

Reversed and Remanded and Majority and Dissenting Opinions filed August 15, 2023.



**In The
Fourteenth Court of Appeals**

NO. 14-21-00288-CV

B.B., Appellant

v.

A.C.B., Appellee

**On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 2000-16955A**

OPINION

The issue in this appeal is whether the trial court erred in a habeas-corpus proceeding after the pro se respondent B.B. (Father) informed the court that he was visually impaired and could not read documents served on him the day before the hearing. The trial court conducted a video hearing, did not provide accommodations to Father, and signed a habeas-corpus order that among other things awarded A.C.B. (Mother) a \$4,231.44 attorney-fee judgment against Father. *See* Tex. Fam. Code Ann. §§ 157.371, .372(a) (habeas-corpus jurisdiction to

enforce motion for possession or access to child); § 106.002 (court may render judgment for reasonable attorney’s fees and expenses in a suit under Family Code title 5).¹

In two issues on appeal, Father argues that the trial court (1) violated his rights to due process and due course of law and (2) violated his right to due process when he was not allowed to present evidence of danger to the child. Concluding that we have jurisdiction over the final attorney-fee judgment against Father, we reverse and remand for further proceedings related to that judgment. Tex. Fam. Code Ann. § 109.002 (appeal from final order).

I. BACKGROUND²

Mother married Father in 1998. The couple subsequently divorced, and in 2000, the 310th District Court in Harris County signed an order concerning possession of the child, child support, and other matters. In 2012, on Mother’s motion, the trial court signed a modification of its original order, allowing Father possession of their child, E.A.B, as specified in the order. In 2021, Mother filed a petition for a writ of habeas corpus, demanding the return of E.A.B., after Father refused to return E.A.B. under the terms of the 2012 possession order.

At the hearing conducted via video conference, Mother was represented by counsel, while Father appeared pro se. At the beginning of Mother’s case-in-chief, she called her first witness, a constable, and questioned him about various exhibits. Father voiced confusion, telling the trial court: “Okay. I’m going to be honest, Judge. I really don’t know what’s going on with this witness.” When

¹ We express no opinion whether an attorney-fee judgment is proper under Family Code section 106.002 as no complaint has been preserved on that issue. *Cf.* Tex. Fam. Code Ann. § 106.001 (court may award costs in suit or motion under Family Code title 5 *and in habeas-corporis proceeding*).

² Mother has not filed an appellee’s brief.

Father cross-examined the constable, Father explained that he is vision-impaired: “I can’t see, sir. If you were the officer that showed up at my home, you and the other officers that were standing at the door know that I cannot see.” Mother objected and the trial court admonished Father, explaining that the questioning was outside the scope of the witness’s testimony. Father then told the trial court: “Okay. Judge, I apologize. I can’t see the records that were submitted to me.”

After confirming that Mother’s counsel had provided the records to Father the previous day, the following conversation occurred:

[Trial court]: Okay. Thank you. So when I say that you may speak, you may speak, but right now we’re trying to get to the bottom of this issue that you’ve raised. Okay? The issue that you raised is that you are sight impaired and you cannot see the documents that were sent to you. What I am asserting, sir, is that you were sent these documents, it sounds like, at 1:30 yesterday, sir. You’ve had an opportunity to have somebody sit down and review those documents with you. Have you not, sir?

[Father]: No, sir.

[Trial Court]: Why not?

[Father]: They sent pictures.

[Trial Court]: Exactly, sir. But—

[Father]: Those—

[Trial Court]: Don’t you—

[Father]: I apologize.

[Trial Court]: So, sir, what do you need to be able to see them, sir? I know you are sight impaired, but that’s not going to stop this hearing from moving forward. You know what I’m saying, sir? I mean, what is it that you need? What sort of accommodation are you needing to ensure that you know what’s in those exhibits? How do you usually have

somebody relay to you what printed information is or what photographs depict, sir? How do you normally do that just on a daily basis, sir?

[Father]: My voiceover on my iPhone reads PDFs if they are in a Word document.

[Trial Court]: Okay.

[Father]: The voiceover does not, however, read pictures or—any pictures.

[Trial Court]: Okay. How does somebody—how does one normally relay to you what is depicted in a picture? All right? How does that normally work for you?

[Father]: If someone sends me a photo, I have someone with vision to tell me or describe it to me; however, I don't—I don't have a lot of pictures.

....

[Trial Court]: I thought you were—I thought you were referring to the exhibits that were sent to you, sir. Sir, you've had ample time for somebody to sit down and review those pictures with you, sir. So, I mean, why did you do that? I'm just trying to get to the bottom of this. Maybe I'm just giving you too much leeway here. I'm trying to understand, sir. If you were given the pictures by 1:30 yesterday—right?

[Father]: Yes, sir.

[Trial Court]: —why—I'm trying to get to the bottom of why you didn't have somebody sit down with you and describe to you what was depicted in those photographs because that's normally how it sounds like you would have somebody assist you with photographs. Okay. Continue, Counsel.

Mother then moved to an exhibit that included nine videos that had also been provided to Father via a “Dropbox link.”

Father's mother made a brief appearance during the hearing to help Father

read some of the exhibits:

[Trial Court]: Please assist [appellant] during the recess with the additional five exhibits. Please explain to him what they are and answer any questions that he might have regarding them. Okay? Because we're going to get there once we reconvene. Okay?

[Father's mother]: Okay. The remaining five exhibits. How many pages, because I am at work? I work from home, too.

[Trial Court]: Yes, ma'am. Understood. You know, [appellant] was given advance notice of this hearing and I understand your obligations as well, ma'am. If you're able to do it, you're able. If not, then we may need to proceed regardless. So I'm just letting you know just to expedite this matter, if you have the time to do it, you can do it during this recess. Okay? Thank you, ma'am.

Mother's counsel then called herself to testify regarding attorney's fees. She displayed an exhibit on the screen of the video conference, which was essentially a timesheet detailing all the reasonable and necessary attorney's fees incurred by Mother in pursuing this action.

On April 27, 2021, the trial court signed a habeas-corpus order (1) holding Mother was the person entitled by law to possession of the child, (2) compelling Father to return the child to Mother, and (3) awarding Mother a \$4,231.44 attorney-fee judgment against Father. Father filed a notice of appeal.

In April 2022, our court issued a memorandum opinion, dismissing the appeal for want of jurisdiction because "[t]he issues raised in appellant's brief concern the grant of the petition for writ of habeas corpus." Father filed a letter with the court, conceding that "[t]he granting or denying of a writ of habeas corpus is not appealable." However, he insisted that we could exercise jurisdiction

over the appealable portion of the order because he “seeks only review of the portion of the order granting attorneys’ fees in this case.”

Father then filed a motion for rehearing, arguing that his appellate brief challenged the entire order signed by the trial court, including the portion awarding attorney’s fees. Father additionally reasserted that the trial court violated his rights by going “forward with a court process that denied him the basic ability to read and understand the evidence introduced against him.”

Our court issued a per curiam order granting the motion for rehearing, withdrawing our previous opinion, vacating our judgment, and reinstating the appeal.

II. ANALYSIS

Father argues that the trial court violated his due process rights by: (1) proceeding with the hearing and admitting exhibits despite Father not being able to see or understand them; and (2) not allowing Father to present evidence of the danger to his child.

As appellant concedes, the granting or denying of a writ of habeas corpus is not appealable. *See Gray v. Rankin*, 594 S.W.2d 409, 409 (Tex. 1980); *Nydegger v. Breig*, 740 S.W.2d 551, 552 (Tex. App.—San Antonio 1987, no writ). However, “[w]here a judgment or order contains both appealable and nonappealable portions, this Court has jurisdiction over the appealable portion.” *Miericke v. Lemoine*, 786 S.W.2d 810, 811 (Tex. App.—Dallas 1990, no writ). Therefore, we have jurisdiction over the portion of the order that awards attorney’s fees. *See id.* (concluding that while appellate courts have no jurisdiction to review granting of writ of habeas corpus, “this Court has jurisdiction to entertain an appeal of an award of attorney’s fees and costs emanating from a habeas corpus proceeding”).

In this limited scope, we now address whether the trial court erred by awarding Mother attorney's fees in violation of Father's rights.

A. Applicable law

“As a rule, a claim, including a constitutional claim, must have been asserted in the trial court in order to be raised on appeal.” *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993). Even due process arguments must be presented to the trial court. *See In re B.L.D.*, 113 S.W.3d 340, 354 (Tex. 2003) (“[D]ue process does not require review of unpreserved complaints[.]”).

“‘[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). “A violation of substantive due process occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of power.” *In re J.R.*, 652 S.W.3d 508, 514 (Tex. App.—Houston [14th Dist.] 2022, pet. denied) (quoting *Reynoso v. Dibs US, Inc.*, 541 S.W.3d 331, 338 (Tex. App.—Houston [14th Dist.] 2017, no pet.)). Procedural due process rules are meant to protect persons from the mistaken or unjustified deprivation of life, liberty, or property. *In re J.R.*, 652 S.W.3d at 514. Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *University of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).

While due process is flexible and calls for such procedural protections as the situation demands, the supreme court has noted that

[i]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of

an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In re E.R., 385 S.W.3d 552, 558 n.14 (Tex. 2012) (quoting *Mathews*, 424 U.S. at 335).

B. Preservation of error

Before we can address Father's due process challenge, we must first determine whether it has been preserved for review.

To preserve a complaint for appellate review, the record must show that:

- (1) the complaint was made to the trial court by a timely request, objection, or motion that:
 - (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
 - (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and
- (2) the trial court:
 - (A) ruled on the request, objection, or motion, either expressly or implicitly; or
 - (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

Tex. R. App. P. 33.1(a).

Rule 33.1 does not require a litigant to use "magic words" to preserve error. While this is not a criminal case, the test for error preservation as set out by the court of criminal appeals is as straight-forward as it gets:

To properly preserve an issue concerning the admission of evidence for appeal, “a party’s objection must inform the trial court why or on what basis the otherwise admissible evidence should be excluded.” However, a party need not spout “magic words” or recite a specific statute to make a valid objection. References to a rule, statute, or specific case help to clarify an objection that might otherwise be obscure, but an objection is not defective merely because it does not cite a rule, statute, or specific case. As this Court stated in *Lankston v. State*,

Straightforward communication in plain English will always suffice [A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.

The objection must merely be sufficiently clear to provide the trial judge and opposing counsel an opportunity to address and, if necessary, correct the purported error. In making this determination, *Lankston* states that an appellate court should consider the context in which the complaint was made and the parties’ understanding of the complaint at the time.

Ford v. State, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) (citing *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)) (footnotes omitted); *see also Hanks v. Hanks*, No. 01-20-00205-CV, 2022 WL 2309394, at *4 (Tex. App.—Houston [1st Dist.] June 28, 2022, no pet.) (mem. op.) (citing *Laws v. State*, 640 S.W.3d 227, 228–29 (Tex. Crim. App. 2022) (party need not use magic words to preserve error)).

Thus, while Father did not specifically use the words “due process,” “due course of law,” or “objection,” we hold that the specific grounds were apparent from the context. Father made it abundantly clear to the trial court—on numerous occasions and in a timely fashion—that he could not meaningfully participate in the hearing and that he needed more time to prepare due to his vision impairment

and his inability to see the exhibits, videos, and documents relied on by Mother and her witnesses. *See* Tex. R. App. P. 33.1(a)(1)(A). In attempting to cross-examine one of Mother’s witnesses, Father clearly conveyed confusion and expressed, “I really don’t know what’s going on with this witness.” Thus, liberally construing Father’s complaints at the hearing, Father sufficiently made the trial court aware of the nature of his complaint.³

The trial court implicitly ruled on Father’s complaint when it continued with the proceedings despite Father’s inability to see the exhibits and videos and meaningfully participate. The trial court even told Father’s mother that the hearing would likely continue “regardless” of whether she was able to assist Father. Tex. R. App. P. 33.1(a)(2)(A). Therefore, we conclude that Father preserved his complaints for appellate review.

C. Due-process factors

Because he has vision impairment, Father asserts that he was denied notice and the opportunity to be heard in a meaningful manner because the trial court proceeded with the hearing even though Father could not properly see or understand the exhibits and documents. *See Than*, 901 S.W.2d at 930.

Under the first prong of the balancing test, a court is to consider the nature of the private interest affected by the official action. *Mathews*, 424 U.S. at 335; *In re J.R.*, 652 S.W.3d at 514. Parents hold a “fundamental liberty interest” in the care as well as the custody and management of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The supreme court has recognized the natural parental right as

³ Generally, pro se litigants—such as Father—are held to the same standards as licensed attorneys and must comply with all applicable rules of procedure. *See Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) (explaining courts may not stray from procedural rules simply because litigant represented self). However, we still construe procedural rules liberally so that the right to appeal is not lost unnecessarily. *Id.*

“essential,” “a basic civil right of man,” and “far more precious than property rights.” *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

Considering the foregoing, the liberty interest in the parent-child relationship must be recognized as considerable under the first prong of the *Mathews* balancing test. *See In re J.R.*, 652 S.W.3d at 514.

Under the second prong of the balancing test, a court is to consider the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *Mathews*, 424 U.S. at 335. In the present case, the risk involves assessing thousands of dollars of attorney’s fees against a sight-impaired litigant who could not see or understand the exhibits entered against him, in a case involving possession of his child.

Father brought his sight impairment to the trial court’s attention on multiple occasions. The trial court was aware that Father only had approximately three business hours on the day before to find somebody to help him review the documents submitted to him before the hearing. The trial court made no effort to verify, after its brief recess, whether Father’s mother was able to adequately review the documents with Father. Nevertheless, the trial court admitted into evidence an exhibit, which included nine videos. The trial court also admitted the time sheet of Mother’s counsel, a spreadsheet containing 25 entries documenting her reasonable attorney’s fees. Father was denied the meaningful opportunity to cross-examine her on the listed activities, who completed them, and why they were allegedly reasonable and necessary. The risk that Father, a sight-impaired litigant, was erroneously deprived of rights is high.

Likewise, the probable value of additional procedural safeguards is high.

Father testified that he usually finds someone to read documents or describe photos to him. The trial court simply needed to be certain Father had sufficient time before trial to procure someone to help him read the documents, and that Father had someone available during the hearing to help him understand the exhibits being admitted.

Considering the risk of erroneous deprivation of his interests through the procedures used and the probable value, of additional or alternative procedural safeguards, the second *Mathews* prong weighs in favor of concluding Father was deprived of due process.

The third prong of the balancing test focuses on the government's dual interests—an administrative interest in reducing costs associated with habeas-corpus proceedings and an interest in ensuring an expeditious yet accurate resolution of the action to ensure the child stays with, or is returned to, the person entitled by law to possession of the child. *See Mathews*, 424 U.S. at 335. Simply accommodating Father's disability would not impose great administrative or fiscal burdens on the government. Indeed, the trial court only needed to delay the hearing to make sure Father had adequate time to find someone to help him understand the exhibits. Further, there was no allegation nor evidence that the child was in any danger. Mother simply asserted that Father violated her possession rights by failing to return E.A.B. according to the possession schedule. Thus, any such delay or cost in making accommodations for Father would not be so great as to frustrate the government's interests or endanger the child.

The three *Mathews* factors weigh in favor of the conclusion that awarding attorney's fees under these circumstances offended Father's due process rights. *See Hlavaty v. Commercial State Bank of El Campo, Tex., Inc.*, No. 13-14-00516-CV, 2016 WL 1316750, at *6 (Tex. App.—Corpus Christi—Edinburg Mar. 10, 2016,

pet. denied) (mem. op.) (reversing order of sanctions that awarded attorney’s fees because “the ordering of attorney’s fees as a sanction under these circumstances offended [cross-appellant’s] due process rights and amounted to an abuse of discretion”).

We sustain Father’s first issue. We dismiss Father’s second issue in which Father argues that the trial court violated his rights by not allowing him to present evidence regarding the perceived danger to his child. This argument ultimately concerns the granting or denying of a writ of habeas corpus, which is not appealable. *See Gray*, 594 S.W.2d at 409.⁴

III. CONCLUSION

We reverse the portion of the trial court’s order that awards attorney’s fees. We remand this case for further proceedings consistent with this opinion.

/s/ Charles A. Spain
Justice

Panel consists of Chief Justice Christopher, and Justices Bourliot and Spain. (Christopher, C.J., dissenting).

⁴ We express no opinion whether this issue can be reviewed in a mandamus proceeding.