

Reversed and Rendered and Memorandum Opinion on Contest of Affidavit of Indigence filed March 25, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00930-CV

RALPH O. DOUGLAS, Appellant

V.

ELISE SELMA INGERSOLL, Appellee

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2008-71252**

**MEMORANDUM OPINION ON CONTEST TO AFFIDAVIT
OF INDIGENCE**

Ralph O. Douglas appeals the trial court's order sustaining the contest to his affidavit of indigence and request for a free record on appeal. Because we find the trial court abused its discretion in sustaining the contest, we reverse the trial court's ruling and find appellant's affidavit of indigence is sufficient to enable him to proceed on appeal without advance payment of costs.

Background

On August 10, 2009, the trial court signed a judgment dismissing appellant's cause of action filed in trial court cause number 2008-71252 for want of prosecution. On

August 24, 2009, appellant filed a notice of appeal from that judgment, which this court docketed as cause number 14-09-00752-CV. On the same day, appellant filed an affidavit of indigence with the trial court pursuant to Texas Rule of Appellate Procedure 20.1. The Harris County District Clerk timely filed a contest to appellant's affidavit, which the trial court sustained on October 7, 2009. Appellant appealed the trial court's order sustaining the district clerk's contest.

An indigent party may obtain the record pertaining to the trial court's ruling sustaining the contest to his affidavit of indigence and challenge that ruling as part of his appeal instead of by mandamus review as was done previously. *See In re Arroyo*, 988 S.W.2d 737, 738–39 (Tex. 1998). Accordingly, on January 29, 2010, we ordered those portions of the record necessary to review the order sustaining the contest to appellant's affidavit of indigence be filed with the clerk of this court. On March 1, 2010, the district clerk filed a partial clerk's record containing the documents relevant to appellant's indigency claim. No reporter's record from the indigency hearing was filed. The court reporter informed this court that she did not record a hearing.

Standard of Review

When a contest is sustained and a review of the ruling is sought, the question is whether an examination of the record as a whole establishes that the trial court abused its discretion. *See Jones v. Duggan*, 943 S.W.2d 90, 93 (Tex. App.—Houston [1st Dist.] 1997, orig. proceeding). In ruling on the merits of the evidence at the trial court level, the test for determining entitlement to proceed in forma pauperis is whether the preponderance of the evidence shows that the appellant would be unable to pay the costs of appeal, if he really wanted to and made a good faith effort to do so. *See Griffin Indus. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 351 (Tex. 1996). To show a clear abuse of discretion, the appellant must show that, under the circumstances of the case, the facts and law permit

the trial court to make but one decision. *See Cronen v. Smith*, 812 S.W.2d 69, 70 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

Discussion

Texas Rule of Appellate Procedure 20.1 governs affidavits of indigence. It permits a party to proceed with an appeal without advance payment of costs if (1) the party files an affidavit of indigence in compliance with the rule; (2) either the claim of indigence is not contested or the contest is not sustained; and (3) the party files a timely notice of appeal. Tex. R. App. P. 20.1(a). The affidavit must identify the party filing it, state the amount of costs the party can pay, if any, and contain complete information regarding sources of income and property. Tex. R. App. P. 20.1(b). The affidavit must specifically state:

- (1) the nature and amount of the party's current employment income, government-entitlement income, and other income;
- (2) the income of the party's spouse and whether that income is available to the party;
- (3) real and personal property the party owns;
- (4) cash the party holds and amounts on deposit that the party may withdraw;
- (5) the party's other assets;
- (6) the number and relationship to the party of any dependents;
- (7) the nature and amount of the party's debts;
- (8) the nature and amount of the party's monthly expenses;
- (9) the party's ability to obtain a loan for court costs;
- (10) whether an attorney is providing free legal services to the party without a contingent fee; and
- (11) whether an attorney has agreed to pay or advance court costs.

Tex. R. App. P. 20.1(b)(1)–(11).

If an indigent party is incarcerated at the time of the hearing on the contest, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the party's attendance at the hearing. Tex. R. App. P. 20.1(g).

The district clerk filed a contest in which he demanded strict proof that appellant is too poor to pay filing fees and alleged that appellant's affidavit failed to meet the requirements of Rule 20.1(b). We have reviewed the record and determined that appellant's affidavit meets all of the requirements of Rule 20.1(b). Further, we have contacted the court reporter who informed the court that no hearing was recorded on the district clerk's contest. Appellant was incarcerated at the time the district clerk contested his affidavit. Therefore, appellant's affidavit must be considered as evidence and is sufficient to meet his burden to present evidence. Tex. R. App. P. 20.1(b). Our review of the record reveals that appellant's affidavit meets each of the requirements of Rule 20.1(b). The record further reflects no evidence to the contrary.

We find the trial court abused its discretion in denying appellant's request to proceed without the advance payment of costs. Therefore, appellant is declared indigent for purposes of appeal and the record will be provided without prepayment of costs. *See* Tex. R. App. P. 20.1(j). The trial court's order sustaining the district clerk's contest to appellant's affidavit of indigence is reversed. Accordingly, we issue the following order.

The Harris County District Clerk is ordered to file a complete clerk's record in cause number 14-09-00752-CV on or before April 19, 2010. The official court reporter, Carmen Miller, has certified to this court that no reporter's record was taken in the underlying appeal. Appellant's brief in cause number 14-09-00752-CV will be due 30 days after the clerk's record has been filed. *See* Tex. R. App. P. 38.6(a).

PER CURIAM

Panel consists of Justices Yates, Seymore, and Brown.