

ORAL ARGUMENT – 09/04/02
01-0571
IN RE JFC AND MINOR CHILDREN

GARCIA: Texas procedure rules require that civil litigants object at trial to a jury charge error before that error can be reviewed on appeal. Yet, in this case, the Waco CA _____ jury charge issue based on a _____ conclusion that the due process clause required this result.

This court has properly noted that while parental rights are of constitutional magnitude, they are not absolute. Because Texas procedural rules provide adequate due process protections to parents, this court should reverse the Waco CA, and hold parents to the same standard as preservation of error as all other civil litigants.

Rule 272 of the Texas Rules of Civil Procedure and rule 33.01 of the Texas Rules of Appellate Procedure provide adequate due process protections.

PHILLIPS: I'm trying to understand how due process is protected by a rule that your appointed lawyer doesn't follow. You said due process is fully preserved and I'm just trying to understand that.

GARCIA: Due process fully preserved under Texas Preservation of Error Rules would be the rule that requires a parent to object to the jury charge before they could complain about it on appeal. And in determining what process is due, the US SC has applied a three factor test, which was first established in *Matthews v. Eldridge*, and later adopted in a termination case, *Lassiter v. Dept. of Public Services*. In *Lassiter*, the SC considered whether an indigent parent was required to be appointed counsel; whether due process required this. And the SC said, No, that the constitution did not require that appointed counsel be extended to parents in termination cases.

So in evaluating the three factors, these factors first are that the court must recognize the private interests at stake; and then the court must evaluate the countervailing governmental interest; and third, the court must weigh in the risk of error that is associated with the state's chosen procedure.

HANKINSON: Would you focus a minute on that third requirement from *Lassiter*, the risk that the procedure will lead to an erroneous decision. If we are dealing with a question of waiver as we are here, then don't we have a substantial risk that the procedure could lead to an erroneous decision? In fact when we don't have for example in this case a determination by the jury on the appropriate legal grounds for determination.

GARCIA: No. The risk of error is minimal. And the reason the risk of error is minimal it's because the Texas Procedural Rules provide parents an adequate procedure for preventing that error.

HANKINSON: It depends on whether or not their counsel does his or her job.

GARCIA: Yes. But due process only requires that the trial be fundamentally fair. And in determining that it's fundamentally fair, the constitutional inquiry is not whether juries might be confused by an erroneous jury instruction.

HANKINSON: I'm not as concerned about the confusion at this point about the total absence of an instruction that the Texas legislature has determined is part of the law for deciding to terminate parental rights.

GARCIA: _____ that there is not a total absence of the best interest instruction because...

HANKINSON: As to one parent there was.

GARCIA: Well this court has specifically accepted the pattern jury charge instruction. And that instruction only requires the disjunctive question...

HANKINSON: I don't disagree about that. But I believe it was as to the mother. Even with a disjunctive question that was submitted there was no mention of best interest in the instruction to the jury.

GARCIA: I agree that the jury charge could be left meaningless to the mother.

HANKINSON: I mean there was a total absence of one of the requirements in the family code for grounds for termination.

GARCIA: Well if we look at the jury charge and actually the record supports this because the jury charge was read in open court. If for example there had been a paragraph return, that the best interest instruction would have been separated, then it could have been said that the best interest instruction pertain to both the mother and the father.

HANKINSON: What I'm concerned about is that third element in Lassiter, the risk that the procedure will lead to an erroneous decision. And if we have a case in which the lawyer did not object and the state for some reason did not submit the appropriate issue to the jury that included both a ground for termination and the best interest requirement in the instruction, we have a total absence of that going to the jury, the state didn't submit it, the judge didn't catch it apparently, and the lawyer for the parents did not object to the failure to submit it, why isn't there a substantial risk that we could have erroneous decisions because we're allowing a waiver ground to control the ultimate decision in a parental termination case?

GARCIA: Because under the due process clause analysis, that risk of error has to be considered under the protections of the due process clause _____. That is notice and an

opportunity to be heard. Texas Rule of Civil Procedure 272 provides that notice. This is not an issue of where the parents never see the jury charge until after judgment has been rendered. This is not an issue of whether the parents don't get an opportunity to complain about an error in the jury charge. They get an opportunity to complain about an error in the jury charge. For that reason, the risk of error is minimal, yet it may have happened in this case, but that does not mean that it will happen in every termination case.

And the constitutional due process protections don't waive _____ of ignoring the state's procedural rule when they provide a fundamentally fair trial.

ENOCH: Was this appointed counsel in the TC?

GARCIA: Yes.

ENOCH: In a criminal case the US SC, I guess, requires _____ briefs to be filed. They require issues to be raised on behalf of a convicted defendant even if the lawyer doesn't think there are grounds for bringing the appeal there. And the US SC requires criminal courts to review underlying cases for ineffective assistance of counsel. And so I suppose these getting _____ because of the criminal defendant is entitled to a lawyer, the states required to appoint them a lawyer, and we give the defendants the additional protection that they can even get their case reversed if their lawyer doesn't do the things the lawyer is supposed to do. Should we distinguish between those cases where parents in a termination have court appointed counsel and consider the state's then having further obligation to assure that any errors are appropriately reviewed on appeal as opposed to cases where people are not entitled to appointed counsel, and therefore, the state does not have an interest in assuring that the lawyer that is representing him presents all the appropriate issues on appeal?

GARCIA: No. This court should not distinguish between termination proceedings in which there is an appointed lawyer verses where there is no appointed lawyer. Because the criminal standard for ineffective assistance of counsel derives from the sixth amendment's right to counsel guarantee. And that amendment clearly applies by its plain language to criminal cases.

In any instance if the court looks to guidance from some criminal law, the Texas CCA recently said in ex parte Graves that the statutory right to competent counsel did not equal a right to effective assistance of counsel. So in comparison because there is a right to appoint a counsel in termination cases that does not necessarily include a right to effective assistance of counsel. Moreover, ineffective assistance of counsel claims in criminal cases are brought on collateral review, because the evidence or facts pertaining to that issue would be matters outside the record. In a civil case, in the civil trial system or procedures setup that we have, we don't have any type of collateral review for civil cases. So it would be troublesome to see how issues of ineffective counsel could be raised on direct appeal.

HANKINSON: One of the grounds for termination in the family code can be that the parents' rights to another child have been earlier terminated in a later proceeding. So if we have a

circumstance such as this where there's been a waiver of the failure to submit appropriate instructions to the jury and judgment is entered terminating the parental rights, then after that in subsequent proceedings that first judgment seems to me to infect everything that happens afterwards. How does that then fit into this analysis? That seems to make that waiver have an effect that goes far beyond just even the instant proceeding.

GARCIA: It could. But the court should not develop a broad _____ that applies to all termination cases based on what happened in this case. Because that ground in the Texas family code, §161.001(M) only allows for a termination in a subsequent proceeding if the parents had a termination based on grounds D or E. Only two narrow grounds. In this case the predicate grounds alleged for termination was ground D as to the mother; and ground O. And then ground E as to the father and ground O. So because this court allows for destructive question, we can't really know whether the jury actually terminated on predicate ground O or predicate ground D. But necessarily that the judgment reflects that and that can be used. But there is also a whole other laundry list of factors that could be used to terminate parental rights. And if there was an error in the jury charge, for example if it had been different grounds, then the _____ you raised would not come up.

HANKINSON: I understand. But my concern then it seems to me we that we have a little bit broader question that we have to answer here. Because if the waiver in the initial proceeding results in termination on one of the statutory grounds that can be the predicate for future termination actions, then in fact this waiver has far greater significance than just in the current proceeding that is at issue. And how does due process accommodate that?

GARCIA: Again, it would go back to whether there was fair notice and opportunity to object. But that is fundamental fairness. That is what the procedural due process clause protects. It protects fundamental fairness. And the reason that the preservation of error rules are fundamentally fair is because the parents have the opportunity to object. The parents look at this jury charge. They actually said that they had one objection. They objected to the instruction on clear and convincing evidence.

If the error is so glaring to this court, then it should have been revealed. At least the parents had fair notice and opportunity to minimize the error for the judge to grant an unjust decision.

HANKINSON: In all fairness as well, the state regularly engages in termination proceedings. And these were the state's issues. And the state did have an obligation to present them correctly and completely to the judge for consideration before submitting to the jury. The state did not do that.

GARCIA: The state should be held to its duty to present a fair and correct charge.

O'NEILL: I want to make sure I understood your answers to one of the prior questions. Are you saying that this termination order cannot be the basis for subsequent terminations, or it can?

GARCIA: Yes this one can because it did include the ground D and E, which are the only grounds that will support a subsequent determination under ground M.

O'NEILL: So automatically in this case, this couple can no longer have children?

GARCIA: Not necessarily. The state can allege that along with other predicate grounds, but it's actually the jury's determination as to whether they would terminate based on...

O'NEILL: Well my question is, can this charge be collaterally attacked in those proceedings? I mean for example in a future termination proceeding if the parents come in and try to say, well this was a defective charge, we were held to have waived it in this first case, but it was defective. Can they collaterally attack a subsequent termination proceeding, or collaterally attack this judgment in a subsequent case to retain the right to their children?

GARCIA: I don't believe that there is an avenue for collaterally attacking this judgment unless there was a...

O'NEILL: So this is it? So the state's position is this is it? This waiver results in them never having the children again?

GARCIA: No. That is not true, because that is only one of the predicate acts that the state can allege for termination. There is a whole laundry list. There's like 26 predicate acts that the state can use to ask a jury to terminate parental rights. It's not necessarily conclusive or automatically assumed that this ground for termination would be alleged to terminate future children.

O'NEILL: I understand that a future child was terminated. What grounds did the state use for that termination?

GARCIA: Actually what happened, there were the three children that were removed in Waco. The parents moved to Austin, and a child was born here in Austin, and that child was removed at birth.

O'NEILL: And on what grounds did the state rely to remove that child? And my understanding is that resulted in a termination correct?

GARCIA: Yes.

O'NEILL: And what grounds did the state rely upon for that termination proceeding?

GARCIA: I don't know all of the grounds. I do know that one of the grounds was on endangerment.

O'NEILL: So it was based then on this judgment?

GARCIA: Not on this judgment. Nothing has been based on this judgment.

O'NEILL: It was endangerment as to that child?

GARCIA: Endangerment as to that child

O'NEILL: My understand was that they took the child right after birth. How could there have been a separate endangerment finding that didn't relate back to this judgment?

GARCIA: Because there was reason to believe that the child would be endangered by the parent's drug use and...

O'NEILL: Which was all based on this judgment.

GARCIA: No. Not based on this judgment. This is based - I mean when you bring an initial proceeding it's based on the investigation of the facts as they exist to those parents. It's not based on a prior judgment. It's an investigative inquiry, so the department was investigating and had reason to believe that this child would be endangered by being left with the parents. That's why they took it into custody, and then they moved, presented evidence, all new evidence, not this prior judgment...

O'NEILL: They didn't introduce the prior judgment?

GARCIA: No. They did not use this prior judgment.

O'NEILL: Had nothing to do with that subsequent termination?

GARCIA: No. This judgment has not been used in any subsequent determination at all.

HANKINSON: But then they use the Austin judgment on the two Bastrop terminations?

GARCIA: That's correct.

O'NEILL: I thought you just said they didn't use this judgment in the Bastrop termination.

GARCIA: I'm talking about the Waco judgment. The Waco judgment has not been used. The Austin judgment on the baby that was born here in Austin, that one was used to support a subsequent termination in Bastrop county.

O'NEILL: But this one has not been used in subsequent terminations?

GARCIA: No.

PHILLIPS: On the first two Lassiter grounds, tell me why the countervailing public interest in preservation of error trumps the private interest in parent's rights to raise their children?

GARCIA: In this case, because the Texas Family Code especially established that the state's public interest is in protecting the safety and welfare of children. And that is exactly the interest that the US SC has recognized, is the state's interest.

PHILLIPS: So we're supposed to look at the whole interest of the family code proceedings under it and not just the interest and not waiving error under Lassiter? The interest that we look at in No. 2, the countervailing public interest in your opinion is for the whole proceeding and the whole result and not just our interest in rule 272 being _____?

GARCIA: What the governmental interest would be of course is protecting the safety and welfare of the children. But also as to rule 272 in protecting the efficiency of the judicial process in standardizing proceedings for litigants and ensuring fairness in all trials. That would be particular states interest as to rule 272 in the due process analysis. But that I think the court needs to also consider the public policy that the state is charged with and that is establishing permanency in these children's lives who have already been tragically abused and neglected.

RODRIGUEZ: You acknowledged a moment ago that the state has an obligation to the court to submit a proper charge in parental termination cases. Why wasn't that done here?

GARCIA: I don't know. It was an oversight...

RODRIGUEZ: It seems to me in private practice one reason for that is a tactical advantage. If you think that the opposing counsel won't notice a deficiency in the charge that is advantageous to your client in that case, then you might propose a charge that way and then leave it up to the court to find the error. Do you think that might have happened here?

GARCIA: I don't believe that we can assume a negative or malicious motive on the part of the state. I don't know why the error went unnoticed. I don't know how the error happened. A reasonable possibility could be that the state did present a charge but that the court, you know the secretary retyped the charge, and in retyping it that the error occurred. I think that's a reasonable possibility.

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RESPONDENT

BRADT: The question before the court is the difference between a substantive and procedural due process. The question before the court is the US SC decision in M.L.Green v. S.L.J., which says that as a matter of substantive due process, there must be a specific finding of conduct

that will support termination. This court when it decided E.B. did not address that question, and it lays before you.

What you have here is a disjunctive submission at best. Defective in that it doesn't even address the question of best interest as to...

HANKINSON: Are you making a substantive due process argument as opposed to a procedural due process argument?

BRADT: Yes.

HANKINSON: There seems to be a lot of confusion in the briefing. So you are not claiming that there is a procedural due process problem?

BRADT: No. It's a substantive due process. There is a case out of Amarillo, In the interest of S.H., 548 S.W.2d 804. And it holds that a question that is submitted or a finding that a person did A or B, is not a finding that they did either. It does not mean that they A. It does not mean that they did B. So what you then have...

HECHT: What does it mean?

BRADT: It means nothing. Because it's not a specific finding. And under MLB v. SLJ, which is cited in our...

HECHT: We submit charges all the time. We say, did the defendant drive negligently with respect to brakes or with respect to look at? And they say, yes, and we don't have anything?

BRADT: Under this situation, and I believe that if it was raised in that, it's not a finding.

PHILLIPS: So the whole general charge philosophy in the last 20 years has been illegitimate?

BRADT: It's been flawed. The answer is very simple. All you have to do is ask the jury. Answer yes or no to the following: Did Page Cox place the children in a situation that endangered them?

HANKINSON: That's not a broadform submission then.

BRADT: But then you get the specific answer that the SC...

HANKINSON: I understand. To follow up on what CJ Phillips just asked, then that means that we have had a problem for the last 20 years with broadform submission?

BRADT: Yes. And this court addressed in *Crown v. Castill Life*. Because you don't know who was grabbing on what when you have a broadform submission. And because we're dealing with parental rights, we have an elevated standard we have to deal with. What we have in the question that was submitted to the jury is, did he engage in conduct which endangered the physical well being of the child? Did he engage in conduct which endangered the emotional well being of the child? Did he knowingly place the child with persons who engaged in conduct which endangered the physical well being of the child? Did he knowingly place the child with persons who engaged in the conduct which endangered the emotional well being of the child? Or did he fail to comply with provisions of the court order that established and so forth?

You have 6 different grounds, and you have no way of knowing if ten jurors agreed on any single ground.

O'NEILL: Is this the sole underpinning of your substantive due process argument?

BRADT: No.

O'NEILL: Would you move to the other.

BRADT: The question is, where is the specific finding of conduct?

O'NEILL: I thought that that's what you were just arguing.

BRADT: That is, and that goes to the very crux of the question presented by CJ. The oral submission is fatally flawed.

HANKINSON: But you have just recited what would be a granulated submission, which was a form of jury charge submission that Texas abandoned some 20 years ago. The question that was asked of this jury is whether or not the parents' rights to the child should be terminated? That was the jury question. The rest were in the form of instructions.

BRADT: That's right. And I think that is procedurally and substantive flawed, because you don't know what they specifically answered. All they answer in the question is should it be terminated? And that's a general finding of neglect, which is prohibitive.

O'NEILL: Well I guess my question is. Is it critical to your winning your substantive due process argument if we find the charge was flawed in that respect, or do you have a separate due process argument?

BRADT: You have to find that the charge was flawed in that respect, because that goes to the very question that the court was addressing on the petitioner's argument of the waiver question. Can this be waived? Is it a question of substantive due process? This question of how it was submitted to the jury, how they answered whether there was an objection or not. These are

all tied together.

O'NEILL: If instructions were proper as opposed to a number of individual questions, if the instructions are proper under our broadform submission, would the failure to include the best interest instruction specifically as to the mother support your substantive due process argument?

BRADT: Yes.

HANKINSON: Explain your substantive due process argument as it relates to the failure to instruct on best interest as to mom?

BRADT: As to mom there are two parts. First off, as to best interest, the jury was not instructed that they had to find that it was in the best interest of the children to have the parental rights terminated.

HANKINSON: Your client had a right to have that submitted. Why doesn't that become a procedural due process question in terms of whether or not they can now complain about that?

BRADT: Because you go to *MLB v. SLJ*, and when the US SC says that the general finding of neglect, which is should rights be terminated, and that's all it is...

HANKINSON: But it seems that before you can reach that particular question, you have to cross the procedural due process hurdle, which is whether or not you had an opportunity to present that to the jury and you chose not to.

BRADT: The problem with your honor's logic is this, and you have to work them backwards. When you look at *MLB v. SLJ* they looked at what is the judgment and is there a specific finding in the judgment that will support a termination. Forget that was argued. Forget there was a waiver. And this judgment doesn't support it because there is not a specific finding.

HANKINSON: But under our broadform submission, there is a finding that the parental rights should be terminated, and that can support a judgment under Texas law.

BRADT: And if it is fatally flawed under *MLB v. SLJ* because there has to be a specific finding of _____.

HANKINSON: As J. O'Neill said, leave behind that particular argument and go to the failure to submit on the best interest.

BRADT: Under *Crown v. Castill*, on a much less important issue than the termination of parental rights, this court reversed because of the possibility that the jury could have found on different grounds...

HECHT: And one of them did not support a judgment.

BRADT: Right. And in this case we have no evidence of violation of the court order. This court is going to have to find that a family service plan is a court order. There is no evidence of a court order that specifically set forth the grounds of what they have to do to obtain return of their children. And a family service plan doesn't rise to that level. That's a CPS caseworker. So we're missing that element entirely.

HANKINSON: I need to go back to the construct of analyzing this, because I am very, very confused. Our starting point has to be whether or not you can even complain about the charge at this point. So what is the nature of your legal argument that says we should be allowed to look at your complaints about the charge?

BRADT: As a matter of substantive due process did the procedure that the court used comply with due process under the 14th amendment. And contrary to what counsel says in, and to address the question of the right to effective counsel, this is a quasi criminal proceeding. Technically civil. The right to counsel in a civil case brings you the fifth amendment not the sixth amendment.

HANKINSON: But again, that gets you to the substance of your objection. So we have to get over the procedural hurdle that that objection is never presented to the TC as Texas civil procedure requires. What is it that gets you over that to where we could even answer that question?

BRADT: The fourteenth amendment due process.

HANKINSON: But we have plenty of authority out of this court that indicates that if constitutional arguments are not raised in the TC, we will not consider them for the first time on appeal. I understand that you have objections to the charge. You think it shouldn't have been a broadform submission. It shouldn't have been disjunctive. Best interest should have been submitted. And none of those things were brought to the attention of the TC. Texas civil procedure required you to do that in order for an appellate court to review the charge. How do we get past that hurdle that in the TC the parents did not comport with what Texas civil procedure requires?

BRADT: And then I throw back on the court. Where is the specific finding required by *NLB v. SLJ*, a conduct that warrant termination?

O'NEILL: Was error preserved in *NLB v. SLJ*?

BRADT: My recollection is it was addressed solely on the basis of what the judgment recited.

O'NEILL: But error was preserved below?

BRADT: My understanding in reading the appellate record in predecessor cases it did

not have to do with the charge. It had to do specifically with what was in the judgment. And the fact that the judgment did not comport with due process.

O'NEILL: But was an objection made in the TC to perform the judgment?

BRADT: It was made on appeal. I'm unaware that it was made at the TC.

O'NEILL: For the first time on appeal?

BRADT: That is all that I am aware of.

ENOCH: This court has gotten away a long time ago from the fundamental error, which was the notion that some error occurred in the TC that was so fundamental to the issue of justice that the appellate courts would allow the question to be raised on appeal. And although everybody has tried to avoid using that word, even in the CA and in the briefs, really your argument is that this is fundamental error. Your point is, the US SC says you can't terminate judgment or otherwise unless there's a specific finding in the TC of a grounds for termination. You say this judgment doesn't have a specific finding of termination, therefore, it's an unconstitutional judgment, and that objection ought to be allowed to be raised on appeal for the first time because it's fundamental. That's really your issue and this court long ago said, if it's the type of thing that can be presented to the TC before it comes up we're just not going to entertain on appeal, that the TC ought to have an opportunity to fix that. Do you have any US SC authority that says that an appellate court must accept fundamental error if the objection is to the judgment not being supported by a ground of termination?

BRADT: No. I do not have a specific case that I can point to that says that. However, I have to address the question that was raised on petitioner's case. The child ____ was taken from the hospital the day after the child was born.

O'NEILL: Do you agree that that was not based though on this judgment?

BRADT: I disagree. That was the initial basis. Now they went in and said we didn't follow an order. And the judgment as such is technically correct that it does not rely upon a termination in this case. But the reason for grabbing the child when it's 24 hours old is this judgment.

PHILLIPS: If we remand this case can we rely on Austin and Bastrop to take these children on...

BRADT: They can rely upon Austin because that judgment is technically correct. It makes specific findings that they did this and they did that. As far as Bastrop, I respectfully argue that no they cannot because that's a disjunctive submission. And it's a disjunctive judgment: if they did A, or B, or C or D. And there is nothing there.

O'NEILL: Would your argument allow parents to lie behind the law, not object to a charge, realizing if they kept the case in the appellate system long enough it would prevent adoption? I mean the state is asserting the child's interest here in finality and to being able to move on with their life. Couldn't this ability to bring appeals on all these different bases result in parents preventing their children from being adopted?

BRADT: It's only for a brief period. And I realize while this case has been pending for 3 years, there was some...

HECHT: Five.

BRADT: On the appellate level.

HECHT: Only three years in the appellate court.

BRADT: The judgment was in March 1999. These cases now require expedited consideration. This court, I believe, has a policy of you get one extension of time on filing a petition for review. That's what happened with the Cox case in Bastrop. I requested an extension of time. I was told I get one and that was it. The legislature has recognized that. And these are on a fast track.

When the rights are so important, when they are protected under the First and the Ninth and Fourteenth amendments, can we say that they are not entitled to proper counsel. Whether appointed or not. Now there are some issues that you cannot look at and determine from a record. Can you determine from this record that counsel was ineffective? And usually the answer is no. But when you make no objection to something that is so fundamental, how can you say that they got the due process in the counsel that they are entitled to under the fifth amendment.

O'NEILL: I guess the answer to my question then is only if the court decides to expedite, and in fact expedites, and it all goes through here quickly, then that concern would not be raised?

BRADT: We're going back to what is the standard procedure of TDPRS. DDPRS in every case that I've been involved in that has had a termination issue has asked for expedited consideration for the last several years.

O'NEILL: That doesn't mean that that always happens.

BRADT: I understand. There are circumstances beyond control. But there is a limit...

O'NEILL: You would acknowledge there is a risk?

BRADT: But I think it's a nominal risk in light of the interest that are at stake here. If this was an ordinary civil case, if it was something other than the civil equivalent of a death penalty,

there wouldn't be a substantive due process question. It's because we're dealing with such fundamental rights as recognized by _____ v. Illinois.

HANKINSON: Do the Texas rules of civil procedure relating to jury charge and objections to the charge provide notice and a meaningful opportunity to be heard?

BRADT: Technically yes. But it has to be exercised.

HANKINSON: All I'm asking is on the face of the rules is there a procedure in place that gives notice and a meaningful opportunity to be heard?

BRADT: Yes. And on the face of the statutory framework for termination is constitutionally correct. The problem is the way it's implemented.

RODRIGUEZ: As I understand the record, the jury was instructed or told by lawyers and by the judge a minimum of 35 times of the requirements that the jury makes the termination in the best interest of the children. Why isn't the error that you are claiming here harmless error since really the jury knew what was going on?

BRADT: The problem is that _____ in the charge that they are given. They are not presumed to follow argument, because sometimes there is incorrect argument. And I believe we've cited a case on that point in our brief. The charge here is totally missing that you have to find that it's in the best interest of the children to terminate as to the mother.

O'NEILL: As a practical matter what happens if rights are not terminated as to mom but are terminated as to dad, and they are still together. How does that work?

BRADT: That is an unusual circumstance. I'm unaware of any circumstance where that situation has existed. I'm aware of cases where TDPRS has come in and insisted that there be a divorce or that they would bring termination proceedings against the parent whose rights have not been terminated because they are now exposing them to somebody whose rights have.

O'NEILL: Does the child then stay in foster care and just get to have contact with mom, or does the child go back to the home?

BRADT: I don't see why she wouldn't be entitled to have them back, because here rights haven't been terminated. And the legislature has changed the termination statutes by putting in deadlines to prevent this in limbo forever under the temporary orders, which that essentially is if they are kept in foster care forever. There either has to be a termination or a return. There has to be a final order within 12 months, and if not, the court can extend it through six months and that's it. You either have to terminate or the children have to be returned.

O'NEILL: You just don't know the answer?

BRADT: I don't know the answer.

O'NEILL: So unlikely the jury would find not in the best interest to return to dad, but find it is in the best of interest to return to mom. I mean that would be kind of odd. It would be a morass.

BRADT: Well we are back to, if we're looking at this charge, what was the answer they sought? We don't know because it's the disjunctive submission. But as the law presently stands, as I understand it, if this is fatally flawed as to Miles, he's entitled to return those children even if the rights are terminated against dad, and there might or might not have to be some sort of proceeding. Because there is nothing to stop him from coming in and seeking to adopt the children at that point if he can prove that he is an unfit parent.

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REBUTTAL

GARCIA: First, there is no substantive due process challenge in this case. The Waco CA held that Texas' procedural waiver rules would violate procedural due process. There was no substantive due process either raised nor addressed by the Waco CA. Moreover, the parents confused the issue of substantive due process with procedural due process. A substantive due process challenge would lie against a statute that directly affected the parents' right to control the upbringing of their children. And this is recognized by the US SC in _____ v. Granville. Where the SC reviewed a statute that allowed any person, including a grandparent, to petition for visitation rights. And the court held that that would violate the parent's substantive due process right to directly control the upbringing of the children.

Now while the Coxes challenge may indirectly affect a fundamental right to control the upbringing of your children because the termination judgment severs the parent/child relationship, that subordinative fact is not enough to rise the procedural due process challenge that is raised here against the preservation for error rules to a substantive due process. So therefore the court should not pause. We've spent too much time on that.

I would like to correct what I believe is a misunderstanding in the SC's decision in *MLB v. SLJ*, 519 US 102, and it was decided in 1996. This case concerned whether due process would prohibit a state from denying a parent's access of their right to appeal for their inability to pay for a trial transcript. And in evaluating the parents' constitutional right under the due process analysis set forth in *Mathews v. Eldridge*, the court determined that although in termination cases they were not your regular run of the mill civil cases because they had constitutional protections that it would violate due process to deny the parents the right to equal acts of support, and, therefore, the case did not concern anything about a jury charge. And whether it was preserved or not is not the issue in that case.

Finally, I want to go ahead and readdress the concern expressed by Justice

O'Neill and Justice Hankinson that this erroneous judgment, defining waiver of this erroneous judgment might somehow preclude the parents right to ever have children. Again, I believe that that risk is minimal. Certainly, although there is not a established collateral _____ a challenge of civil judgment, certainly that in subsequent proceeding when the state seeks to terminate the parental rights best on ground M, and based on the other finding the jury must make that it is in the best interest of the children, certainly parents can challenge use of that judgment. Because they can raise that it was an erroneous judgment, and that it's not in the best interest of the children to terminate parent rights based on an erroneous judgment.

So the parents will have an opportunity to challenge this again. They missed the first bite of the apple. The court should not give them a second bite of the apple because that is more than what the constitutional due process of fundamental fairness requires in these cases. be taken.

HANKINSON: If we agree with you in this case and reverse the judgment of the Waco CA, do we need to return the case to the Waco court for consideration of other issues raised by the parents on appeal?

GARCIA: We believe that the court can decide those issues and that would avoid unnecessary...

HANKINSON: They've not all been briefed here. As I understand from the Waco decision there were multiple issues there, but not all of those have been raised here. That's what I am trying to understand. Is that right?

GARCIA: Yes. There were 11 issues raised and most of those issues have been rebriefed in this court. But I believe that the issues regarding the challenge to ground O, which was the court order regarding _____ procedures, I believe that issue has not been fully briefed in this court.

HECHT: Was there evidence to support termination under all of the grounds submitted in the charge?

GARCIA: Yes.

HECHT: The court order ground, there was evidence to support that?

GARCIA: Yes.

HECHT: What was that?

GARCIA: Well the parents actually fully admitted in their own testimony that they voluntarily chose to ignore obeying the court order.

HECHT: What is the status of the children? Are they still in foster care, or do you know?

GARCIA: My understanding from the caseworker is that the children were initially in a home where the foster parents were considering adopting the three children so that they could stay together. And since that time, since this case has been pending, those plans have fallen through and the children are in different homes. And yes they are in homes that the parents are considering adopting them. And the foster parents realize that they are taking a risk because this judgment is not final yet. And until this court decides this case, the children's permanency is in limbo.

HANKINSON: The court order that you say there's evidence that they violated and admitted was that the CPS directives or was there something else when you say?

GARCIA: It was temporary orders entered by the TC.