Parent testifying against a child does not warrant “sua sponte” appointment of guardian ad litem by the court. [In the Matter of S.A.](15-1-4A)

On December 31, 2014, the Texarkana Court of Appeals held that trial court did not abused its discretion in not appointing a guardian ad litem where parents were present at the child’s hearings and there was nothing in the record to suggest that the parents were incapable or unwilling to make decisions in the child’s best interest.

¶ 15-1-4A. **In the Matter of S.A.**, MEMORANDUM, No. 06-14-00055-CV, 2014 WL 7442507 (Tex.App.-Texarkana, 12/31/14).

Facts: In the first five months of 2014, fifteen-year-old Sandra had, let's say, a tumultuous relationship with her sixty-five-year-old father, marked by three documented instances in which Sandra assaulted or injured him. The first two instances resulted in Sandra's probation.

The final confrontation occurred the afternoon of May 10, 2014. That afternoon, Sandra was listening to music on a cellular telephone while she sunbathed outside her home. Wanting to hear different music, Sandra went inside to download more music from the computer. Since the conditions of Sandra's existing probation forbad her to use the computer, her father sought to stop her. Her father, who had broken his foot several days before, stumbled as he tried to get between Sandra and the computer. As he sought to stop her, he grabbed the base of the back of her neck. At about the same time, Sandra stomped his broken foot, which was in a cast, on top and at the ankle, and kicked his shin. Her mother then restrained her as her father tried to get out of the door. As she was being restrained, she slung her telephone with its charger, and it struck and cut her father's arm.

At Sandra's June 12, 2014, hearing, Sandra's mother appeared at trial, sat at the counsel table with Sandra, and was ultimately called as a witness by the State. Sandra's mother's testimony generally confirmed the testimony of Sandra's father—that Sandra had assaulted him on the occasion in question.

On appeal, Sandra complains that the trial court did not appoint a guardian ad litem because her mother was incapable of making decisions in her best interest. Sandra asserts that her mother had an inherent conflict of interest because she was the victim's wife, a witness to the incident, and a key witness for the State. At the hearing below, Sandra did not ask for a guardian ad litem to be appointed or point to any conflict of interest her mother may have had. Nevertheless, Sandra maintains that the right to a guardian ad litem is a “waivable only” right and that the right to a guardian ad litem is on par with the right to counsel. She cites no authority, however, and we have found none, that has so held when a parent is present at the hearing.

Held: Affirmed

Memorandum Opinion: In any case in which it appears to the juvenile court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings. TEX. FAM.CODE ANN. § 51.11(b) (West 2014) (emphasis added).

When a parent is present at the hearing, the appointment of a guardian ad litem is in the sound discretion of the trial court. In the Matter of P.S.G., 942 S.W.2d 227, 229 (Tex.App.—Beaumont 1997, no writ). In P.S.G., P.S.G.'s mother was present at trial and was called as a witness on behalf of her son. Nevertheless, P.S.G. asserted that since she was the mother of the alleged victim, she had an inherent conflict of interest and was therefore incapable of acting in P.S.G.'s best interest and rendering friendly support and guidance. Id. at 228. Since, under the statute, the decision to appoint a guardian ad litem is discretionary, the court of appeals found nothing in the statute to support the contention that the trial court's failure to sua sponte appoint a guardian ad litem deprived P.S.G. of any fundamental right. Id. at 229. Further, the court refused to assume, without evidence, that P.S.G.'s mother could not render the necessary support and guidance. Id.FN4

FN4. The court of appeals went on to hold that P.S.G., by failing to object at the hearing below, had not preserved his error. Id.; see TEX. R. APP. P. 33.1(a). We also doubt that Sandra preserved error in this case.

While acknowledging that Texas courts have not found error when a trial court does not sua sponte appoint a guardian ad litem, Sandra asserts that none have involved a parent who was closely related to the victim and testified on behalf of the State. Several cases, however, have involved parents who have been present at trial and gave testimony adverse to the juvenile. In the Matter of P.A.C. concerned the father of the juvenile who was present and seated at the counsel table with his daughter at her certification hearing. The State introduced the affidavit of the father, which, along with other documents, tended to implicate his daughter in the alleged crime. In the Matter of P.A.C., 562 S.W.2d 913, 917 (Tex.Civ.App.—Amarillo 1978, no writ). Finding nothing in the affidavit or record to indicate the father's lack of willingness to make decisions in the best interest of his daughter or his adversary position, the court of appeals found the trial court had not erred in failing to appoint a guardian ad litem. Id. In two cases the San Antonio court of appeals has also found no error when a parent testified adverse to the juvenile, but there was nothing in the record to show that the parent was incapable of making or unwilling to make decisions in the best interest of the juvenile. In re J.W.M.D., No. 04–08–00908–CV, 2009 WL 2878111 (Tex.App.—San Antonio Sept. 9, 2009, no pet.)(mem. op., not designated for publication); In re L.A.P., No. 04–07–00143–CV, 2008 WL 312704 (Tex.App.—San Antonio

Feb. 6, 2008, no pet.)(mem.op.). In L.A.P., the fifteen-year-old juvenile was charged with two counts of assault causing bodily injury to her father. L.A.P., 2008 WL 312704, at *1. Both her father and mother testified against allowing L.A.P. to serve probation in the home because they feared for their own and her safety based on L.A.P.'s gang affiliation and threats she had made against her father. Id. at *1–2. The court of appeals held that, since (1) the father was present at the adjudication and disposition hearing and both parents were present at the continuation and (2) there was nothing in the record to suggest that the parents were incapable or unwilling to make decisions in L.A.P's best interest, the trial court had not abused its discretion in not appointing a guardian ad litem. Id. at *4.

In this case, Sandra's mother testified at the hearing, and her testimony confirmed the testimony of her husband, which had been placed in question by the vigorous cross-examination of Sandra's trial counsel. There is nothing in the record, however, to suggest that her mother was incapable or unwilling to make decisions in Sandra's best interest. Further, at no time did Sandra request that a guardian ad litem be appointed. Nor did she claim to the trial court that her mother was not giving her friendly support and guidance or that she was incapable of making or unwilling to make decisions in her best interest.

Sandra also asserts that additional harm caused by the trial court not appointing a guardian ad litem "is ... that [her] counsel would have been unable to invoke 'the rule' excluding witnesses from the courtroom." See TEX.R. EVID. 614. Sandra's counsel, however, invoked this rule before any testimony and, although the State had identified her mother as a witness before trial began, did not object to her remaining in the courtroom, nor did she object when her mother was eventually called as a witness by the State.

Conclusion: Under these facts, we find that the trial court did not abuse its discretion in failing to sua sponte appoint a guardian ad litem. We overrule this point of error.