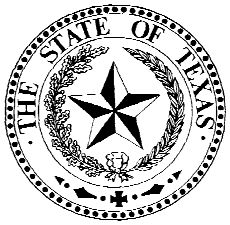
Affirmed and Opinion filed February 21, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00525-CV

IN THE INTEREST OF M.R.E.

On Appeal from the 2nd 25th District Court
Colorado County, Texas
Trial Court Cause No. 19,577

O P I N I O N

Appellant, the mother of M.R.E., appeals an order terminating her parental rights[1] on the grounds of ineffective assistance of counsel and jury charge error. We affirm.

Ineffective Assistance

Appellant's first issue argues that her trial lawyer was ineffective in failing to: (1) object to the intervenors' redundant questions regarding appellant's lifestyle that did not follow a chronological order and could have been misleading to the jurors; (2) request a continuance after he learned that appellant's key witness, her psychologist, was killed in an automobile accident during trial but before testifying; (3) object to questions by the Texas Department of Protective and Regulatory Services (the "Department") which called for

[1] Although the termination order also terminated the parental rights of the alleged and presumed fathers, they are not parties to this appeal.

speculative answers; (4) call witnesses who were relevant to appellant's defense; and (5) vigorously cross-examine the Department's witnesses.[2]

While the constitutional right to effective assistance of counsel is clearly recognized in criminal proceedings,[3] it has not been extended to civil actions by the Texas or United States Supreme Courts. *See Smith v. Smith*, 22 S.W.3d 140, 151 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Texas appellate courts are split as to whether a right to effective assistance of counsel accompanies the statutory right to appointed counsel in civil proceedings for termination of parental rights.[4] *See* TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon Supp. 2002) (requiring appointment of attorney ad litem for indigent parent in termination proceeding).

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[2] Although appellant's brief also assigns error to the jury charge (see following section), it does not claim ineffective assistance for failing to preserve that complaint with an objection.

[3] *See* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); U.S. CONST. amend XIV; TEX. CONST., art. I, § 10.

[4] *Compare In re A.R.R.*, No. 2-01-030-CV, 2001 WL 1382686, at * 3 (Tex. App.—Fort Worth 2001, no pet.) (finding no right to effective assistance of counsel in parental termination case), *In re B.B.*, 971 S.W.2d 160, 172 (Tex. App.—Beaumont 1998, pet. denied), *Arteaga v. Texas Dep't of Protective and Regulatory Servs*., 924 S.W.2d 756, 762 (Tex. App.—Austin 1996, writ denied), *In re J.F.*, 888 S.W.2d 140, 143 (Tex. App.—Tyler 1994, no writ), *Krasniqi v. Dallas County Child Protective Servs. Unit of Tex. Dep't of Human Servs.*, 809 S.W.2d 927, 932 (Tex. App.—Dallas 1991, no writ), *and Posner v. Dallas County Child Welfare Unit of Tex. Dep't of Human Servs.*, 784 S.W.2d 585, 588 (Tex. App.—Eastland 1990, writ denied), *with In re B.L.D.*, 56 S.W.3d 203, 211 (Tex. App.—Waco 2001, no pet.) (holding that statutory right to counsel in a termination case includes a due-process right that the representation be effective) *and In re J.M.S.*, 43 S.W.3d 60, 62 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (same).

There is also variation among other states as to whether a statutory right to be represented by counsel in a termination proceeding includes a right to effective representation. *Compare Ex parte E.D.*, 777 So.2d 113, 115 (Ala. 2000) (recognizing right to effective counsel), *Adoption of Holly*, 738 N.E.2d 1115, 1121(Mass. 2000) (recognizing constitutional right of an indigent parent to court-appointed counsel in a contested termination proceeding, and therefore, a right to effective counsel), *and In re Termination of Parental Rights of Brittany Ann H*., 607 N.W.2d 607, 609 n.2 (Wis. 2000) (statutory right to counsel includes right to effective counsel), *with In re Jonathan*, 764 A.2d 739,741, 744, 748-49 (Conn. 2001) (recognizing right to effective assistance of counsel only if party had a constitutional right to appointed counsel in the termination proceeding), *Adoption of J.M.H. v. T.J.E., Jr.*, 564 N.W.2d 623, 627 (N.D. 1997) (not deciding whether statutory right to counsel includes right to effective counsel, but acknowledging that it has not recognized a claim for ineffective assistance of counsel in a civil action).

This court has not yet ruled on the existence of such a right. However, even where a constitutional right to effective assistance of counsel exists in a criminal proceeding, scrutiny of counsel's performance is highly deferential, and there is a strong presumption that the challenged action could have been sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). In Texas, this presumption ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 803 (2000). In addition, a claim of ineffective assistance requires a showing of prejudice, *i.e.*, a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687; *Tong*, 25 S.W.3d at 712.

In this case, appellant has developed no record of her trial counsel's reasons for the actions or omissions of which appellant complains. Similarly, appellant has not shown what beneficial testimony could have been developed if a continuance had been sought, other defense witnesses had been called, or Department witnesses had been cross-examined more vigorously. Nor has appellant explained how objections to questions that were redundant or called for speculative answers might have changed the outcome. Under these circumstances, we cannot conclude that appellant has demonstrated ineffective assistance of counsel, even if such a right exists in this context.[5] Accordingly, appellant's first issue is overruled.

Jury Charge

Appellant's second issue argues that the jury charge was defective because: (1) the broad-form submission does not allow one to discern whether the same ten jurors decided the termination ground and whether it was in M.R.E.'s best interest to terminate appellant's

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[5] We recognize that an indigent parent might have no meaningful opportunity to develop a record necessary to support a claim of ineffective assistance where the motion for new trial must be filed before appellate counsel is appointed and/or the reporter's record from trial is completed. To the extent a right to effective assistance of counsel becomes established in Texas in this context, this aspect will obviously warrant further attention. Until then, and despite potential inequity, we are not persuaded that reversal of a termination decision could be justified where ineffective assistance is not clearly demonstrated by the record.

rights;[6] (2) the narrative accompanying the word "endanger" is superfluous and was a comment on the weight of the evidence; and (3) the addition of other factors[7] (the "additional factors") to the *Holley*[8] best interest factors pinpointed distinct evidentiary factors for the jury to consider instead of the overall testimony.

Objections to a civil jury charge that are not raised in the trial court are generally considered waived.[9] In this case, because appellant failed to raise her objections to the jury charge in the trial court, her complaint presents nothing for our review.

Moreover, even if appellant had preserved her complaints, the termination question submitted in this case followed the Texas Pattern Jury Charge ("PJC").[10] As prescribed in the PJC, the admonitory instructions to the charge stated, among other things, "The same ten

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6 *See* TEX. R. CIV. P. 292 ("A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve . . . .").

7 Appellant complains of the addition of the following factors: "(10) the child's age and physical and mental vulnerabilities; (11) the frequency and nature of out-of-home placements; (12) the magnitude, frequency, and circumstances of the harm to the child; (13) whether the child has been the victim of repeated harm after the initial report and intervention by the department or other agency; (14) whether the child is fearful of living in or returning to the child's home; (15) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parent, other family members, or others who have access to the child's home; (16) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; (17) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (18) whether the perpetrator of the harm to the child is identified; (19) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; (20) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (21) whether the child's family demonstrates adequate parenting skills . . .; (22) whether an adequate social support system consisting of an extended family and friends is available to the child."

8 *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

9 TEX. R. CIV. P. 272, 274; TEX. R. APP. P. 33.1; *In re V.L.K.*, 24 S.W.3d 338, 343-44 (Tex. 2000) (noting that charge error must be properly preserved in the trial court). *But see In re A.V.*, 57 S.W.3d 51, 56 (Tex. App.—Waco 2001, no pet. h.) (holding that unpreserved complaints about core termination issues, *i.e.*, whether a statutory termination ground has occurred and whether termination is in the best interest of the child, are reviewable).

10 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 218.1B (2000) ("Should the parent-child relationship between *PARENT* and *CHILD* be terminated?")

or more of you must agree upon all of the answers made and to the entire verdict." *See* PJC 200.3. In the absence of evidence to the contrary, the jury is presumed to follow the instructions it has been given. *See Phillips v. Phillips,* 820 S.W.2d 785, 787 n.2 (Tex. 1991). Moreover, appellant cites no statute, rule, or decision requiring that the jurors' compliance with this or any other such requirement be independently verifiable from the face of the verdict. In addition, overcoming appellant's complaint would require not only dispensing with broad form submission, but requiring jurors to individually signify their votes to the respective granulated questions.

Similarly, the Texas Supreme Court has expressly adopted the definition of "endanger" used in this case.[11] Lastly, with regard to the additional factors, the *Holley* list of factors is not exhaustive, and all relevant circumstances should be considered.[12] The additional factors are all listed as statutory best interest factors a court should consider. *See* TEX. FAM. CODE ANN. § 263.307(b)(1)-(13) (Vernon 1996). Under these circumstances, appellant has failed to demonstrate error in the charge. Accordingly, issue two is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 21, 2002.

Panel consists of Justices Hudson, Fowler, and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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[11] The trial court submitted the following definition: " 'Endanger' means to expose to loss or injury; to jeopardize. Although 'endanger' means more than a threat of abstract injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury." *See In re M.C.*, 917 S.W.2d 268, 269 (Tex. 1996).

[12] *See In re Jane Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000); *Holley*, 544 S.W.2d at 372.