
YEAR 2005 CASE SUMMARIES

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[2005 Summaries](#) [2004 Summaries](#) [2003 Summaries](#) [2002 Summaries](#) [2001 Summaries](#) [2000 Summaries](#) [1999 Summaries](#)

Juvenile required to file timely notice of appeal to initiate review; waiver standard of Section 51.09 does not apply [In re C.W.] (05-1-06).

On December 13, 2004, the Dallas Court of Appeals held that a juvenile must take the affirmative step of filing a timely notice of appeal to obtain appellate review. The standard of Section 51.09—that a right exists unless waived in a specified fashion—does not apply to notices of appeal.

¶ 05-1-06. In the Matter of C.W., UNPUBLISHED, No. 05-04-00674-CV, 2004 WL 2849150, 2004 Tex.App.Lexis ____ (Tex.App.—Dallas 12/13/04) *Texas Juvenile Law* (6th Ed. 2004).

Facts: C.W. appeals the juvenile court's denial of his application for writ of habeas corpus requesting an out-of-time appeal.

In 1992, the juvenile court found C.W. delinquent based upon the offense of murder and assessed a determinate sentence of confinement for thirty years with transfer to the Texas Department of Criminal Justice (TDC) at age eighteen. Five years later, the court conducted a hearing and ordered C.W. transferred to TDC for completion of his sentence. At the conclusion of the hearing, the court told C.W. that he had the right to appeal and the right to an attorney to represent him in the appeal. The court specifically informed C.W. that an attorney would be appointed if he could not afford one. C.W. did not express a desire to appeal at that time. Nor did he file a notice of appeal.

Nearly seven years after his transfer, C.W. filed an application for a writ of habeas corpus requesting an out-of-time appeal. The writ application asserted that C.W. had never waived his right to appeal the transfer order and now desired to do so. The court denied relief.

On appeal, C.W. claims the denial of his writ application was improper because the juvenile court did not follow the statutorily mandated procedure for the waiver of rights under section 51.09 of the family code. Tex. Fam.Code Ann. § 51.09 (Vernon 2002). The State argues that section 56.01, not section 51.09, governs the waiver of appeal in this case. Tex. Fam.Code Ann. § 56.01 (Vernon 2002).

Held: Affirmed.

Opinion Text: Relevant Law

Standard of review

The applicant for a writ of habeas corpus has the burden of proving his allegations by a preponderance of the evidence. *Parrish v. State*, 38 S.W.3d 831, 834 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd). We review a trial court's ruling on a habeas corpus application for an abuse of discretion. *Id.* We decide whether a trial court abused its discretion by determining whether the court acted without reference to any guiding rules or principles, or in other words, whether the court acted arbitrarily or unreasonably. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex.Crim.App.1993). A trial court abuses its discretion when its decision lies outside of the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex.Crim.App.1990) (op. on reh'g).

Waiver of rights as governed by section 51.09

Section 51.09 provides that, "[u]nless a contrary intent clearly appears elsewhere in this title," any right may

be waived if (1) the child and his attorney make the waiver; (2) the child and his attorney were informed and understood the right and consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is in writing or in recorded court proceedings. Tex. Fam.Code Ann. § 51.09 (Vernon 2002).

Right to appeal as governed by section 56.01

On entering an appealable order, the juvenile court shall advise the child and his parent, guardian, or guardian ad litem that the child has the right to (1) appeal, (2) representation by counsel on appeal, and (3) appointment of an attorney for the appeal in the case of indigency. Tex. Fam.Code Ann. § 56.01(d), (e) (Vernon 2002). If the child and his parent, guardian, or guardian ad litem express a desire to appeal, the trial attorney is obligated to file a timely, written notice of appeal with the juvenile court. Tex. Fam.Code Ann. § 56.01(f) (Vernon 2002). If the juvenile's attorney informs the court that he will not handle the appeal beyond the filing of the notice, the juvenile court judge is responsible for assuring that the child is represented. Tex. Fam.Code Ann. § 56.01(f) (Vernon 2002).

Application Of Law

To decide if the juvenile court abused its discretion in denying C.W.'s application for habeas corpus, we must first determine if section 51.09 applies as C.W. claims. According to C.W., section 56.01 clearly fails to express an intent contrary to the requirements of section 51.09. As a result, C.W. asserts that section 51.09 governs in this case and requires affirmative waiver of the right to appeal. We disagree.

"Contrary intent" is expressed in different manners throughout the juvenile code. For example, section 52.02 specifically states that "notwithstanding Section 51.09(a)," a juvenile can consent to intoxilyzer testing without the concurrence of his attorney if the request and consent are videotaped. Tex. Fam.Code Ann. § 52.02(d) (Vernon 2002). On the other hand, section 54.03(a) also expresses a contrary intent without specific reference to the requirements of section 51.09 by simply providing that a court may find that the child engaged in delinquent conduct "only after an adjudication hearing." Tex. Fam.Code Ann. § 54.03(a) (Vernon 2002). This language clearly indicates that a child and his attorney may not waive the hearing under any circumstances. See *In the Matter of N.S.D.*, 555 S.W.2d 807, 808 (Tex.Civ.App.—El Paso 1977, no writ).

Similarly, because section 56.01 specifically states that the requirements governing a juvenile appeal are "as in civil cases generally," section 51.09 cannot govern waiver in the juvenile appellate process. See Tex. Fam.Code Ann. § 56.01(b) (Vernon 2002). It is well-established that the right to appeal is not automatic. A party who seeks to alter an appealable order of the trial court must file a notice of appeal within a specified time frame. Tex.R.App. P. 25.1; 26.1. There is simply no provision that a party must affirmatively waive the right to appeal. Instead, a party may waive an appeal by his own inaction. Section 56.01 directly contradicts the provision of section 51.09 that requires an affirmative waiver of a right. We therefore conclude that section 56.01 has escaped the strictures of section 51.09 by expressing a "contrary intent."

We note that section 51.09 can be triggered during a juvenile appeal. See Tex. Fam.Code Ann. § 56.01(f) (Vernon 2002). If the juvenile's trial court attorney will not continue his representation after he has filed a notice of appeal as requested by the juvenile, the court is required to appoint counsel in the case of indigence "unless the right to appeal is waived in accordance with Section 51.09." See Tex. Fam.Code Ann. § 56.01(f) (Vernon 2002). Thus, by complying with the requirements of section 51.09, the juvenile and his attorney may waive the right to appeal *after* a timely and proper notice of appeal has been given.

Therefore, section 51.09 does not apply in this case. The juvenile court properly admonished C.W. pursuant to the applicable statute, and C.W. simply did not timely file a notice of appeal. See Tex. Fam.Code Ann. § 56.01(f) (Vernon 2002). The juvenile court correctly denied C.W.'s application for habeas relief. Accordingly, we overrule C.W.'s sole issue.