

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT AT AMARILLO

Benjamin Allen Bengé v. Robert N. Harris and Kari L. Imler-Harris

Benge · No. No. 07-13-0064-CV · Decided March 19, 2013

SUMMARY

The Texas Seventh Court of Appeals abated and remanded an accelerated parental-rights termination appeal because the reporter's record was past due and the appellant's indigency status required trial-court determination. The trial court was directed to determine whether the appellant was entitled to a free reporter's record and to facilitate filing of the appellate record or make supporting findings and conclusions.

CASE DETAILS

COURT	Court of Appeals of Texas, Seventh District at Amarillo
WRITING FOR THE COURT	Per Curiam; Quinn, C.J.; Campbell, J.; Pirtle, J.
JURISDICTION	Texas
DECIDED	March 19, 2013
DOCKET	No. 07-13-0064-CV
DISPOSITION	remanded
PROCEDURAL POSTURE	Appellant appealed an order terminating his parental rights. The appellate record was incomplete because the court reporter had not prepared the reporter's record, allegedly because appellant had not paid or arranged to pay for it.
PRECEDENTIAL VALUE	Published
PARTIES	Benjamin Allen Bengé v. Robert N. Harris, Kari L. Imler-Harris

TOPICS

termination of parental rights

parental rights

appellate procedure

family law procedure

civil procedure

PRACTICE AREAS

family law

appellate procedure

parental rights

termination of parental rights

QUESTIONS PRESENTED

1. Whether the appeal should be abated and remanded because the reporter's record was past due and the court reporter had not prepared it.
2. Whether the trial court must determine whether appellant was entitled to a free reporter's record based on his affidavits of indigency.
3. Whether the court reporter's contest to appellant's affidavit of indigency was timely.

HOLDINGS

1. A contest to an affidavit of indigency must be filed within ten days after the affidavit is filed in the trial court; an untimely contest cannot prevent the affidavit from being deemed true under the applicable appellate rule.
2. When the reporter's record in an accelerated parental-termination appeal is past due and the available extension period has elapsed, the appellate court may abate the appeal and remand to the trial court to determine entitlement to a free reporter's record and ensure preparation and filing of the record.

KEY QUOTATIONS

“Unless a contest is timely filed, an affidavit of indigency shall be deemed true, and the party allowed to proceed without the advancement of costs.” (2)

“Because the reporter’s record is currently past due and any extension this Court could grant pursuant to Rule 28.4(b)(2) would have already elapsed, we abate this appeal and remand the cause to the trial court for further proceedings.” (2)

FACTUAL BACKGROUND

The trial court terminated Benge's parental rights to his child, identified in the opinion by initials as A.M.I-H. Benge filed multiple affidavits of indigency, while the court reporter filed a contest asserting that Benge had not paid or arranged to pay for the reporter's record. The reporter's record was past due in the accelerated parental-rights appeal.

PROCEDURAL HISTORY

Appellees filed a petition to terminate Benjamin Allen Benge's parental rights on May 11, 2012. The trial court signed an order of termination on October 23, 2012, and Benge timely filed a notice of appeal on November 13, 2012. During the accelerated appeal, the court reporter asserted that the reporter's record could not be filed because Benge had not paid for it; the appellate court abated the appeal and remanded to the trial court to determine Benge's entitlement to a free reporter's record and to facilitate preparation and filing of the appellate record.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The trial court was directed to use whatever means available to determine whether Benge was entitled to a free reporter's record and, if so, ensure that the appellate record was filed by April 2, 2013, including by ordering the court reporter to begin preparation immediately and arranging for a substitute reporter if necessary. The court reporter was ordered to notify the trial court in writing when the reporter's record was filed. If the record was timely filed, the trial court was to cause a supplemental clerk's record containing the court's order and the reporter's notice to be filed by April 9, 2013. If the trial court determined that Benge was not entitled to a free reporter's record, it was to file findings of fact and conclusions of law by April 2, 2013, and a supplemental clerk's record containing them by April 9, 2013.

OPINION

PER CURIAM.

In The Court of Appeals Seventh District of Texas at Amarillo _____ No. 07-13-0064-CV _____ BENJAMIN ALLEN BENGE, APPELLANT VS. ROBERT N. HARRIS AND KARI L. IMLER-HARRIS, APPELLEES On Appeal from the 69TH District Court Sherman County, Texas Trial Court Cause No. 5035, Honorable Ron Enns, Judge Presiding March 19, 2013 ORDER OF ABATEMENT AND REMAND Before Quinn, C.J., and Campbell and Pirtle, JJ. On May 11, 2012, Appellees, Robert N. Harris and Kari L. Imler-Harris, filed a petition to terminate the parental rights of Appellant, Benjamin Allen Benge, to his child, A.M.I-H.

1 On October 23, 2012, the trial court signed an Order of Termination, and on 1 To protect the child=s privacy, we refer to her by her initials. See TEX. FAM. CODE ANN. ' 109.002(d) (W EST SUPP. 2012). November 13, 2012, Appellant timely filed a Notice of Appeal. 2 The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from.

TEX. R. APP. P. 25.1(b). Appeals in parental termination cases are governed by the rules of appellate procedure for accelerated appeals. TEX. R. APP. P. 28.4(a)(1). In an accelerated appeal, the appellate record, including the reporter's record, is due within 10 days after the judgment being appealed is signed. TEX. R. APP. P. 35.1(b). Where a reporter requests an extension of time to file the reporter's record, the extension or cumulative extensions granted must not exceed 30 days, absent extraordinary circumstances.

TEX. R. APP. P. 28.4(b)(2). Furthermore, the restrictions on preparation of a reporter's record found in section 13.003 of the Texas Civil Practice and Remedies Code do not apply to an appeal from a parental termination case. TEX. R. APP. P. 28.4(b)(3). Pending before this Court is the affidavit of Shelly C. Burnett, Official Court Reporter of the 69th District Court, wherein she alleges that she is unable to file the reporter's record in the above-styled and numbered cause because Appellant has not paid or made arrangements to pay for the record.

She further alleges that she filed a Contest of Affidavit of Inability to Pay Costs on March 5, 2013. From the clerk's record already filed we note that Appellant has filed affidavits of indigency in this proceeding on four separate occasions: August 21, 2012, January 4, 2013, January 30, 2013, and February 8, 2013. Even if Ms. Burnett's contest were to be meritorious, it would have been subject to denial as untimely.

See TEX. R. APP. P. 20.1(e) (providing that a contest 2 The deadline for filing the notice of appeal was Monday, November 12, 2012. However, that date was a legal holiday and the deadline was extended to November 13, 2012. TEX. R. APP. P. 4.1(a). 2 to indigence must be filed within 10 days after the date when the affidavit of indigency was filed in the trial court).

Unless a contest is timely filed, an affidavit of indigency shall be deemed true, and the party allowed to proceed without the advancement of costs. TEX. R. APP. P. 20.1(f). Because the reporter's record is currently past due and any extension this Court could grant pursuant to Rule 28.4(b)(2) would have already elapsed, we abate this appeal and remand the cause to the trial court for further proceedings.

Upon remand, the trial court is directed to use whatever means available to determine whether Appellant is entitled to a free reporter's record and, if so, to ensure the filing of the appellate record on or before April 2, 2013, by ordering the court reporter to immediately commence preparation of the reporter's record and, if necessary, by making arrangements for a substitute reporter.

See TEX. R. APP. P. 28.4(b). Upon the filing of the reporter's record, Ms. Burnett is ordered to notify the trial court, in writing, of the filing. Should Ms. Burnett timely file the reporter's record in accordance with the order of the court, the trial court need not take any further action other than to cause a supplemental clerk's record to be filed with the Clerk of this Court by April 9, 2013, containing the court's order and the reporter's notice.

Should the trial court find Appellant not to be entitled to a free reporter's record, then the court shall file findings of fact and conclusions of law supporting that decision on or before April 2, 2013, and cause a supplemental clerk's record to be filed with the clerk of this Court by April 9, 2013, containing those findings and conclusions. 3 It is so ordered.

Per Curiam 4