NUMBER 13-21-00175-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN THE INTEREST OF J.H., A CHILD

On appeal from the County Court at Law of Aransas County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Longoria, and Tijerina
Memorandum Opinion by Justice Longoria

Appellant D.D. (Mother) appeals the trial court's order terminating her parental rights to her child, J.H.[1] By two issues, Mother argues that her due process rights were violated when: (1) evidence disclosed to the judge in chambers was improperly submitted as evidence to the trial court without allowing Mother to exercise her right to cross-

[1] To protect the identity of the minor child, we utilize aliases for the child and related parties. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8.

examination,[2] and (2) the trial court failed to inform her of her right to counsel before commencement of the adversary hearing. *See* TEX. FAM. CODE ANN. § 262.201(c). We affirm.

I. BACKGROUND

On May 5, 2020, appellee, the Texas Department of Family and Protective Services (the Department), filed its original petition requesting a non-emergency removal of J.H. An adversary hearing was held on May 20, 2020, in which Mother and L.H. (Father)[3] appeared without an attorney. At the conclusion of the hearing, the trial court admonished the parents of their right to request court-appointed counsel:

> The Court: [S]econdly, neither of you has an attorney at this point. If you wish to have an attorney, feel like you need one, and you disagree with what is being done by the Department here, then if you think you can't afford an attorney but want one, you can advise the court and we will see if you qualify to have one paid for by the court for you. But that's up to you. You have to let us know. We can't read your mind about that. All right.
>
> Having crossed that bridge, if you want one, speak up soon. Don't wait.

That same day, the trial court signed a temporary order appointing the Department temporary managing conservator of J.H. The order also stated in pertinent part that "[t]he Court defers its finding regarding an attorney *ad litem* for [Mother], because [Mother] has not appeared in opposition to this suit or has not established indigency." The docket sheet

[2] We note that Mother refers to the evidence disclosed to the judge as occurring "in chambers" in framing her first issue but also refers to the disclosure occurring in a "breakout session" under the facts section of her brief. For consistency below, we use the words "breakout session."

[3] The trial court also terminated Father's parental rights pursuant to Texas Family Code §§ 161.001(b)(1)(E) & O, 161.001(b)(2), but he did not appeal said order. Thus, he is not a party to this appeal.

notes from the hearing state that "[b]oth parents have asked for attorneys[,]" and the court "[m]aiiled [sic] affidavit[s] of indigence to the parents." At the status hearing on July 8, 2020, Mother appeared without an attorney. Temporary managing conservatorship was continued with the Department, and the trial court again informed Mother about her right to counsel as follows:

> The Court: Also the parents need to know that if they disagree with what the Department is doing and the action being taken and wish to be represented by counsel and that if they feel they cannot afford attorneys on their own, then it is up to them to advise me and at that point, I will determine whether or not the court will appoint attorneys on their behalf.
>
> Any questions about that, [Mother] and [Father]?
>
> [Parents]: No, sir.

At the initial permanency hearing on October 21, 2020, Mother did not appear, and the Department requested a termination hearing due to the lack of progress on the parents' service plans. Two days later, the trial court appointed an attorney ad litem for Mother. A permanency hearing was held in which Mother appeared with her attorney on January 20, 2021. Another permanency hearing was set for April 7, 2021, with a trial setting of May 3, 2021. Mother did not personally appear at the next hearing, but her attorney was present. On April 30, 2021, Mother waived her right to a jury trial, and on May 19, 2021 a bench trial was held via Zoom in which Mother appeared with her counsel.

During the trial, at the request of the Department and without objection, a breakout room[4] was used in which all counsel, Officer Jairo Herrera and Sergeant Jeremy Gates

[4] We note that while the Department did request a "breakout room" during the trial proceedings, the record indicates that the witnesses, with the exception of Officer Jairo Herrera and Sergeant Jeremy Gates, were placed in a virtual waiting room, and then brought back into the virtual proceedings once the

with the Aransas Pass Police Department, and the trial court convened. In the breakout session, the following exchange ensued:

[Department]:	Officer Herrera, I have been given a note that is a suggestion that [Mother and Father] are together in violation of a protective order that was issued out of Aransas County. Can you give me information on that?
[Officer Herrera]:	Based on both of our experiences, we think it is the same trailer where they are right now. We had an officer go out there right now and he refused us to go inside the residence and we can't go inside the residence without a search warrant.
[Department]:	What are you asking the court to do?
[Officer Herrera]:	Judge, if you can have one of them walk around the trailer to see if we can see him with the camera.
[Mother's Counsel]:	Everyone has seen this YouTube video of this literally happening in court. It's happened before.
The Court:	I don't know what you are asking me. You want somebody to walk around the trailer.
[Father's Counsel]:	I am a late bloomer to this.
[Department]:	The purpose is to find out if [Mother and Father] are together in violation of a protective order; is that correct?
[Officer[5]]:	Yes, sir.

breakout session concluded.

[5] It is unclear from the record, which of the two officers in the breakout session answered the Department's question as the record only states "Officer", and the record uses the term "Officer Gates" when referring to Sergeant Jeremy Gates.

[Child's Ad Litem]: Perhaps we can ask him under oath at the appropriate time when they are called, if they are called. If they choose to commit perjury—

The Court: You know, I am still unclear Officer Herrera is the request is for somebody to walk around the trailer with a camera?

[Mother's Counsel]: One of them. One of the parents is the request, right?

[Officer Herrera]: Yes.

The Court: Just walk around inside the trailer?

[Officer Herrera]: To see if they are together or not.

The Court: It would be interesting to see the condition of the trailer.

Officer Gates: This would also make a third arrest for her for violating the PO if they were together.

The Court: Do I hear objection to the request?

[Mother's Counsel]: Judge, I have to object. I have to. I don't know what her status is with her criminal cases. I know she was released from jail this past Saturday for the same alleged offense. But as far as a I am aware today, I have been informed that she is staying with a friend, moving from friend's house to friend's house as she is able to find availability and that she is using a friend's device for this hearing.

So in terms of my personal knowledge, that's all I know. I don't have a legal objection to the request.

The Court: Bring them back in, please.

Court Manager: I am letting everyone back in now. Is it okay to resume the live stream now as well?

The Court: That's fine.

The trial court did not grant the request for the parents to walk around the trailer with their Zoom cameras on. At the conclusion of the bench trial, the trial court terminated Mother's parental rights to J.H., and subsequently signed an order terminating her parental rights pursuant to §§ 161.001(b)(1)(E) and (O), and the best interest of the child. *See* TEX. FAM. CODE ANN. §§ 161.001(b)(1)(E) & (O); 161.001(b)(2).

This accelerated appeal followed. *See id.* § 109.002; *see also* TEX. R. APP. P. 28.1, 28.4.

II. BREAKOUT SESSION

In her first issue, Mother argues that the trial court violated her constitutional due process rights and violated Texas Rule of Evidence 611 by permitting two witnesses to testify in a breakout session outside her presence and by failing to give her the opportunity to cross examine these two witnesses on their new testimony.[6] We must first decide whether Mother preserved her constitutional claim for review.

Even constitutional complaints can be waived absent a timely objection. *See In re B.L.D.*, 113 S.W.3d 340, 353 (Tex. 2003) ("Appellate review of potentially reversible error never presented to a trial court would undermine the Legislature's dual intent to ensure finality in these [parental termination] cases and expedite their resolution."); *see also In re M.W.*, No. 13-19-00593-CV, 2020 WL 1887769, at *3 (Tex. App.—Corpus Christi–Edinburg Apr. 16, 2020, no pet.) (mem. op.) ("[C]omplaints about due process violations

[6] Mother also argues that the officers' request to do a virtual search of her location would have been a violation of her due process rights. However, the request was implicitly denied by the trial court, leaving nothing for our review.

must be raised and ruled on in the trial court in order to be preserved for appeal.").

Here, Mother did not seek a finding or raise a legal argument before the trial court about a constitutional due process claim related to the confrontation or cross examination of any adverse witnesses, namely, the two officers in the virtual breakout session. *See* TEX. R. APP. P. 33.1(a)(1), (2) (requiring as a prerequisite to presenting a complaint for appellate review, a showing on the record that the complaint was made to the trial court by a timely request, objection, or motion and a ruling from the trial court on such request, objection, or motion); *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003); *see also In re J.C.R.*, No. 13-18-00491-CV, 2020 WL 3396603, at *7 (Tex. App.—Corpus Christi–Edinburg June 18, 2020, no pet.) (mem. op.) (holding that the appellant's due process argument was not preserved and reasoning in part that "[Father], who was represented by counsel, sought no finding and raised no legal argument before the trial court about a constitutional claim").

Similiarly, although Mother cites to Texas Rule of Evidence 611, she also did not raise this complaint to the trial court during the trial proceedings. *See* TEX. R. APP. P. 33.1(a)(1), (2).[7] Moreover, other than a recitation of the evidentiary rule coupled with a bald assertion of a violation of such rule, Mother has not directed us to any authorities to show even without an objection raised, this alleged rule violation is preserved for our

[7] Additionally, in support of her first issue, Mother also relies on *Brown v. McLennan Cty. Children's Protective Servs.*, 627 S.W.2d 390, 393 (Tex. 1982), which has been *abrogated by Ex parte E.H.*, 602 S.W.3d 486, 496–97 (Tex. 2020) (abrogation pertaining to fourth requirement for a restricted appeal). For that reason, we do not address *Brown* in the body of this memorandum opinion. Nonetheless, we relevantly note here that under the circumstances of the *Brown* case, the court held that the appellant did not have a right to an attorney. *See Brown*, 627 S.W.2d at 394, *abrogated by Ex parte E.H.*, 602 S.W.3d 486 (Tex. 2020).

review and a violation of such rule is reversible error. *See* TEX. R. APP. P. 38.1(i); *In re J.A.M.R.*, 303 S.W.3d 422, 425 (Tex. App.—Dallas 2010, no pet.) ("Bare assertions of error without argument or authority waive error."); *see also Sandoval v. Sandoval*, No. 13-17-00128-CV, 2019 WL 386138, at *2 (Tex. App.—Corpus Christi–Edinburg Jan. 31, 2019, no pet.) (mem. op.) (finding appellant inadequately briefed his complaints after explaining that "[h]e merely recites the issues without providing any discussion, argument, authority, or substantive analysis."). Even if we were to consider the issue preserved, the record does not show that Mother's counsel was prevented from asking either officer a question, as referenced above. Indeed, shortly after one of the officers stated his suspicions, Mother's counsel made a general comment, and later in the proceedings, out of the breakout session, the trial court asked all parties whether there was any reason that the two officers could not be released to which Mother's counsel responded "No objection." Therefore, under these circumstances, we hold that Mother has not preserved her issue for appellate review. *See* TEX. R. APP. P. 33.1(a)(1), (2); *In re M.W.*, 2020 WL 1887769, at *3. Accordingly, we overrule Mother's first issue.

III. ADMONISHMENT

By her second issue,[8] Mother argues her due process rights were violated when

[8] In the conclusion section of Mother's appellate brief on her second issue, she misstates or re-characterizes the issue she previously framed on appeal from an untimely lack-of-admonishment complaint to a failure-to-appoint-counsel complaint. Nonetheless, we will liberally construe her brief to discuss both §§ 107.013(a)(1) and 262.201(c) of the Texas Family Code in addressing Mother's second issue. *See* TEX. FAM. CODE ANN. §§ 107.013(a)(1) (governing the appointment of attorney ad litem for an indigent parent who responds in opposition to termination or appointment) and 262.201(c) (requiring the court to inform an unrepresented parent of the right to be represented and if a parent is indigent and appears in opposition, such parent's right to a court-appointed attorney); *Rivera v. State*, 130 S.W.3d 454, 459 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.) ("[I]t long has been the practice to liberally construe briefs to obtain a just, fair, and equitable adjudication of the rights of the litigants.").

the trial court failed to inform her of her right to counsel before commencement of the adversary hearing as required by Texas Family Code § 262.201(c)(1), (2).[9] Specifically, Mother argues that the trial court's failure resulted in the denial of her fundamental due process right to defend herself in a meaningful way in an action brought by the Department. Mother further explains that she was prevented from cross examining a witness at the adversary hearing which she asserts indicates her inability to meaningfully represent herself. Additionally, Mother asserts without legal counsel she was denied the opportunity to object to leading questions and to exclude alleged inadmissible evidence.

A. Standard of Review & Applicable Law

Termination proceedings should be strictly scrutinized, and involuntary termination statutes are strictly construed in favor of the parent. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *Ybarra v. Tex. Dep't of Hum. Servs.,* 869 S.W.2d 574, 576 (Tex. App.—Corpus Christi–Edinburg 1993, no writ); *see also In re C.M.D.*, No. 13-20-00402-CV, 2021 WL 497302, at *3 (Tex. App.—Corpus Christi–Edinburg February 11, 2021, no pet.) (mem. op.). "Due process 'expresses the requirement of 'fundamental fairness,' a requirement as opaque as its importance is lofty.'" *In re K.S.L.*, 538 S.W.3d 107, 112 (Tex. 2017) (citing *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 24 (1981)). "At a minimum, due process requires notice and an opportunity to be heard at a

[9] We also construe Mother to argue that she was deprived of a meaningful way to defend herself at the adversary hearing because the trial court failed to give the statutory admonishment at the commencement of the proceeding which therefore renders the temporary order void, but such issue is moot given Mother did not challenge the temporary order by mandamus and the trial court has since entered a final judgment. *See In re Tex Dep't of Fam. & Protective Servs*., 255 S.W.3d 613, 615 (Tex. 2008); *see also In re C.M.D.*, No. 13-20-00402-CV, 2021 WL 497302, at *4 (Tex. App.—Corpus Christi–Edinburg Feb. 11, 2021, no pet.) (mem. op.) ("Once a trial court renders a final judgment, any issue concerning its earlier removal orders becomes moot.").

meaningful time and in a meaningful manner." *In re A. J.*, 559 S.W.3d 713, 720 (Tex. App.—Tyler 2018, no pet.) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

A two-part test is applied when analyzing a due process claim, namely: (1) whether the complaining party has a liberty or property interest entitled to protection; and (2) if so, what process is due. *Id*. at 719. To assess what process is due, a court balances: (1) the private interest affected by the proceeding or official action; (2) the countervailing governmental interest supporting use of the challenged proceeding; and (3) the risk that the procedure will lead to erroneous decisions. *In re K.S.L.*, 538 S.W.3d at 114. "Courts must weigh these factors to determine whether the fundamental requirements of due process have been met by affording an opportunity to be heard at a meaningful time and in a meaningful manner under the circumstances of the case." *In re A. J.*, 559 S.W.3d at 720.

Section 262.201(c) of the Texas Family Code provides that "[b]efore commencement of the full adversary hearing, the court must inform each parent not represented by an attorney of: (1) the right to be represented by an attorney; and (2) if a parent is indigent and appears in opposition to the suit, the right to a court-appointed attorney." TEX. FAM. CODE ANN. § 262.201(c)(1), (2). Section 107.013(a)(1) states that "[i]n a suit filed by a governmental entity . . . in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of: (1) an indigent parent of the child who responds in opposition to the termination or appointment." *Id*. at § 107.013(a)(1).

B. Discussion

Assuming without deciding that Mother's due process complaint requires our preservation rules to give way, Mother's due process argument nonetheless fails. *See generally*, *In re B.L.D.*, 113 S.W.3d at 354–55 (finding court of appeals erred in reviewing unpreserved complaint on jury charge but acknowledging that in a given parental rights termination case, a different calibration of the *Eldridge* factors could require a court of appeals to review an unpreserved complaint of error to ensure that our procedures comport with due process).

Mother's argument fails because she does not show how she was denied a meaningful way to defend herself in the termination proceedings or a meaningful opportunity to do so. As the record shows, she was represented by counsel nearly seven months before the trial with the proceedings as a whole spanning a little over a twelve-month timeframe. *See In re A. J.*, 559 S.W.3d at 721 (holding that the appellant was denied procedural due process after explaining, among other things, "[t]hat despite his representation by counsel at the second half of the termination trial, [the appellant] was effectively without representation during the almost eighteen months of the case"); *see generally, In re N.G.*, No. 13-00-00749-CV, 2001 WL 1554200, at *3 (Tex. App.—Corpus Christi–Edinburg Nov. 29, 2001, no pet.) (mem. op.) (noting under waiver of error analysis in right to counsel claim that when the appellant was appointed counsel she and her counsel had more than seven months to prepare for the termination hearing). Additionally,

Mother has not complained about the effectiveness of her appointed counsel at any stage of the proceeding.

Moreover, while it is clear from the record that the trial court failed to properly timely admonish Mother at the adversary hearing, Mother fails to show how this error is harmful error and warrants reversal of the judgment. *See* TEX. R. APP. P. 44.1(a)(1) (stating that a judgment may not be reversed unless this Court concludes that the error "probably caused the rendition of an improper judgment"); *see also In re S.R.*, No. 10-19-00235-CV, 2019 WL 7374736, at *2 (Tex. App.—Waco Dec. 31, 2019, pet. denied) (mem. op.) (stating that it was error where the parents were not admonished at the adversary hearing, the status hearing, and the first permanency hearing and finding error was not harmless where parents were unrepresented approximately one third of the time the case was pending and testified at hearings without the benefit of counsel); *In re B.C.*, 592 S.W.3d 133, 137 (Tex. 2019) (citing Texas Rule of Appellate Procedure 61.1 and stating that "[f]ollowing the *repeated* failure to properly admonish [appellant], she remained unrepresented at trial . . .[.] Given these circumstances, and absent a dispute that Mother is truly indigent, noncompliance with [§] 263.0061 was not harmless and reversal is required") (emphasis added).

Indeed, the record shows that Mother was not called as a witness by any of the parties at the adversary hearing or at the next hearing. Additionally, Mother declined to make a statement when the trial court asked her if she wanted to do so at the adversary hearing. Further, the facts presented are different than those in *In re B.C.*, because while the trial court in *In re B.C*. admonished the appellant at the status hearing as in this case,

here, Mother did not appear at the initial permanency hearing, and was thereafter represented by appointed counsel at both subsequent hearings, including one she again personally failed to attend, and trial. *See In re B.C.*, 592 S.W.3d at 137 ("Mother was present and unrepresented at several hearings falling within [§] 263.0061's ambit without receiving the mandatory admonitions, including at one of the most critical points in the proceeding—the permanency hearing immediately before trial, when the Department expressed the necessity of moving forward with the impending termination trial due to the statutory dismissal deadline."); *Ybarra,* 869 S.W.2d at 580 (overruling appellant's right to appointed counsel issue by considering, in part, that appellant was represented by retained counsel at trial).

Further, even considering that the docket sheet reflects the desires of Mother to be represented by an attorney, the record is void of an affidavit of indigency, and we observe that § 107.013 of the Texas Family Code concerning the mandatory appointment of counsel in a termination suit does not specify a particular time that an appointment must be made. *See* TEX. FAM. CODE ANN. § 107.013(a)(1) ("In a suit filed by a governmental entity under Subtitle E in which termination of the parent-child relationship or the appointment of a conservator for a child is requested, the court shall appoint an attorney ad litem to represent the interests of: an indigent parent of the child who responds in opposition to the termination or appointment."); *In re M.J.M.L.*, 31 S.W.3d 347, 354 (Tex. App.—San Antonio 2000, pet. denied) (stating that the timing of appointment of counsel to indigent parents appearing in opposition to termination is a matter within the trial court's discretion); *see also In re A.M.*, No. 13-11-00304-CV, 2011 WL 5844526, at

*3 (Tex. App.—Corpus Christi–Edinburg Nov. 22, 2011, no pet.) (mem. op.) (explaining that the Legislature did not set forth any time frame or procedure by which trial courts must appoint counsel). As stated previously, the record reflects that the trial court appointed Mother an attorney nearly seven months before the termination proceeding. *See* TEX. FAM. CODE ANN. § 107.013(a)(1); *see also In re K.G.,* No. 09-17-00153-CV, 2017 WL 4414024, at *5 (Tex. App.—Beaumont Oct. 5, 2017, no pet.) (mem. op.) (concluding that the timing of appointment of counsel, approximately four months before trial, was not shown to have led to the rendition of an improper judgment). Thus, we hold that under these circumstances, the trial court did not reversibly err, and we overrule Mother's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

Delivered and filed on the
4th day of November, 2021.