COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00179-CV

IN THE INTEREST OF J.N. AND
M.N., CHILDREN

FROM THE 442ND DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-08692-442

MEMORANDUM OPINION[1]

The mother of J.N. and M.N. and the father of J.N. appeal from the trial court's judgment terminating their parental rights. We affirm.

In March 2015, Mother voluntarily placed J.N. and M.N. with their maternal grandmother (Grandmother) after Mother was arrested for assaulting her girlfriend and threatening her with a knife while the children were at home with her. Mother was also under the influence of drugs and had a history of long-term drug use. While the children were in the voluntary placement, the Department of

[1]*See* Tex. R. App. P. 47.4.

Family and Protective Services worked with Mother to provide family-based safety services so that the children could be returned to her safely. Mother either did not provide the Department with Father's correct first name or there was a misunderstanding about his first name; regardless, the Department did not learn Father's correct first name or address until over a year later. A little over six months after the voluntary placement, Mother failed a drug test. As a result, in October 2015, the Department filed a petition seeking to be named temporary managing conservator of the children and to remove the children from Mother's conservatorship but not from their placement with Grandmother. At the time, Mother's sister and her four children were also living with Grandmother, with the Department's knowledge and acquiescence. The original petition conditionally pled that if family reunification could not be achieved, the Department sought (1) permanent placement of the children with a relative "or other suitable person" or (2) if a permanent placement could not be achieved, to be named the children's permanent managing conservator, either after termination of the parents' rights or with the Department's consent.

After an adversary hearing, the trial court named the Department temporary managing conservator of the children. The Department prepared, and Mother began to try to follow, a service plan for the return of the children. Mother only sporadically worked her services. The record shows that the Department made several attempts to locate and serve Father over the next nine months, but those attempts were initially unsuccessful because the Department did not have

his correct name or address. During one of Mother's visits with the children in July 2016, a CASA volunteer and Department caseworker overheard Mother calling Father so that Father could wish J.N. a happy birthday, which is when the Department learned Father's actual first name. The Department was then able to serve Father on September 26, 2016. Father sent a letter to the trial court indicating that he wanted genetic testing and stating that if he was J.N.'s biological father he wanted to take care of the child. The trial court appointed counsel for Father, ordered paternity testing, and ordered Father to work services. Because Father had been served shortly before the one-year dismissal deadline, the trial court extended the trial date for six months, to begin on May 1, 2017. *See* Tex. Fam. Code Ann. § 263.401 (West Supp. 2016).

In October 2016, a kinship caregiver specialist with the Department visited Grandmother's three-bedroom, one-bath house and found Mother's father, who has a criminal history, hiding in Grandmother's bedroom. The specialist also discovered that Mother's uncle and his long-time girlfriend, both of whom had been investigated by the Department, would sometimes be there. By the time of trial during the first week of May 2017, they were living with Grandmother, along with another uncle of Mother's with a criminal history who had parked his trailer in Grandmother's yard. On October 31, 2016, the Department removed the children from placement with Grandmother and placed the children in the first of a series of foster homes.

Although the trial court ordered genetic testing of Father and J.N., Father failed to attend his first three testing appointments. When a test was completed in January 2017, UPS lost the sample. Father's paternity of J.N. was finally confirmed one month before trial. Father never worked any of the ordered services, nor did he allow the Department to visit his home or provide the Department with any relatives' names.

On the first day of trial, before voir dire, Mother moved to exclude "any evidence, whether via testimony or document, in support of termination of [her] rights" because the Department had failed to supplement its response to her request for disclosures to indicate that it was seeking adoption of the children by a nonrelative. According to Mother, the Department had consistently responded to discovery stating only that the primary goal for the children was adoption by a relative with family reunification as a secondary goal. Father joined Mother's motion. The trial judge bench filed a trial brief in support of the motion, heard argument, and overruled the motion before trial began. But the trial court gave appellant a running objection to any such evidence.

A jury found that

- Mother's parental rights to both children should be terminated on (D), (E), and (O) grounds,
- Father's parental rights to J.N. should be terminated on (E), (N), and (O) grounds, and
- M.N.'s alleged father's rights should be terminated on the (A) ground.

See id. § 161.001(b)(1)(A), (D)–(E), (N), (O) (West Supp. 2016). Mother and Father both appealed, but M.N.'s alleged father did not.

Mother's Issues

In two issues, Mother contends (1) that the trial court erred by determining that rule 193.6(a) did not bar admission of evidence pertaining to adoption by a nonrelative in the event of termination and (2) that because the Department failed to comply with various family code provisions related to notice and placement of the children, the trial court should not have permitted the Department to "move forward" with the trial.

Nonrelative Adoption Evidence Was Admissible

During discovery, a party may request disclosure of "the legal theories and, in general, the factual bases of the responding party's claims or defenses." Tex. R. Civ. P. 194.2(c). A party who fails to "make, amend, or supplement" a discovery response "may not introduce in evidence . . . information not timely disclosed unless the court finds (1) there was good cause for the failure to timely disclose, or (2) the failure to timely disclose will not unfairly surprise or unfairly prejudice the other party." Tex. R. Civ. P. 193.6(a); *Williams v. Cty. of Dallas*, 194 S.W.3d 29, 32 (Tex. App.—Dallas 2006, pet. denied) (op. on reh'g). Unless the trial court finds good cause or a lack of unfair surprise or prejudice, the sanction for failure to comply with this rule is the "automatic and mandatory" exclusion from trial of the omitted evidence. *Gibbs v. Bureaus Inv. Grp. Portfolio No. 14, LLC*, 441 S.W.3d 764, 766 (Tex. App.—El Paso 2014, no pet.); *Lopez v.*

La Madeleine of Tex., Inc., 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no pet.); *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 856 (Tex. App.—Fort Worth 2001, pet. denied) (op. on reh'g); *see In re E.A.G.*, 373 S.W.3d 129, 145 (Tex. App.—San Antonio 2012, pets. denied).

But when answering a request for disclosure, "the responding party need not marshal all evidence that may be offered at trial." Tex. R. Civ. P. 194.2(c). Rule 194 is intended to require disclosure only of a party's "basic assertions," not necessarily all aspects of the party's claims or defenses. Tex. R. Civ. P. 194 cmt. 2; *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, at *6 (Tex. App.—Dallas Dec. 2, 2014, pet. denied) (mem. op.). A "complete response" is one that is based on all information reasonably available to the responding party or its attorney at the time the response is made. Tex. R. Civ. P. 193.1; *Leas v. Comm'n for Lawyer Discipline*, No. 13-10-00441-CV, 2012 WL 3223688, at *6 (Tex. App.—Corpus Christi Aug. 9, 2012, pet. dism'd w.o.j.) (mem. op.). Additionally, "properly pled claims for affirmative relief, as opposed to withheld evidence, are not abandoned or waived by a party's failure to expressly identify those claims in a response to a request for disclosure." *Concept Gen. Contracting, Inc. v. Asbestos Maint. Servs.*, 346 S.W.3d 172, 180 (Tex. App.—Amarillo 2011, pet. denied).

In her trial brief, Mother contended that she was only prepared for a trial seeking adoption by a relative, not a trial seeking termination of her parental rights. But the Department's goal of adoption of these children by a relative

presumes termination.[2] *See* Tex. Fam. Code Ann. § 162.001(b) (West Supp. 2016). Mother further argued in the trial court that the Department was barred from offering evidence related to whether the children could or should be adopted by a nonrelative because it had not supplemented its discovery to explain its legal theories and factual bases supporting that type of relief.

In its March 31, 2017 response to Mother's request for disclosure, the Department noted,

> As stated in the *Petition for Protection of a Child, for Conservatorship, and for Termination in Suit Affecting the Parent-Child Relationship* . . . , the safety and welfare of the child is sufficiently at risk to justify temporary or permanent restriction, and, if necessary, termination, on the grounds stated in the petition, of parental rights unless the parent or parents are willing and able to provide the child with a safe environment.

The Department then quoted verbatim from the family code the numerous definitions of abuse and neglect, listed generally most of the conduct grounds in section 161.001(a)(1) without specifying which particular grounds it was relying upon in seeking any termination, referred to the facts set forth in the affidavit attached to the petition explaining the need for removal in September 2015, and set forth the services Mother was to work to obtain possession of the children.

[2]Mother filed an answer in which she made a general denial, sought to be named possessory conservator in the event she was not named joint or sole managing conservator, and, alternatively, sought a monitored return. No party had filed pleadings seeking Grandmother's adoption of the children with Mother's consent upon the termination of only Father's rights. *See* Tex. Fam. Code Ann. § 162.001(b)(3) (West Supp. 2016).

Additionally, the Department stated that its goal at that time was adoption by a relative with a concurrent goal of family reunification. According to the Department's response,

> [A]doption by a relative is in the children's best interest as it would allow the children a safe home, and continued contact with family in a more stable environment than . . . Mother could provide for them on more than one occasion. At this time, the Permanency Goal is Adoption by a Relative. The Department has concerns regarding the parents' ability to properly care for the children, given . . . Mother's minimal efforts in working her services.

The Department also stated its concerns that Mother had not alleviated the behavior that led to removal even after completing and participating in some of the services.

In response to an interrogatory asking why the Department did not believe that appointing Mother joint managing conservator was in the children's best interest—and seeking the legal theories and factual bases supporting that contention—the Department stated,

> The primary goal for the children is to establish permanency. . . . Currently, the Department goal is family reunification. There are concerns due to [Mother's] history of illegal substance abuse, untreated mental health concerns, and criminal history . . . . At this time, little progress has been made by [Mother]. The Department will continue to maintain temporary managing conservator of the children until [Mother] completes her services and shows significant, positive changes in her lifestyle.
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> **Supplement:**
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> Currently the Department goal is adoption by relative. . . . The Department has not been given any family that is appropriate. The Department continues to search for appropriate family members.

> . . . Because [Mother] failed to alleviate the concerns that brought the children into care by failing to participate in services, failing to consistently visit with the children, and failing to maintain contact with the Department, the Department . . . believes it is not in the best interest of the children that [Mother] be appointed joint managing conservator of the children.

To an interrogatory asking for the legal theories and factual bases for the Department to seek sole managing conservatorship, the Department answered,

> At this time no determination has been made as to whether it is or is not in the best interest of the children that TDFPS be appointed as sole managing conservator. The goal at this time is adoption by relative for all parents the subject of this suit. [Mother] has not demonstrated adequate compliance in her service plan or a change in lifestyle.
>
> [Mother] has a concerning criminal history, assaultive history, mental health history, and drug related history. If for some reason this placement cannot continue, and the goal is changed to termination, the TDFPS should be appointed sole managing conservator for these children until an adoptive home can be found.
>
> **Supplement:**
>
> . . . Because [Mother] failed to alleviate the concerns that brought the children into care by failing to participate in services, failing to consistently visit with the children, and failing to maintain contact with the Department[,] the Department believes it is in the best interest that placement adopt or be named permanent managing conservator. The Department believes it is in the children's best interest that the Department be named sole managing conservator if the relative placement is unable to immediately adopt or take permanent managing conservatorship.

At trial, the Department's witnesses continued to maintain that adoption by a relative was the goal for the children. At least one testified that for such an adoption to occur, the parents' rights would first have to be terminated. The

Department's witnesses also testified that Mother and Father were uncooperative in providing relative placements other than Grandmother but that the Department would continue to seek relative placements if Mother's and Father's rights were terminated.

Mother does not specifically identify the evidence she believes should not have been admitted other than "testimony, documentary evidence, and expert reports relating to termination . . . with adoption by non-relative as the ultimate goal." Presumably, the primary evidence of which she complains is the caseworker's and supervisor's testimony that the Department had identified four nonrelative families who had expressed interest in adopting the children and the CASA volunteer's testimony that M.N.'s then-current foster placement was motivated to adopt M.N., and possibly J.N., if she was able to obtain adequate room to do so.

We conclude and hold that the trial court did not abuse its discretion by admitting this evidence because the record shows a lack of unfair surprise or prejudice. The Department consistently pled for termination of Mother's and Father's rights as an alternative to family reunification or the naming of a relative or "other suitable person" as permanent managing conservator. Although no reporter's records of the permanency hearings were taken, the record shows that Mother's counsel was present at each of these hearings and that before most of the hearings, both CASA and the Department filed progress reports documenting the adequacy of the children's placements. And the trial court's permanency

hearing orders reflect that the trial court considered whether those placements remained appropriate and in the children's best interest. The CASA report filed ten days before trial recommended that the children remain in their then-current foster care placements and that all parents' rights should be terminated. Mother's family service plan filed by the Department a few days before trial, which listed a review date of April 12, 2017, stated that the Department had "extreme" concerns about Mother's living situation, which was "crowded [with] not enough space for the children, and . . . other family members that live in the home."

If Mother's issue can be construed to include a complaint about any testimony, documentary evidence, or expert reports opining that at the time of trial Grandmother's home was not a suitable placement, the record also shows no unfair surprise or prejudice. The children were removed from their placement in Grandmother's home six months before trial began, and the Department supervisor testified that the Department had gone over its concerns about the living arrangements with Grandmother "several times." Grandmother acknowledged being told of those concerns throughout the case. But Grandmother further testified that those living arrangements had not changed, and she did not express any intent to change them to meet the Department's requirements for the children. Mother was living with Grandmother at the time of trial and testified that she was not concerned about the people who lived and visited there. Mother and Father did not provide the Department or trial court

with any other potential relative placement names before trial. *See id.* § 262.201(c) (West Supp. 2016) (requiring trial court to order parent to file a proposed child placement resources form with the court and provide the Department with necessary information to locate relatives). The children's caseworker at the time of trial and her supervisor testified that adoption by a relative was still the goal at the time of trial if a suitable relative could be found post-termination; the supervisor testified that adoption by a nonrelative was a backup plan if no suitable relative could be found.

Accordingly, we conclude and hold that the trial court did not abuse its discretion by admitting this evidence. *See In re M.F.D.*, No. 01-16-00295-CV, 2016 WL 7164063, at *6 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) (mem. op. on reh'g); *Concept Gen. Contracting*, 346 S.W.3d at 180; *In re G.N.H.*, No. 11-05-00405-CV, 2006 WL 3094354, at *3 (Tex. App.—Eastland Nov. 2, 2006, no pet.) (mem. op.). We overrule Mother's first issue.

Trial Court Did Not Abuse Discretion by Proceeding With Trial

In her second issue, Mother contends that the trial court abused its discretion by allowing the trial to go forward because the Department violated Texas family code sections 262.114(a-2), 263.0021, 263.003, and 263.3026. Mother raised these concerns in the trial court but did not formally seek a continuance of trial. *See* Tex. R. Civ. P. 251; *In re S.H.*, No. 2-05-174-CV, 2006 WL 59354, at *2 (Tex. App.—Fort Worth Jan. 12, 2006, no pet.) (mem. op.). To the extent she preserved her complaints by asking the trial court to abate the

trial,[3] we conclude that she is not entitled to relief. *See generally* Tex. R. App. P. 44.1.

Section 262.114(a-2) provides,

> If the child has not been placed with a relative or other designated caregiver by the time of the full adversary hearing under Section 262.201, the department shall file with the court a statement that explains:
>
> (1) the reasons why the department has not placed the child with a relative or other designated caregiver listed on the proposed child placement resources form; and
>
> (2) the actions the department is taking, if any, to place the child with a relative or other designated caregiver.

Tex. Fam. Code Ann. § 262.114(a-2) (West Supp. 2016). At the time of the adversary hearing in this case, J.N. and M.N. were already placed with Grandmother and continued to be placed with her until they were removed and placed with "other designated caregiver[s]." Thus, the Department did not fail to comply with this provision at that time.

The provisions of chapter 263 apply after the Department has been named temporary or permanent managing conservator of a child and require the trial court to review the child's placements. *See id.* § 263.002 (West Supp. 2016),

[3]Mother's counsel moved to abate the trial after the trial court denied her motion to exclude the evidence of adoption by a nonrelative, in the context of arguing that section 263.0021 had not been complied with. But counsel also raised the other three family code sections in the trial court in the context of his exclusion-of-evidence request, and he urged the trial court to resolve that issue "short of a trial." Thus, we conclude he requested that the trial court not "move forward" because of a lack of compliance with those sections of the family code as well. *See* Tex. R. App. P. 33.1(a)(1).

§ 263.201 (West 2014), § 263.202 (West Supp. 2016), §§ 263.203, .304–.305 (West 2014), § 263.306 (West Supp. 2016).

Section 263.003 requires the Department to file "any document described by Sections 262.114(a-1) and (a-2) that has not been filed with the court" no later than the tenth day before a placement review hearing. *See id.* § 263.003 (West 2014). The Department filed permanency plans and progress reports in the trial court before the permanency hearings in July and November 2016 and February 2017. The July 2016 report indicates that although the Department had some concerns about the children's placement with Grandmother, the Department continued to recommend that the children stay in that placement. But the November 2016 report reflects that the children had been placed in a foster home together, that the Department thought that placement was the most appropriate for the children at that time, and that the Department had "continued concerns about [Grandmother's] home allowing [Mother] to visit outside of the office and not disclosing frequent visitors to the Department." The February 2017 report also states that the children were in a foster home, which was "the most appropriate family like setting at this time." In both the November 2016 and February 2017 reports, the Department indicated that it was "searching for possible relative placements." Thus, the Department did not fail to file with the trial court information regarding the placement of the children.

Section 263.3026 provides,

> (a) The department's permanency plan for a child may include as a goal:
>
> > (1) the reunification of the child with a parent or other individual from whom the child was removed;
> >
> > (2) the termination of parental rights and adoption of the child by a relative or other suitable individual;
> >
> > (3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or
> >
> > (4) another planned, permanent living arrangement for the child.
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> (b) If the goal of the department's permanency plan for a child is to find another planned, permanent living arrangement for the child, the department shall document that there is a compelling reason why the other permanency goals identified in Subsection (a) are not in the child's best interest.

Id. § 263.3026 (West 2014).

Mother contends that the Department was required to comply with subsection (b) in order to present evidence of adoption by a nonrelative because that goal was "another planned, permanent living arrangement for the child." But the plain language of section 263.3026(a) differentiates "adoption of the child by a relative *or other suitable individual*" and "another planned, permanent living arrangement for the child." *Id.* § 263.3026(a)(2), (4) (emphasis added). Therefore, according to well-established principles of statutory construction, for purposes of section 263.3026, "another planned, permanent living arrangement for the child" does not include "adoption of the child by a relative or other suitable

individual." *See, e.g.*, *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

Finally, Mother argues that the Department did not comply with family code section 263.0021, which provides that foster parents are entitled to ten days' notice of a hearing under chapter 263 and are entitled to present evidence and be heard. Tex. Fam. Code Ann. § 263.0021 (West Supp. 2016). But Mother lacks standing to complain about improper notice to the foster parent. *See In re A.M.-H.*, No. 02-15-00286-CV, 2016 WL 1267894, at *9 n.15 (Tex. App.—Mar. 31, 2016, no pet.) (mem. op.); *In re E.M.,* No. 02-13-00337-CV, 2014 WL 5409091, at *2 (Tex. App.—Fort Worth Oct. 23, 2014, no pet.) (mem. op.).

Therefore, we conclude and hold that the trial court did not abuse its discretion by overruling Mother's objections to proceeding with trial. We overrule Mother's second issue.

Father's Appeal

Father's appointed appellate counsel has filed a motion to withdraw and a brief in support of that motion in which he asserts that Father's appeal is frivolous. *See Anders v. California*, 386 U.S. 738, 744–45, 87 S. Ct. 1396, 1400 (1967); *see also In re K.M.*, 98 S.W.3d 774, 776–77 (Tex. App.—Fort Worth 2003, no pet.) (holding that *Anders* procedures apply in termination of parental rights cases). The brief meets the requirements of *Anders* by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds to be advanced on appeal. This court informed Father of his

right to file a response to the *Anders* brief, but he has not done so. The State has declined to file a brief.

Once an appellant's court-appointed attorney files a motion to withdraw on the ground that the appeal is frivolous and fulfills the requirements of *Anders*, this court is obligated to undertake an independent examination of the record to determine if any arguable grounds for appeal exist. *See Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991); *Mays v. State*, 904 S.W.2d 920, 922–23 (Tex. App.—Fort Worth 1995, no pet.). When analyzing whether any grounds for appeal exist, we consider the record, the *Anders* brief, and any pro se response. *In re Schulman*, 252 S.W.3d 403, 408–09 (Tex. Crim. App. 2008) (orig. proceeding).

We have carefully reviewed counsel's brief and the appellate record. Finding no reversible error, we agree with counsel that Father's appeal is without merit. *See Bledsoe v. State*, 178 S.W.3d 824, 827 (Tex. Crim. App. 2005); *In re D.D.*, 279 S.W.3d 849, 850 (Tex. App.—Dallas 2009, pet. denied).

Conclusion

Having overruled Mother's two issues, we affirm the trial court's judgment terminating her parental rights to J.N. and M.N. Additionally, we affirm the trial court's judgment terminating Father's parental rights to J.N.

Because counsel's motion to withdraw from representing Father does not show cause for the withdrawal other than counsel's conclusion that the appeal is frivolous, we deny the motion. *See In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016)

(order); *In re C.J.*, 501 S.W.3d 254, 255 (Tex. App.—Fort Worth 2016, pets. denied).[4]

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

DELIVERED: September 7, 2017

[4]The supreme court has held that in cases such as this, "appointed counsel's obligations [in the supreme court] can be satisfied by filing a petition for review that satisfies the standards for an *Anders* brief." *P.M.*, 520 S.W.3d at 27–28.