In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00043-CV

IN THE INTEREST OF S.J., A.J., I.J., AND I.J., CHILDREN

On Appeal from the 76th Judicial District Court
Titus County, Texas
Trial Court No. 33101

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

Jonathan and Jasmane Jeffery appeal from the termination of their parental rights to S.J., A.J., I.J., and I.J. They contend that the trial court abused its discretion by failing to appoint, upon a finding of indigency, separate trial counsel for each parent.

I. Contention of the Parents

The contention is that the father and mother had an inherent conflict of interest regarding their legal defenses to the allegations made by the Department of Family and Protective Services (Department) in its effort to terminate their rights. In short, Jasmane was accused of using marihuana and cocaine, and of stealing to pay for her habit when she had no other way to obtain the illegal substances and accused of negligently supervising her children at times when she was allegedly seeking additional drugs.

Jonathan faced no such accusations and tested negative for all illicit substances in several drug screens. The evidence showed that he continued to attempt to get his wife into rehabilitation, and he stated numerous times that he wanted the family to be reunified. He opposed her drug use, and there was evidence that he demanded that Jasmane not engage in such activities around the children. Further, he did not live with Jasmane *and* the children during the entire pendency of this case. As grounds for terminating his parental rights, the trial court found that Jonathan knowingly placed or allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being, engaged in conduct or knowingly placed the children with persons

who endangered them, and failed to comply with the provisions of a court order to have the children returned from the Department. Neither parent argues that the evidence is insufficient or that counsel was ineffective.

II. Standard of Review

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority different than an appellate judge does not demonstrate such an abuse. *Holtzman v. Holtzman*, 993 S.W.2d 729 (Tex. App.—Texarkana 1999, pet. denied) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985)).

III. The Procedure

The Jefferys are indigent. Lori Chism was originally appointed as counsel to represent both parents. At the final permanency hearing, on September 11, 2008, she informed the trial court that she desired to be removed from the case

> I'm asking to be let off this case and to appoint somebody else to represent the parents. They have not been satisfied with my representation. And they have both yelled at me today, and I have tried and tried and tried. And, Your Honor, we're not making any progress.

The court then appointed another attorney who was present, Charles Cobb, to represent both parents. Counsel stated he wanted to make it clear that he had represented Jasmane Jeffery in a different matter in another court, but that he was aware of no conflict. The court then asked the parties if there

was "any conflict between the two of you that would cause you to need different lawyers in this thing?" Both answered "no." The court then directed a trial date to be set, and ultimately recessed the proceeding. The trial on the merits was conducted February 12, 2009.

IV. Preservation of Error

The principal case addressing this issue is *In re B.L.D.*, 113 S.W.3d 340 (Tex. 2003). The court pointed out that in a suit filed by a governmental entity Section 107.013(a)(1) of the Texas Family Code requires a court to appoint counsel to an indigent parent who opposes termination of his or her parental rights. TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon 2008). The court stated:

> In a termination suit against two parents, both may be entitled to appointed counsel. In that circumstance, the statute provides that if "the court finds that the interests of the parents are not in conflict, the court may appoint a single attorney ad litem to represent the interests of both parents." *Id*. § 107.013(b). The statute therefore implicitly provides that indigent parents who face termination of their parental rights in the same suit are entitled to nonconflicted counsel.

B.L.D., 113 S.W.3d at 346.

The Texas Family Code also provides that indigent parents who are defendants in the same termination lawsuit are entitled to nonconflicted counsel. TEX. FAM. CODE ANN. § 107.013(b) (Vernon 2008). If the court finds the interests of the parents are not in conflict, the court may appoint an attorney to represent their interests. In deciding whether there is conflict between parents opposing termination in a single lawsuit requiring separate counsel, the trial court must determine whether there is a substantial risk that counsel's obligations to one parent would materially and adversely affect his or her obligations to the other parent. *B.L.D.*, 113 S.W.3d at 343; *see In re*

K.M.H., 181 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (analyzing possible conflict in context of an ineffective assistance of counsel claim).

A major distinction in this case and *B.L.D.* is that in *B.L.D.* the parents sought separate trials as a remedy for a conflict of interest between them. They did not demand separate counsel, but sought the separate trials as a way to remedy the conflict that existed. The appellate court found their motion sufficient to make the trial court aware of the nature of their complaint, and thus sufficient to preserve their complaint regarding a right to nonconflicted counsel by their motion for separate trials. *B.L.D.*, 113 S.W.3d at 344–45. The court also noted that it did not condone the notion that separate trials could have remedied counsel's own ethical obligation to avoid a conflict of interest in his joint representation. *Id.* at 346.

In the present case, error was not preserved. Neither party perceived a conflict between them, and counsel was aware of only one possibility of a conflict having to do with the mother's criminal proceeding in which he was representing her. The court asked the proper questions, and the information received did not apprise the trial court of any possible conflicts of interest. No complaint was ever brought to the trial court's attention about the joint trial or about Cobb's representation of both mother and father. Counsel is thus now in the position of arguing that we should consider a claim of error that has not been preserved for our review.

The complaint is constitutional in nature. However, constitutional rights may be waived depending on the nature of the right, and in *B.L.D.*, the Texas Supreme Court discussed preservation

in the context of parental rights termination cases. The court recognized that termination cases implicate fundamental liberties, thus requiring compliance with procedural due process.

> As discussed above, this Court's precedents establish that our procedural rules bar review of unpreserved error except in very narrow circumstances. We have followed this rule when other constitutional rights are at stake. *See, e.g., Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 845 (Tex. 2002) (per curiam) (concluding that court of appeals correctly held that litigant waived constitutional claim by not raising it at arbitration); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 222 (Tex. 2002) (refusing to consider constitutional open-courts claim that was not preserved in trial court). Moreover, we have declined to review unpreserved complaints even when a parent's constitutional interests are implicated. *See Sherry*, 46 S.W.3d at 861.

B.L.D., 113 S.W.3d at 352.

Ultimately, the court concluded, after balancing various interests and considering the purposes of the rules and statutes involved, that error must be preserved even in parental rights termination cases, and that when not preserved, the court of appeals errs by considering such a claim. Although not directly on point, as the type of error alleged was charge error, the principles discussed in *B.L.D.* illustrate that the constitutional dimension of this proceeding does not necessarily outweigh the procedural preservation requirements.

V. Conclusion

We conclude that before this claim may be raised on appeal, the complaint must have been brought to the attention of the trial court. *See* TEX. R. APP. P. 33.1. In this instance, no objection or request was made that would have put the court on notice that any problem existed, and when the court raised the matter before appointing Cobb, consent was unanimous. It further does not appear

that any conflict requiring separate counsel was ever brought to the attention of the trial court, and the court was never asked to order either separate trials or to appoint separate counsel. Under these circumstances, we find that the issue was not preserved for appellate review.

We affirm the judgment.

Jack Carter
Justice

Date Submitted: July 15, 2009
Date Decided: July 16, 2009