In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00247-CV

IN THE INTEREST OF N.A.O., A CHILD

On Appeal from the 64th District Court
Hale County, Texas
Trial Court No. A42858-1908, Honorable Danah L. Zirpoli, Presiding

February 18, 2022

MEMORANDUM OPINION

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

The trial court in this case entered a judgment wherein it terminated the parental rights of Mother (J.M.) based on her affidavit of voluntary relinquishment. It declined to terminate the parental rights of Father (L.O.) and instead named him possessory conservator. The Texas Department of Family & Protective Services (the Department) was designated permanent managing conservator of the child, N.A.O. Mother appeals the trial court's judgment terminating her parental rights. She maintains that the evidence is insufficient to illustrate that termination was in the child's best interest. The Department

also appealed, questioning the decision appointing it as permanent managing conservator. We affirm in part, reverse in part, and remand the cause.

Background

On September 7, 2021, Mother executed an irrevocable Affidavit of Relinquishment. In Paragraph 3.2 of it, she acknowledged that "[t]ermination of the parent-child relationship is in the best interest of the child." Same was received into evidence at the final termination hearing.

Other evidence admitted at the final hearing illustrated that N.A.O. was two years old at the time of trial and in the care of his maternal grandmother (Grandmother) for the last sixteen months, with court approval. Furthermore, Grandmother sought to adopt the child once all parental rights were terminated. Grandmother and Mother also executed a post-termination agreement whereby the former would allow the latter to visit the child once Mother's rights were ended.[1]

Other evidence revealed that Father 1) had been convicted of domestic violence and served a prison sentence, 2) was on probation at the time of the final hearing, 3) sought possession of N.A.O., and 4) believed family members (such as his mother and a cousin) would assist him in raising the child. During the months he was not incarcerated, Father had interacted with N.A.O., and a bond developed between the two.

At the end of the hearing, the trial court terminated Mother's rights based upon the affidavit of relinquishment, permitted Father to retain and exercise his parental rights as possessory conservator, and designated the Department permanent managing conservator of N.A.O. Upon learning of this outcome, Mother requested leave of the court

[1] The trial court approved the agreement at the end of the hearing and after terminating Mother's parental rights.

permitting her to revoke her affidavit of relinquishment. Such leave was denied her, and this appeal ensued.

Mother v. Department

On appeal, Mother does not challenge the validity of her affidavit of relinquishment or the trial court's refusal to allow her to revoke it. She, instead, maintains that the trial court erred by terminating her rights without sufficient evidence that doing so was in N.A.O.'s best interest. Allegedly, the Department had to prove that element despite the representation at trial and in the affidavit about termination being in the child's best interest. We overrule the issue for two reasons.

First, a "direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit." TEX. FAM. CODE ANN. § 161.211(c). Mother's complaint about the sufficiency of the evidence does not implicate any of those categories and, thus, is not susceptible to consideration on appeal. *See In re K.S.L.*, 538 S.W.3d 107, 111 (Tex. 2017) (involving the execution of an affidavit of voluntary relinquishment and declining to hear on appeal the complaint about evidence being insufficient to support the finding which indicated termination was in the child's best interest); *accord In re M.M.*, 538 S.W.3d 540, 540–41 (Tex. 2017) (per curiam) (same); *In re B.B.J.*, Nos. 07-19-00156-CV, 07-19-00157-CV, 2020 Tex. App. LEXIS 2741, at *3 n.3 (Tex. App.—Amarillo Apr. 1, 2020, no pet.) (mem. op.) (holding that sufficiency of the evidence concerning the child's best interest was irrelevant given that § 161.211(c) did not permit an attack on that basis).

Second, Mother's admission in the affidavit that termination was in her child's best interest satisfied the requisite evidentiary standard. As said in *In re K.S.L.*, a "parent's willingness to voluntarily give up her child, and to swear affirmatively that this is in her child's best interest, is sufficient, absent unusual or extenuating circumstances, to produce a firm belief or conviction that the child's best interest is served by termination." *In re K.S.L.*, 538 S.W.3d at 112; *accord In re D.W.*, No. 07-18-00115-CV, 2018 Tex. App. LEXIS 6003, at *3 (Tex. App.—Amarillo Aug. 1, 2018, no pet.) (mem. op.) (holding that a statutorily compliant affidavit of relinquishment can, alone, provide sufficient evidence that termination is in a child's best interest). Mother cites us to no "unusual or extenuating circumstances" which cause us to deviate from *In re K.S.L*.'s general holding.

Department v. Father

We turn now to the Department's complaint. It proffers a litany of arguments attacking the decision appointing it permanent managing conservator of N.A.O. All arise from the trial court's alleged failure to abide by Texas statute in making the appointment. We sustain the argument.

Conservatorship decisions are reviewed under the standard of abused discretion. *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). A trial court abuses its discretion when its decision is arbitrary and unreasonable, *id.*, such as when made without reference to any guiding rules or principles. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). Under the standard, legal and factual insufficiency are not independent grounds of error, but rather factors in assessing whether abuse occurred. *In re J.J.G.*, 540 S.W.3d 44, 55 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (en banc) (op. on reh'g). For instance, if the complaint implicates the evidentiary basis of the ruling, discretion is not abused if some

evidence of probative character supports it. *Id.* The converse is also true, though. Discretion is abused when no evidence supports it. *Huq v. Huq*, No. 14-10-00866-CV, 2011 Tex. App. LEXIS 7422, at *8 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (mem. op.); *accord Fitch v. Fitch*, No. 05-12-00266-CV, 2013 Tex. App. LEXIS 7015, at *20–21 (Tex. App.—Dallas 2013, no pet.) (mem. op.) (finding the trial court abused its discretion because no evidence supported the decision to halt the payment of child support).

The statute in question provides that a "court may render a final order appointing the department as managing conservator of the child without terminating the rights of the parent of the child if" it finds that "(1) appointment of a parent as managing conservator would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development; ***and*** (2) it would not be in the best interest of the child to appoint a relative of the child or another person." *See* TEX. FAM. CODE ANN. § 263.404(a) (emphasis added). The Department initially contends that the trial court did not make the two findings required by the provision. It is mistaken.

Both findings appear in paragraph 6.1 of the trial court's final order. Therein, it said:

> The Court finds that the appointment of a parent or both parents as managing conservator would not be in the best interest of the child [N.A.O.] because the appointment would significantly impair the child's physical health or emotional development; ***and it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator***.

(Emphasis added). That both findings were not also in the separate findings of fact and conclusions of law issued by the court matters not. This is so because findings within a judgment have probative value as long as they do not conflict with findings appearing in a separate document. *S. Plains Lamesa R.R., Ltd. v. Heinrich*, 280 S.W.3d 357, 364–65

(Tex. App.—Amarillo 2008, no pet.); *Hill v. Hill*, 971 S.W.2d 153, 156 (Tex. App.—Amarillo 1998, no pet.). Here, the finding within the judgment about the child's best interest not being served by having a relative or other person designated as managing conservator does not conflict with anything in the trial court's separate findings issued on October 12, 2021. However, our perusal of the evidentiary record failed to uncover any evidence to support the finding.[2]

It is rather clear that the Department and Mother intended for the parental rights of both parents to be terminated. Their ultimate goal was to have Grandmother adopt N.A.O. That goal was thwarted when Father retained his rights. Similarly clear is that the trial court appointed the Department "permanent" managing conservator after the final hearing because it mistakenly believed the Department had previously been so designated. In fact, the trial court's earlier appointments of Department had only been "temporary." And, while N.A.O. had relatives, such as Grandmother and at least one aunt, the parties presented no evidence depicting them as incapable of adequately exercising conservatorship over the child.[3] Nor did they present evidence touching upon the impact, if any, that their appointment as permanent managing conservator would have on the child's best interest. The same is true about the appointment of anyone other than a relative and the effect it would have on N.A.O.'s best interest.

To reiterate, we find no evidence to support the finding that N.A.O.'s best interest would not be served by appointing a relative of the child or another person as managing

[2] This too was raised by the Department.

[3] On the contrary, N.A.O. had been living with Grandmother for an extended time period. She cared for his needs, be they physical, medical, or emotional. More importantly, the trial court had allowed N.A.O. to remain in her care prior to trial.

conservator. Indeed, it appears that the issue was not broached below. All were focused on the termination of parental rights and a potential adoption of the child. None focused on who would serve as the child's managing conservator if complete termination never occurred. Lacking the requisite evidence to support the second finding, the trial court's ultimate decision to appoint the Department as N.A.O.'s permanent managing conservator constituted an abuse of discretion.

Having overruled Mother's issue but sustained that of the Department, we affirm the trial court's judgment to the extent it terminates Mother's parental rights and preserves Father's parental rights, reverse the portion of the judgment that appoints the Department permanent managing conservator of N.A.O., and remand the cause to the trial court for further proceedings. *See* TEX. R. APP. P. 43.3. Additionally, reversing a judgment generally nullifies it, "leaving it as if it had never been rendered." *In re S.S.G.*, 208 S.W.3d 1, 3 (Tex. App.—Amarillo 2006, pet. denied). This effectively places the parties in the same position that they occupied before the judgment was rendered. *Swank v. Cunningham*, 258 S.W.3d 647, 663 (Tex. App.—Eastland 2008, pet. denied). From this, it logically follows, and we hereby order, that our reversal of the judgment as it pertains to the permanent managing conservatorship of N.A.O. leaves the Department as the child's temporary managing conservator during the interim. This is because it held that position before judgment issued.

Brian Quinn
Chief Justice