In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00315-CV

IN THE INTEREST OF L.V. AND A.V., CHILDREN

On Appeal from the 121st District Court
Terry County, Texas
Trial Court No. 19,842; Honorable Kevin C. Hart, Presiding

February 2, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, R.V., Jr., appeals the trial court's order terminating his parental rights to his daughters, L.V. and A.V.[1] on the sole statutory ground of an executed affidavit of voluntary relinquishment. In presenting this appeal, appointed counsel has filed an *Anders*[2] brief in support of her motion to withdraw concluding there are no non-frivolous

[1] To protect the privacy of the parties involved, we refer to them by their initials. *See* TEX. FAM. CODE ANN. § 109.002(d) (West 2014). *See also* TEX. R. APP. P. 9.8(b).

[2] *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

issues that could be presented on appeal and that any appeal would be without merit. We affirm and grant counsel's motion.[3]

APPLICABLE LAW

The Texas Family Code permits a court to terminate the relationship between a parent and a child if the Department of Protective and Regulatory Services establishes (1) one or more acts or omissions enumerated under section 161.001(b)(1) of the Code and (2) that termination of that relationship is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.001(b)(1), (2) (West Supp. 2015); *Holley v. Adams*, 544 S.W.2d 367, 370 (Tex. 1976). The burden of proof is by clear and convincing evidence. § 161.206(a) (West 2014). "'Clear and convincing evidence' means 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." § 101.007 (West 2014).

Only one statutory ground is required to support termination. *In re K.C.B.*, 280 S.W.3d 888, 894-95 (Tex. App.—Amarillo 2009, pet. denied). Although evidence presented may be relevant to both the statutory grounds for termination and best interest, each element must be established separately and proof of one element does not relieve the burden of proving the other. *See In re C.H.,* 89 S.W.3d 17, 28 (Tex. 2002). In appellate review of a termination proceeding, the standard for sufficiency of the evidence is that discussed in *In re K.M.L.,* 443 S.W.3d 101, 112-13 (Tex. 2013). In reviewing a best interest finding, appellate courts consider, among other evidence, the factors set forth in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

[3] The mother's rights were also terminated but she did not appeal.

BACKGROUND

In April 2013, L.V., age two, was removed from her parents for neglectful supervision, domestic violence issues, and continued drug use and placed with a maternal relative. At that time, L.V.'s mother was eight months pregnant with her sister, A.V. After A.V.'s birth, she was also placed with the maternal relative.

On the date of the final hearing, R.V., Jr. appeared and signed an *Affidavit of Voluntary Relinquishment of Parental Rights to the Department of Family and Protective Services* which was introduced at the final hearing without objection. The caseworker testified the affidavit was signed while R.V., Jr. was represented by counsel. She requested the court find that relinquishment of R.V., Jr.'s parental rights was in his daughters' best interest. The trial court signed an order terminating R.V., Jr.'s parental rights and he pursued this appeal.

ANDERS V. CALIFORNIA

Although the Texas Supreme Court has yet to consider the issue, for many years Texas appellate courts, including this court, have found the procedures set forth in *Anders v. California* applicable to appeals of orders terminating parental rights. *See In re A.W.T.,* 61 S.W.3d 87, 88 (Tex. App.—Amarillo 2001, no pet.).[4] The brief filed in this

[4] *See also In re R.M.C.*, 395 S.W.3d 820 (Tex. App.—Eastland 2013, no pet.); *In re K.R.C.*, 346 S.W.3d 618, 619 (Tex. App.—El Paso 2009, no pet.); *In the Interest of D.D.*, 279 S.W.3d 849, 850 (Tex. App.—Dallas 2009, pet. denied); *In the Interest of L.D.T.*, 161 S.W.3d 728, 731 (Tex. App.—Beaumont 2005, no pet.); *Taylor v. Tex. Dep't of Protective & Regulatory Servs.*, 160 S.W.3d 641, 646 (Tex. App.—Austin 2005, pet. denied); *In re D.E.S.*, 135 S.W.3d 326, 329 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *In re K.D.*, 127 S.W.3d 66, 67 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Porter v. Texas Dep't of Protective & Regulatory Services*, 105 S.W.3d 52, 56 (Tex. App.—Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774, 777 (Tex. App.—Fort Worth 2003, no pet.); *In re E.L.Y.*, 69 S.W.3d 838, 841 (Tex. App.—Waco 2002, no pet.); *In re K.S.M.*, 61 S.W.3d 632, 634 (Tex. App.—Tyler 2001, no pet.); *In re P.M.H.*, No. 06-10-00008-CV, 2010 Tex. App. LEXIS 3330, at *2 (Tex. App.—Texarkana May 6, 2010, no pet.) (mem. op.); *In the Interest of R.R.*, No. 04-03-00096-CV, 2003 Tex. App. LEXIS 4283, at *10-12 (Tex. App.—San Antonio May 21, 2003, no pet.) (mem. op.).

appeal meets the requirements of *Anders* by presenting a professional evaluation of the record and demonstrating why there are no arguable grounds for reversible error.

In support of her motion to withdraw, counsel certifies she has conducted a conscientious examination of the record, and in her opinion, the record reflects no potentially plausible basis to support an appeal. *In re D.A.S.*, 973 S.W.2d 296, 297 (Tex. 1998). Counsel has demonstrated that she has complied with the requirements of *Anders* by (1) providing a copy of the brief to R.V., Jr. and (2) notifying him of his right to file a *pro se* response if he desired to do so.[5] *Id.* By letter, this court also granted R.V., Jr. an opportunity to exercise his right to file a response to counsel's brief, should he be so inclined. He did file a response asserting he was forced into signing the affidavit of relinquishment. The Department notified this court it would not file a response unless requested to do so.

ANALYSIS

As in a criminal case, we have independently examined the entire record to determine whether there are any non-frivolous issues that might support this appeal. *See Penson v. Ohio*, 488 U.S. 75, 82-83, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988); *Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). Section 161.001(b)(1)(K) authorizes the trial court to terminate parental rights upon an executed unrevoked or irrevocable affidavit of relinquishment as governed by section 161.103 of the Code. TEX. FAM. CODE ANN. §§ 161.001(b)(1)(K), 161.103 (West Supp. 2015).[6] The

[5] Counsel shall, within five days after this opinion is handed down, mail the parent a copy of the opinion and judgment along with notification of the right to file a *pro se* petition for review under Rule 53 of the Texas Rules of Appellate Procedure to the parent's last known address.

[6] As required, the affidavit recites that at least forty-eight hours had passed since his children's births, is verified, and is signed by two witnesses. The affidavit also contains the requirements set forth in section 161.103(b).

affidavit must be voluntarily, knowingly, and intelligently executed. *In re K.M.L.*, 443 S.W.3d at 113. The burden to prove the elements for voluntary relinquishment falls on the Department. *Id.*

R.V., Jr. filed a *Motion for New Trial* pursuant to section 161.211(c) of the Family Code alleging fraud, duress, or coercion in signing the irrevocable affidavit of voluntary relinquishment. TEX. FAM. CODE ANN. § 161.211(c) (West 2014). Duress occurs when, due to some kind of threat, a person is incapable of exercising his free agency and unable to withhold consent. *In re D.E.H.*, 301 S.W.3d 825, 828-29 (Tex. App.—Fort Worth 2009, pet. denied).

At the hearing on his motion, he testified his understanding was that if he did not sign the affidavit, "the Judge would sign for me."[7] According to R.V., Jr., he told his attorney he did not want to sign the affidavit. He ultimately did but his contention at the hearing was that it was under duress. He also explained he was nervous and did not sleep the night before the hearing which, he alleges, resulted in his sleeping through the entire final hearing.

During cross-examination, R.V., Jr. acknowledged he made the choice to sign the affidavit but denied it was done so voluntarily. He was questioned on his failure to work services to obtain the return of his children and admitted use of crack and methamphetamines. He also admitted he had not seen his children since 2013. The trial judge then inquired about his incarceration for possession of methamphetamines and tampering with a witness. The judge also asked him at what point in the final hearing he had fallen asleep to which he replied, "when we first came in." He was

[7] During cross-examination, he was asked if he misunderstood his attorney—could his attorney have meant that if he did not sign the affidavit, the court would sign an order of termination based on evidence in support of other grounds?

adamant that he slept through the entire hearing but admitted it was because of his addiction.

He expressed his love for his children and a desire to get them back. He testified that if he had not slept through the entire hearing, he would have testified. The judge questioned him to assure he had not been denied the opportunity to testify at the final hearing. He confirmed that no one had denied him the opportunity to testify but that by falling asleep, he missed his opportunity and wanted another chance.

R.V., Jr. admitted he did not work his services during the two years his children were in the Department's care. He insisted he signed the affidavit because he was advised that if he did not, the judge would sign it for him. He was repeatedly questioned on the possibility of having misunderstood what his attorney had said, i.e., that if he did not sign the affidavit, the trial judge would likely sign a termination order after hearing evidence on other grounds for termination.

A Department witness testified that the final hearing was delayed because R.V., Jr. consulted with his attorney for approximately thirty minutes. After that meeting, his attorney requested a "relinquishment form" from the Department and he again met with R.V., Jr. for another thirty minutes before commencement of the final hearing.

Notwithstanding R.V., Jr.'s testimony that he slept through the entire final hearing, a Department witness testified that she observed R.V., Jr. awake when the hearing began and that the first item addressed was his affidavit of relinquishment. It was not until approximately twenty minutes later, when the hearing focused on the

mother's affidavit of relinquishment, that the witness observed R.V., Jr. "passed out with his head down, asleep."[8]

The person who notarized the affidavit of relinquishment testified that R.V., Jr. was sad and tearful when he signed the affidavit but seemed to understand the consequences of executing it. R.V., Jr.'s attorney was present and the notary was surprised to hear R.V., Jr. was alleging he was forced into signing the affidavit. There were no indications he was signing the affidavit other than voluntarily.

The notary answered affirmatively when questioned by the judge on whether R.V., Jr. hesitated before signing the affidavit. But the notary did not hear the attorney or anyone else tell R.V., Jr. that he had to sign it. R.V., Jr. swore to the notary that the contents of the affidavit were true and correct before signing and did not ask any questions.

The trial court denied the motion for new trial for various reasons. R.V., Jr. was represented by counsel, his testimony lacked credibility, there was no evidence of duress, and he denied himself the opportunity to be heard at the final hearing because of his own conduct.

By the *Anders* brief, counsel acknowledges she has conducted a diligent review of the record and finds no reversible error to present on appeal. She candidly evaluates the testimony and evidence to support the trial court's ruling that R.V., Jr. voluntarily signed the affidavit of relinquishment and he did not establish fraud, coercion, or duress.

[8] On cross-examination, the witness testified that R.V., Jr.'s mother had to shake him to wake him after the hearing.

CONCLUSION

After carefully reviewing the appellate record, counsel's brief, and R.V., Jr.'s *pro se* response, we conclude there are no plausible grounds for reversal of the trial court's order. Accordingly, the trial court's order terminating R.V., Jr.'s parental rights to L.V. and A.V. is affirmed and counsel's motion to withdraw is granted.

Patrick A. Pirtle
Justice