Affirmed and Memorandum Opinion filed January 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00960-CV

IN THE INTEREST OF K.L.A.C., D.D.C., AND S.L.H.C.

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Cause No. 2007-02942J

M E M O R A N D U M O P I N I O N

Appellant Denise Ann Tucker appeals a final order terminating her parental rights to her children K.L.A.C., D.D.C., and S.L.H.C.[1] After a bench trial, the trial court (1) appointed the Texas Department of Family and Protective Services ("DFPS") as sole managing conservator of appellant's three children; and (2) involuntarily terminated the parent-child relationship between appellant and all three children. In three issues, appellant argues (1) the evidence was legally and factually insufficient to support the trial court's findings justifying termination of appellant's parental rights; (2) the evidence was legally and factually insufficient to prove that termination of the parent-child relationship

[1] *See* Tex. R. App. P. 9.8 (requiring alias name for child in parental-rights termination cases).

between appellant and K.L.A.C., D.D.C., and S.L.H.C. was in the best interest of the children; and (3) she received ineffective assistance of counsel.[2] We affirm.

Background

Appellant is the biological mother of three children: K.L.A.C., age eight; D.D.C., age seven; and S.L.H.C., age five. DFPS received a referral of neglectful supervision of K.L.A.C. on March 21, 2007. K.L.A.C., who is autistic and mentally retarded, was found unsupervised in a parking lot near a busy street. After speaking with a DFPS investigator, appellant agreed to place all three children with their maternal grandparents.

Shortly after the children were placed with their maternal grandparents, DFPS learned that appellant's mother was ill and having difficulty caring for the children, and that there was no running water at the house. A DFPS caseworker also requested that appellant and her parents submit to a drug test on March 27, 2007. Appellant refused, stating that she would test positive for Xanax. Appellant's father also refused. Appellant's mother complied with the request and tested positive for cocaine.

DFPS subsequently removed all three children from their maternal grandparents' home on March 27, 2007, and filed a petition seeking to terminate the parent-child relationship between appellant and her three children on March 28, 2007.[3] A family service plan was filed on May 11, 2007. Under the family service plan, appellant was required to attend parenting classes; visit her children twice a month; complete a drug and alcohol assessment; complete a psychological evaluation; and submit to random drug tests.

A bench trial was held on September 24, 2008. On October 8, 2008, the trial court

[2] Appellant does not appeal the trial court's appointment of DFPS as sole managing conservator of appellant's three children. Therefore, only the trial court's decision to terminate the parent-child relationship of appellant and K.L.A.C., D.D.C., and S.L.H.C. is addressed in this appeal.

[3] The trial court also terminated the parental rights of (1) Shawn Henry Campbell, the alleged father of K.L.A.C., D.D.C., and S.L.H.C.; and (2) the "unknown father" of K.L.A.C., D.D.C., and S.L.H.C. The trial court's termination of the parental rights of Shawn Henry Campbell and the "unknown father" as to K.L.A.C., D.D.C., and S.L.H.C. is not challenged in this appeal.

signed its judgment appointing DFPS as sole managing conservator of K.L.A.C., D.D.C., and S.L.H.C., and involuntarily terminating the parent-child relationship between appellant and all three children.

The court found that termination of the parent-child relationship was in the best interests of the children and that appellant:

- "knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children[,]" *see* Tex. Fam. Code Ann. § 161.001(1)(D) (Vernon 2002);
- "engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children[,]"*see id.* § 161.001(1)(E);
- "constructively abandoned the children who have been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services or an authorized agency for not less than six months and: (1) the Department or authorized agency has made reasonable efforts to return the children to the mother; (2) the mother has not regularly visited or maintained significant contact with the children; and (3) the mother has demonstrated an inability to provide the children with a safe environment[,]"*see id.*§ 161.001(1)(N); and
- "failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the children who have been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse or neglect of the children[,]" *see id.* § 161.001(1)(O).

Appellant filed her (1) notice of appeal, (2) affidavit of indigence, and (3) motion for new trial and statement of appellate points on October 15, 2008. On October 29, 2008, the trial court held a hearing and signed an order denying appellant's motion for new trial, sustaining appellant's affidavit of indigence, and finding the appeal to be frivolous.[4] *See* Tex. Fam. Code Ann. § 263.405(d) (Vernon 2009).

Analysis

Appellant presents three issues on appeal. As a threshold matter, DFPS argues that appellant's legal and factual sufficiency challenges are subject to Texas Family Code section 263.405(g) because the trial court determined that the appeal is frivolous. DFPS argues that under section 263.405(g), we must first review the trial court's frivolousness finding before proceeding to the merits of this appeal. We agree.[5]

I. Frivolousness Finding

Family Code section 263.405(b) requires an appellant to file "a statement of the point or points on which the party intends to appeal" not later than the 15th day after the date a final termination order is signed. *Id.* § 263.405(b). Once a party files a statement of appellate points, section 263.405(d) requires the trial court to hold a hearing to determine whether: (1) a new trial should be granted; (2) a party's claim of indigence, if any, should be sustained; and (3) the appeal is frivolous as provided by Civil Practice and Remedies Code section 13.003(b). *Id.* § 263.405(d). If the trial court concludes that the appeal is frivolous, appellant may appeal the trial court's frivolousness finding. *Id.* § 263.405(g). But appellant's appeal is limited to the trial court's determination that the appeal is frivolous. *See* Tex. Civ. Prac. & Rem. Code Ann. § 13.003(a)(2)(A) (Vernon

[4] Appellant's initial appellate counsel filed an *Anders* Brief. Counsel's brief did not comply with the procedures set out in *Anders v. California*, 386 U.S. 738 (1967). We granted counsel's motion to withdraw, abated this appeal, and remanded to the trial court with instructions to appoint other counsel for appellant. After the trial court appointed other counsel for appellant, we reinstated this appeal.

[5] We construe appellant's briefing to include a challenge to the trial court's finding that her appeal is frivolous. *See Lumpkin v. Dep't of Family and Protective Servs.*, 260 S.W.3d 524, 525 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *In re R.A.P.*, No. 14-06-00109-CV, 2007 WL 174376, at *2 (Tex. App.—Houston [14th Dist.] Jan. 25, 2007, pet. denied) (mem. op.).

2002); *Lumpkin v. Dep't of Family and Protective Servs.*, 260 S.W.3d 524, 526 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (appellate court must consider frivolousness issue before proceeding to the merits of the appeal).

We review a trial court's determination that an appeal is frivolous for abuse of discretion. *In re J.J.C.*, Nos. 14-08-01074-CV, 14-08-01091-CV, 14-08-01129-CV, 2009 WL 3817892, at *6 (Tex. App.—Houston [14th Dist.] Nov. 17, 2009, no pet.); *Lumpkin*, 260 S.W.3d at 526. An appeal is frivolous when it lacks an arguable basis in law or in fact. *In re K.D.*, 202 S.W.3d 860, 865 (Tex. App.—Fort Worth 2006, no pet.). In determining whether an appeal is frivolous, the trial court considers "whether the appellant has presented a substantial question for appellate review." Tex. Civ. Prac. & Rem. Code Ann. § 13.003(b); *see* Tex. Fam. Code Ann. § 263.405(d)(3) (incorporating section 13.003(b) by reference).

Appellant identified two appellate issues in her statement of points on appeal: (1) whether the evidence was legally and factually sufficient to support the trial court's finding that appellant committed one or more of the acts specifically named in Family Code section 161.001; and (2) whether the evidence was legally and factually sufficient to support the trial court's determination that termination of appellant's parental rights as to K.L.A.C., D.D.C., and S.L.H.C. was in the best interest of the children.

To terminate a parent-child relationship, a trial court must find by clear and convincing evidence that (1) termination is in the best interest of the child, and (2) the parent committed one or more of the acts specifically named in Family Code section 161.001. Tex. Fam. Code Ann. § 161.001. "Clear and convincing evidence" is defined as the "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam. Code Ann. § 101.007 (Vernon 2002). Only one ground under section 161.001 is necessary to support a judgment in a parental rights termination case. *See* Tex. Fam. Code Ann. § 161.001; *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003).

When conducting a legal and factual sufficiency review in a parental rights

termination case, we must determine whether the trial court abused its discretion by finding that, based on the evidence, the factfinder reasonably could have formed a firm belief or conviction that its findings were true. *See In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *In re J.F.C.*, 96 S.W.3d 256, 265-66 (Tex. 2002). In reviewing legal sufficiency of the evidence, we examine all of the evidence in the light most favorable to the factfinder's findings. *In re J.F.C.*, 96 S.W.3d at 266. In reviewing factual sufficiency, we examine all of the evidence giving due consideration to evidence that the factfinder could have reasonably found to be clear and convincing. *Id.* We also consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *Id.* If the disputed evidence that a reasonable factfinder could not have credited in favor of its finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

Appellant first challenges the legal and factual sufficiency of the trial court's finding that appellant committed one or more of the acts specifically named in Family Code section 161.001. The trial court terminated appellant's parental rights on grounds that appellant (1) "knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endanger the physical or emotional well-being of the children;" (2) "engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical or emotional well-being of the children;" (3) constructively abandoned the children; and (4) "failed to comply with the provisions of a court order that specifically established the actions necessary for the mother to obtain the return of the children who have been in the permanent or temporary managing conservatorship of [DFPS] for not less than nine months as a result of the children's removal from the parent under Chapter 262 for the abuse or neglect of the children." *See* Tex. Fam. Code Ann. § 161.001(1)(D),(E),(N),(O).

In regards to the trial court's finding that appellant failed to comply with the provisions of a court order, appellant argues that the record "does not contain an order

signed by the Court with which Appellant may or may not have complied with." DFPS filed a family service plan on May 11, 2007. The trial court approved and adopted DFPS's family service plan without modification in an order signed on May 18, 2007. Although the family service plan is not a court order itself, the trial court's order approving and adopting the family service plan established that compliance with the requirements of the family service plan was an action necessary for appellant to obtain the return of her children. *See In re E.S.C.*, 287 S.W.3d 471, 475 (Tex. App.—Dallas 2009, pet. filed).

Under the family service plan, appellant was required to attend parenting classes; visit her children twice a month; complete a drug and alcohol assessment; complete a psychological evaluation; and submit to random drug tests. At trial, Raneka Hayes, a DFPS case worker, testified that appellant completed only a psychological evaluation; appellant did not complete any of the other requirements under her family service plan. Appellant does not argue that she complied with the provisions of the family service plan. Appellant does not contest that her children had been under the conservatorship of DFPS for more than nine months, or that they were removed for abuse or neglect.

Based on the record, the factfinder reasonably could have formed a firm belief or conviction that appellant failed to comply with a court order specifically establishing the actions necessary for appellant to regain custody of her children. *See id.* Therefore, the trial court did not abuse its discretion when it made a frivolousness determination as to appellant's legal and factual sufficiency challenge to the evidence supporting the trial court's finding that appellant committed one or more of the acts specifically named in Family Code section 161.001.[6]

Appellant next challenges the legal and factual sufficiency of the evidence supporting the trial court's finding that termination of her parental rights as to K.L.A.C.,

[6] Because only one ground alleged under section 161.001 is necessary to support a judgment in a parental rights termination case, we do not address appellant's arguments regarding the trial court's other three grounds for termination. *See* Tex. Fam. Code Ann. § 161.001; *In re A.V.*, 113 S.W.3d at 362.

D.D.C., and S.L.H.C. was in the best interest of the children. Courts consider the following factors in determining whether termination of the parent-child relationship is in the best interest of the child: (1) the child's desires; (2) the child's emotional and physical needs now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or by the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976); *In re C.M.C.*, 273 S.W.3d 862, 876 (Tex. App.—Houston [14th Dist.] 2008, no pet.). "Best interest" does not require proof of any unique set of factors, and it does not limit proof to any specific factors. *In re S.M.L.*, 171 S.W.3d 472, 480 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The same evidence of acts or omissions used to establish a ground for termination under section 161.001(1) may be probative in determining the best interest of the child. *In re A.A.A.*, 265 S.W.3d 507, 516 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

At trial, there was evidence that K.L.A.C. is autistic and mentally retarded. As a result, K.L.A.C. requires a high level of assistance. There was also evidence that S.L.H.C. had behavioral problems and was receiving play therapy. Hayes testified that appellant was not able to meet the needs of the children. There also was evidence that all three children were doing well in their placements. Hayes testified that DFPS was currently searching for adoptive homes for the children, and she believed DFPS could find adoptive homes for the children. There was evidence that appellant had failed to complete any of the services required under her family services plan other than completing a psychological examination. There was evidence that appellant did not attend all of her scheduled visits with her children and was "sporadic in her contact with" DFPS. There was evidence that appellant refused to submit to a drug test and stated she

would test positive for Xanax. There also was evidence that appellant had moved three times between February 2008 and November 2008 and had failed to demonstrate that she could provide a stable home for the children.

Appellant did not attend the trial and offered no evidence of her ability to care for the children or her plans to care for the children in the future.

Based on this record, the factfinder reasonably could have formed a firm belief or conviction that termination of appellant's parental rights as to K.L.A.C., D.D.C., and S.L.H.C. was in the best interest of the children. *See Holley*, 544 S.W.2d at 371-72; *In re C.M.C.*, 273 S.W.3d at 876. Therefore, the trial court did not abuse its discretion when it made a frivolousness determination as to appellant's legal and factual sufficiency challenge to the evidence supporting the trial court's finding that termination of appellant's parental rights as to K.L.A.C., D.D.C., and S.L.H.C. was in the best interest of the children.

After reviewing the appellate record, we conclude that appellant's statement of points did not present a substantial question for appellate review. *See* Tex. Civ. Prac. & Rem. Code Ann. § 13.003(b); Tex. Fam. Code Ann. § 263.405(d)(3) (incorporating section 13.003(b) by reference).

We overrule appellant's first and second issues.

II. Ineffective Assistance of Counsel

Appellant also argues that she received ineffective assistance of counsel. Ineffective assistance of counsel claims are not subject to the procedural rules of Family Code section 263.405. *See In re J.O.A.*, 283 S.W.3d 336, 339 (Tex. 2009).

We review claims of ineffective assistance of counsel in termination cases under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003). Under *Strickland*, an appellant must establish that (1) trial counsel's representation was deficient; and (2) the deficient performance was so serious that it deprived the appellant of a fair trial. *Strickland*, 466 U.S. at 687; *In re M.S.*, 115

S.W.3d at 545. To statisfy these prongs, the appellant must establish by a preponderance of the evidence that (1) counsel's representation fell below the objective standard of prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 690-94. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 694. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *In re K.K.*, 180 S.W.3d 681, 685 (Tex. App.—Waco 2005, no pet.).

When reviewing a claim of ineffective assistance of counsel, we look to the totality of the representation and not to isolated instances of error or to a single portion of the trial. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Rivera-Reyes v. State*, 252 S.W.3d 781, 788-89 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Appellate review of trial counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007).

If the reasons for counsel's conduct at trial do not appear in the record and it is at least possible that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *Id.* To warrant reversal when trial counsel has not been afforded an opportunity to explain those reasons, the challenged conduct must be "'so outrageous that no competent attorney would have engaged in it.'" *Roberts v. State*, 220 S.W.3d 521, 533-34 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 920 (2007) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). A vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally deficient. *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

Appellant argues that her trial counsel was ineffective because he did not "bother to cross-examine" DFPS's sole witness, Hayes. Appellant argues that her trial counsel should have asked the following:

> Ms. Hayes testified about a recommended follow through after Appellant's psychological examination but has not asked what. She testified without details in the visits of Appellant, nothing about whether Appellant was appropriate. Nothing was asked about her moves, or why she was unstable and why she had an inability to care for the children. Nothing was asked for details on why [D.D.C.] and [S.L.H.C.] are thriving.

Contrary to appellant's assertion, appellant's trial counsel questioned Hayes at trial. Appellant's trial counsel asked Hayes if she had had any recent contact with appellant; Hayes testified that she had not. This testimony was consistent with evidence that had been introduced indicating that appellant had not provided DFPS with her current contact information. Appellant's trial counsel also questioned Hayes regarding placement of the children with a maternal relative as requested by appellant.

Appellant cannot satisfy *Strickland*'s first prong by showing by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. *See Rivera-Reyes*, 252 S.W.3d at 788-89. Appellant failed to specify what testimony would have been introduced by asking the above referenced questions. Further, the record contains no evidence regarding the trial strategy of appellant's trial counsel. Therefore, the record does not rebut the presumption that trial counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.*

We overrule appellant's third issue.

Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Anderson, Boyce, and Mirabal.[7]

[7] Senior Justice Margaret Garner Mirabal sitting by assignment.