NUMBER 13-20-00194-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

**IN THE INTEREST OF S.F.O., A.S.O., A.M.O.,
A.A.O., AND A.S.O., CHILDREN**

**On appeal from the 73rd District Court
of Bexar County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Benavides**

This case involves the termination of parental rights of the A.O. (Father) to his five children, S.F.O. (Child 1),[1] A.S.O. (Child 2), A.M.O. (Child 3), A.A.O. (Child 4), and A.S.O. (Child 5).[2] By one issue, the attorney and guardian ad litem for the children argues that

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[1] We identify the children by number to protect the minors' identity. *See* TEX. FAM. CODE ANN. § 109.002(d); TEX. R. APP. P. 9.8.

[2] Mother's parental rights were also terminated to the five children who are involved in this appeal. Mother did not appeal the termination of those rights. There was a sixth child who was removed from Mother's home, but Mother's parental rights were not terminated to that child due to a request from that

the trial court abused its discretion by not terminating Father's parental rights under § 161.001(b)(1)(D) and (E) of the Texas Family Code. Father has also perfected an appeal; however, his court-appointed appellate counsel has filed an *Anders* brief stating there are no arguable grounds for appeal. *See Anders v. California*, 386 U.S. 738, 744 (1967). We affirm.

I. Background[3]

The children were removed from E.M. (Mother) in March 2019 due to reports of physical neglect and neglectful supervision. When the Department of Family and Protective Services (the Department) first observed the home, the children were living in filthy conditions. The home smelled of urine and was covered with dirty dishes and trash, the children were unclean and had lice, and Mother had not been present at the home for close to two weeks. The maternal grandmother and aunt were present, but both stated they were not the children's caregivers—instead, they stated Child 1 and another sibling[4] not part of this termination appeal were the caregivers.

Mother's family service plan was presented to her in April 2019. Father, at the time of the removal, was incarcerated. When he was released, he signed his family service plan. According to a June 2019 report, Father was complying with the family service plan

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child's biological father, who has custody.

[3] This case is before this Court on transfer from the Fourth Court of Appeals in San Antonio pursuant to a docket equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

[4] Mother had six children in total: the five children subject to appeal, and a sixth child who had a different biological father. At the time of the final termination hearing, Child 1 was fourteen years old, Child 2 was seven years old, Child 3 was six years old, Child 4 was three years old, and Child 5 was one year old. The additional sibling was eleven years old.

by attending parenting and domestic violence classes, had negative drug tests, was in compliance with his parole requirements, was employed and residing in his own apartment, and regularly visited the children. However, by September 2019, Father was no longer in compliance with any of his requirements and stopped visiting the children completely.

At the termination hearing, which Father attended by telephone, William Brown, the Department's caseworker, stated that Father was incarcerated in Beeville, Texas and had been sentenced to five years' imprisonment shortly before the hearing. Brown stated that all potential family placement had been denied and that termination would open up additional options for the three older children to find permanent placement.[5] Brown testified that besides the neglect from Mother, there had also been reports of domestic violence between Mother and Father. Father was arrested for assaulting Mother in January 2020. Brown felt that Mother did not recognize the threat Father posed to the children. Brown also stated that Father never completed any of his family service plan requirements and "disappeared" when he became non-compliant with his parole obligations. He explained that the Department had concerns about Father because of his "continued criminal activities." Brown agreed that Father had partial compliance through August and there had been no concerns with drug use. Brown stated he had no contact with Father from August through October. When they finally spoke, Father asked to visit the children but could never "meet" at the appointed times. Brown admitted that Father

[5] At the time of the hearing, the three older children were placed in a foster home together, and the two younger children were placed in a foster home together. The two younger children were placed in a home deemed "foster to adopt," and the Department indicated that the foster parent wanted to adopt Child 4 and Child 5.

did "try" with the children during visits, although the younger ones seemed hesitant around him.

Jeff Ivey, the CASA volunteer assigned to this case, testified regarding the children. He explained he and his wife have been "super involved" with the children and encouraged Mother to complete her family service plan. Ivey stated that the children did not have much interaction with Father, but that Child 1 was very affected when Father's visits stopped. Ivey explained that Child 1 became upset that Father stopped visiting and did not understand why Father was not trying to reunite with the children. The other children were aware that Father was not visiting them, but it did not seem to affect them as much, according to Ivey. He said no issues were observed when Father visited the children, but Father seemed to interact the most with Child 1, while holding Child 5 as the other children played independently.

Father also testified. He explained to the trial court that he was incarcerated for assault with family violence and burglary of a habitation after having his community supervision revoked. Father stated that the burglary of a habitation charge alleged that he burglarized the home he shared with Mother and he denied assaulting Mother. Father admitted that he stopped visiting the children because he was paranoid about getting arrested. He was aware that Mother had told his community supervision officer that Father was harassing her because after loaning her his truck, Father took his truck keys away from Mother after they argued. Father told the trial court that he was in an intermediate sanctions facility (ISF) when the children were removed, and when he was released from ISF, he began taking his classes, but he stopped attending his classes for the same

reason he stopped visiting the children: he was afraid of getting arrested for a community supervision violation. Father explained that he wants his children with his family and the home they lived in when they were removed should be condemned due to its condition. Father also admitted that he has a history of assault charges, mainly with his brother, but also some with Mother during which the children were present.

The trial court terminated Mother's and Father's parental rights. The trial court found termination was in the children's best interest and terminated Father's rights under § 161.001(b)(1)(N) (constructive abandonment), (O) (failure to comply with court ordered services, and (Q) (engaging in criminal activity resulting in conviction and the inability to care for a child). *See* TEX. FAM. CODE. ANN. § 161.001(b)(1)(N), (O), (Q). The children's guardian and attorney ad litem also asked for termination under § 161.001(b)(1)(D) (knowingly placing or allowing the children to remain in conditions or surroundings that endanger their physical or emotional well-being) and (E) (engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well-being), but the trial court declined to make that finding stating that none of the domestic violence incidents between Mother and Father led to the children's removal. This appeal by Father and the ad litem followed.

II. AD LITEM'S APPEAL

By one issue, the ad litem for the children challenges the trial court's denial of her request for a finding under family code § 161.001(b)(1)(D) or (E) in terminating Father's parental rights.

A. Standard of Review

Texas Family Code § 161.001(b) allows for involuntary termination of parental rights if clear and convincing evidence supports that a parent engaged in one or more of the twenty-one enumerated grounds for termination and that termination is in the best interest of the child. *Id.* § 161.001(b). To affirm a termination judgment on appeal, a court need uphold only one termination ground—in addition to upholding a challenged best interest finding—even if the trial court based the termination on more than one ground. *In re N.G.*, 577 S.W.3d 230, 232 (Tex. 2019) (per curiam). In parental termination cases, due process mandates a clear and convincing evidence standard of proof. *Id.* at 235. "Due process compels this heightened standard because terminating the parent-child relationship imposes permanent, irrevocable consequences." *In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007). "Clear and convincing evidence" means a "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." TEX. FAM. CODE ANN. § 101.007. Because of this high evidentiary burden at trial, we have concluded that appellate review in parental termination cases also warrants a heightened standard of review. *In re N.G.*, 577 S.W.3d at 235; *In re A.B.*, 437 S.W.3d 498, 502 (Tex. 2014) (holding that when an appellate court reviews the factual sufficiency of evidence underlying grounds for termination of parental rights, the court must "determine whether 'the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the [s]tate's allegations'" (citation omitted)).

B. Applicable Law and Discussion

In its petition, the Department alleged eleven grounds for termination listed in § 161.001(b)(1), including parts (D) and (E). As noted, the trial court made affirmative findings only as to parts (N), (O), and (Q), thereby implicitly finding against the Department on parts (D) and (E). "When parental rights have been terminated under either § 161.001(b)(1)(D) or (E), that ground becomes a basis to terminate that parent's rights to other children." *In re N.G.*, 577 S.W.3d at 234; *see* TEX. FAM. CODE ANN. § 161.001(b)(1)(M). Here, the ad litem is requesting that this Court remand this case back to the trial court with instructions to make affirmative findings regarding whether Father's parental rights should be terminated under § 161.001(b)(1)(D) or (E). We construe this as a challenge to the legal sufficiency of the evidence supporting the trial court's rejection of termination grounds under parts (D) and (E).

When a party challenges the legal sufficiency of the evidence supporting an adverse finding on an issue on which it had the burden of proof, that party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). We view the evidence in the light most favorable to the finding, and we assume that the trier of fact credited testimony favorable to the verdict and disbelieved testimony contrary to it. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). We defer to the trier of fact's determination as to the credibility of the witnesses and the weight to give their testimony, and we indulge every reasonable inference in support of the finding. *Id.* at 819, 822.

The ad litem highlights evidence adduced at the hearing that would support its position that findings under parts (D) and (E) were warranted; however, we must defer to

the trial court as the finder of fact. *See id.* We cannot conclude that the evidence established, as a matter of law, all vital facts supporting findings under parts (D) and (E). *See Dow Chem. Co.*, 46 S.W.3d at 241. We overrule the ad litem's sole issue.

III. FATHER'S APPEAL

A. *Anders* Brief

Father's appellate counsel has filed a motion to withdraw and brief in support thereof in which he states that he has diligently reviewed the entire record and has found no non-frivolous grounds for appeal. *See Anders*, 386 U.S. at 744; *High v. State*, 573 S.W.2d 807, 813 (Tex. Crim. App. [Panel Op.] 1978); *In re N.F.M.*, 582 S.W.3d 539, 541–42 (Tex. App.—San Antonio 2018, no pet.) (providing that, when appointed counsel in a parental termination case concludes that there are no non-frivolous issues for appeal, counsel may file an *Anders*-type brief). Counsel's brief meets the requirements of *Anders* as it presents a thorough, professional evaluation of the record showing why there are no arguable grounds for advancing an appeal. *See In re Schulman*, 252 S.W.3d 403, 407 n.9 (Tex. Crim. App. 2008) (orig. proceeding) ("In Texas, an *Anders* brief need not specifically advance 'arguable' points of error if counsel finds none, but it must provide record references to the facts and procedural history and set out pertinent legal authorities.") (citing *Hawkins v. State*, 112 S.W.3d 340, 343–44 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.)); *Stafford v. State*, 813 S.W.2d 503, 510 n.3 (Tex. Crim. App. 1991) *see also In re R.R.*, No. 04-03-00096-CV, 2003 WL 21157944, at *3 (Tex. App.—San Antonio May 21, 2003, no pet.) (mem. op.) (determining that an *Anders* evaluation can apply to parental termination appeals).

In compliance with *High v. State*, 573 S.W.2d at 813, and *Kelly v. State*, 436 S.W.3d 313, 319–20 (Tex. Crim. App. 2014), counsel carefully discussed why, under controlling authority, there is no reversible error in the trial court's judgment. Father's counsel has also informed this Court that he has: (1) notified Father that he has filed an *Anders* brief and a motion to withdraw; (2) provided Father with copies of both filings; (3) informed Father of his rights to file a pro se response,[6] to review the record preparatory to filing that response, and to seek discretionary review in the Texas Supreme Court if this Court finds that the appeal is frivolous; and (4) provided Father with a form motion for pro se access to the appellate record with instructions to file the motion in this Court. *See Anders*, 386 U.S. at 744; *Kelly*, 436 S.W.3d at 319–20; *see also In re Schulman*, 252 S.W.3d at 409 n.23. More than an adequate time has passed, and Father has not filed a pro se response.

B. Independent Review

Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to determine whether the case is wholly frivolous. *Penson v. Ohio*, 488 U.S. 75, 80 (1988). We have reviewed the records and counsel's brief, and we have found no reversible error. *See Bledsoe v. State*, 178 S.W.3d 824, 827–28 (Tex. Crim. App. 2005) ("Due to the nature of *Anders* briefs, by indicating in the opinion that it considered the issues raised in the briefs and reviewed the record for reversible error but found none,

[6] In the criminal context, the Texas Court of Criminal Appeals has held that "the pro se response need not comply with the rules of appellate procedure in order to be considered. Rather, the response should identify for the court those issues which the indigent appellant believes the court should consider in deciding whether the case presents any meritorious issues." *In re Schulman*, 252 S.W.3d 403, 409 n. 23 (Tex. Crim. App. 2008).

the court of appeals met the requirement of Texas Rule of Appellate Procedure 47.1."); *Stafford*, 813 S.W.2d at 509.

C. Motion to Withdraw

Counsel filed a motion to withdraw in conjunction with his *Anders* brief. We deny counsel's motion to withdraw because it does not assert any ground for withdrawal apart from counsel's conclusion that the appeal is frivolous. *See In re P.M.*, 520 S.W.3d 24, 27 (Tex. 2016) (per curiam); *In re A.M.*, 495 S.W.3d 573, 583 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). Counsel's duty to his client extends through the exhaustion or waiver of all appeals, including the filing of a petition for review in the Texas Supreme Court. *See* TEX. FAM. CODE ANN. § 107.016(3); *In re P.M.*, 520 S.W.3d at 27. After this court has rendered its decision, appointed counsel's obligations to his client may be met by filing a petition for review in the Texas Supreme Court that satisfies the standards for an *Anders* brief. *In re P.M.*, 520 S.W.3d at 27–28 & n. 14; *see also In re E.D.D.*, No. 04-19-00138-CV, 2019 WL 3642651, at *1 (Tex. App.—San Antonio Aug. 7, 2019, pet. denied) (mem. op.).

IV. CONCLUSION

We affirm the trial court's termination order.

GINA M. BENAVIDES,
Justice

Delivered and filed the
23rd day of July, 2020.