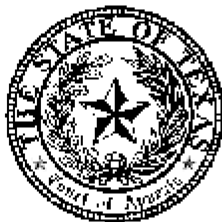
Affirmed and Opinion filed May 10, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-00-00022-CV

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IN THE INTEREST OF F.L., Appellant

On Appeal from the 306th Judicial District
Galveston County, Texas
Trial Court Cause No. 97JV0260

OPINION

Appellant Derrick Alcorn appeals from the trial court's termination of his parental rights to F.L., a child. He presents four issues, complaining of the trial court's denial of his attorney's motion to withdraw, the admission of certain documentary evidence, insufficiency of the evidence to support termination, and the absence of an exhibit from the appellate record. We affirm.

Background

In June of 1997, Galveston County Children's Protective Services (CPS) was notified that a small, unidentified child was wandering alone around an apartment complex. CPS case workers located the child, a five-year old girl dressed in a soiled diaper, unable or unwilling

to speak. She was subsequently identified as F.L. CPS took emergency custody of the child, placed her in therapeutic foster care, and commenced an investigation into her situation.

CPS records revealed four earlier reports and investigations regarding F.L. and her mother, primarily due to unexplained bone fractures and other injuries. The fourth referral had resulted in F.L. being placed in foster care for a year. The child's mother had a history of psychological problems, and due to F.L.'s developmental delays, CPS determined the mother was incapable of taking care of the child. Following the June 1997 referral, appellant signed an affidavit of paternity, and CPS began working to reunite F.L. and appellant. As part of the reunification plan, appellant agreed in writing to certain conditions, including attendance at parenting classes, maintaining regular visits with F.L., and remaining drug-free, as he was on community supervision for possession of crack cocaine. He was also ordered to pay $100.00 per month child support for the child.

Appellant failed to comply with the reunification plan, failed to pay child support or regularly visit F.L., and failed to comply with the terms of his probation. The State subsequently filed a motion to revoke his probation, and CPS filed a motion to terminate his parental rights so that F.L. could be placed for adoption.

At the hearing on CPS' motion to terminate appellant's parental rights, appellant's attorney stated on the record that appellant had chosen not to appear. The trial court heard evidence as to the significant developmental progress being made by F.L. while in foster care, and that the foster care parents wanted to adopt her. Testimony was presented as to appellant's non-compliance with the terms of his community supervision and the reunification plan; appellant's probation officer testified that a motion to revoke probation had been filed and that he intended to recommend jail time for appellant. The trial court granted termination of appellant's parental rights to F.L.

Motion to Withdraw

Under his first issue, appellant complains that the trial court erred in denying his trial

counsel's motion to withdraw. The record reflects that, following the court's ruling terminating parental rights, appellant's attorney stated:

> I've been instructed by my client to file notice of appeal. In any event the Court's motion for new trial can proceed [sic] notice of appeal. My point is this, I would prefer not to do the appeal. I would like also the record to reflect that before the trial started I asked the judge to relieve me for what I explained was a personal conflict of interest which has developed in the last couple of weeks and the court denied my oral request to be relieved so I renew that at this time. I really don't want to proceed any further in this case and I ask that the court appoint someone else to handle the appeal...

The trial court subsequently appointed other counsel to represent appellant on appeal. To the extent, however, that appellant's complaint is that the trial court "forced" his trial attorney to proceed to trial with an alleged conflict of interest, the record is devoid of any pre-trial motion to withdraw made by trial counsel. We have only trial counsel's oral recitation quoted above that a request had been made and denied at some earlier point in time. There is neither a motion by appellant nor a ruling by the trial court in the record for us to review. Rule 10 of the Texas Rules of Civil Procedure requires that a motion to withdraw be in writing and filed with the court, with "good cause" shown. *Rogers v. Clinton*, 794 S.W.2d 9, 10 (Tex. 1990). Such ruling is subject to review for abuse of discretion. *Moss v. Malone*, 880 S.W.2d 45 (Tex. App. – Tyler 1994, writ denied). Absent a written motion filed with the court supported by evidence of "good cause," as well as a ruling by the trial court, nothing is presented for our review and no error or abuse of discretion is shown. TEX. R. APP. P. 33.1. Appellant's first issue is overruled.

Admission of Exhibits

By his second issue, appellant argues that the trial court erroneously admitted exhibits 1 and 2 into evidence as they contained impermissible hearsay. Exhibit 1 was an Affidavit signed by a CPS caseworker, stating how F.L. has been found and identified, and describing the events leading up to CPS' involvement in her case. Exhibit 2 was a Report to the Court from a CPS caseworker assigned to F.L.'s case, setting forth facts surrounding CPS' involvement

with F.L. and her mother, with an assessment of F.L.'s mother and recommendations as to F.L.'s temporary conservatorship. At trial, appellant objected to such exhibits as not being reported by a person with actual knowledge who has a business duty to report abuse or neglect; the objections were overruled. We note, however, that substantially the same evidence as contained within the disputed exhibits was orally presented by CPS witnesses at trial without objection.

Even assuming in passing on this issue that the trial court did err in admitting the exhibits because they included inadmissible hearsay, this would not demonstrate that the matters complained of constitute reversible error. On appeal from a judgment rendered in a non-jury case such as this, the appellate court must presume that the trial court disregarded any evidence that was improperly admitted during trial and did not consider it in arriving at a judgment. *Day v. Crutchfield*, 400 S.W.2d 377, 384 (Tex. Civ. App. – Texarkana 1965, writ dism'd); *see also Permaspray Mfg. Corp. v. Permaspray Mfg. Corp*., 490 S.W.2d 866, 870-71 (Tex. Civ. App. – Fort Worth 1973, no writ). Appellant has not rebutted this presumption, and the second issue is overruled.

Insufficiency of the Evidence

Under his third issue, appellant complains that the evidence was insufficient to support two of the six statutory grounds for termination alleged in the decree of termination. Specifically, appellant alleges that the evidence is insufficient to support termination under TEX. FAM. CODE ANN. § 161.001(1)(C) and (D). To support termination of parental rights, the evidence must establish that termination is in the child's best interest, and that one of the statutory grounds for termination under Sec. 161.001 exists. These requirements must be established by clear and convincing evidence. TEX. FAM. CODE ANN. § 101.007; *In the Interest of G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

It is well-established that any one of the grounds under Sec. 161.001(1), when supported by a finding that termination is in the child's best interest, will justify termination

of the parent's rights. Appellant has not alleged error by the trial court in finding termination under subsections (E), (N) and (O). Therefore, such findings as to subsections (E), (N) and (O) are binding on this Court, and establish grounds for termination under the statute. *Flowers v. Texas Department of Human Resources, Tarrant County Welfare Unit*, 629 S.W.2d 891 (Tex. App – Fort Worth 1982, no writ). Accordingly, we need not address the merits of appellant's evidentiary issue which attacks the findings that his conduct also violated subsections (C) and (D). *Id*. Appellant's third issue is overruled.

Missing Exhibit

Appellant's fourth and final issue contends that the termination decree must be set aside, as an essential exhibit is missing from the appellate record. Under TEX. R. APP. P. 34.6(f), an appellant is entitled to a new trial (1) if appellant has timely requested a reporter's record; (2) if, without appellant's fault, a significant exhibit has been lost; (3) the missing exhibit is necessary to resolution of the appeal, and (4) the parties cannot agree on a complete reporter's record. Appellant complains that Exhibit 7, a Family Service Plan signed by appellant, is missing from the record. A review of the court reporter's record reflects that Exhibit 7 was admitted into evidence; moreover, the court reporter certified that the record correctly reflects the exhibits, if any, admitted by the respective parties.

Appellant, however, fails to present factual grounds for application of Rule 34.6(f). Nothing in the record demonstrates that Exhibit 7 has been "lost or destroyed," or that any such loss or destruction was without appellant's fault, as required by the rule. Moreover, nothing in the record shows that the parties were unable to agree on a complete reporter's record, as also required by the rule. Lastly, appellant fails to show that Exhibit 7 is necessary to the resolution of this appeal. While he alleges that absence of the actual document makes the record incomplete, he does not show how Exhibit 7 is required for resolution of his case, and fails to articulate an issue to which Exhibit 7 is germane. Rule 34.6(f)(3) is not a *per se* rule requiring a new trial when any exhibit is lost. Absent a showing that the appeal is insoluble

without the exhibit, a new trial is not warranted. In any event, the contents of Exhibit 7 are substantially set forth in the record through the trial testimony of Carol Edwards, an employee of Galveston County Children's Protective Services, and that testimony is not pertinent to our resolution of this appeal. Appellant's fourth issue is overruled.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed May 10, 2001.
Panel consists of Justices Anderson, Fowler and Edelman.
Do Not Publish — TEX. R. APP. P. 47.3(b).