In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00409-CV

IN THE INTEREST OF N.W., A CHILD

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 87,244-E, Honorable Douglas R. Woodburn, Presiding

March 22, 2018

MEMORANDUM OPINION

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

This case involves the termination of parental rights to the child, N.W.[1] After a bench trial, the associate judge terminated the parental rights of both parents and appointed the Texas Department of Family and Protective Services as the child's managing conservator. Both parties have appealed asserting different claims of error. We reverse and remand the father's case for a de novo hearing, and we affirm the termination of the mother's parental rights.

[1] To protect the privacy of the parties involved, we refer to them by their initials. See TEX. FAM. CODE ANN. § 109.002(d) (West Supp. 2017); TEX. R. APP. 9.8(b).

Background

Because the issues presented by both parents are procedural, we need not address the specific facts of this case. On June 1, 2016, the Department filed a petition for termination of the parental rights[2] of N.W.'s father, B.W., and mother, H.M. The Department was given temporary managing conservatorship following an adversary hearing. Both parents were court-ordered to participate in services provided by the Department.

When the final hearing was convened, H.M. was not present. Her attorney did not ask for a continuance due to a lack of contact from H.M. During a break, the judge was made aware that H.M. had been in the courthouse the day before filling out paperwork for an unrelated case. H.M.'s phone number was provided to her attorney, and the judge recessed the termination trial to allow H.M.'s attorney to contact her. Shortly thereafter, H.M. appeared in court.

On September 6, 2017, the associate judge terminated H.M.'s rights on the grounds of endangering conditions, endangerment, prior termination, constructive abandonment, and failure to comply with a court order. See TEX. FAM. CODE ANN. § 161.001(b)(1)(D), (E), (M), (N), (O) (West Supp. 2017).[3] B.W.'s rights were terminated on the grounds of endangering conditions, endangerment, and conduct resulting in

[2] The petition filed on June 1 also sought to modify a December 9, 2015, order establishing the parentage of N.W.

[3] Further references to provisions of the Texas Family Code will be by reference to "section ___" or "§___."

confinement for more than two years. § 161.001(b)(1)(D), (E), (Q). The judge also found that termination of each parent's rights was in the best interest of N.W. § 161.001(b)(2).

On Monday, September 11, 2017, B.W. filed a request for a de novo hearing, challenging the sufficiency of the evidence to support termination under subsection (D), (E), and best interest. B.W. did not challenge the sufficiency of the evidence supporting termination under subsection (Q). On October 11, 2017, the referring court signed the order of termination without holding a de novo hearing.

Both parents appealed. By his sole issue, B.W. contends that the referring court erred by failing to hold a de novo hearing. By her sole issue, H.M. contends that the associate judge violated her constitutional due process rights by failing to continue the final hearing to allow her to complete services.

Analysis

B.W.'s Appeal

B.W. filed his request for a de novo hearing. However, the referring court signed an order adopting the order of the associate judge without conducting a de novo hearing. B.W. contends that the trial court erred by failing to conduct a de novo review. The Department concedes that B.W. is entitled to a de novo hearing before the referring court.

A party who timely requests a de novo hearing before the referring court is entitled to a hearing. *In re Talley*, No. 07-15-00198-CV, 2015 Tex. App. LEXIS 6268, at *4 (Tex. App.—Amarillo June 22, 2015, orig. proceeding) (mem. op.); *see* § 201.015 (West Supp. 2017). The referring court's duty to hold a de novo hearing after a notice of appeal is

timely filed is mandatory, and failure to hold such a hearing is presumed harmful. *In re Talley*, 2015 Tex. App. LEXIS 6268, at *4; *Phagan v. Aleman*, 29 S.W.3d 632, 635 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (op. on reh'g).

"After a hearing, the associate judge shall provide the parties participating in the hearing notice of the substance of the associate judge's report, including any proposed order." § 201.011(b) (West 2014). "Notice may be given to the parties: (1) in open court, by an oral statement or a copy of the associate judge's written report, including any proposed order; (2) by certified mail, return receipt requested; or (3) by facsimile transmission." § 201.011(c). Under subsection 201.015(a), a party may request a de novo hearing before the referring court by filing a written request "not later than the third working day after the date the party receives notice of: (1) the substance of the associate judge's report as provided by Section 201.011." § 201.015(a)(1).

The associate judge announced the termination decision in open court on Wednesday, September 6, 2017. B.W. filed his request for a de novo hearing on Monday, September 11, 2017, which was the third working day after the associate judge announced the decision to terminate. As such, B.W.'s request was timely. The trial court abused its discretion by signing an order of termination on October 11, 2017, without holding a de novo hearing. *See In re Talley*, 2015 Tex. App. LEXIS 6268, at *4; *Phagan*, 29 S.W.3d at 635.

H.M.'s Appeal

H.M. does not challenge the sufficiency of the evidence to support the grounds for termination or the best interest finding. Instead, she asserts that the associate judge

erred in failing to grant a continuance of three months so she could complete services before the statutory dismissal date of December 1, 2017. According to H.M., the court's failure to recess the proceedings constitutes constitutional error.

A parent's rights to the "companionship, care, custody[,] and management" of a child is a constitutional interest "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); s*ee In re M.S.,* 115 S.W.3d 534, 547 (Tex. 2003). Consequently, we strictly scrutinize termination proceedings and strictly construe the involuntary termination statutes in favor of the parent. *Holick v. Smith,* 685 S.W.2d 18, 20 (Tex. 1985). While parental rights are of constitutional magnitude, they are not absolute. *In re C.H.*, 89 S.W.3d 17, 26 (Tex. 2002). "Just as it is imperative for courts to recognize the constitutional underpinnings of the parent-child relationship, it is also essential that emotional and physical interests of the child not be sacrificed merely to preserve that right." *Id*. Additionally, a child's need for permanence through the establishment of a "stable, permanent home" has been recognized as the paramount consideration in determining best interest. See *In re K.C.,* 219 S.W.3d 924, 931 (Tex. App.—Dallas 2007, no pet.).

Under the rules of appellate procedure, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefor, and obtain a ruling. *In re L.M.I.,* 119 S.W.3d 707, 711 (Tex. 2003); TEX. R. APP. P. 33.1.

H.M.'s attorney did not file a motion for continuance and announced ready for trial. The associate judge recessed the trial to allow counsel to contact H.M. by phone to determine whether H.M. was planning to attend. H.M. appeared at trial and testified. At

no point in the proceedings was a constitutional objection raised. H.M. concedes that she failed to make a constitutional objection at trial, but claims that error was preserved because she testified she wanted additional time to complete services. H.M. cites no authority to support her contention. Under these facts, H.M. has failed to preserve a constitutional violation for appellate review. *See In re A.S.D.*, No. 02-10-00255-CV, 2011 Tex. App. LEXIS 9205, at *31-32 (Tex. App.—Fort Worth Nov. 17, 2011, no pet.) (mem. op) (failure to raise constitutional complaints at trial fails to preserve them for appeal).

Even if we construe H.M.'s statement as a request for an extension of the statutory dismissal deadline,[4] we find no evidence that the associate judge abused her discretion in failing to allow H.M. three additional months to complete her services. "[W]hen a parent, through his or her own choices, fails to comply with a service plan and then at the time of the termination trial requests a continuance or an extension of the statutory dismissal deadline in order to complete the plan, the trial court does not abuse its discretion by denying the continuance or extension." *In re K.P.*, 2009 Tex. App. LEXIS 6301, at *11-12. In the fifteen months that this case was pending in the trial court, H.M. attended one counseling session and made no other effort to avail herself of services designed to reunite with N.W. Nothing in the record points to the likelihood that H.M. would participate in services if she had additional time. To the contrary, H.M. testified she was no longer residing in the State of Texas, and was scheduled to start a job in Fort Collins, Colorado, the next day.

[4] Because an extension of the dismissal date is similar to a continuance and section 263.401(b) does not specify which appellate standard of review should apply, we apply the abuse of discretion standard. *In re K.P.,* No. 02-09-00028-CV, 2009 Tex. App. LEXIS 6301, at *10 (Tex. App.—Fort Worth Aug. 13, 2009, no pet.).

Finding no abuse of discretion, we overrule H.M.'s issue and affirm the termination of her parental rights.

Conclusion

For the foregoing reasons, we reverse and remand B.W.'s case for a de novo hearing before the referring court, and we affirm the order terminating H.M.'s parental rights.

Judy C. Parker
Justice