

respectively, 199 days,⁴ 361 days,⁵ 387 days,⁶ 540 days,⁷ 584 days,⁸ and 646 days⁹ to issue an opinion in each. In none of the three cases that the Court took a week, eight weeks, and seventeen weeks longer to decide than it took to decide this case was “appellate review . . . greatly hampered” by poor briefing.

“[W]e still disagree about what the complaints are and whether they were preserved”, the Court moans.¹⁰ And here again, the fault for our disagreement must in all fairness be laid squarely at the parties’ feet. If only the briefing had been better, the Court’s decision would have been prompt and unanimous. But before taking the Court’s word for this, the reader may wish to know that the parties have filed about 88 pages of briefs and motions in this Court, the reporter’s record of the one-day hearing in the trial court is 328 pages, and the clerk’s record is 117 pages. All told, the record and briefs would not take any one of our law clerks more than half a day to master. Truth is, the Court knew what the issues were in this case from the time it was filed. What the Court has disagreed about for more than a year is not what the issues are, but whether these parents’ rights in their children can be terminated some technical way without having to address their arguments.

⁴ *A.F.*, ___ S.W.3d ___.

⁵ *K.N.R.*, ___ S.W.3d ___.

⁶ *M.S.*, ___ S.W.3d ___.

⁷ *J.F.C.*, 96 S.W.3d 256.

⁸ *B.L.D.*, ___ S.W.3d ___.

⁹ *A.V.*, ___ S.W.3d ___.

¹⁰ *Ante* at ___.

Then in what I believe must rank as among the most bizarre statements to be found in an opinion from this Court, the Court says that what it is really trying to do in this case is: *discourage foreign adoptions*. This, the Court warns, is a mounting plague on our society, and for proof one need look no further than a story in last month's *Miami Herald*. Thank goodness this case, poorly briefed and all, came along when it did, and that we delayed our decision until the *Miami Herald*'s exposé. If we hadn't turned these parents away for poor briefing, no telling where adoptive parents would have had to go for "simpler and less expensive"¹¹ procedures in the future.

The Court says that this case is about appellate procedure. You can't argue on appeal what you don't raise in the trial court. Pure and simple. Happens all the time. Too bad, really. Especially when children are at stake. The Court is certainly not unsympathetic to parents who claim that they have been unjustly deprived of their children. Absolutely not. Just can't be helped, that's all.

With respect, and all nonsense aside, this case is not about appellate procedure or delay. It is certainly not about discouraging foreign adoptions. It is about the process for taking children from their parents, and it is about the Texas legal system's treatment of people who do not speak English.

Ricardo Duenas is Hispanic. His native tongue is Spanish. He was at work in a hotel kitchen one day when he was called and told to go immediately to the office of a lawyer he had never met, who as it turned out had been hired by a couple who wanted to adopt Ricardo's five-month-old twin sons. There he was handed a seven-page, single-spaced affidavit, written in English, and told to sign it. He complied,

¹¹ *Ante* at ____.

although it took him two tries to get it right. He was told to initial every line of part of the affidavit, and he did. He initialed this sentence, written in boldface, capital letters:

I REALIZE THAT I SHOULD SIGN THIS AFFIDAVIT OF RELINQUISHMENT IF I AM NOT THINKING CLEARLY BECAUSE OF ILLNESS, MEDICATION, MY EMOTIONAL STATE, OR ANY OTHER REASON.

Apparently a “not” was left out. The affidavit was not read to him in English or Spanish. Parts of it were paraphrased to him briefly in Spanish. He understood it had something to do with losing his sons.

Ricardo contends that he cannot be said to have voluntarily relinquished all rights to his twin sons by signing an affidavit written in English that he could not understand and that was not translated for him. This was his position in the trial court and the focus of the evidence at the one-day hearing (with an interpreter present, appointed by the court); it was his position in the court of appeals, was thoroughly briefed by all parties there, and was decided by that court on its merits;¹² it is still his position here. His lawyer on appeal has called the termination of his parental rights a violation of constitutional due process; his lawyer in the trial court did not use those exact words. Based on this relatively minor discrepancy and nothing else, the Court refuses to consider Ricardo’s position. His trial lawyer could have been more specific, even though she had only two days to prepare, and the appellate lawyer could have elaborated in briefs and argument. But still there cannot be the slightest doubt what Ricardo’s complaint is: he lost his five-month-old sons because he does not speak English.

¹² ___ S.W.3d ___, ___ (Tex. App.—Houston [14th Dist.]) (“Ricardo claims that because he does not understand English, he did not understand what he was signing. . . . We disagree.”).

Nor can there be any doubt what his wife Luz Maria Sylvestre Inocencio's complaint is. She contends that in signing her affidavit of relinquishment she was unduly influenced by the kindness of some of the participants in the process and defrauded by promises that her sons' adoptive parents would send her pictures and update her on their progress. This was her position in the trial court; it was her argument in the court of appeals, was briefed by the parties, and was decided by that court;¹³ it is still her argument here. For the same technical reasons, the Court refuses to consider whether Maria is right. Again, her appointed guardian ad litem at trial and her appellate counsel (who also represents Ricardo) might have been clearer, but there is still no mistaking Maria's claim.

To miss the simple arguments these parents make, one would seemingly have to understand as little English as Ricardo does. Yet the Court takes an extremely restrictive view of Ricardo and Maria's brief, reading it to raise only narrow issues that were not ruled on by the trial court. The termination of parental rights, fundamental and constitutional in their magnitude, is thus held to turn on trifling points regarding the construction of appellate briefs. It has long been "our practice to liberally construe [briefs] in order to obtain a just, fair and equitable adjudication of the rights of the litigants,"¹⁴ and our rules mandate this

¹³ *Id.* at ___ ("Appellants contend that Detective Goetschius engaged in coercion and overreaching to compel Luz to sign the affidavit. Appellants further contend that the Monteguts' defrauded Luz by agreeing to her demands that she be given semi-annual updates and photographs of the twins. We reject both contentions.").

¹⁴ *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); *accord Texas Mexican Ry. v. Bouchet*, 963 S.W.2d 52, 54 (Tex. 1998) ("Courts should liberally construe briefing rules."); *Anderson v. Gilbert*, 897 S.W.2d 783, 784 (Tex. 1995) ("Courts are to construe rules on briefing liberally."); *Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990) ("It is our practice to construe points of error liberally in order to adjudicate justly, fairly and equitably the rights of the litigants. We have a policy of 'permitting broader points of error,' 'liberally construing briefing rules,' and relaxing the 'past rigorous requirements as to the wording of points of error' in order to do justice." (citations omitted)); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989) ("[I]t is our practice to construe liberally points of error in order to obtain a just, fair and equitable adjudication of the rights of the litigants."); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 632-633 (Tex. 1986) ("We look not only at the wording of the points of error, but to the argument under each point to

practice.¹⁵ The Court does not follow the practice in this case, where the importance of the rights asserted make it all the more essential. It is fair to say that Ricardo did not make a due process argument to the trial court, but it is not fair to say that his brief, liberally read, makes no broader argument, or that a “just, fair and equitable adjudication” of his parental rights can be made if the core complaint he has made since he was sued is ignored. The same is true for Maria.

To order that children be taken from their parents and given to others is a grave responsibility. To do it solely for technical reasons of appellate procedure, without regard for the parents’ arguments, is hard to justify. But to terminate parental rights as the Court does today, based solely on a rigid reading of a brief, is in my view indefensible. I would decide the case on the merits, not on procedure, and would reverse and remand to the trial court for further proceedings.

Accordingly, I dissent.

I

The Court’s summary of the record is as crabbed as its reading of petitioners’ brief. From the Court’s opinion, it is impossible even to begin to appreciate the context in which the important issues in this case arise. According to the record, here is what happened. Some events are disputed, as I will indicate, but many are not.

A

determine as best we can the intent of the party.”).

¹⁵ TEX. R. APP. P. 55.2(f) (“The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.”).

In April 1999, Luz Maria Sylvestre Inocencio, age 15, gave birth to twin boys. She contends that Ricardo Duenas, age 25, was their father, and he admits he was. Ricardo and Maria were not married until later in the year. Detective Brian Goetschius had investigated a report that a minor — Maria, as it turned out — had been dancing at a strip joint,¹⁶ and when he learned she was pregnant, he and his wife, Dawnell, took a personal interest in her. Maria’s older sister, Esther Gonzalez, age 33, a college graduate, deplored Maria’s lifestyle and decided that Maria could not care for her sons properly. Maria and the boys were staying with Esther and Maria’s mother, Guillerma Pruitt, and on September 2, 1999, Guillerma petitioned to be named their sole managing conservator, apparently with Maria’s agreement. Nevertheless, on September 21, Esther called Detective Goetschius to ask for help in placing the twins for adoption. A day or so later, the Goetschiuses told Esther that Dawnell’s sister and brother-in-law, Monica and Miles Montegut, would be willing to adopt Maria’s boys.

On September 24, Esther went to Guillerma’s home and announced that she had “great news”: she had arranged for Maria to give her sons up for adoption that very day. This was certainly news to Maria, since this was the first Esther had mentioned it, but it was not “great” news, and Maria furiously refused to give up her sons. Maria says that she and Esther fought. Esther says Maria was emotional at first but soon calmed down and saw that adoption was best for her boys. Maria and Guillerma say that Esther threatened Maria with juvenile proceedings for having danced nude as a minor if she did not cooperate. Guillerma says that Esther threatened her with truancy proceedings for not having kept Maria in school. Guillerma

¹⁶ See TEX. PENAL CODE § 43.251(b) (“A person commits an offense if the person employs, authorizes, or induces a child to work: (1) in a sexually oriented commercial activity; or (2) in any place of business permitting, requesting, or requiring a child to work nude or topless.”).

says that she and Maria feared what would happen to them if they resisted the adoption, and that she and Maria were like “caged animals”, “like sheep to the slaughter”. Esther maintains that she threatened no one and that calm reason simply prevailed over all. In any event, Maria agreed to go to a lawyer’s office in Texas City within the hour and surrender her children. Esther told her that it would be necessary for Ricardo to agree as well, so on the way they stopped at a gasoline station, and Maria telephoned Ricardo at work in Galveston and demanded that he join her. She angrily told him that losing the twins was all his fault.

Ricardo, a native of Honduras with temporary residence in the United States, was working as a cook at a hotel restaurant. He speaks and understands a little English, but there is no evidence that he can read or write English; Spanish is his language. He first heard of the proposed adoption when Maria called him at work on September 24 and demanded that he leave immediately and accompany her to a lawyer’s office. He says, and Maria and Guillerma agree, that he was told that if he failed to cooperate he would be prosecuted for statutory rape.¹⁷ Esther and others present at the lawyer’s office deny that any threats were ever made. Ricardo rode with Maria to the lawyer’s office, where they met Guillerma and Maria’s brother, Solomon.

The lawyer, Mark Ciavaglia, had been retained by Miles Montegut earlier in the week. Ciavaglia had been in court the morning of September 24, and upon his return to his office he was met with messages

¹⁷ See TEX. PEN. CODE § 22.011(a) (“A person commits an offense if the person . . . (2) intentionally or knowingly: (A) causes the penetration of the . . . female sexual organ of a child”); § 22.011(c) (“In this section: (1) “Child” means a person younger than 17 years of age who is not the spouse of the actor. (2) “Spouse” means a person who is legally married to another.”).

from Miles and Esther insisting that adoption papers be signed that day. He drew up the papers while Ricardo, Maria, Esther, Solomon, Guillerma, and the babies waited in his office.

Ciavaglia prepared an affidavit entitled “Father’s Affidavit of Relinquishment of Parental Rights” for Ricardo to sign. How much Ricardo understood of the seven-page, single-spaced affidavit is vigorously disputed. The affidavit was not read to Ricardo in English or Spanish, but Ciavaglia paraphrased parts of it briefly and asked Guillerma to translate for Ricardo. Ciavaglia’s paralegal, who understood some Spanish but could not speak it, testified that Guillerma told Ricardo that by signing the affidavit he was giving up his rights to his children but did not tell him he could not change his mind later. Guillerma testified that all she told Ricardo was to sign the affidavit. There is no evidence that Ricardo was able to read the affidavit or that he did read it. He signed it and initialed several sentences, one of which stated, apparently incorrectly (or perhaps not):

I realize that I *should* sign this affidavit of relinquishment if I am not thinking clearly because of illness, medication, my emotional state, or any other reason.

(Emphasis added.)

Ciavaglia then attempted to obtain Maria’s signature on an identical affidavit. At first she refused, but Ciavaglia offered to have the prospective adoptive parents agree that they would provide her periodic reports and pictures of the boys and would allow her to give them gifts. At that point Maria relented, and when Ciavaglia had discussed the matter with his clients, the Monteguts, and reduced the promise to writing, Maria signed the affidavit.

B

On October 1, a week after the affidavits were signed, the Monteguts sued Ricardo and Maria to terminate their parental rights. The trial court issued an *ex parte* order temporarily giving the Monteguts custody of the boys. On October 22, the court appointed a guardian ad litem for Maria because she was a minor. The record does not reflect that the guardian filed an answer for Maria.

On November 15, trial was set for a week later, on November 22. On November 17, Ricardo filed an original answer in which he acknowledged paternity. Attached to the answer was his verified “Revocation of Affidavit”, in which he stated: “The Affidavit of Relinquishment was not translated for me.” Ricardo’s attorney reiterated this statement in a motion for continuance filed the day the case was called for trial. At a hearing on the motion the same day, counsel told the trial court:

My basic meritorious defense aside from [having only six days to prepare for trial] is the fact that my client speaks no English, was not translated the affidavit of relinquishment. He was basically picked up at his place of employment [in Galveston], taken to a law office in Texas City, and told if you don’t sign this document, the detective will take you to prison and that was all that was told to him. They did not translate the affidavit word for word or line for line. The attorney involved in that case was Mark Ciavaglia of Texas City. The translation was — of that comment was done by Esther Gonzalez who’s the older sister of Maria Inocencio, the minor mother in this case, and the minor mother also said the detective is outside and they’re going to take you to jail if you don’t sign this document. But it was never translated to him as to what the document meant as far as relinquishing his parental rights. Due to other people at work telling him that that was probably not constitutional and not right, they looked around for an attorney and he finally did hire me.

Counsel for the Monteguts urged the trial court to try the case immediately because the affidavits of relinquishment would expire the next day, the sixtieth day after they were signed.¹⁸ The court denied the motion for continuance and immediately proceeded to trial.

¹⁸ See TEX. FAM. CODE § 161.103(e).

Ricardo's counsel requested the presence of a court interpreter to translate the proceedings into Spanish, and the court attempted to locate one. When a suitable interpreter could not be found on such short notice, the court recessed the trial until the morning of November 23.

A principal focus of the brief trial was on whether Ricardo could understand English and what he knew of the affidavit he signed. There was also testimony about the promise the Monteguts made to persuade Maria to sign her affidavit. At the close of the evidence, the court ruled from the bench that Maria and Ricardo had signed their affidavits voluntarily and without duress. The court immediately heard evidence on whether termination of the parents' relationship was in the children's best interest, and after a few minutes of testimony from Miles Montegut, concluded that it was. The court then rendered judgment orally terminating Maria's and Ricardo's relationship with their sons. The judgment signed December 16 recited:

Luz Maria Inocencio presented issues of fraud, duress, and overreaching to the Court to deny that her Mother's Affidavit of Relinquishment of Parental Rights was signed voluntarily.

Ricardo Duenas present [sic] issues of fraud, duress, and overreaching to the Court to deny that his Father's Affidavit of Relinquishment of Parental Rights was signed voluntarily.

The Court found after hearing the evidence that Luz Maria Inocencio executed her Mother's Affidavit of Relinquishment of Parental Rights voluntarily and was not influenced by fraud, duress, or overreaching.

The Court found after hearing the evidence that Ricardo Duenas executed his Father's Affidavit of Relinquishment of Parental Rights voluntarily and was not influenced by fraud, duress, or overreaching.

Findings made January 21, 2000, echoed the judgment, adding that Ricardo and Maria had married:

Luz Maria Duenas' signing of the Mother's Affidavit of Relinquishment of Parental Rights was voluntary, and not secured by fraud, duress, or coercion.

* * *

Antonio Duenas' signing of the Father's Affidavit of Relinquishment of Parental Rights was voluntary, and not secured by fraud, duress, or coercion.

The Court finds that Luz Maria Duenas and Antonio Duenas have married after the signing of their Affidavits of Relinquishment of Parental Rights.

Ricardo and Maria filed no post-trial motions.

II

A

I agree with the Court that Ricardo did not raise in the trial court a claim that his constitutional due process rights had been violated. His counsel's single mention of the word "constitutional" at the hearing on his motion for continuance was insufficient to call the matter to the trial court's attention, especially in the haste in which the trial was conducted. But even a brief review of the record leaves no question that Ricardo's complaint was not merely that his due process rights had been violated, but that he could not have voluntarily relinquished his sons by signing an affidavit he did not understand because it was in English. This was the principal focus of the trial.

The Court concludes that Ricardo has not raised anything *but* a constitutional issue on appeal. It is true that the issue stated in Ricardo's briefs in the court of appeals and this Court, and on which they focus, is whether his signature "was procured in a manner that violated Ricardo's due process rights", and this is the focus of his brief and petition. But we are obliged by rule to treat the issue "as covering every

subsidiary question that is fairly included.”¹⁹ Moreover, we construe briefs “liberally . . . in order to obtain a just, fair and equitable adjudication of the rights of the litigants.”²⁰ This practice becomes even more important when fundamental rights are at stake. Ricardo’s briefs in this Court and the court of appeals can fairly be read to raise a broader concern than constitutional due process. After pointing out the requirements of chapter 161 of the Texas Family Code, the briefs state: “Ricardo relinquished one of his most fundamental rights, i.e., the right of parenthood, by signing a document that he could not read and was never put forth to him in his native tongue.” One could well expect more elaboration of the argument, but when the briefs are read in light of the record, Ricardo’s complaint is clear.

It was certainly clear to the Monteguts. In their fifty-page brief in the court of appeals, they argued at great length that the evidence showed that Ricardo understood enough English to know what he was doing and that the affidavit was translated sufficiently for him. The Monteguts devoted only a few sentences of their brief to arguing that Ricardo’s sole complaint was of a denial of due process. The court of appeals restated Ricardo’s complaint on appeal as one of due process, but it also added: “Ricardo claims that because he does not understand English, he did not understand what he was signing.”²¹ The court concluded that “Ricardo’s right to have the affidavit accurately interpreted in a language he understands is

¹⁹ TEX. R. APP. P. 55.2(f).

²⁰ See *supra* note 14.

²¹ ___ S.W.3d at ___.

a matter of due process,”²² but concluded that the evidence failed to show that Ricardo did not understand what he was signing.

As the Court points out, at one point in oral argument Ricardo’s counsel appeared to disavow any complaint except a denial of due process. What the Court does not see fit to mention is that Ricardo’s counsel opened his argument stating: “We further believe that in terms of the statutory requirements of placing a child were totally violated.”

The extent of Ricardo’s understanding of English may be disputed, but there is no dispute that it is limited. It seems unjust to me to terminate his parental rights despite that limited understanding on the ground that his brief is not clearer. To read Ricardo’s brief as rigidly as the Court does simply compounds his limitations. I would consider the substance of his argument: was his affidavit of relinquishment effective given his limited understanding of English?

B

Maria’s guardian ad litem should have been clearer at trial, even though she had only a month to prepare. She should have pointed out more directly Maria’s contention that she had been misled into signing the affidavit of relinquishment by the Monteguts’ promise to her that they would provide her reports and photographs of the boys and would let her send them gifts. There is no question that this is her principal complaint on appeal.

²² *Id.* at ____.

The Court refuses to consider this complaint because Maria did not ask the trial court to rule on whether the Monteguts' promise was legally unenforceable. But even though Maria did not request the trial court to rule, the trial court did rule: in its judgment it expressly recognized she had "presented issues of fraud, duress, and overreaching to the Court to deny that her [affidavit] was signed voluntarily," and it specifically found against her on those issues. The Court offers no authority for imposing a requirement that the trial court have ruled on the subsidiary question whether the promises made to Maria were enforceable.

I would therefore consider the substance of Maria's argument: did the promises made to her defeat the effectiveness of her affidavit of relinquishment?

III

A

Section 161.001 of the Family Code states that a parent-child relationship may be terminated

"if the court finds by clear and convincing evidence: (1) that the parent has . . . (K) executed before . . . the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter . . . ; and (2) that termination is in the best interest of the child."²³

An affidavit of relinquishment of parental rights is not a simple instrument. Section 161.103(b) of the Family Code requires that a parent must swear to all of the following:

- (1) the name, address, and age of the parent whose parental rights are being relinquished;
- (2) the name, age, and birth date of the child;

²³ TEX. FAM. CODE § 161.001(1)(K), (2).

(3) the names and addresses of the guardians of the person and estate of the child, if any;

(4) a statement that the affiant is or is not presently obligated by court order to make payments for the support of the child;

(5) a full description and statement of value of all property owned or possessed by the child;

(6) an allegation that termination of the parent-child relationship is in the best interest of the child;

(7) one of the following, as applicable:

(A) the name and address of the other parent;

(B) a statement that the parental rights of the other parent have been terminated by death or court order; or

(C) a statement that the child has no presumed father and that an affidavit of status of the child has been executed as provided by this chapter;

(8) a statement that the parent has been informed of parental rights and duties;

(9) a statement that the relinquishment is revocable, that the relinquishment is irrevocable, or that the relinquishment is irrevocable for a stated period of time;

(10) if the relinquishment is revocable, a statement in boldfaced type concerning the right of the parent signing the affidavit to revoke the relinquishment only if the revocation is made before the 11th day after the date the affidavit is executed;

(11) if the relinquishment is revocable, the name and address of a person to whom the revocation is to be delivered; and

(12) the designation of a prospective adoptive parent, the Department of Protective and Regulatory Services, if the department has consented in writing to the

designation, or a licensed child-placing agency to serve as managing conservator of the child and the address of the person or agency.²⁴

It should go without saying that a person who executes such an affidavit must have some idea of all the facts to which he is required to swear. It is not enough that an affiant understand that he is severing his relationship with his children; he must understand what that means. The purpose of the statute is to prescribe the specific things a person must swear that he knows before he surrenders his children. Furthermore, proof that he did must be clear and convincing.

So the question in this case is this: how much of the affidavit Ricardo signed did he understand? The answer, as a detailed review of the evidence below demonstrates, is that the most he could *possibly* have understood was that by signing the affidavit he was losing his sons. There is no evidence at all, for example, that Ricardo thought relinquishing his sons was in their best interest, or that he knew what rights and duties parents have, or that he understood his decision was irrevocable for sixty days. The most important part of the affidavit, and the only part that may have been paraphrased to him in Spanish, omits the word “not” and consequently states the very opposite of what was intended. If an English-speaking lawyer could not get the language right, it is hard to imagine how Ricardo could have been expected to understand it.

²⁴ *Id.* § 161.103(b).

The Court's view of this case is that the evidence was conflicting and the trial court made the call, end of story. But only last Term we held that evidence for terminating a parent-child relationship must be carefully reviewed to determine whether it is clear and convincing.²⁵ Specifically, we said:

In a legal sufficiency review [of a termination of parental rights], 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.²⁶

In my view, when one considers all the evidence regarding what Ricardo understood or could have understood and then reads the affidavit he signed, it is impossible to conclude that there is any clear and convincing evidence that he understood a word of what he signed.

Ricardo testified through an interpreter. He stated that he had been in the United States four years and was working as a cook. His supervisor, he said, spoke only English, and a co-worker had to translate for him. He stated that he could neither read nor write English. Asked whether he understood some English, he answered, "Very little. A word here and there." Regarding the signing of the affidavit of relinquishment, he stated that he understood only that he was required to sign and initial the affidavit, nothing else. Specifically, he testified as follows, as translated by the interpreter:

Q Now, Mr. Duenas, could you tell us what happened on the day that the Affidavits of Relinquishment of Parental Rights were signed?

A Uh, they picked me up at my work. They took me to an office. What they have that papers that I signed that I didn't know what I was signing and nobody explained to me anything.

²⁵ *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

²⁶ *Id.*

* * *

Q Do you recall who gave you the papers?

A Well, I don't know if it was a lawyer or notary, but they gave me the paper. He said, "Sign here, and then date it and initial it there," and that was it.

* * *

Q Did — did the man that gave you the papers to initial and to sign, did he translate for you what those papers meant?

A No.

* * *

Q So all you know is that the last page has your signature; is that correct?

A Yes.

Q And the second to the last page has your initials; is that correct? Actually, it's the third.

A Yes.

Q And are those the areas where the man told you to put your initials?

A Yes.

Q And in putting those initials, did that man or the secretaries or anybody in that room, did they translate to you what that document meant?

A No.

* * *

Q And, Mr. Duenas, how much English, if any, do you understand?

A I only understand "put your name" and "initial that thing there." That's all.

Q Was that what was translated to you?

A Yes. It was translated to me, but I understood that. Only that.

Maria verified that Ricardo does not speak English and cannot understand it. “One time,” she testified, “I told him to say the word ‘seagull.’ That’s what I got out of him.” Regarding his signing the affidavit of relinquishment, she testified as follows:

Q . . . [W]ho translated the document for Mr. Duenas?

A Nobody translated.

Q What was Mr. Duenas told he was signing?

A When I got there, I didn’t really tell him what it was. I just told him, “Put your name here, put the date there.”

Q Did any of the secretaries for the attorney translate to Mr. Duenas what was in that document?

A No. I don’t think anybody there spoke Spanish.

Q So the attorney didn’t translate it either for him?

A No. He was just reading it in English, pointing and then out — because there would be sometimes that Ricardo wouldn’t catch on and he would point and say, “Put your name there,” but then he would just initial it. So I’d have to tell him — (speaking Spanish) — “Put your whole name.”

Q And did your mother or your sister translate the seven-page document to Mr. Duenas?

A My sister doesn’t speak good Spanish. My mom — she tried to start out telling him, and I told her, “Shush.”

Q So no one in that office, while Mr. Duenas was signing the Affidavit of Relinquishment, explained to him that this document meant that he was giving up his rights as a parent forever; is that correct?

A No.

Q And no one explained to him by signing this document he couldn't change his mind until after 60 days —

A No.

Q — is that correct? And by that, I mean translating it into Spanish what he understood the document meant?

A No.

Q To your knowledge, had Mr. Duenas ever talked about giving up his babies for adoption or anything like that?

A No, of course not. He used to tell me if I wanted to be stupid and — and if I didn't act right, that he would take the babies and he would raise them. And I would tell him, "You're crazy."

Maria's mother, Guillerma, understands both English and Spanish, and she spoke to Duenas in Spanish in the lawyer's office. This is what she testified:

Q Did [the lawyer] read at this time to anybody in Spanish?

A No. No, he can't read it in Spanish.

Q Okay. Did anybody ask you to — or let me rephrase it. Did you translate any of the documents for anybody else?

A No, ma'am. I wasn't given the chance.

* * *

Q Did you tell Ricardo Duenas what the papers were about in Spanish?

A No, no. Uh, I wasn't given that opportunity.

Q So you didn't ever speak Spanish at all during your — the time that you were at Mr Ciavaglia's [the lawyer]?

A The little words I said, it was not that much. It was my own, uh — Mr. Ciavaglia wanted someone to interpret so he could understand what was going on, and that's all.

Q And so you did say a few words in Spanish, didn't you?

A A few, a few.

Q And what was it that you said? Tell us in English what you told Mr. Duenas.

A I looked at him and I told him that, uh, Mr. Ciavaglia wanted those papers, uh, interpreted to him.

Q And what else did you tell him?

A Nothing, nothing.

Q And didn't you tell him, Mr. Duenas, that these were papers that they wanted him to sign where he was giving up his rights to the babies? Didn't you tell him that in Spanish?

A No, no. No.

Esther, Maria's sister who arranged for the adoption, testified that she understood some Spanish but could not speak it fluently and could not and did not converse with Ricardo. As for what Ricardo understood about what was happening, this is her account of the events:

Q . . . And then did you discuss the father [with the lawyer] and how to get him involved in this process?

A The babies looked like him, but we weren't absolutely sure that he was the father. DNA testing had not been done. It was assumed that he was. And I am not fluent in Spanish, so I cannot communicate with him to — with him. So, if anything, it would have to be told to him. My mother and my sister would have to be the ones.

* * *

Q Did Ricardo Duenas make any motions or do anything that would indicate that he knew what was going on that day?

A Yes.

Q What was that?

A He agreed to put his initials in the areas where he was — where he needed, and he was asked over and over again if he understood.

Q And who asked him over and over if he understood?

A Mark [the lawyer] asked him, and my mother asked him also.

Q And did your mother ask him in Spanish if he understood what he was doing that day?

A Yes.

Q But Mr. Ciavaglia did not speak Spanish to Ricardo Duenas; is that right?

A Right. That is correct.

* * *

Q [By the Court:] Okay. And can you tell me if someone explained each of those lines to him, or was it just a cursory summary, or was it a detailed explanation?

A Mark [the lawyer] explained it in detail. And Ricardo kept on, like he acknowledged what was being said. And then my mother made an attempt also in Spanish and asked Ricardo did he understand, and he said yes, and he continued putting his initials on there.

Q [By the Court:] But how could he understand if no one went line by line in Spanish and read that to him? That is — that's my dilemma right here.

A I can't read his mind, ma'am. I don't know. He said he understood. That's all I know.

Q [By the Court:] And who asked him if he understood?

A Mark did.

Q [By the Court:] In English?

A Yes.

Q [By the Court:] And he answered in English? I mean, if you can remember.

A He did not speak much. He just nodded his head. I don't recall him speaking much at all.

* * *

Q Based on your observations of Ricardo Duenas and your sister in Mr. Ciavaglia's office, do you believe both of them understood what was going on?

A Yes, I do.

Q And do you believe that the relinquishment document was, in fact, explained to Ricardo Duenas in Spanish?

A Yes. As much as he needed, yes.

* * *

Q Okay. At one point your mother attempted to translate the document for Mr. Duenas; is that correct?

A Yes, that is correct.

Q And what happened during that translation?

A She asked him if he understood all the details, and my little sister also communicated with him in Spanish.

Q So it was actually both your mother and sister that were talking to him in Spanish?

A Yes. I remember both of them doing that, doing some —

* * *

Q And the — are you sitting here and telling the Court today that on September 24th, when the attorney and the secretaries presented the seven-page document to Mr. Duenas, that those seven pages were translated to Mr. Duenas in Spanish?

A Each page was not translated word for word, no.

* * *

Q So the total sum of the translations were actually three or four sentences, weren't they?

A I don't recall exactly.

Q It was very quick, wasn't it, the translation that your mother supposedly — or Maria gave to him (indicating)?

A It wasn't within, like, 30-minute time intervals, no. They were not that long.

Q Would three or four sentences be about right, the translation that your mother did or that Maria did?

A I don't recall exactly how many lines were said.

* * *

Q You testified earlier that you're "not very fluent in Spanish." Wasn't those your exact words?

A Conversational Spanish, yes.

Q Okay. So, then, how is it that you can sit here today and tell this Court that Mr. Duenas had heard as much as he needed to hear?

A I didn't state that.

Q Yes, you did. You didn't just say on testimony from [counsel for the Monteguts] — on your direct testimony that he heard, and I quote, "as much as he needed"?

A Okay. As much as he needed apparently to understand because he nodded and he acknowledged that he understood repeatedly.

Q Okay. But it was being read to him in English, correct?

A That's correct.

Q Okay. If I started speaking to you in French right now — you don't speak French, do you?

A No.

Q And I kind of nodded my head and was speaking to you in French, would you have any idea what I was talking about if I just started speaking French right now?

A No.

Q Okay. But if I smiled at you and nodded my head and looked sort of favorably upon you, is it possible that you might just nod your head back?

* * *

A No, because I wouldn't know what I would be agreeing to.

Q But how would you even know you were agreeing to anything if you didn't understand the French language?

A I would not be able to elicit a response if I did not understand what's being said.

Q Okay. Thank you. Now, you said that on the 21st you called Mr. Ciavaglia's office and you had talked to Detective Goetschius and you got all of this arranged before you went over there on the 24th. Didn't you think it might be a good idea to talk to either Ricardo or [Maria] before you got all this arranged to find out whether they were even in agreement with it?

A I have not had any communication with Ricardo one on one because I cannot converse fluently in Spanish.

* * *

Q On September 24th, after Mr. Duenas signed the papers, you spoke to him; is that correct?

A After?

Q After the papers were signed.

A Outside of the lawyer's office.

Q And would you tell the Court what you said?

A I told him in English — I walked to him and shook his hand. I told him, "Thank you. What you are doing is very courageous."

Q And did your mother translate what you said?

A I asked her so he could make sure to understand what I was saying. And she started to — and then she said — I can't recall word for word, that, "Oh, he says he understands. I don't need to."

Mark Ciavaglia had been in practice six years when he agreed to represent the Monteguts in adopting Ricardo's and Maria's sons. He does not understand Spanish. Concerning the events in his office, he testified as follows:

Q How did you receive the information [for the affidavit of relinquishment] for Ricardo Duenas?

A I asked him verbally.

Q And was he able to understand what you asked him and relay that information?

A He seemed to be. He seemed to understand English and responded to questions.

Q When you asked for his name, did he respond with his name correct — give you a detail of his name, or did he write it out? How did he do it?

A He pronounced it, and I just wrote it. As I wrote his last name, I spelled it out loud; and he acknowledged that was correct.

Q And you don't speak Spanish, correct?

A That's correct.

Q And he — did he respond to what is your address and other information, what is your Social Security number, what is your Texas driver's license number?

A At some point when I asked for his Social Security number, I don't recall who responded or — as to the address. I was asking, just writing the information down. As to the question about his Social Security number, uh, he didn't really respond. And I don't remember if it was Maria or [Guillerma] that said he doesn't have a Social Security number, didn't have his wallet with him.

* * *

Q What specifically did you tell the parties?

A I again introduced myself and told them — or stated to them, “Does everyone understand why we’re here today? You’re here to sign documents. I’m going to offer to you some documents for your inspection and your signature that will begin the process of adopting these children.”

Q And did Ricardo Duenas do anything that would indicate whether he understood what you were saying?

A He said very little. During the course of that statement, I said — I kind of looked at each and every one of them. I said, “Do you understand? Do you understand?” Ricardo was to my left, and I said, “Do you understand?” And he nodded. I specifically said, “Do you understand,” in English. And he nodded his head yes and he mouthed yep. Like yep.

* * *

Q And what discussion was had with Mr. Duenas about his document?

A I explained that I would offer to each of them two documents. I turned to Mr. Duenas and I said, “This document, the first document, is an affidavit that acknowledges your paternity.” And I, knowing that sometimes legalese is intimidating for laypersons, I asked, uh — I kind of made sure that they were aware in common English what that meant. I said, “By signing this document, you’re admitting that you’re the father of these children.” And there’s some other reference, statutory information.

Q Okay. Now, did he say yes, he understood, or no, he didn’t? Or did he acknowledge anything?

A He didn’t really acknowledge either way. He just looked at the document.

Q Okay. Now, with regards to the Affidavit of Relinquishment of his parental rights, did you explain what that document was?

A I did.

Q And did he make any response whatsoever to your explanation?

A Not at all.

Q Okay. Was there any discussion amongst the people in the room whether he understood or whether he should have a translator or anything?

A The documents that I offered first, the Affidavit of Relinquishment, as we were going through the form and I was explaining it to him, and I use the same term each time, "By signing this document, you fully, finally, and forever give up all parental rights to these children." As I was going through that, Maria noted — she was sitting across from Mr. Duenas. She noted that her name was spelled incorrectly on the document.

Q Okay. So what happened then?

A Well, at that point she corrected the spelling of her last name. I went back and corrected all the documents. And this is after he had signed it, okay.

Q So, then, he had to resign the documents, is that correct?

A That's correct.

Q Now, before he resigned the documents, was there any point in time that anybody in Spanish went over any parts or all of those documents?

A Yes.

Q What happened and who supposedly was it that went over those documents with him in Spanish?

A Ms. Pruitt.

Q And would that be Maria's mother?

A That's correct.

Q And what — what do you recall her doing with regards to that document?

A There's a specific part of the form that requires a set of initials by each one. It's a double-spaced section. And it denotes if — I'm paraphrasing — it says that they understand the importance of this document. . . . I directed his attention specifically to this section and began to read it. And at that point, Esther said, "Mom, why don't you translate that to him to make sure he understands?" At that point, Maria turned to her

mother in a very agitated fashion and said, “He don’t give a shit. He don’t even buy diapers.” So, nonetheless, Ms. Pruitt did continue to, uh, what sounded to me was to translate that in Spanish.

Q Did it take her awhile to read that into Spanish?

A She didn’t seem to read it. She was repeating what I was saying, which was paraphrasing this language.

Q Okay. And was that what you were saying basically that, “I understand that I’m executing this relinquishment, and I’m giving up my rights to my children”? . . . In your words, how did you explain that in English before it was translated.

A What I told him was that, “This document is very — excuse me — very important. And that by signing it, you’re acknowledging that you understand this document and you understand the consequences of this document, and that is that you fully, finally, and forever give up any parental rights to your children. And you also relinquish your right and give up your right to change your mind.”

Q [By the Court:] And you said that pretty much the way you just told me?

A That’s correct.

Q [By the Court:] And you’re telling me that Ms. Pruitt, the grandmother, interpreted that after you said it in English?

A She was speaking in Spanish. I can’t say.

Q [By the Court:] You can’t speak Spanish. But you think she was translating what you said in English?

A That’s correct.

Q [By the Court:] Go ahead.

Q And then what happened after the — Ms. Pruitt said things in Spanish to Mr. Duenas?

A Uh, Mr. Duenas then initialed beside each line. He executed the document in the signature spaces as provided in front of the witnesses. Uh, and the witnesses signed and, uh, the person that was the notary notarized the document.

* * *

Q Mr. Ciavaglia, are you telling this Court that Ms. Pruitt translated these seven pages to my client, Mr. Duenas?

A No, ma'am.

Q In fact, she probably said a sum total of three or four little sentences the whole time she was there in Spanish to my client, didn't she?

A She said more than that.

Q And when you would say, "You need to sign on this blank," and the translation would have been (speaking Spanish). If that was repeated several different times, you don't know that the translation was, "You're giving up your rights to your children forever," and rather the translation is, "You need to sign on this line, you need to sign on this line, and you need to sign on this line," which was being translated? Do any of your staff know what Ms. Pruitt was translating to Mr. Duenas?

A I could testify as to what I know; and I do not speak Spanish and I do not know what she translated.

* * *

Q What you're saying is that you made an assumption that because — when you were talking in English and he was nodding his head, that he understood what was going on?

A I believed he knew what was going on, yes.

Q And would you know that in pointing to him where he needed to sign, that if someone was telling him you need to sign there, if there was — you said he was very quiet. In fact, he hardly talked at all is what you said a few minutes ago; is that correct? Mr. Duenas was very quiet?

A Yes.

Q In fact, he hardly talked at all?

A Correct.

* * *

Q And you assumed that by Mr. Duenas' silence, that he was agreeing to everything; is that correct?

A I assumed he understood.

* * *

Q Okay. And isn't it true that in the draft that had to be redone because of the misspelling of the name, that at one point Mr. Duenas — forgive me — Mr. Duenas had either initialed where he was supposed to sign or signed where he was supposed to initial or vice versa?

A That's correct.

Q Okay. So what — wouldn't that kind of indicate to you that he didn't understand what he was supposed to do in that situation?

A No.

Q Okay. And while Ms. Pruitt was talking with Mr. Duenas, you don't have any idea what she was talking to him about, do you?

A In Spanish?

Q Yes.

A No.

Q Okay. And you said that you were basically paraphrasing the document; is that correct? And that she was repeating what you were paraphrasing?

A Yes.

Q Don't you think it's kind of possible since we're repeating paraphrasing that something might have been lost in the translation?

A Since I don't know — you're asking me?

Q Is it possible?

A Is it possible? Sure.

Finally, Ciavaglia's paralegal, Laura Hernandez, was present at the meeting and witnessed the Duenas's execution of the affidavit of relinquishment. Hernandez understands Spanish but cannot speak it. She testified to what she observed as follows:

Q Did — at the beginning of the conference, did you have occasion to hear Mr. Ciavaglia say anything to the parties?

A He just explained what was going on, and if they didn't — you know, if they didn't want to go through with it, they didn't have to. And they wanted to make sure that everybody knew what was going on and they understood what was going on.

Q Did you — did you notice whether Ricardo Duenas actually made any indication that he understood? Just from the preliminary statements that Mr. Ciavaglia gave, that he understood?

A We weren't sure if he understood. And Esther kept saying, "Make sure he understands what he's saying." And then Maria said, "Well, he don't care."

Q Okay. And are you talking about later on as he was presented with this Affidavit of Relinquishment?

A Right.

* * *

Q Okay. Did Mr. Ciavaglia explain the papers to Maria Inocencio?

A Yes, he did.

Q Was his explanation to her more detailed than it was to Ricardo Duenas?

A No, because I explained it to Maria, and then she said okay. Then he started to explain it to the father, and he, you know — he kind of looked like he didn't know what he was saying. Then the grandma translated it to him, and he was shaking his head yes. When she was translating — I understand Spanish. I can understand it, but I can't speak it back. And she was telling him the correct things.

Q Okay. So would you tell the Court what it was that the grandmother was actually telling Mr. Duenas?

A 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.

Q So did she tell him whether or not he would have an opportunity to change his mind later?

A No, she didn't.

Q Okay. Based on what you heard that the grandmother translated in Spanish to Mr. Duenas, do you believe he fully understood —

A Yes.

Q — what was happening?

A Yes, because he kept shaking his head yes, he understood. And she just kept telling him to sign it, just sign it. Maria kept telling him just to sign it.

Q So Maria didn't really want to have much discussion?

A No

* * *

Q Now, you were actually a witness on both the father's Affidavit of Relinquishment of Parental Rights and also the mother's; is that right?

A That's correct.

Q And do you feel, based on your observations in the room and what you saw and what you heard of the parties, that they both understood fully what they were signing?

A Yes, ma'am.

* * *

Q And you heard what Esther was telling Maria and what Maria was telling Mr. Duenas?

A Yes.

Q And in the seven pages of the affidavit, you're saying that Ms. Pruitt translated that affidavit to Mr. Duenas?

A She was just telling him that he was giving up his rights as a father because Maria kept saying, "Don't worry about this. Just tell him to sign it there and he'll sign it."

Q And, in effect, Ms. Pruitt didn't tell him about terminating parental rights. She just said, "Sign it," didn't she?

A No.

Q "Just sign here and sign here"?

A Maria was saying, "Just sign it." The grandmother was trying to translate it to him, but Maria was the one that kept pushing. "Initial, sign it."

Q In fact, the grandmother never translated to him that his rights are going to be terminated right then and there?

A 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 And you're saying she was telling him that in Spanish?

A Yes, she was.

Q And she wasn't telling him to sign here and sign there, sign the different parts? She never told him that?

A Maria was pointing out to him where to sign, and he would sign it.

Q And the attorney was there during the times that Ms. Pruitt was translating, is that correct?

A Yes, ma'am.

Q And did Mr. Duenas ever say anything during that whole process of signing any of the affidavits?

A He did not.

Q Never said a word?

A Never said a word.

Q Did anyone verify with him that he understood?

A They asked him if he understood, and he said yes.

In sum, there is no evidence that Ricardo read the affidavit of relinquishment or that he was able to read it, and the uncontradicted evidence of several witnesses is that the affidavit was not translated to Ricardo. Several witnesses testified that they thought or believed or assumed that Ricardo understood, and that he indicated by nodding his head or mouthing "yep" that he understood, but none of these witnesses stated what it was exactly that Ricardo understood. It seems fairly clear that he knew he was losing his children, but the paralegal, who understood Spanish, testified without contradiction that he was never told in Spanish that his affidavit would be irrevocable for sixty days. There is no evidence that Ricardo thought

adoption was in his sons' best interest, as he was required by statute to swear, or that he understood the parental rights he was losing, again as the statute required him to swear.

What various witnesses' meant when they testified that Ricardo "understood" cannot be appreciated without reading the affidavit Ricardo signed. This is what it stated:

**FATHER'S AFFIDAVIT OF RELINQUISHMENT
OF PARENTAL RIGHTS**

STATE OF TEXAS }

COUNTY OF GALVESTON }

BEFORE ME, the undersigned authority, on this day personally appeared RICARDO ANTONIO DUENAS who, by me being duly sworn, in the presence of the undersigned credible witnesses, made the following statements, and swore that they were true:

"My name is RICARDO ANTONIO DUENAS. Social Security Number _____, Driver's License Number [_____] in the State of Texas. My age is 26 years. My residence address in 3714 Avenue S, Galveston, Galveston County, Texas 77550."

"I am the father of twin children:

[L.M.I.], a male child born on April 9, 1999, and [J.A.I.], a male child born on April 9, 1999, both twin children born to LUZ MARIA INOCENCIO at UTMB, Galveston, Galveston County, Texas."

"The natural mother of the children, LUZ MARIA SYLVESTRE INOCENCIO and the children reside at 806c – 3RD Avenue South, Texas City, Galveston County, Texas 77590."

"I am not presently obligated by court order or decree to make payments for child support in this or any court or jurisdiction."

"No property is owned or possessed by the children."

“I designate MILES QUENTIN MONTEGUT and MONICA GAIL MONTEGUT, qualified persons, as managing co-conservators of the children. I have been informed that my parental rights, powers, duties, and privileges are as follows:

1. the right to have physical possession, to direct the moral and religious training and the [sic] establish the legal domicile of the children;
2. the duty of care, control, protection, and reasonable discipline of the children;
3. the duty to support the children, including providing the child with clothing, food, shelter, medical care, and education;
4. the duty to manage the estate of the children, except when a guardian of the estate has been appointed;
5. the right to the services and earnings of the children;
6. the power to consent to marriage, to enlistment in the Armed Forces of the United States, and to medical, psychiatric and surgical treatment;
7. the power to receive and give receipt for payments for the support of the children and to hold or disburse any funds for the benefit of the children;
8. the power to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;
9. the right to inherit from and through the children; and,
10. any other rights, privileges, duties and powers existing between a parent and children by virtue of law, including decisions concerning medical care and treatment.”

I freely and voluntarily give and relinquish to the above-named managing co-conservators all of my parental rights, powers, duties, and privileges.”

“I fully understand that a lawsuit will be promptly filed in a Court in Galveston County, Texas to terminate forever the parent-child relationship between me and the above-named children. I fully understand that the termination suit may or may not be combined with a suit to adopt the children. I understand that either way, once the Court terminates my

parental rights, I have no further say concerning my children, whether or not my children are adopted then or at some later time.”

“I know that I have the right to appear personally before the Court, with an attorney of choice, to testify about my desires with respect to my children. However, I do not want to go to court in person. I have been encouraged to seek independent legal advice, but I do not feel that is necessary. I want this Affidavit of Relinquishment of Parental Rights presented to the Court.”

“Because I do not want to testify in person before the court, I freely and voluntarily waive and give up my right to the issuance, service, and return of citation, notice and all other process in any suit to terminate my parental rights or in any suit to terminate my parental rights joined with a suit to adopt. By executing this affidavit and desiring to having [sic] it presented to the court on my behalf, I freely and voluntarily consent to the jurisdiction of a court of competent jurisdiction of the State of Texas. I do not want to be informed further about the lawsuit, and I waive and give up my right to be given notice about anything [sic] proceedings in the lawsuit. I specifically agree that a final hearing in the lawsuit may be held at any time without further notice to me. I waive and give up my right to have the official court reporter make a record of the testimony in the lawsuit. Furthermore, I do not want to be mailed or given a copy of the judgment terminating my parental rights and do not want to be notified of the signing, rendition, or entry of that judgment. Therefore, I waive and give up my right insist [sic] that those things be done. I also consent to have any suit affecting the parent-child relationship filed or to be filed with respect to the above-identified children be decided by a family law master appointed pursuant to Texas Government Code § 54.001.”

“If I am in the armed services of the United States at this time, that fact in no way interfered with my freedom the [sic] make my decision to execute this affidavit, and, insofar as this matter is concerned, I waive all rights, privileges, and exemptions existing or that may hereafter exist in my favor under the Soldiers’ and Sailors’ Civil Relief Act of 1940, including the appointment of counsel to represent me in this cause.”

“IFULLYUNDERSTAND THATIMAYNOTBE FURTHER INFORMED ABOUT THE TERMINATION SUIT OR ABOUT ANYOTHER HEARING OR PROCEEDING AFFECTING THE CHILD NAMED IN THIS AFFIDAVIT.”

“Termination of the parent-child relationship is in the best interest of the children. I understand that I made this termination possible by executing this affidavit. With that in mind, I hereby declare that this Affidavit of Relinquishment of Parental Rights is and shall

be irrevocable for sixty (60) days. **I FULLY UNDERSTAND THAT, IF I CHANGE MY MIND, I CANNOT FORCE THE MANAGING CONSERVATOR TO DESTROY, REVOKE, OR RETURN THIS AFFIDAVIT AND THAT I CANNOT TAKE BACK OR UNDO THIS AFFIDAVIT IN ANYWAY DURING THIS 60-DAY PERIOD. I FURTHER UNDERSTAND THAT MY PARENTAL RIGHTS PROBABLY WILL HAVE ALREADY BEEN ENDED FOR ALL TIME BEFORE THIS 60-DAY PERIOD EXPIRES.** I also understand that, if my parental rights have not been ended within this 60-day period, this affidavit shall remain in full force and effect until I revoke it. **I FULLY UNDERSTAND THAT, AT ANY TIME UNTIL THIS AFFIDAVIT IS REVOKED, MY PARENTAL RIGHTS MAY BE TERMINATED FOR ALL TIME.”**

“I have carefully considered alternate plans for my children’s future and have obtained the advice of whatever family members, friends, or other persons and professionals I feel were necessary to help make this decision. This decision is very difficult for me to make, and under other circumstances I might have made a different decision. Nevertheless, under the circumstances I find myself in, I have decided that I cannot provide properly for my children’s physical and emotional needs, and I want MILES QUENTIN MONTEGUT and MONICA GAIL MONTEGUT to provide my children a permanent home. I declare that I fully understand the meaning of this Affidavit of Relinquishment of Parental Rights and the finality of my action in signing it, and understanding all of this, I am signing it freely and voluntarily, and with the firm conviction that this decision is the best available alternative for my children.”

“I am signing this affidavit today because I want to sign it and not because any other person or persons want me to sign it. I am ready emotionally and in every other way to make the decision I am making today. I am signing this affidavit in the presence of the two undersigned witnesses, each of whom is present and acting as a witness. I want them to be here and witness my signature. I am also signing this affidavit before a notary public who has asked me under oath whether or not each and every statement in this affidavit is true and correct and has advised me not to sign it unless it is true.”

s/ RD **“I REALIZE THAT I SHOULD NOT SIGN THIS AFFIDAVIT UNTIL**
s/ RD **I HAVE READ AND UNDERSTOOD EACH WORD, SENTENCE,**
s/ RD **AND PARAGRAPH IN IT. I REALIZE THAT I SHOULD NOT SIGN**
s/ RD **THIS AFFIDAVIT OF RELINQUISHMENT IF THERE IS ANY**
s/ RD **THOUGHT IN MY MIND THAT I MIGHT SOMEDAY SEEK TO**
s/ RD **CHANGE MY MIND. I REALIZE THAT I SHOULD [SIC] SIGN**
s/ RD **THIS AFFIDAVIT OF RELINQUISHMENT IF I AM NOT**

s/ RD THINKING CLEARLY BECAUSE OF ILLNESS, MEDICATION, MY
s/ RD EMOTIONAL STATE, OR ANY OTHER REASON. BECAUSE I
s/ RD REALIZE HOW IMPORTANT THIS DECISION IS FOR THE
s/ RD FUTURE OF MY CHILDREN, I HAVE PUT MY INITIALS BESIDE
s/ RD EVERY LINE OF THE PARAGRAPH SO THAT IT WILL ALWAYS
s/ RD BE UNDERSTOOD THAT I HAVE READ THIS AFFIDAVIT OF
s/ RD RELINQUISHMENT, UNDERSTAND IT, AND DESIRE TO SIGN
s/ RD IT.”

SIGNED on this 24 day of Septieber [sic], 1999.

s/ Ricardo A. Duenas

s/ Laura D. Hernandez

s/ Esther Gonzalez

1232-2nd Ave. North

8161 1/2 Grofton

Texas City, TX 77590

Houston TX 77017

VERIFICATION

STATE OF TEXAS }

COUNTY OF GALVESTON }

BEFORE ME, the undersigned authority and notary public, on this day personally appeared RICARDO ANTONIO DUENAS, who, being by me duly sworn on his oath, deposed and said that he is the affiant and that he has read the foregoing Affidavit of Relinquishment of Parental Rights and that the statements contained therein are within his personal knowledge and are true and correct.

This Affidavit of Relinquishment of Parental Rights was subscribed and sworn before me on the 24th day of September, 1999, by

[notary seal]

s/ Claudia Tibaldo
Notary Public, State [sic] of Galveston

STATE OF TEXAS }

COUNTY OF GALVESTON }

BEFORE ME, the undersigned authority, on this day personally appeared Laura D. Hernandez and Esther Gonzalez, witnesses whose names are subscribed to the foregoing instrument in their respective capacity, and both persons being by me duly sworn, declared to me, in the presence and hearing of the affiant _____, [sic] that the affiant had declared to them that the foregoing instrument is an Affidavit of Relinquishment of Parental Rights, that he executed it as such and wanted each of them to sign it as a witness to his execution of the same; and upon the oaths each witness stated further that he/she did sign the same as witness, in the presence of the affiant and at his request, that affiant was at that time eighteen years of age, or older, was of sound mind, and executed the affidavit of his own free will; that each of said witnesses was then at least eighteen years of age.

s/ Ricardo A. Duenas
RICARDO ANTONIO DUENAS

s/ Laura D. Hernandez
Witness

s/ Esther Gonzalez
Witness

SUBSCRIBED AND ACKNOWLEDGED BEFORE ME by RICARDO ANTONIO DUENAS, the Affiant, and SUBSCRIBED AND SWORN TO before me by said witnesses Laura D. Hernandez and Esther Gonzalez on this 24th day of September, 1999.

[notary seal]

s/ Claudia Tibaldo

Notary Public, State of Texas

Contrary to what the affidavit states, there is no evidence that Ricardo had any idea what his “parental rights, powers, duties, and privileges were, or that he had “the right to appear personally before the Court, with an attorney of choice,” or that the affidavit was irrevocable for sixty days. The careful reader will note that in what appears to be the most crucial part of the affidavit, where the words are all in upper case and bold font, and where the affiant must initial every line, Ricardo was required to swear:

I realize that I *should* sign this affidavit of relinquishment if I am not thinking clearly because of illness, medication, my emotional state, or any other reason.

(Emphasis added.) It seems obvious to me that this was an error, but then I speak English. It would be much less obvious to me if, like Ricardo, I did not.

B

To recite the evidence exhaustively and verbatim, as I have just done, is what the Court calls “effectively second-guess[ing] the trial court’s resolution of a factual dispute”. I do not see how one could be truer to the record than by quoting it, which of course, the Court does not do. The Court bases its second-guessing accusations on a recharacterization of the record that simply does not support the Court’s conclusions.

The Court has three points. First, the Court says, “witnesses testified that Duenas appeared to understand what was transpiring at the affidavit signing.”²⁷ That is true, of course, as the record just quoted shows. But none of these witnesses testified that Duenas *did* understand what was transpiring, or that he

²⁷ *Ante* at ____.

said he did, or that anyone present who spoke Spanish could tell from talking with him that he did. From all the witnesses said about Duenas’s *appearance*, one cannot tell whether he was a Shakespearean professor bemused into silence or someone for whom all of the English conversation and the seven-page affidavit were unintelligible gibberish.

Second, the Court says, “Duenas’s testimony about his ability to understand English was inconsistent”.²⁸ That, too, is true. But the only inconsistency to which the Court points is that Ricardo’s statement that he understood no English followed by his admission that he understood when he was told, “sign here”. I cannot fathom how that inconsistency is any evidence that Ricardo could read and understand a seven-page affidavit. If it were, then why did Ciavaglia ask that his summary of the affidavit be translated into Spanish for Ricardo?

Finally, the Court says that the trial court could have determined that Ricardo was not a credible witness because he could not have worked in a hotel kitchen as long as he had and not have understood better English, because he minimized how much of the affidavit was translated for him, and because of his responses and demeanor.²⁹ This, too, is all true; the trial court could have made all of these determinations. But a witness’s lack of credibility cannot establish the opposite of his assertions. This is simple logic. The trial court may not have believed Ricardo when he said he could not understand English, but that disbelief is no evidence that Ricardo was a Shakespearean professor. Apart from Ricardo’s credibility, there must

²⁸ *Ante* at ____.

²⁹ *Ante* at ____.

be some positive evidence that he *could* understand English — and not just *some* evidence — *clear and convincing* evidence.

Nothing in the record that the Court says has been overlooked has been omitted from the recitation of the evidence contained in this opinion. The Court cannot point to any evidence whatever that clearly and convincingly shows that Ricardo had the knowledge that the Family Code requires before a parent can voluntarily relinquish a child.

C

Conspicuously, the Monteguts do not argue that their promise to Maria is enforceable. Even if it were, I would hold that such promises precluded Maria's affidavit of relinquishment from being effective. There is no question in this case that the promise was made; it was given to Maria in writing. Nor is there any question that Maria signed her affidavit of relinquishment only because the promises were made. Under these circumstances, I would hold that Maria's relinquishment was not voluntary.

IV

The Court's strained view of the record casts doubt on the sincerity of its assurance that it is not unsympathetic to Ricardo's and Maria's claims. One ordinarily hopes for a little more generosity from one's sympathizers. But the true measure of the Court's non-unsympathy is reflected in its argument, never raised in the case, that, oh and by the way, Ricardo would not be entitled to his children even if his relinquishment had been involuntary because he may not have been the father, was unfit, and probably has no constitutional rights anyway. Before today, there has not been so much as a whisper of doubt that Ricardo was the father of Maria's twin sons. Both Ricardo and Maria swore to that fact. Even Maria's sister acknowledged that the boys "looked like" Ricardo. Were the issue in question, it could easily be determined — but in a proceeding not based on his affidavit of relinquishment. There are also procedures for challenging Ricardo's fitness as a father, but they do not include indictment by the Supreme Court of Texas. To refuse to consider Ricardo's argument because it has not been raised properly, and then to make an argument against him that no one has ever raised, is not what immediately comes to mind when one thinks of not unsympathetic.

* * * * *

The record contains no clear and convincing evidence — I agree with JUSTICE OWEN for the reasons she explains that such evidence is required — that Ricardo understood and swore to the statements required by section 161.103(b) of the Family Code for relinquishment of parental rights. To the contrary, the evidence is overwhelming that Ricardo has lost rights among the most precious guaranteed by law simply because he does not understand English. If Ricardo could read the Court's opinion, he would no

doubt be surprised (and dismayed) to learn that he is not entitled to a decision on the only claim he has ever made because his lawyer in the trial court phrased it differently than his lawyer on appeal. The one benefit of Ricardo's inability to understand English is that he will not be able to read of the injustice that has been done to him. He should at least have a paraphrase of the Court's opinion, however, just as his affidavit was paraphrased for him. I offer the following:

¡Peligro!
Si usted no puede hablar Inglés,
usted puede perder a sus niños.

Nathan L. Hecht
Justice

Opinion delivered: September 18, 2003