

Accordingly, when the basis for termination is an affidavit of relinquishment, there must be clear and convincing evidence that the waiver was knowing, intelligent, and voluntary. In the case before us today, there is no clear and convincing, legally sufficient evidence that material parts of the affidavit Duenas signed were disclosed to him and thus that he in actuality swore to and agreed to be bound by the affidavit.

The affidavit that Duenas signed was entirely in English. No one disputes that Duenas, a Honduran citizen, was unable to read English. The evidence is accordingly confined to what was said to Duenas in English and Spanish about the affidavit. There is no evidence, however, that Duenas's command of the spoken English language was such that he understood what was said to him in that language. The Court concludes that the trial court could have surmised that Duenas understood more English than he and others said he could. But a surmise is no evidence at all, much less clear and convincing evidence.⁴ The Court can point to nothing in the record other than speculation that Duenas was able to comprehend what was said to him in English when he was directed to sign the affidavit.

We are thus left to examine what was said to Duenas in Spanish. The evidence is undisputed that the affidavit of relinquishment was never read to Duenas in Spanish. The grandmother of the children made a short statement to him in Spanish about the purpose of the affidavit. That statement did not apprise him of material provisions of the affidavit.

Duenas's complaint that his affidavit was not knowing and voluntary is a valid one and was preserved. I would therefore reverse the termination of his parental rights. With regard to the mother of the children, Luz Maria Inocencio, I join in this Court's judgment terminating her parental rights, but I do not agree with the reasoning of JUSTICE O'NEILL's concurring opinion.

⁴ *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002) (quoting *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 & n.3 (Tex. 1993) (citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."))).

I

Ricardo Duenas and Luz Maria Inocencio are the biological parents of twins. When the children were born, Duenas and Inocencio were not married. Inocencio was fifteen, and Duenas was twenty-five. The children and Inocencio lived with her mother when they came home from the hospital. There were familial difficulties, and at some point, Inocencio's mother filed a proceeding with the trial court requesting that she be named managing conservator. While that proceeding was pending, Miles and Monica Montegut became involved with the family and hoped to adopt the twins. In the interest of brevity, I will not repeat the facts set forth in JUSTICE HECHT's dissenting opinion in any detail. I think it is important to emphasize, however, that the Monteguts, who were the prospective adoptive parents, were the moving force behind this controversy. Neither the State of Texas nor any state entity sought termination of the biological parents' rights. The Monteguts retained an attorney to assist them with the adoption of the children. That attorney arranged for Duenas and Inocencio to come to his office to sign affidavits that purported to relinquish their respective parental rights. However, about a week later, Inocencio sought to revoke her affidavit and forestall any termination or adoption proceedings. Her mother was supportive of these efforts and had not dismissed the proceeding requesting that she be named managing conservator.

In the face of opposition from Inocencio and her mother, the Monteguts nevertheless desired to proceed with adoption efforts and filed suit against Duenas and Inocencio, requesting the trial court to terminate the latter's parental rights. Duenas then sought to revoke or otherwise set aside the affidavit that he had signed and filed a counterclaim seeking to establish his paternity.

The trial court consolidated the Monteguts' suit with the proceeding that had been filed by Inocencio's mother. The affidavits of relinquishment that Duenas and Inocencio had signed stated that they were irrevocable, but only for sixty days. At the end of sixty days, the affidavits were fully revocable. The trial court denied Duenas and Inocencio's motion for a continuance and proceeded with a bench trial in the consolidated proceedings just prior to the expiration of the sixty-day window during which the affidavits

were irrevocable. (The affidavits were signed September 24, 1999, trial occurred on November 22 and 23, 1999, and an order of termination was entered December 16, 1999.)

The trial court terminated Duenas's and Inocencio's parental rights based on the affidavits and appointed the Monteguts managing conservators of the children. Duenas and Inocencio appealed, and the court of appeals affirmed the trial court's order of termination. This Court granted the joint petition for review filed by Duenas and Inocencio.

II

In deciding this case, it must first be determined what arguments have been made and if they were preserved for appeal. The affidavit that Duenas filed in the trial court in an attempt to revoke the "Affidavit of Relinquishment of Parental Rights" that he had previously signed said, "[t]he Affidavit of Relinquishment was not translated for me. I was told I would go to jail if I did not sign the documents." Unquestionably, much of the trial in this case was devoted to determining the extent to which Duenas was apprised of the contents of the affidavit and the extent to which he understood what he had signed. The trial court's only basis for terminating Duenas's parental rights was the relinquishment affidavit, which the trial court affirmatively found had been "signed voluntarily" and was not procured by fraud, duress, or coercion.

In the court of appeals, Duenas contended for the first time that his due process rights had been violated. In setting forth how he believed those rights had been violated, he explained that it was because the affidavit that he signed was in English, which he could not read, and that it was not translated into Spanish for him either orally or in writing. His brief in the court of appeals contained a section titled "Scope of Review—Appellate Court Must Look at All Evidence." In that section, the brief said: "This Honorable Appellate Court must sustain Appellants' challenge to the sufficiency of the evidence if this Court finds that the trier of fact could not have reasonably found the termination of Appellants' rights was not [sic] established by clear and convincing evidence." In our recent decision in *In re J.F.C.*, we held that "[i]n a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding

to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.”⁵ Thus, the basis Duenas articulated for his due process claim was that the evidence was legally insufficient to support a finding that he had properly executed a voluntary affidavit of relinquishment.

Duenas’s briefing in this Court does not contain the identical statement regarding “sufficiency of the evidence” that was in his court of appeals’ brief. But a fair reading of his brief in this Court shows that his basic complaint underlying and supporting his due process issue is that the evidence was legally insufficient to support the trial court’s findings regarding the affidavit. The entire focus of the statement of facts in Duenas’s brief is that he does not understand English and that the substance of the affidavit was not translated for him, nor was its substance explained to him in Spanish. He repeats the arguments he made in the court of appeals that the trial court’s finding must be based on clear and convincing evidence and that his execution of the affidavit of relinquishment was not knowing and voluntary because its core terms were not translated for him. He asserts that the clear and convincing evidence burden of proof “is not lessened by proof of an irrevocable affidavit of relinquishment. In fact, such affidavit being one of the alleged grounds for termination, the affidavit must be established under that burden of proof.” He is thus complaining that there was no clear and convincing evidence to support a finding that his affidavit was knowingly and voluntarily executed.

Certainly, Duenas could have more clearly articulated that he was bringing a legal sufficiency challenge in this Court. But his failure to use “magic words” is not fatal. The United States Supreme Court has said in an analogous context:

A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction.⁶

⁵ 96 S.W.3d at 266.

⁶ *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988).

Similarly, as JUSTICE HECHT’s dissent points out,⁷ this Court has long held that points of error (now “issues or points presented for review”⁸) and arguments made in briefs will be liberally construed “to obtain a just, fair and equitable adjudication of the rights of the litigants.”⁹ We should be particularly careful to avoid dismissing substantive arguments on overly technical procedural grounds when termination of parental rights is at issue.

At least one Texas court of appeals has said in a parental termination case, “[w]e interpret [the biological mother’s] appellate attack on the voluntariness of her affidavit as a challenge to the legal sufficiency of the evidence to support the trial court’s presumed voluntariness finding.”¹⁰ I would similarly hold that Duenas preserved a legal sufficiency challenge in this Court.

To support its holding that error was not preserved, this Court quotes counsel for Duenas and Inocencio when he said, in response to a question at oral argument, that his clients have not contended that the affidavit fails to comply with the Family Code.¹¹ But counsel’s response to the question at oral argument does not amount to a statement, much less an admission, that the legal sufficiency of the evidence supporting the voluntariness of the affidavits is not at issue.

Accordingly, I would decide Duenas’s petition based on his complaint that there is no legally sufficient evidence that his execution of the relinquishment affidavit was knowing and thus voluntary.

⁷ ___ S.W.3d at ___.

⁸ TEX. R. APP. P. 53.2(f), 55.2(f).

⁹ *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

¹⁰ *In re D.R.L.M.*, 84 S.W.3d 281, 297-98 (Tex. App.–Fort Worth 2002, pet. denied).

¹¹ ___ S.W.3d at ___.

III

The trial court's only basis for terminating Duenas's rights was the relinquishment affidavit. A parent who signs such an affidavit is surrendering rights protected by the United States Constitution.¹² The United States Supreme Court has made clear that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."¹³ We have likewise recognized that a waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences.¹⁴

To that end, the Legislature has enacted requirements to ensure that a parent's voluntary relinquishment of his or her rights to a child is indeed voluntary and is done with full knowledge of the rights that are being relinquished and the legal consequences. A trial court may terminate a parent's rights if the court finds by clear and convincing evidence that the parent executed "an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter."¹⁵ Among other things, the affidavit must contain "a statement that the parent has been informed of parental rights and duties" and a statement that the relinquishment is revocable, irrevocable, or irrevocable for a stated period of time.¹⁶

When a trial court is presented with an affidavit that, on its face, meets the requirements of section 161.103, the affidavit itself is prima facie proof that it was knowingly and voluntarily executed. Absent any other evidence, the trial court could base termination on such an affidavit. If a parent challenges the affidavit, the burden to produce evidence shifts to the parent to come forward with evidence that the affidavit was not knowingly and thus voluntarily executed. But the constitutional¹⁷ and statutory¹⁸

¹² See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980).

¹³ *Brady v. United States*, 397 U.S. 742, 748 (1970).

¹⁴ *Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390, 393 (Tex. 1982).

¹⁵ TEX. FAM. CODE § 161.001(1)(K).

¹⁶ TEX. FAM. CODE § 161.103(b)(8)-(9).

¹⁷ *Santosky*, 455 U.S. at 769.

¹⁸ TEX. FAM. CODE § 161.001.

requirement that parental rights cannot be terminated unless grounds for termination are established by clear and convincing evidence necessarily means that the ultimate burden of proof based on clear and convincing evidence remains with the party seeking to terminate the parental rights.

There has been some confusion among our courts of appeals about the burden of proof when an affidavit of relinquishment is challenged. The court of appeals in *Neal v. Texas Department of Human Services* correctly recognized that “[b]ecause of the very nature of a *voluntary* relinquishment of parental rights, . . . it is implicit in the language of section 15.03 that such an affidavit be executed voluntarily.”¹⁹ And the court in that case correctly observed that a reviewing court must apply the clear and convincing standard of proof as part of its review of the evidence to determine whether an affidavit was voluntary:

When the trier of fact is required to make a finding made [sic] by clear and convincing evidence, the court of appeals will sustain an insufficient evidence point of error only if the fact finder could not have reasonably found that the fact was established by clear and convincing evidence.

Having reviewed all of the evidence in the record under the clear and convincing standard of proof, we conclude that the record before us does not contain evidence of that effect and quality. From the evidence in the record, we further conclude that the trial court could not have reasonably found by a “firm belief or conviction” that Dianna voluntarily executed the affidavit for relinquishment of parental rights.²⁰

Similarly, the court in *B.A.L. v. Edna Gladney Home* reviewed the record evidence of voluntariness based on the clear and convincing evidence standard, recognizing that at all times, the ultimate burden remained on the proponent of the affidavit to prove by clear and convincing evidence that the affidavit was voluntarily executed without duress.²¹ The court concluded:

After reviewing the record of the hearing on the motion for new trial and viewing it in the light of the standards set forth above, we have no trouble in holding that there was clear and convincing evidence to support the judgment of the trial court and the findings of fact necessarily implied to support that judgment. Under this evidence it is obvious, and

¹⁹ 814 S.W.2d 216, 218 (Tex. App.–San Antonio 1991, writ denied) (emphasis in original) (section 15.03 has been recodified as section 161.103).

²⁰ *Id.* at 222 (citations omitted).

²¹ 677 S.W.2d 826, 830 (Tex. App.–Fort Worth 1984, writ ref’d n.r.e.).

the trial court was clearly entitled to find, as it did, that appellant signed the relinquishment affidavit voluntarily, intelligently, and knowingly, she was aware that she could keep her baby if she so desired with the full support, financial and otherwise of her own family, and she made her own choice to place the baby for adoption without any undue influence, pressure or overreaching on the part of The Edna Gladney Home.²²

Other decisions of the courts of appeals, however, have shifted the burden of proof to a parent challenging the affidavit. Those courts have said that once it is proven that a parent signed the affidavit, the parent must prove by a preponderance of the evidence that the affidavit was executed as a result of coercion, duress, fraud, deception, undue influence, or overreaching.²³ The first of these decisions seems to have been *Coleman v. Smallwood*,²⁴ and the courts of appeals that have followed it have done so without any analysis of why. The decision in *Coleman* relied on *Pattison v. Spratlan*²⁵ and *Terrell v. Chambers*²⁶ for its conclusions. The holding in *Pattison* was simply that “[i]n the absence of a statement of facts showing duress, we must presume in support of the judgment that appellant failed to establish her defense of duress.”²⁷ Thus, with no analysis and no comment at all about the burden of proof in a termination case, the court of appeals in *Pattison* labeled “duress” a “defense” in a termination case.

The court in *Terrell* cited *Pattison* for the proposition that the burden of proof is on a parent challenging an affidavit based on fraud or misrepresentation.²⁸ The *Terrell* decision also cited one of this

²² *Id.* at 830-31.

²³ *In re D.R.L.M.*, 84 S.W.3d 281, 296 (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.); *Vela v. Marywood*, 17 S.W.3d 750, 758 (Tex. App.–Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex. 2001); *In re Bruno*, 974 S.W.2d 401, 405 (Tex. App.–San Antonio 1998, no pet.); *Coleman v. Smallwood*, 800 S.W.2d 353, 356 (Tex. App.–El Paso 1990, no writ).

²⁴ 800 S.W.2d at 356.

²⁵ 535 S.W.2d 48 (Tex. Civ. App.–Tyler), *aff'd*, 539 S.W.2d 60 (Tex. 1976) (modifying judgment to strike assessment of costs against indigent parent).

²⁶ 630 S.W.2d 800 (Tex. App.–Tyler), *writ ref'd n.r.e.*, 639 S.W.2d 451 (Tex. 1982).

²⁷ 535 S.W.2d at 50.

²⁸ *Terrell*, 630 S.W.2d at 802.

Court's decisions, *Catholic Charities v. Harper*,²⁹ for the proposition that an "irrevocable affidavit of relinquishment can be revoked only upon a showing of fraud, misrepresentation, over-reaching, or the like."³⁰ Our decision in *Catholic Charities* was issued twenty years before our decision in *In re G.M.*, in which we held that a court may not terminate parental rights unless it finds there are grounds for doing so by clear and convincing evidence,³¹ and more than twenty years before the United States Supreme Court said the same in *Santosky v. Kramer*.³²

None of the courts of appeals that have shifted the burden of proof to a parent in a termination case have analyzed how that burden shifting comports with the clear and convincing evidence standard the United States Supreme Court has said is mandated by the United States Constitution. And some of those same courts of appeals have exhibited a misunderstanding of the standard of review on appeal when the burden of proof in the trial court was clear and convincing evidence.³³ They instead used the standard of review that applies when the burden of proof is only a preponderance of the evidence and when the appealing party has the burden of proof in the trial court.³⁴ Just recently, this Court explained the impact that the clear and convincing evidence requirement has on appellate review.³⁵

The clear and convincing evidence requirement necessarily means that the burden of *proof* that an affidavit of relinquishment was voluntarily executed cannot be shifted to a parent. There must be clear and convincing evidence, from the record as a whole, that the affidavit was knowingly and voluntarily

²⁹ 337 S.W.2d 111 (Tex. 1960).

³⁰ *Terrell*, 630 S.W.2d at 802.

³¹ 596 S.W.2d 846, 847 (Tex. 1980).

³² 455 U.S. 745, 769 (1982).

³³ *In re D.R.L.M.*, 84 S.W.3d 281, 297-98 (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.); *Vela v. Marywood*, 17 S.W.3d 750, 759-60 (Tex. App.–Austin 2000), pet. denied, 53 S.W.3d 684 (Tex. 2001).

³⁴ *In re D.R.L.M.*, 84 S.W.3d at 297-98; *In re V.R.W.*, 41 S.W.3d at 193; *Vela*, 17 S.W.3d at 759-60.

³⁵ See *In re J.F.C.*, 96 S.W.3d 256, 263-67 (Tex. 2002); *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

executed.³⁶ Shifting the burden of proof to a parent is in irreconcilable conflict with the clear and convincing standard of proof that the United States Supreme Court has said the federal Constitution requires before parental rights can be terminated³⁷ and that the Texas Legislature has required in parental termination cases.³⁸ To illustrate, if a parent produced evidence that made it equally as likely that the affidavit was involuntary as it was that the affidavit was voluntary, the parent would not have carried the preponderance burden of proof that some courts of appeals have imposed. But, a court could not sustain termination on such a record because “a reasonable trier of fact could [not] have formed a firm belief or conviction that its finding was true.”³⁹

Some courts of appeals have held that the logical progression of placing the burden of proof on a parent in challenging an affidavit is that on appeal, not only does a parent have to show that there was no evidence to support the trial court’s finding that the affidavit was signed knowingly and voluntarily, the parent must also establish *as a matter of law* that the affidavit was not knowingly or voluntarily executed.⁴⁰ This is clearly at odds with the constitutional and, in Texas, statutory requirement that a trial court cannot terminate a parent’s rights unless it finds grounds to do so from clear and convincing evidence.

The confusion that some courts of appeals have had regarding a parent’s burden is shared by Duenas and Inocencio. In their briefing in this Court, they quote from *In re Bruno*,⁴¹ saying that an “affidavit may be set aside only upon proof, by a preponderance of the evidence, that the affidavit was executed as a result of coercion. . . .”⁴² However, neither the trial court nor this Court has been led into

³⁶ See *In re J.F.C.*, 96 S.W.3d at 266; *In re C.H.*, 89 S.W.3d at 25.

³⁷ *Santosky*, 455 U.S. at 769.

³⁸ TEX. FAM. CODE § 161.001(1)(K).

³⁹ *In re J.F.C.*, 96 S.W.3d at 266.

⁴⁰ *In re D.R.L.M.*, 84 S.W.3d at 298; *In re V.R.W.*, 41 S.W.3d at 193; *Vela*, 17 S.W.3d at 759-60.

⁴¹ 974 S.W.2d 401, 405 (Tex. App.–San Antonio 1998, no pet.).

⁴² Petition for Review at 5-6.

error by these statements. The transcript of the termination hearing reflects that the trial court was unpersuaded that the parents bore the burden of proving by a preponderance of the evidence that they had not voluntarily signed the affidavits. More importantly, the trial court's order terminating Duenas's and Inocencio's parental rights affirmatively found based on clear and convincing evidence that each parent had executed an affidavit voluntarily. The trial court did not *fail* to find that Duenas's or Inocencio's affidavit was knowing or voluntary, which would have been appropriate if the trial court thought the parents had the burden of proof regarding their affidavits. Nor does the trial court's order or any of its findings mention preponderance of the evidence or otherwise indicate that it placed the burden of proof on Duenas and Inocencio. The trial court correctly concluded that it could not terminate the parents' respective rights unless it found by clear and convincing evidence that they had voluntarily executed an affidavit of relinquishment. This Court should not mislead the bench and bar by applying a different, incorrect burden of proof and consequently an incorrect standard of review on appeal simply because a party's briefing incorrectly states the burden of proof. Nor should we ignore controlling United States Supreme Court precedent. In *Santosky v. Kramer*, the Supreme Court squarely held that in parental termination proceedings, due process requires that the burden of proof be at least clear and convincing evidence because the risk of error from using a preponderance standard is too great:

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

* * *

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.⁴³

⁴³ 455 U.S. 745, 747-48, 758 (1989) (discussing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

The statute under review in *Santosky* permitted a state to terminate a parent’s rights upon a finding by a preponderance of the evidence “that the child is ‘permanently neglected.’”⁴⁴ The Supreme Court did not specifically address termination based on an affidavit of relinquishment. But the Supreme Court’s reasoning and holdings were broad, and this Court must follow Supreme Court precedent unless and until the Supreme Court narrows or changes its reasoning and holdings.⁴⁵

To say that a biological parent must prove by a preponderance of the evidence that an affidavit of relinquishment was involuntary not only shifts the burden of proof to the biological parent, it would lead to the incongruous result that a preponderance standard is constitutionally infirm for resolving some factual disputes over whether grounds exist for termination of parental rights, but would be acceptable in determining if other grounds – such as an affidavit signed by a parent – exist. The Supreme Court seems to have foreclosed parsing of this kind when it said in *Santosky*, “this Court never has approved case-by-case determination of the proper *standard of proof* for a given proceeding. Standards of proof, like other ‘procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.”⁴⁶ The Supreme Court elaborated, explaining that the value society places on the individual liberty at issue dictates the degree of confidence in the correctness of factual conclusions:

“[T]he standard of proof is a crucial component of legal process, the primary function of which is ‘to minimize the risk of erroneous decisions.’” Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information *before* the factfinder. But only the standard of proof “instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions” he draws from that information. The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent’s

⁴⁴ *Id.* at 747.

⁴⁵ See generally *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *Barnett v. Barnett*, 67 S.W.3d 107, 124 (Tex. 2001); *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex. 1999).

⁴⁶ *Santosky*, 455 U.S. at 757 (emphasis and alterations in original) (quoting *Mathews*, 424 U.S. at 344).

fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.⁴⁷

The Supreme Court concluded: “Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable.”⁴⁸ Any *parens patriae* interest a state may have in terminating a biological parent’s rights arises only after grounds for terminating that parent’s rights have been found in a court of law to exist.⁴⁹ Accordingly, the Supreme Court explained, the “State’s interest in finding the child an alternative permanent home arises only ‘when it is *clear* that the natural parent cannot or will not provide a normal family home for the child.’”⁵⁰ The Supreme Court continued: “At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.”⁵¹ This reasoning applies with equal force when an affidavit of relinquishment is the evidentiary basis for finding that the parent will not provide a home for the child. There must be *clear* evidence that the affidavit was a knowing and voluntary statement that the parent has chosen to relinquish all responsibility and rights regarding the child.

The Supreme Court also expressly rejected the idea that a child’s interest in stability might outweigh the interests of a biological parent. The *Santosky* decision held that a state court’s suggestion “that a preponderance standard properly allocate[d] the risk of error *between* the parents and the child . . . is fundamentally mistaken.”⁵² The Court reiterated in that decision, “we cannot agree . . . that a preponderance standard fairly distributes the risk of error between parent and child.”⁵³ The Court said,

⁴⁷ *Id.* at 757 n.9 (emphasis in original and citations omitted).

⁴⁸ *Id.* at 768.

⁴⁹ *Id.* at 767 n.17 (“Any *parens patriae* interest in terminating the natural parents’ rights arises only at the dispositional phase, *after* the parents have been found unfit.” (Emphasis in original)).

⁵⁰ *Id.* at 767 (emphasis in original) (quoting N.Y. Soc. Serv. Law § 384-b.1.(a)(iv)).

⁵¹ *Id.*

⁵² *Id.* at 765 (emphasis in original).

⁵³ *Id.*

“the parents and the child share an interest in avoiding erroneous termination.”⁵⁴ The state court’s rationale for using a preponderance of the evidence standard “reflect[ed] the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights.”⁵⁵ The Supreme Court soundly rejected this assessment of a parent’s and child’s respective interests.⁵⁶

The Supreme Court reasoned that the consequences for an erroneous termination are more severe for a parent than a child:

For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.⁵⁷

The Supreme Court has also clearly indicated that any interest of prospective adoptive parents does not change this analysis.⁵⁸ Accordingly, in determining whether grounds for termination exist, to which the Supreme Court referred as the “factfinding” stage,⁵⁹ the vital interest in preventing erroneous termination requires a clear and convincing standard: “But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.”⁶⁰

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 765-66.

⁵⁸ *Id.* at 754 n.7 (“The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures.” (Emphasis in original)).

⁵⁹ *Id.* at 760 (“At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.” (Emphasis in original)).

⁶⁰ *Id.* at 760-61.

In the case before us today, the children and their parents likewise share a vital interest in preventing erroneous termination. The error-reducing procedure required by the United States Supreme Court in *Santosky* and by the Texas Legislature in Family Code section 161.001(1)(K) is that a court may not terminate a parent's rights unless it finds grounds for termination by clear and convincing evidence. The sole ground for termination in this case is the execution of affidavits of relinquishment. Unless and until there is clear and convincing evidence that an affidavit was indeed knowing and voluntary, termination cannot lawfully occur.

Once again, I do not suggest that an affidavit that appears on its face to have been properly executed cannot constitute clear and convincing evidence when there is no challenge to the affidavit. But when there is evidence that the affidavit was not voluntary, all the evidence must be considered to determine whether there is clear and convincing evidence that it was voluntary.

IV

In this case, Duenas presented evidence that he could not read the affidavit, that his command of the English language was very minimal, and that critical provisions were not translated for him into Spanish. In the face of this evidence, what clear and convincing evidence was there from which the trial court could have found that Duenas knowingly and intelligently surrendered his parental rights with sufficient awareness of the relevant circumstances and the likely consequences?⁶¹ Section 161.103 of the Texas Family Code requires that an affidavit of relinquishment state that the parent has been informed of parental rights and duties and whether the affidavit is revocable, irrevocable, or irrevocable for a stated period of time.⁶² What clear and convincing evidence is there that Duenas was apprised of these matters and then voluntarily relinquished all parental rights?

⁶¹ See *Brady v. United States*, 397 U.S. 742, 748 (1970).

⁶² TEX. FAM. CODE § 161.103(b)(8)-(9).

The decision in *Queen v. Goeddertz*,⁶³ cited by Duenas in his briefing in this Court, is instructive. In that case, a father executed an affidavit relinquishing his parental rights so that his wife's new husband could adopt the child. In two places on the affidavit, handwritten additions had been inserted that said the relinquishment was subject to the biological father's understanding that he would have the right to visit the child each month.⁶⁴ The court of appeals held that this provision was unenforceable and that the voluntariness of the affidavit was thereby negated.⁶⁵

In this case, as can be seen from the evidence, Duenas understood that "he wasn't going to be the father anymore." But that is not the same as an understanding that he would no longer be able to visit or telephone his children, or take them to a ball game, or attend school functions, or indeed, see them again. Furthermore, it is undisputed that Duenas was never told that the affidavit was irrevocable for sixty days and that during that time, his children could be adopted by people he did not know and that all ties he had with the children would be severed.

Because the Court characterizes the evidence surrounding Duenas's execution of his affidavit, I think it is helpful to look at the evidence itself, as JUSTICE HECHT's dissent has done. The Court says that the trial court could have made its own determination about the extent to which Duenas understood English in spite of the *undisputed* testimony that Duenas's command of the English language was extremely limited. The Court's reasoning is directly contrary to our precedent. At most, the trial court could have had a suspicion about the extent of Duenas's proficiency in the English language. But that is not legally sufficient evidence, particularly when the burden of proof is clear and convincing evidence.⁶⁶ Esther Gonzalez, who is Inocencio's sister and who was largely responsible for arranging the adoptions, said unequivocally and

⁶³ 48 S.W.3d 928 (Tex. App.—Beaumont 2001, no pet.).

⁶⁴ *Id.* at 929-30.

⁶⁵ *Id.* at 932.

⁶⁶ *See supra* note 1.

without contradiction, “I am not fluent in Spanish, so I cannot communicate with him [Duenas] So, if anything, it would have to be told to him. My mother and my sister would have to be the ones.” Gonzalez also stated, “I have not had any communication with Ricardo [Duenas] one on one because I cannot converse fluently in Spanish.”

A paralegal for the Monteguts’ attorney understood some Spanish, and she witnessed all the events when the affidavits were signed. She testified that throughout the process, Duenas: “Never said a word.” With regard to what was actually translated for Duenas, the paralegal testified that Inocencio’s mother only told Duenas:

- “That he was giving up his rights of the children, and that he will no longer be responsible for them. And that once this is all through, that’s it, you know.”
- “She’s just saying that his father – he wasn’t going to be the father anymore, that he’s giving up his rights. That’s what she was telling him.”
- Q. “So did she tell him whether or not he would have an opportunity to change his mind later?”
A. “No, she didn’t.”

As JUSTICE HECHT’s dissent points out,⁶⁷ when various witnesses say that Duenas “understood,” they could not have meant that Duenas understood all of what was contained in the seven-page, single-spaced document that no one translated for him. The extensive contents of the affidavit are set forth verbatim in JUSTICE HECHT’s dissent.

The Court notes that Duenas submitted a Statement of Paternity to the trial court in which the verification said that Duenas had “read the Statement of Paternity.”⁶⁸ But there is no contention by any of the parties, much less evidence, that this Statement was not translated into Spanish for Duenas.

The record contains no clear and convincing evidence that Duenas understood that by signing the Affidavit of Relinquishment put before him, his children could be adopted by strangers and he could never

⁶⁷ __ S.W.3d at __.

⁶⁸ __ S.W.3d at __.

again have any contact with them. To the contrary, the evidence is overwhelming that Duenas was never told in Spanish, the only language he could speak or read, about material aspects of the affidavit he was signing.

V

A word in response to the suggestion in JUSTICE O'NEILL's concurring opinion that Duenas waived his constitutional rights as a parent by failing to maintain a closer relationship with the twins is in order. The trial court found that "[t]he legal parent-child relationship between [Duenas] and the children did not exist at the time of the signing of the Father's Affidavit of Relinquishment of Parental Rights." That is not a finding that a legal parent-child relationship did not exist thereafter. The trial court's same findings reflect that Duenas filed a Statement of Paternity, which was executed *after* he signed the relinquishment affidavit. The record is also clear that Duenas was attempting to set aside the relinquishment affidavit. The trial court further found that by the time of trial, Duenas and Inocencio had married one another. There is also evidence that Duenas had some relationship with his children. He took them to receive medical care and provided some monetary support, although there is conflicting evidence as to the amount and extent of that support. But no one has ever suggested, and there is no basis for suggesting, that Duenas is not the father of the children or that he waived his parental rights by failing to establish a closer relationship with his children.

VI

As additional grounds for terminating Duenas's parental rights, the Monteguts alleged in their petition in the trial court that Duenas had actually or constructively abandoned the children. The Monteguts did not request the trial court to make any findings of fact or conclusions of law regarding these claims, and the trial court made none. The trial court's judgment as to Duenas was based only on his affidavit of relinquishment. The Monteguts have not argued in the trial court, the court of appeals, or this Court that

the trial court should have based its judgment on additional or alternative grounds. Accordingly, there are no further issues to be resolved by the trial court in the current suit to terminate Duenas's parental rights.

VII

I agree that the order terminating Inocencio's parental rights should be upheld, but I disagree with JUSTICE O'NEILL's concurring opinion that none of Inocencio's arguments were preserved for appeal. Inocencio framed the issue in this Court challenging the voluntariness of her affidavit as follows: "Should the order terminating MARIA's [Inocencio's] parental rights be set aside since MARIA's signature on the affidavit of relinquishment of her parental rights was procured in exchange for 'small kindnesses' and unenforceable promises which constitute undue influence or overreaching as a matter of law?" She argues in her brief that Detective Goetschius, a policeman who was also the Monteguts' brother-in-law, first came into contact with her when she had "been in trouble with the law for dancing at a strip club while underage." She states that she met Detective Goetschius when he was "taking her statement as part of his official investigation of her alleged illegal activity." She further asserts in her brief: "His interest in MARIA peaked when he found out that she was pregnant and thereafter he began giving her advice, taking her to doctor's appointments and contacting her mother." She asserts: "No line was ever drawn to distinguish as to when he was acting in his capacity as a police professional . . . and when he was acting on behalf of his brother-in-law, [Mr. Montegut]."

Inocencio argues that, as a matter of law, Detective Goetschius's conduct amounted to undue influence or overreaching. It is clear from Inocencio's briefing that she is challenging the legal sufficiency of the evidence that supports the trial court's finding that she voluntarily executed an affidavit of relinquishment and the finding that the affidavit was not procured by fraud, duress, or coercion. For the reasons discussed above in Part III, Inocencio does not have to establish, as a matter of law, that she did not voluntarily sign her affidavit of relinquishment.⁶⁹ She must only establish that there was legally

⁶⁹ See *supra* Part III.

insufficient clear and convincing evidence to support the trial court's termination of her parental rights based on the affidavit. Nor did her error of law regarding her burden lead the trial court or this Court into error, as also discussed above in Part III.

Inocencio has not waived or failed to preserve her legal sufficiency challenge. JUSTICE O'NEILL'S concurring opinion is mistaken in contending otherwise. A majority of this Court correctly concludes that Inocencio's legal sufficiency challenge should be reviewed on its merits and should not be summarily dismissed. This same majority disagrees over whether her arguments carry the day when they are analyzed on their merits. However, a different majority of the Court affirms the court of appeals' judgment with regard to Inocencio, albeit for differing reasons.

I conclude that Inocencio's legal sufficiency challenge should not be sustained. The evidence regarding Detective Goetschius's "small kindnesses" toward Inocencio and his influence on her is disputed, but a reasonable trier of fact could have formed a firm belief that they did not induce or unduly influence Inocencio to sign her affidavit. There was testimony that after Detective Goetschius discovered Inocencio was pregnant, he took her to doctors' appointments and asked how her pregnancy was going. Inocencio's mother said that when Goetschius first learned Inocencio was pregnant, he asked both of them whether they had thought of adoption and said he knew people with money who would want the baby. Both Inocencio and Goetschius, however, testified that they once spoke generally about adoption and that Goetschius told her he had adopted one of his children and it had been a good experience, but that he never counseled her to give her baby up for adoption. Goetschius was not present when the affidavit was executed. In reviewing this evidence, the trial court could reasonably have formed the firm belief that Goetschius's contact with Inocencio during her pregnancy and their single general discussion of adoption did not influence Inocencio to sign the affidavit.

Inocencio also argues in this Court that Detective Goetschius and Mark Ciavaglia, the Monteguts' attorney for the adoption proceedings, violated section 162.025 of the Texas Family Code⁷⁰ by acting as intermediaries in a private adoption without being licensed in accordance with Chapter 42 of the Texas Human Resources Code.⁷¹ There was testimony at the trial that neither Children's Protective Services nor a private adoption agency was involved in any way in the Monteguts' attempted adoption of the twins. But there is no evidence that the absence of a licensed adoption agency influenced Inocencio's decision to sign her affidavit of relinquishment.

More troubling is Inocencio's argument that she only agreed to sign her affidavit after the Monteguts made promises in writing to send her updates and photographs of the children periodically and to allow her to give gifts to the children through Ciavaglia. Inocencio now contends that those promises are unenforceable, and that because she conditioned her execution of the affidavit on those promises, she was fraudulently induced to sign the affidavit. However, Inocencio never argued in the trial court that the agreement was unenforceable. Further, the Monteguts have never taken the position that the agreement is unenforceable or that they do not intend to honor it. Inocencio never asked the trial court to include any sort of finding about the enforceability of the agreement in the termination order. Nor did she request the trial court to include in the order a directive that the Monteguts were to provide her periodically with pictures and an update. In fact, when the Monteguts' attorney first questioned Inocencio about the agreement to send pictures and updates, her own attorney objected to the subject, stating, "I don't really see that it's relevant to the issue of fraud and duress." The trial court was never asked to rule on whether the Monteguts' promises were enforceable or whether, if unenforceable, Inocencio's affidavit was procured by fraud, duress or coercion. Inocencio cannot now ask this Court to resolve that issue.

⁷⁰ TEX. FAM. CODE § 162.025.

⁷¹ TEX. HUM. RES. CODE § 42.001 *et seq.*

The trial court could reasonably have formed a firm belief or conviction that Inocencio voluntarily executed the affidavit of relinquishment.⁷² Inocencio clearly understood what she was signing and was aware of the likely consequences of executing the affidavit. Viewing the evidence in the light most favorable to the trial court's findings, I would hold that there is legally sufficient, clear and convincing evidence to support the trial court's finding that Inocencio's execution of her affidavit of relinquishment was voluntary and not the result of fraud, duress, or coercion. Accordingly, I concur in the judgment with regard to Inocencio.

* * * * *

For the foregoing reasons, I concur that the court of appeals' judgment should be affirmed as to Inocencio. But I dissent from the judgment that terminates Duenas's parental rights.

Priscilla R. Owen
Justice

OPINION DELIVERED: September 18, 2003

⁷² See *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).