

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00023-CV

L. A. and T. A., Appellants

v.

Texas Department of Family and Protective Services, Appellee

**FROM THE 146TH DISTRICT COURT OF BELL COUNTY
NO. 298,086-B, THE HONORABLE JACK WELDON JONES, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellants L.A. (the mother) and T.A. (the father) appeal from the district court’s decree, following a bench trial, terminating their parental rights to A.A. and C.A. (the children), who were five and two years old at the time of trial. The parents’ counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967). We will affirm the district court’s decree of termination.

The case began in January 2018, when the Texas Department of Family and Protective Services (the Department) received a report alleging that the children’s home was “very dirty and getting progressively worse.” The report alleged that there was “food on the countertop that appears to be from November,” “empty baby bottles on the floor that have solidified,” “closed pill bottles all around,” “a chain saw on the floor in the kitchen but has now been covered up by more trash,” and “several cats in the home that have fleas.”

A CPS investigator was dispatched to the residence. Once inside, the investigator smelled “a foul odor of unknown origin in the home” and observed “a huge amount of clutter,” including “dirty dishes in the sink and dirty dishes sitting on top of clutter in the kitchen,” “cat feces that was old and dry laying on the floor,” and trash and clutter “piled up to an alarming height that it places the children at risk of injury should the piles fall over.” The clutter also surrounded the crib where one of the children slept, which put that child at “risk of items falling on top of her bed while she [was] sleeping.” The investigator observed that the clutter made it difficult for the children to move around the house. He observed that the area where the older child played “was limited and confined to a four-foot area,” while the younger child was “confined to the inside of [a] pack and play” because the surrounding area was “filled with trash and clutter which would prevent her from moving around.” Photographs showing the conditions inside the residence were admitted into evidence at trial. The mother acknowledged to the investigator that the home was “not clean” but claimed that she and her husband would clean it if the investigator returned on a later date. The father told the investigator that he had intended to clean the home earlier but was unable to do so because he was having “issues with his knees.”

The investigator interacted with the children while at the residence. The older child was “clean and appropriately dressed.” However, the younger child had a diaper rash and small bumps on her chest, the front side of her right arm, and her bottom. The mother told the investigator that the child had suffered “an outbreak of scabies” and had been prescribed a cream for treatment. The mother acknowledged that she had “not gotten around to using the cream” on the child, even though it had been prescribed over ten days earlier. The mother also acknowledged that the home had been treated for fleas.

The investigator told the mother and the father that the conditions of the home “were not acceptable for the children to remain in the home” and attempted to discuss with them a “plan of action.” However, the mother became upset and asked the investigator to leave. Shortly thereafter, the children were removed from the home and placed with foster parents.

In January 2019, the district court allowed the mother and the father, who had demonstrated some progress in improving the conditions inside their home, to have a “monitored return” of the children. However, in March 2019, the children were removed again after the older child and a third child who had been born in December 2018 (the infant) were diagnosed with “severe protein-calorie malnutrition.” The infant, during a February 12, 2019 doctor visit, had been noted as having “poor weight gain.” When the infant was seen again by doctors on March 13, 2019, for an upper respiratory infection, he had “no weight gain.” Dr. Christopher Hovland, a pediatrician who treated the infant, testified that doctors performed tests on the infant to rule out possible causes such as malabsorption metabolic disorder, a tumor, and a heart murmur. That left “severe” malnutrition as the likely cause of the infant’s lack of weight gain. Dr. Hovland opined that “poor nutrition of that magnitude would lead to death” if left untreated.

The older child had lost weight while in the care of the mother and the father. Dr. Sandeep Bains, a pediatric resident who treated the older child, testified that the child weighed 37 pounds and 11 ounces on January 28, 2019, 34 pounds and 8 ounces on February 8, 2019, and 33 pounds and 9.9 ounces on March 8, 2019, which amounted to a 12% weight loss over six weeks. Dr. Bains testified that “oncological processes” such as lymphoma and leukemia were ruled out as possible reasons for the weight loss, leaving malnutrition as the likely cause. Dr. Bains opined that if this malnutrition continued, the child would suffer poor outcomes, including the possibility of death.

In the March 2019 removal affidavit, Department caseworker Carla Zizumbo-Robbins explained that upon receiving reports that the older child and the infant were malnourished, she and CPS investigators went to the children's daycare to interview the children and the daycare workers. At the daycare, Zizumbo-Robbins noticed that the older child had a "foul odor that was coming from her," while the younger child's hair was "matted and tangled and did not appear to have been washed for several days." Additionally, the younger child was observed with "a severe red rash on her outer vaginal area and anal area." According to the daycare worker, the child had that rash "for about two weeks now."

Zizumbo-Robbins and the investigators then went to the home of the mother and the father. Zizumbo-Robbins recounted that when walking up to the home, "there [was] a strong, foul odor almost like cat urine," and the "inside of the home reek[ed] of this same smell." Zizumbo-Robbins observed three cats inside the house and one litter box. Again, "the home had a lot of stuff piled up all over the place." This time, however, "there were paths and areas that were clean and there were no dirty dishes in the sink." While she was inside the home, Zizumbo-Robbins took photographs of the conditions inside the home, copies of which were admitted into evidence. At trial, she recommended termination of the mother's and the father's parental rights. Zizumbo-Robbins believed that the mother and the father had not demonstrated an ability to provide a safe, clean, and appropriate home for the children, which was a requirement of their family service plan to obtain reunification with the children.

The children were returned to the foster parents upon removal. The foster mother, a registered nurse, testified at trial. She testified that when the children first came into her home, they were developmentally delayed and had difficulty communicating. She enrolled them in speech therapy and early-childhood intervention programs, which she believed resulted in

“substantial” improvements in the children’s development and ability to communicate. The foster mother also testified that she and her husband were “attached in every way” to the children and were willing to adopt them. They had no other children. According to the foster mother, the children called her “Mom” and her husband “Dad.”

When the children were returned to the foster parents, the foster mother noticed that the older child had lost weight and that the younger child was “a little bit more tired,” which the foster mother later discovered was the result of anemia. Both children were excited and happy to see the foster parents again. Between the time of their return to the foster parents in March 2019 and the trial in November 2019, the older child had gained nine pounds and the younger child was no longer anemic. The foster mother testified that the older child wanted to stay with the foster parents and would become “upset and distraught” at the thought of leaving them.

Debbie Belviy, the children’s guardian ad litem, testified that throughout the case, the Department had concerns about the cleanliness and safety of the mother and the father’s home. The conditions inside the home included “car batteries on the floor being charged,” extension cords on the floor and accessible to the children, dishes on the countertop, and “junk that the parents could not seem to part with.” When asked why the Department had agreed to a monitored return, Belviy testified that that “every time we would go and address something, they would take care of that. But every time we’d go back, it would be something else. But it got to the point where it was marginal at best, but we felt like we had to give it a try to see if the parents could continue to do what they needed to do to keep the children.” Belviy testified that even after the monitored return, the parents struggled to keep the house clean, and she was not

surprised when the children were removed from the home a second time, although she was surprised that the reason for removal “was medical and not the condition of the home.”

Belviy testified that she believed terminating the parental rights of the mother and the father was in the best interest of the children. In her view, the conditions inside the home endangered the children and it would not be safe for the children to return. Additionally, the older child had told Belviy that she wanted to stay with the foster parents, and Belviy believed both children were “very attached” to the foster parents. Belviy remarked, “If you didn’t know they were their foster children, you would swear they were their biological children.”

The father did not testify at trial but the mother did. The mother testified that she loved the children and believed that her home provided a safe environment for them. She explained that she and the father had “gotten rid of a lot of stuff” in the house and no longer had cats. The mother also testified that she was aware of her children’s nutritional deficiencies and was trying to address them. She explained that she had tried to get the older child to gain weight by feeding her dinners such as chicken nuggets, pancakes, and bacon. The mother “guessed” that the older child had lost weight because “she refused to eat certain things at the daycare.” When asked why she believed the infant had not gained weight, the mother testified that the infant would “throw up a significant amount” of his formula when she would feed it to him.

When the case began, the mother was unemployed and the father worked part time as a “cultural role player” for the military.¹ By the time of trial, the mother worked during the day as a personal caregiver for her mother, while the father also worked for the mother’s mother “about 10 hours per week” doing chores that involved “heavy lifting.” When asked why

¹ The mother explained that this job involved the father dressing up as either a terrorist or a civilian to assist the military in training exercises.

the father did not use his free time to “clean up the home,” the mother testified that the father was “trying to clean up the house more and more,” but he was focused on other tasks, such as “trying to get his camper ready for the Renaissance Festival.”

The mother testified that their visits with the children “normally went very well” and that the children were always happy to see the mother and the father. The mother also testified that when the children were removed from their home after the monitored return, the older child appeared unhappy and anxious.

The Department’s final witness was Charity Staples, the current caseworker. Staples testified that the mother and the father had “made some progress in the home, but they’re still a ways to go,” and they were still struggling to take “responsibility to get the things done that need to be done in the home.” She explained that the home was no longer “horrible” but there was still “a lot of clutter” inside. Staples remained concerned about the mother’s and the father’s ability to take care of the children, and she believed that termination of their parental rights was in the best interest of the children. Staples also testified that the foster parents intended to adopt the children, and she agreed that they were a good “forever home” for the children.

At the conclusion of trial, the district court found that termination of the mother’s and the father’s parental rights was in the best interest of the children and that the mother and the father had: (1) knowingly placed or knowingly allowed the children to remain in conditions or surroundings which endangered the physical or emotional well-being of the children; (2) engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangered the physical or emotional well-being of the children; and (3) failed to comply with the provisions of a court order that specifically established the actions necessary for the

parents to obtain the return of the children. *See* Tex. Fam. Code § 161.001(b)(1)(D), (E), (O), (2). This appeal followed.

Court-appointed counsel has filed an *Anders* brief and a motion to withdraw as counsel, concluding that the appeal is frivolous and without merit. *See* 386 U.S. at 744; *In re P.M.*, 520 S.W.3d 24, 27 & n.10 (Tex. 2016) (per curiam) (approving use of *Anders* procedure in appeals from termination of parental rights because it “strikes an important balance between the defendant’s constitutional right to counsel on appeal and counsel’s obligation not to prosecute frivolous appeals” (citations omitted)). 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. *See* 386 U.S. at 744; *Taylor v. Texas Dep’t of Protective & Regulatory Servs.*, 160 S.W.3d 641, 646-47 (Tex. App.—Austin 2005, pet. denied). Counsel has certified to this Court that she has provided her clients with a copy of the *Anders* brief and informed them of their right to examine the appellate record and to file a pro se brief. No pro se brief has been filed by either parent.

Upon receiving an *Anders* brief, we must conduct a full examination of the record to determine whether the appeal is wholly frivolous. *See Penson v. Ohio*, 488 U.S. 75, 80 (1988); *Taylor*, 160 S.W.3d at 647. After reviewing the entire record and the *Anders* brief submitted on the parents’ behalf, we have found nothing in the record that might arguably support an appeal. Our review included the trial court’s endangerment findings, *see* Tex. Fam. Code § 161.001(b)(1) (D), (E), and we have found no issues that could be raised on appeal with respect to those findings, *see In re N.G.*, 577 S.W.3d 230, 237 (Tex. 2019). We agree with counsel that the appeal is frivolous. Accordingly, we affirm the district court’s decree

terminating the mother's and the father's parental rights. We deny counsel's motion to withdraw.²

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: June 18, 2020

² The Texas Supreme Court has held that the right to counsel in suits seeking termination of parental rights extends to "all proceedings [in the Texas Supreme Court], including the filing of a petition for review." *In re P.M.*, 520 S.W.3d 24, 27-28 (Tex. 2016) (per curiam). Accordingly, if after consulting with counsel either parent desires to file a petition for review, counsel should timely file with the Texas Supreme Court "a petition for review that satisfies the standards for an *Anders* brief." *See id.*