Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00183-CV

IN THE INTEREST OF D.H.G. and M.E.G., Children

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-PA-02241
Honorable Peter A. Sakai, Judge Presiding

Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: November 3, 2021

AFFIRMED

In a single issue, appellant Mother argues for reversal of the trial court order terminating her parental rights to her children on the ground that she received ineffective assistance of counsel.[1] We overrule Mother's issue and affirm the trial court's order.

BACKGROUND

On November 4, 2019, the Texas Department of Family and Protective Services (the "Department") filed a petition to terminate Mother's parental rights to D.H.G. and M.E.G. That same day, the trial court appointed Mother an attorney. On April 30, 2021, the trial court held a bench trial, at which Mother appeared only through counsel. D.H.G. was two years old at the time

[1] To protect the identities of the minor children in this appeal, we refer to the parents as "Mother" and "Father" and to the children by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

of trial, and M.E.G. was one. After the parties rested and closed, the trial court announced that it found clear and convincing evidence to terminate Mother's parental rights. The trial court then cautioned Mother's counsel that he was obligated to file a notice of appeal and a designation of the record if Mother wished to appeal. The trial court remarked that it would allow counsel to withdraw, if he wished, after completion of his due diligence.

On May 3, 2021, trial counsel filed a notice of appeal on behalf of Mother and a motion to withdraw and to substitute new counsel. On May 4, 2021, the trial court signed its final judgment terminating Mother's parental rights. The trial court found four statutory grounds for termination and that termination was in the children's best interest.[2] Further, the termination order states under the heading "Court Ordered Ad Litem for Parent":

> IT IS THEREFORE ORDERED that [trial counsel] earlier appointed to represent [Mother] shall continue in that capacity until all appeals of a final order terminating parental rights are exhausted or waived.

On May 13, 2021, the trial court clerk filed a letter written by Mother. In the letter, dated May 5, 2021, Mother requests the appointment of counsel, writing:

> My former Counsel of Record has withdrawn from my case, and has advised me by letter to write you immediately requesting appointment of counsel. Your Honor, I believe that I was denied my due process to notice of my parental rights hearing. My rights were terminated and I never had an opportunity to appear and present my facts and evidence in support of my requests of reunification and return of my children. I pray that you appoint me counsel to assist me with my motion to set aside Judgment and on Appeal.

The clerk also filed Mother's "Motion for Appointment of Counsel" and her "Motion to Set Aside Default Judgment and Notice of Hearing." Mother's Motion for Appointment of

[2] *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(E) (parent engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child); *id.* § 161.001(b)(1)(O) (parent failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child); *id.* § 161.001(b)(1)(P) (parent used a controlled substance in a manner that endangered the health or safety of the child and failed to complete a court-ordered substance abuse treatment program or, after completion of such a program, continued to abuse a controlled substance); *id.* § 161.001(b)(1)(R) (parent caused the child to be born addicted to alcohol or a controlled substance); *id.* § 161.001(b)(2) (best interest).

Counsel states: "Counsel of Record . . . advised [Mother] by letter on May 03, 2021, that his representation of her on going [*sic*] lawsuit is hereby terminated." Mother's Motion to Set Aside Default Judgment is a completed form document. According to this document, Mother requested that "default judgment" be set aside because she lacked notice of trial:

> I respectfully submit that at no time was I notified by mail, Court or my attorney of record that I had a forthcoming hearing to appear at on the date of April 30, 2021. In addition my case worker made no attempt to notif[y] me of said hearing date and further stated that it was not her obligation or duty to inform me, but rather that was the responsibility of my Attorney of Record.

Under a section for "meritorious (good) defense," Mother wrote:

> I have complied with each of the following requirements[:]
>
> 1. I have submit[ted] to psychological examinations[;]
>
> 2. I have attend[ed] counseling sessions to address the specific issues that led to the removal of the children[;]
>
> 3. I have attended parenting classes as requested by the Department[; and]
>
> 4. I have submit[ted] to a drug and alcohol assessment.

On May 10, 2021, the trial court granted counsel's motion to withdraw and appointed Mother new appellate counsel. In a single issue, Mother argues that we must reverse because trial counsel rendered ineffective assistance by failing to ensure Mother was notified of the trial setting and by failing to file a motion for new trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

In Texas, an indigent parent is entitled to appointed counsel in a state-initiated proceeding to terminate parental rights. *See* TEX. FAM. CODE ANN. § 107.013(a)(1); *In re D.T.*, 625 S.W.3d 62, 69 (Tex. 2021). This statutory right to appointed counsel "embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). Claims for ineffective assistance of counsel in parental-termination cases, as in criminal cases, are governed by the two-prong test

articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *In re D.T.*, 625 S.W.3d at 73. "First, the [parent] must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "Second, the [parent] must show that the deficient performance prejudiced the defense." *Id.*

Under the first prong, we primarily focus on whether counsel performed in a "reasonably effective" manner. *Strickland*, 466 U.S. at 687. Only when "the conduct was so outrageous that no competent attorney would have engaged in it" will the challenged conduct constitute deficient performance. *In re M.S.*, 115 S.W.3d at 545 (citation omitted). To determine whether counsel's performance fell below an objective standard of reasonableness, we "must take into account all of the circumstances surrounding the case." *Id.* We are greatly deferential to counsel and indulge "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance, including the possibility that counsel's actions [were] strategic." *Id.* (citation omitted). "It is only when 'the conduct was so outrageous that no competent attorney would have engaged in it,' that the challenged conduct will constitute ineffective assistance." *Id.* (citation omitted). Under the second prong, an appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Ineffective assistance of counsel claims must be firmly founded in the record. *In re L.C.W.*, 411 S.W.3d 116, 127 (Tex. App.—El Paso 2013, no pet.); *see also Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 622–23 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When the record is silent concerning the reasons for counsel's actions, the reviewing court may not speculate to find the representation ineffective. *See In re L.C.W.*, 411 S.W.3d at 127; *P.W. v.*

Dep't of Family & Protective Servs., 403 S.W.3d 471, 476 (Tex. App.–Houston [1st Dist.] 2013, pet. dism'd w.o.j.).

DISCUSSION

Mother argues first that trial counsel was ineffective for failing to ensure that she was notified of the trial setting. However, Mother's lack of notice, let alone counsel's failure to provide notice, is not firmly rooted in the record. The trial transcript reflects that trial was conducted via Zoom web conference. After the trial court called the case, trial counsel announced "not ready" and stated that he had not been able to reach Mother, but had provided her with login information. The trial court conducted a brief segment of the trial related to Father, and then the court recessed for approximately an hour and a half. When trial resumed, trial counsel represented that he had been in contact with Mother by email and telephone in the past and that he sent her the login information for the trial setting at least three times—when trial was set, the morning of trial, and prior to resumption of trial after the break. In addition to counsel's statements, a Department caseworker testified that she last spoke to Mother a week before trial and advised her of the trial setting.

Mother challenges trial counsel's statements and the caseworker's testimony through her sworn Motion to Set Aside Default Judgment. She states in her motion that she lacked notice of the trial setting and had not received notice from the trial court, trial counsel, or her caseworker. However, there is nothing in the record to indicate that the trial court considered Mother's sworn statement and determined contested facts regarding notice.

"Texas courts have recognized the inequities created by the 'record' requirement in parental-rights termination cases." *In re A.L.*, No. 04-17-00620-CV, 2018 WL 987484, at *8 (Tex. App.—San Antonio Feb. 21, 2018, no pet.) (mem. op.) (citing *In re K.K.*, 180 S.W.3d 681, 685 n.3 (Tex. App.—Waco 2005, no pet.)). Parents in termination cases, unlike defendants in criminal

cases, have no habeas remedy to develop a post-trial record to support their ineffective-assistance-of-counsel claims. *Id.* In cases such as this one, we do not have the benefit of a trial court determination of historical facts to accept or give deference to, as we would in habeas appeals. *See Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011) (noting fact-finding roles of trial courts in habeas cases). To remedy this inequity, some appellate courts have held that the appropriate remedy is to abate the appeal and remand the case to the trial court for a hearing at which a parent may develop a record. *See In re A.L.*, 2018 WL 987484, at *8 (citing *In re M.E.–M.N.*, 342 S.W.3d 254, 258 (Tex. App.—Fort Worth 2011, pet. denied), *and In re K.K.*, 180 S.W.3d at 688). "Whether abatement is appropriate will depend on the facts of each termination case and the specific allegation of ineffective assistance." *In re K.K.*, 180 S.W.3d at 688.

Here, abatement is unnecessary because Mother cannot show a reasonable probability that, but for trial counsel's asserted deficiencies, the outcome of the proceeding would have been different. *See In re M.S.*, 115 S.W.3d at 549–50; *In re A.L.*, 2018 WL 987484 at *9 (deciding against abatement because Mother would not have been able to show that challenged deficiencies prejudiced mother's defense). Before moving to prejudice, however, we consider Mother's other challenge to trial counsel's performance.

In her second challenge, Mother contends that trial counsel performed deficiently by failing to file a motion for new trial. The 30-day period after judgment is signed, during which a party may file a motion for new trial, is generally referred to as "the motion for new trial stage." *See Cooks v. State*, 240 S.W.3d 906, 909 (Tex. Crim. App. 2007); *In re I.L.*, 580 S.W.3d 227, 241 (Tex. App.—San Antonio 2019, pet. dism'd); *see also* TEX. R. CIV. P. 329b.[3] In the motion for

[3] "Notwithstanding the fact that termination proceedings follow an accelerated timetable, the deadline in which to file a motion for new trial remains 'prior to or within thirty days after the judgment or other order complained of is signed.'" *In re M.M.*, No. 07-20-00089-CV, 2020 WL 5032842, at *7 (Tex. App.—Amarillo Aug. 25, 2020, no pet.) (quoting TEX. R. CIV. P. 329b(a)).

new trial stage, the strong presumption in favor of counsel "gives rise to the rebuttable presumption that counsel considered filing a motion for new trial, rejected the consideration based on either strategy or a professional opinion there was no error about which to complain, and discussed the merits with the client." *In re I.L.*, 580 S.W.3d at 243; *see In re M.S.*, 115 S.W.3d at 549.

Here, the record contains no evidence to show trial counsel did not discuss the merits of a motion for new trial with Mother. Mother attached to her brief a letter that she asserts trial counsel sent to her on May 3, 2021, which is a day before the trial court entered its termination order and three days after trial. The letter states: "[M]y representation of you is hereby terminated in this matter. . . . Further, if you want a court appointed attorney to assist you in the Appeal, it will be important for you to immediately send a letter to [the trial court judge]." We may not consider this attachment because attachments to briefs do not comprise a part of the appellate record. *See Gomez v. State*, No. 04-13-00205-CR, 2014 WL 2601724, at *1 (Tex. App.—San Antonio June 11, 2014, no pet.) (mem. op.) (refusing to consider portions of a reporter's record attached to a brief because "it has long been the law in this state that an appellate court may not consider documents attached to a brief as part of the record on appeal"); *In re H.M.*, No. 05-12-01638-CV, 2014 WL 2801356, at *2 n.2 (Tex. App.—Dallas June 17, 2014, no pet.) (mem. op.) (noting appellate record did not include a reporter's record because the reporter's record was attached only to an appellate motion); *In re M.T.*, 495 S.W.3d 617, 621–22 (Tex. App.—El Paso 2016, no pet.) (refusing to consider affidavits included as an appendix to a brief).

Nevertheless, we do not abate for admission of this letter into the appellate record or for further development of the record because Mother has not shown that, but for trial counsel's allegedly unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. Regarding the motion for new trial, a fully developed record may show that trial counsel "abandoned his client" at the "critical" motion for new trial stage of the

proceedings. *See In re J.O.A.*, 283 S.W.3d 336, 343 (Tex. 2009) ("Trial counsel's failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding.");[4] *Cooks*, 240 S.W.3d at 911 (describing the motion for new trial stage as a "critical stage of the proceedings"). However, even if we assume trial counsel's abandonment, the record shows that Mother was appointed her current appellate counsel within the 30-day window to file a motion for new trial. *See* TEX. R. CIV. P. 329b. Appellate counsel was appointed on May 10, 2021, and, at that time, 24 days remained to file a motion for new trial. *See id.* Under these circumstances, the Texas Court of Criminal Appeals has required a prejudice analysis. *See Cooks*, 240 S.W.3d at 911 (determining presumption that appellant was adequately represented during the motion for new trial stage was rebutted by evidence appellant was unrepresented by counsel for initial 20 days, but holding deprivation of counsel was harmless because appellate counsel presented no facially plausible claims that could have been presented in a motion for new trial). The Texas Supreme Court has conducted a *Strickland* prejudice analysis following post-trial abandonment of counsel during the 15-day period after trial within which to file a statement of points. *See In re J.O.A.*, 283 S.W.3d at 344–47 (determining parent had not shown prejudice that would affect legal sufficiency review).

We hold Mother has not shown that, had trial counsel filed a motion for new trial, there is a reasonable probability the trial court would have granted the motion. *See In re E.H.R.*, No. 04-19-00380-CV, 2019 WL 6333466, at *3 (Tex. App.—San Antonio Nov. 27, 2019, no pet.) (mem. op.) (holding father had not established *Strickland's* second prong because he had not shown the

[4] *In re J.O.A.* concerned the fifteen-day deadline to file a statement of points after a termination order was signed; the Texas Supreme Court remarked that this was a "critical stage of the proceeding." 283 S.W.3d at 343. Until repealed in 2011, Family Code section 263.405(i) barred an appellate court's consideration of any issue not presented to the trial court in a timely filed statement of points. *See* TEX. FAM. CODE ANN. § 263.405(i).

trial court would have granted his motion for new trial).[5] More generally, Mother has not shown that the outcome of the proceeding would have been different had she appeared or testified. *See Strickland*, 466 U.S. at 694; *In re M.S.*, 115 S.W.3d at 549–50.

Substantial evidence supports termination of Mother's parental rights and, largely, Mother has not challenged this evidence on appeal or through her Motion to Set Aside Default Judgment. Among this evidence, the Department's caseworker testified that D.H.G. and Mother tested positive for drugs when D.H.G. was born in 2018. The Department initiated a first case, which it closed in August 2019, when the Department reunited Mother with D.H.G. Two months later, M.E.G. was born, and Mother and M.E.G. tested positive for methamphetamine and marijuana. The Department removed the children from Mother's care and began this second case. Mother stated to a Department caseworker that she relapsed after D.H.G. was returned to her care because she was overwhelmed. Mother repeatedly tested positive for methamphetamine, she admitted to methamphetamine use, and she was discharged unsuccessfully from inpatient, and later outpatient, drug treatment. In addition, Mother's therapist testified that she made minimal progress to address her bipolar issues and poor decision making before Mother stopped attending her therapy sessions.

Mother does not dispute this evidence or contend that it was admitted due to counsel's deficient performance. In her Motion to Set Aside Default Judgment, Mother asserts four matters in her defense that are uncontested and were presented through trial testimony. First, Mother states she submitted to a psychological examination; this was uncontested. Second, Mother asserts that she attended counseling to address the specific issues that led to the children's removal; this too

[5] "[C]ourts considering . . . issues . . . concerning a failure of counsel to timely file or obtain a hearing or ruling on a motion for new trial, have consistently required a showing of actual prejudice, meaning that but for counsel's deficient performance, the trial court would have granted the defendant a new trial." *Jackson v. State*, 550 S.W.3d 238, 244 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *cf. In re D.J.J.*, 178 S.W.3d 424, 432 (Tex. App.—Fort Worth 2005, no pet.) (determining parent had shown prejudice because parent would have been entitled to a new trial had counsel preserved legal sufficiency complaints through a motion for new trial).

was uncontested. Third, Mother asserts that she attended parenting classes; however, a caseworker acknowledged that Mother attended parenting classes as part of her first case and that Mother was unsuccessfully discharged from parenting classes in her second case. Fourth, Mother states that she submitted to a drug and alcohol assessment; this too was undisputed. A Department caseworker testified that Mother attended three assessments, and all recommendations were for inpatient treatment. Mother's four statements in her Motion to Set Aside Default Judgment do not undermine confidence in the outcome of the proceedings. *See Strickland*, 466 U.S. at 694; *see also* TEX. FAM. CODE ANN. § 161.001(b)(1)(E), (O), (P), (R); *id.* § 161.001(b)(2).

On appeal, Mother does not address any good cause which could support a new trial and that was not raised with the trial court because of trial counsel's deficient representation. *See* TEX. R. CIV. P. 320 ("New trials may be granted and judgment set aside for good cause."). Instead, Mother argues that "the trial court all but directed [trial counsel] to file a Motion for New Trial, strongly hinting that such motion stood a good chance of success." However, the record does not support Mother's assertion. After trial counsel argued against proceeding with trial, the trial court remarked: "[T]here are post-judgment reliefs that you can present to the Court, and the Court will give you leave to file whatever the appropriate motions are. . . . [S]hould your client contact you, please know that this Court will make itself available for any appropriate motions."

With few exceptions, an attorney appointed to represent an indigent parent in a suit filed by a government entity for termination of parental rights must serve until suit is dismissed, all appeals in relation to any final termination order are exhausted or waived, or until the attorney is relieved or replaced after a finding of good cause is rendered on the record. *See* TEX. FAM. CODE ANN. §§ 107.013(e), 107.016(2); *In re P.M.*, 520 S.W.3d 24, 26–27 (Tex. 2016) (per curiam). The trial court notified trial counsel of these obligations; however, the record—specifically, the allegations contained in Mother's sworn Motion to Set Aside Default Judgment and Notice of

Hearing and her Motion for Appointment of Counsel—strongly suggests that trial counsel abdicated his duties and abandoned his client at the critical motion for new trial stage of the proceedings. *See In re J.O.A.*, 283 S.W.3d at 343.[6]

Despite this, Mother's burden under *Strickland* is a high one. *See Strickland*, 466 U.S. at 694. We cannot say that Mother has shown there is a reasonable probability that, but for trial counsel's asserted errors in failing to notify his client of trial and failure to file a motion for new trial on her behalf, the result of the termination proceeding would have been different. *See id.* We overrule Mother's sole issue.

CONCLUSION

We affirm the trial court's order of termination.

Rebeca C. Martinez, Chief Justice

[6] We have no reason to suspect that trial counsel's letter disclaiming representation, which Mother attached to her brief, is inauthentic; however, as stated above, we do not rely on it because it is not part of the record.