denied counsel's motions, he properly represented appellant through the remainder of the proceedings before the associate judge, and through the *de novo* hearing. Although it seems clear from the record that appellant and his counsel had difficulty agreeing on a trial strategy, there is no indication in the record of a conflict between counsel and appellant after the associate judge denied counsel's motions. Appellant's position on his relationship with his children and his response to the court-ordered service plan was presented to the associate judge and again at the *de novo* hearing.

Second, even if we assume the associate judge could have appointed a person to assist appellant in addition to, or in lieu of, his appointed counsel, a ruling we do not make, the discussion of the subject of counsel's difficulty with his representation of

appellant on the record is not sufficient to show an abuse of discretion by the associate judge. Perhaps the discussion of the subject off the record was more complete. Just before counsel made his motions before the associate judge, he requested, and the court granted, a conference with the court in chambers. That discussion does not appear in the record. Counsel characterized his request as one for appointment of a guardian ad litem, but the record does not show a reviewing court exactly what purpose counsel perceived for such a guardian in appellant's case. Appellant does not cite us to a provision of the Family Code authorizing appointment of a guardian ad litem for the adult respondent in a termination proceeding.[4] His brief written motion filed after the conclusion of the hearing before the associate judge provided no additional information and cited only the disciplinary rules applicable to Texas attorneys.[5] Certainly counsel is to be commended for bringing his concerns for his client to the associate judge's attention, but this record does not provide us evidence to support a conclusion the judge abused her discretion by denying his request for a guardian ad litem.

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[4] *See In the Interest of R.M.T.,* 352 S.W.3d 12, 18 (Tex. App.—Texarkana 2011, no pet.) ("there is no Texas authority which would permit a trial court to halt termination proceedings due to the incompetency of the parent") (citing *In re E.L.T.,* 93 S.W.3d 372, 375-77 (Tex. App.—Houston [14th Dist.] 2002, no pet.)). We note that *R.M.T.*, 352 S.W.3d at 16-17, and *E.L.T.*, 93 S.W.3d at 377 (Guzman, J., concurring), address due process issues not raised here. Appellant also does not expressly contend he lacked competence to undergo adjudication of his parental rights.

[5] The motion cited Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct, which reads:

> A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

TEX. DISCIPLINARY RULES PROF'L CONDUCT RULE 1.02(g).

It is clear also from the record that the associate judge perceived counsel's request to involve the appointment of a guardian for appellant by the court having jurisdiction over guardianship appointments,[6] and the Family Code provides support for her perception. Section 107.010 permits the discretionary appointment of an attorney ad litem for an incapacitated person. TEX. FAM. CODE ANN. § 107.010 (West 2015). The provision states, "The court may appoint an attorney to serve as an attorney ad litem for a person entitled to service of citation in a suit if the court finds that the person is incapacitated. The attorney ad litem shall follow the person's expressed objectives of representation and, if appropriate, refer the proceeding to the proper court for guardianship proceedings." *Id.*

As noted, the matter of appointment of a guardian was not raised again until the day after the initial hearing terminating appellant's parental rights. By that time, the court had determined sufficient evidence had been presented to support termination. And again, the exact purpose for appointment of a guardian ad litem at that point is unclear from the record. No complaint about the failure of the associate judge to appoint a guardian ad litem was noted in appellant's request for a *de novo* hearing, nor was the request reiterated before the district court. The Department characterizes appellant's failure to raise the issue before the district court as a failure to preserve the issue for appeal. *See* TEX. R. APP. P. 33.1. We do not engage in an analysis of the preservation requirement with respect to issues raised before an associate judge but

[6] *See* TEX. ESTATES CODE ANN. § 1101.001 (requisites and contents of application for appointment of guardian); § 1022.001 (West 2014) (general probate court jurisdiction in guardianship proceedings). *See also* TEX. R. CIV. P. 173 (appointment of guardian ad litem).

not before the referring court on hearing *de novo*, but will say that the completion of the hearing *de novo*, resulting in the same outcome as the hearing before the associate judge, without a mention of the need for a guardian ad litem, provides a further indication the associate judge's ruling was not an abuse of discretion, much less an error calling for reversal. *See* TEX. R. APP. P. 44.1 (reversible error in civil cases).

Appellant's sole issue is overruled, and the trial court's order of termination is affirmed.

James T. Campbell
Justice