IN THE SUPREME COURT OF TEXAS

444444444444
NO. 02-0244
444444444444

IN THE INTEREST OF L.M.I. AND J.A.I., MINOR CHILDREN

4444444444444444444444444444444444444444444444444444
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
4444444444444444444444444444444444444444444444444444

Argued on February 5, 2003

JUSTICE WAINWRIGHT, concurring.

I join the Court in affirming the court of appeals' judgment. However, I join only sections I, II, and IV.A. of Justice O'Neill's writing concerning the judgment on Ricardo Duenas's appeal, and section VII of Justice Owen's writing concerning the judgment on Maria Inocencio's appeal.

The Court today holds that Ricardo Duenas failed to preserve the issue he presented for our review – that the procurement of his affidavit of relinquishment and the subsequent termination of his parental rights constituted a violation of his right to due process under the United States Constitution. Because he failed to preserve the sole issue raised in his petition, determining the burden of proof applicable to his affidavit of relinquishment of parental rights is unnecessary to resolve his appeal.

I agree that Maria Inocencio preserved for our review the issue that execution of her affidavit of relinquishment was rendered involuntary by the coercion, deception and undue influence by certain individuals, including her sister and the persons seeking to adopt the twins. Accordingly, a legal sufficiency review of the issue Inocencio raises is required, and I agree with the result of Justice Owen's writing on this point.

I write separately to express my concern about another issue in this case. At trial, Inocencio represented to the court that to set the relinquishment affidavit aside, she had the burden of proof by a preponderance of the evidence to show that it was executed as a result of coercion, duress, fraud, deception, undue influence, or overreaching. Some courts of appeals likewise have held that the parent who executed the relinquishment affidavit has the burden to prove by a preponderance of the evidence that it was not executed voluntarily in order to avoid the very serious consequences of its execution. *See, e.g.*, *In re D.R.L.M.*, 84 S.W.3d 281, 296-298 (Tex. App.–Fort Worth 2002, pet. denied); *In re V.R.W.*, 41 S.W.3d 183, 193 (Tex. App.–Houston [14th Dist.] 2001, no pet.); *Coleman v. Smallwood*, 800 S.W.2d 353, 356 (Tex. App.–El Paso 1990, no writ).

Justice Owen, applying a different approach, cites the requirement under the Constitution and the Texas Family Code that the ultimate burden of proof, based on clear and convincing evidence, remains with the party seeking to terminate the parental rights. She recognizes that, absent any other evidence, a trial court could base termination on a relinquishment affidavit. If the burden to disprove the affidavit at trial remains on the parents in this circumstance, as stated by Inocencio at trial, then the constitutional and statutory requirements would be violated.

I maintain that where a "voluntarily" executed relinquishment affidavit is the sole ground for termination of parental rights under section 161.001(1) of the Family Code, placing the burden on the parents to set aside the affidavit may run afoul of constitutional and statutory mandates for the burden of proof and quantum of evidence necessary to terminate parental rights. This issue was not briefed, nor was it expressly decided in the courts below.

Inocencio's appeal is unsuccessful under either approach. Accordingly, it is not necessary to decide this issue in this case.

J. Dale Wainwright
Justice

OPINION DELIVERED: September 18, 2003