

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-04-016 CV

IN THE INTEREST OF L.D.T., C.R.E.T., AND W.G.T.

On Appeal from the 279th District Court

Jefferson County, Texas

Trial Cause No. F-149,369-A

OPINION

This case presents an issue of first impression for this Court. We must determine whether appointed counsel may file an *Anders* brief in a parental-rights termination appeal. In *Anders v. California*, 386 U.S. 738, 741-44, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the United States Supreme Court held that a court-appointed defense attorney in a criminal case who determines, after fully examining the record, that an appeal is frivolous must so advise the appellate court and then set forth any potential points of error and applicable law that might arguably support the appellant's position. Upon receiving a "frivolous appeal" brief, appellate courts must conduct "a full examination" of the record and determine independently whether the case is "wholly

frivolous." *Penson v. Ohio*, 488 U.S. 75, 80, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

Rebecca Green appeals the trial court's judgment terminating her parent-child relationship with her three children, L.D.T., C.R.E.T., and W.G.T. The judgment also terminated the parent-child relationship between the children and their father, who does not appeal.⁽¹⁾ Pursuant to Family Code section 161.001, the trial court found, by clear and convincing evidence, that statutory grounds existed for the termination and that termination of the parent-child relationship between Green and her children was in the children's best interests. See *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003); Tex. Fam. Code Ann. § 161.001 (Vernon 2002).

On appeal, Green's appointed counsel filed an *Anders* brief stating that, after a thorough review of the record, he determined this appeal is frivolous. The brief presents an adequate evaluation of the record to demonstrate why there are no arguable grounds for reversal. Green's attorney has certified that a copy of the brief has been provided to Green and that counsel has provided Green with access to the appellate record. On December 16, 2004, Green was given an extension of time to file a brief. The extension expired on January 25, 2005, and as of the date of this opinion, Green has not filed a brief.

Several of our sister courts of appeals previously have determined that *Anders* procedures are appropriate in parental-rights termination cases. See *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 Servs.*, 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.). However, there is a distinction in these holdings. Several courts - Houston First, Houston Fourteenth, Fort Worth, and Waco - all specifically find that *Anders* procedures apply and, thus, make them mandatory. See *In re D.E.S.*, 135 S.W.3d at 329; *In re K.D.*, 127 S.W.3d at 67; *In re K.M.*, 98 S.W.3d at 777; *In re E.L.Y.*, 69 S.W.3d at 841. Other courts - Corpus Christi and Tyler - hold that appointed counsel may file an *Anders* brief, and thereby apparently allow counsel to choose whether or not to follow the *Anders* procedures. See *Porter*, 105 S.W.3d at 56; *In re K.S.M.*, 61 S.W.3d at 634.

The Texas Supreme Court has not addressed the applicability of *Anders* procedures in parental-rights termination cases. Some of its recent decisions, however, suggest that *Anders* briefs may be appropriate in such appeals. In *In re M.S.*, the Texas Supreme Court held that the statutory right to counsel provided for parental-rights termination cases under Texas Family Code section 107.013(a)(1) necessarily includes the right to effective counsel. *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003). And in doing so, the Court extended the *Strickland* test⁽²⁾ used in the criminal context to civil parental-rights termination proceedings. *Id.* at 545. In *In re D.A.S.*, the Court extended *Anders* to juvenile delinquency proceedings on the basis that their quasi-criminal nature implicated the Sixth Amendment right to counsel. *In re D.A.S.*, 973 S.W.2d 296, 298-299 (Tex. 1998). The rationale of *D.A.S.*--that *Anders* applied to appointed counsel in non-criminal contexts where the Sixth Amendment is implicated--seemingly would extend to termination cases, as *M.S.* held that the right to effective counsel applies in those proceedings.

However, neither the Texas Supreme Court nor the United States Supreme Court has held that counsel is required to file an *Anders* brief in a parental-rights termination case upon finding that

no arguable error exists or that the appellate courts are obliged to review the record for arguable error. Conversely, we are not prohibited from conducting our own review of the record for arguable error in a parental-rights termination case where counsel files an *Anders* brief. ⁽³⁾

Accordingly, we hold that when appointed counsel represents an indigent client in a parental termination appeal and concludes that there are no non-frivolous issues for appeal, counsel may file an *Anders* brief.

Although we may or may not be required to do so, in this case we have reviewed the clerk's record and the reporter's record, and we find no arguable error requiring us to order appointment of new counsel to re-brief this appeal. *Compare Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991). We affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON

Justice

Submitted on March 1, 2005

Opinion Delivered March 24, 2005

Before McKeithen, C.J., Gaultney and Horton, JJ.

1. The father signed an affidavit voluntarily relinquishing his parental rights. *See* Tex. Fam. Code Ann. § 161.103 (Vernon Supp. 2005). At the Fourteen Day hearing on July 23, 2002, the father stated that he presently was incarcerated and was unable to care for the children.
2. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (setting forth the two-pronged test for ineffective assistance of counsel claims in criminal proceedings: (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance).
3. We note that this case does not involve any issues under section 263.405, and thus need not determine whether our decision would be the same if such issues were present. *See* Tex. Fam. Code Ann. § 263.405 (Vernon 2002)(requiring, for example, in subpart(d) that the trial court, on appeal of a final order, conduct a hearing to determine whether a new trial should be granted, whether appellant's claim of indigence should be sustained, and whether the appeal is frivolous.) As the Fort Worth Court explains, the Legislature's apparent intent in enacting

Section 263.405 "was to provide a mechanism to reduce frivolous parental-termination appeals and to reduce post-judgment appellate delays in parental-termination appeals." *In re S.J.G.*, 124 S.W.3d 237,242(Tex. App.- Fort Worth 2003, pet.denied).