Opinion issued August 25, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00809-CV

C.M.D., Appellant

V.

DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, Appellee

On Appeal from the 315th District Court
Harris County, Texas
Trial Court Case No. 0804352J

MEMORANDUM OPINION

The trial court terminated C.M.D.'s parental rights to her four children.[1] C.M.D. filed a motion for new trial and statement of points for appeal. The trial

[1] C.M.D. gave birth to another child during the pendency of this matter. That child is not at issue in this action. References to C.M.D.'s "children" are to the four children who are the subject of the trial court's termination order only.

court denied the motion for new trial and determined that an appeal would be frivolous. *See* TEX. FAM. CODE ANN. § 263.405 (West Supp. 2010). C.M.D.'s court-appointed appellate counsel has filed a motion to withdraw along with a brief stating his professional opinion that she has no meritorious ground for appeal and there is no arguable ground for reversal. *See Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400 (1967). After an independent review of the record, we determine that the trial court did not abuse its discretion in determining that any appeal would be frivolous.

Background

In April 2008, the Texas Department of Family and Protective Services received a referral alleging that C.M.D. and N.R. were abusing C.M.D.'s four children, three of whom are also N.R.'s children. The allegations included domestic violence that put the children in danger of injury, failure to supervise the children, and that C.M.D. was using crack cocaine. The department later received another referral alleging that a shooting had occurred at C.M.D.'s home, resulting in serious injury to one of her children. On May 13, the department filed a petition to appoint it conservator of C.M.D.'s four children and to terminate the children's parent-child relationships with C.M.D. and with their respective fathers. After an adversary hearing, the trial court appointed the department temporary sole managing conservator of the children.

The trial court also ordered C.M.D. to comply with the department's service plan. The service plan required C.M.D. to participate in drug testing and counseling. The service plan also required C.M.D. to obtain employment to support herself and her children, provide suitable housing for herself and her children, complete a one-time psychological evaluation, and complete a parenting class. C.M.D. completed the parenting class and the psychological evaluation. The record indicates that she obtained employment at one point, but lost the job in November 2009.

C.M.D. repeatedly tested positive for cocaine in her court-ordered hair analysis drug screening. Her May 2008 drug test results were positive for cocaine. When she went in for testing again in March 2009, she did not have sufficient hair to perform the analysis. She was tested again in September 2009 and twice in November 2009. All three tests were positive for cocaine. Her September test was also positive for ecstasy. She tested negative for cocaine in February of 2010, but she tested positive for opiates[2] in April and positive for cocaine in May. In March 2010, the trial court ordered C.M.D. to enter into an inpatient drug treatment program. C.M.D. did not comply. At the time of the late-2009 and early-2010 drug tests, C.M.D. was pregnant with another child not at issue in this case.

[2] The opiates were identified at trial as "morphine and metabolite of heroine."

In interviews after the children were placed in the custody of the department, C.M.D. and N.R. both admitted to incidents of domestic violence in their home. At some point, N.R. moved out of the apartment in which he and C.M.D. lived. In January 2010, C.M.D. was evicted from her apartment and moved in with her sister.

On August 25, 2010, the trial court held a hearing on the department's suit to terminate C.M.D.'s parental rights to her four children. C.M.D. attended the hearing with her appointed counsel. The department was represented at the hearing by its caseworker and counsel, and the children were represented by an attorney ad litem. The parties waived a jury, and the trial court acted as finder of fact. Expert testimony confirmed C.M.D.'s drug test results. The caseworker for the department testified that the department's original goal was reunification of the children with their mother, but the mother's continued drug use placed the children in continuing danger. The caseworker testified that the department had the children in safe and stable homes and that permanent placement in those homes was in the children's best interest. She also testified that C.M.D. continually denied any drug use and claimed to have tested positive for cocaine as a result of sexual intercourse. The children's ad litem also testified that it was in the best interest of the children that they remain with the families with whom they had been placed by the department and that C.M.D.'s parental rights be terminated so that the children could be

adopted by those families. The ad litem also testified that C.M.D. denied any drug use.

C.M.D. also testified at trial, repeatedly stating that she did not use drugs. She testified that she thought the reason she tested positive for drugs was that she was having sexual intercourse with a man who used drugs. She also indicated that the tests might have been altered by someone. C.M.D.'s sister testified that she had never seen C.M.D. use drugs. She testified that she also believed that C.M.D.'s positive drug tests were the result of sexual intercourse. She stated that N.R. used drugs but she did not know if the new baby's father used drugs. She further testified that she went with C.M.D. to the court-ordered drug treatment facility but it would not accept C.M.D. into the program because C.M.D. would not admit to any drug use. On follow-up examination, the drug testing expert testified that sexual intercourse with a drug user could not cause a positive result on the hair analysis drug screening performed on C.M.D. C.M.D. did not rebut this expert testimony with an expert of her own.

On September 8, 2010, the trial court entered a decree terminating C.M.D.'s parental rights to her four children on the basis of its findings that C.M.D

- placed or knowingly allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being,
- engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well-being,

- failed to comply with the provisions of a court order that specifically established the actions necessary for her to obtain the return of her children who had been in the managing conservatorship of the department for not less than nine months as a result of removal from her home, and

- used a controlled substance in a manner that endangered the health or safety of the children and failed to complete a court-ordered substance abuse treatment program or failed to discontinue abuse after completion of program.

On September 13, C.M.D. filed a motion for new trial and statement of appellate points. She also sought indigency status for her appeal. In her appellate points, C.M.D. contended that there was no evidence or legally or factually insufficient evidence to support each of the trial court's findings of fact and its determination that termination of her parental rights was in the best interest of the children. She also pointed out that the caseworker had testified to a strong bond between C.M.D. and her children and that she had visited her children while they were in conservatorship.

At the hearing on her motions, C.M.D.'s counsel admitted that C.M.D. did not complete the drug abuse treatment ordered by the court after she tested positive for cocaine, but stated that the drug treatment center "ousted" her from the program because she would not admit she had a drug problem. Her counsel stated that C.M.D. felt that, for that reason, it was not her fault that she violated the court's order. C.M.D.'s counsel admitted that C.M.D. tested positive for cocaine numerous times over the course of this case, but stated that C.M.D. believed the

cocaine had gotten into her system through sexual intercourse with N.R.. He stated that she did not believe she had a drug problem or was using drugs. The department responded that the expert testimony at the termination hearing demonstrated that sexual intercourse with a cocaine user could not result in a positive cocaine reading on the hair analysis tests.

The trial court (1) denied C.M.D.'s motion for new trial, (2) sustained C.M.D.'s claim of indigence, appointing her new counsel for her appeal, and (3) found that her appeal was frivolous. *See* TEX. FAM. CODE ANN. § 263.405(d). C.M.D. appealed the trial court's determination that her appeal was frivolous. *See id.* § 263.405(g). Initially, C.M.D.'s appellate counsel contended that C.M.D. did not receive adequate representation at trial but that he was unable to demonstrate this without the full reporter's record on appeal. We ordered the full reporter's record and afforded the parties additional time for briefing. C.M.D.'s appellate counsel then filed an *Anders* brief in which he contends that C.M.D. has no viable basis for appeal. With his *Anders* brief and motion to withdraw, C.M.D.'s appellate counsel has certified that he provided C.M.D. a copy of his *Anders* brief and advised her of her right to the reporter's record and clerk's record, as well as her right to file a pro se brief of her own.

Standard of Review

A party seeking to appeal from an order terminating a parent-child relationship must file with the trial court a statement of the point or points on which the party intends to appeal. TEX. FAM. CODE ANN. § 263.405(b). Under the Family Code as it exists until the effective date of the Legislature's 2011 amendments, the trial court must then determine whether the appeal is "frivolous," as described in section 13.003(b) of the Texas Civil Practices and Remedies Code. TEX. FAM. CODE ANN. § 263.405(d)(3). If the trial court determines that the appeal is frivolous, the parent may appeal the trial court's frivolousness finding by filing with the court of appeals the reporter's record and clerk's record of the hearing on the parent's 263.405 motion. *See id.* § 263.405(g).

We must decide the challenge to the trial court's determination of frivolousness before we may reach any substantive issues on appeal. *Lumpkin v. Dep't of Family & Protective Servs.*, 260 S.W.3d 524, 526 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Montes v. Dep't of Family & Protective Servs.*, No. 01-10-00643-CV, 2011 WL 2089721, at *2 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.); *see also In re K.D.*, 202 S.W.3d 860, 865 (Tex. App.—Fort Worth 2006, no pet.) ("[O]nce the trial court determines that an appeal is frivolous, the scope of appellate review is statutorily limited to a review of the trial court's frivolousness finding."). We review a trial court's frivolousness finding under an

abuse of discretion standard. *Lumpkin*, 260 S.W.3d at 526-27; *Montes*, 2011 WL 2089721, at *2. A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, without reference to any guiding rules or principles. *Lumpkin*, 260 S.W.3d at 526–27 (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)); *Montes*, 2011 WL 2089721, at *2 (same).

The Family Code limits the issues an appellate court may consider to those issues presented to the trial court in a timely filed statement of points for appeal. TEX. FAM. CODE ANN. § 263.405(i). The Supreme Court of Texas, however, has held that a court of appeals may also consider an ineffective assistance of counsel claim in order to ensure that the parent's rights were adequately represented in the trial court. *In re J.O.A.*, 283 S.W.3d 336, 341 (Tex. 2009). A court of appeals will presume that counsel's conduct falls within the range of reasonable professional assistance, "including the possibility that counsel's decision not to challenge factual sufficiency was based on strategy, or even because counsel, in his professional opinion, believed the evidence factually sufficient such that a motion for new trial was not warranted." *Id.* at 343 (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052 (1984)). A parent pursuing an ineffective assistance of counsel claim bears the burden of overcoming that presumption. *Id.* at 343.

Frivolousness of C.M.D.'s Appeal

In his *Anders* brief, C.M.D.'s appellate counsel states that, after diligently reviewing the record, he has concluded that there are no arguable grounds he can advance on C.M.D.'s behalf on appeal of the trial court's termination of C.M.D.'s parental rights. This Court has previously determined that it is appropriate to file an *Anders* brief in a termination-of-parental-rights case. *See Abbott v. Dep't of Family and Protective Servs.*, No. 01-07-01034-CV, 2009 WL 214510, at *2 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, no pet.) (citing *In re K.D.*, 127 S.W.3d 66, 67 (Tex. App.—Houston [1st Dist.] 2003, no pet.)). Although C.M.D.'s counsel's *Anders* brief does not specifically conclude that the sufficiency issues are frivolous under Family Code section 263.405(d), the brief meets the requirements of *Anders* by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds for an appeal. *Abbott*, 2009 WL 214510, at *2. We construe the *Anders* brief as a conclusion by C.M.D.'s appellate counsel that an appeal based on the sufficiency of the evidence would be frivolous. *Id.*

Based on our independent review of the record and the *Anders* brief, we conclude that the trial court did not abuse its discretion when it found that C.M.D.'s appeal would be frivolous.[3]

[3] The record contains undisputed evidence that C.M.D. tested positive for illegal drugs at least six times over the course of this proceeding. Although C.M.D. insists that she tested positive for cocaine because there was cocaine in her system

Conclusion

We affirm the trial court's order and grant appointed counsel's motion to withdraw.[4]

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Huddle.

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transmitted to her through sexual intercourse, the expert testimony excluded that as a possible explanation. C.M.D. offered no controverting expert testimony. This evidence supports the trial court's controlled substance and endangerment findings. *See In re J.O.A.*, 283 S.W.at 345 ("We accordingly agree that a parent's use of narcotics and its effect on his or her ability to parent may qualify as an endangering course of conduct."); *In re S.N.*, 272 S.W.3d 45, 52 (Tex. App.—Waco 2008, no pet.) ("Evidence of illegal drug use or alcohol abuse by a parent is often cited as conduct which will support an affirmative finding that the parent has engaged in a course of conduct which has the effect of endangering the child."); *Toliver v. Tex. Dep't of Family and Protective Servs.*, 217 S.W.3d 85, 98 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Evidence of narcotics use and its effect on a parent's life and her ability to parent may establish that the parent has engaged in an 'endangering course of conduct.'"); *In re R.W.*, 129 S.W.3d 732, 739 (Tex. App.—Fort Worth 2004, pet. denied) ("As a general rule, conduct that subjects a child to a life of uncertainty and instability endangers the physical and emotional well-being of a child. Drug use and its effect on a parent's life and his ability to parent may establish an endangering course of conduct.") (citation omitted). The record also contains evidence that C.M.D. was unable to complete the court-ordered drug treatment program because she refused to admit that she had a drug problem. This evidence supports the trial court's finding that C.M.D. failed to comply with its order requiring participation in a drug treatment program.

[4] Appointed counsel still has a duty to inform C.M.D. of the result of this appeal and that she may, on her own, pursue discretionary review. *See In re K.D.*, 127 S.W.3d at 68 n.3.