ORAL ARGUMENT – 02-12-03
02-0509
IN THE INTEREST OF MS, ET AL

LAWYER: I brought 4 issues for the court. The first two deal with the trial judge admitting orders that he had signed, that he had made findings. And it's these orders that he entered that we have a problem with.

HECHT: Didn't they need the orders to prove their case?

LAWYER: Not the first two. As far as the second order, the mediation agreement, well actually there was one order in the first two that she takes out of the court. That was the only one that I could see in there that had any order to show that she disregarded the court's prior order. Basically those orders talked about the judge found that she wasn't able to take care of her child. There wasn't anyone else to take care of the child. The children weren't safe at home. And basically she just couldn't provide for them.

ENOCH: Accepting as you say that those preliminary orders had findings in them that are basically testimony to the jury, what was left for the jury to decide if the trial judge had already decided that she was not capable of taking care of the children and that she was lying _____ conditions that were not for their safety. What was being left for the jury to decide?

LAWYER: That's kind of my question. I don't understand why they entered those orders like that. If the jury was going to determine all the facts of the case whether the parent/child relationship should be terminated? They should have made all of the findings. The fact that the judge goes in and puts his stamp of approval on these orders it doesn't purport with a fair trial.

The facts as they've laid out, they are in conflict. There are reasons yes. And there are reasons no. And the facts are in dispute. But when the judge goes in and he signs this order and puts it in before the jury, not only that, once the state introduced them and the judge allowed them, she publishes them to the jury. Right then. Right there. And then those same findings, the same things that they have to determine. Now the state has argued that well this is cumulative, there was other evidence. We don't know what that evidence was there at that temporary orders hearings. All we know is the judge's findings in that temporary order. As far as the specifics of what she did for the judge to make that we're not sure of that.

HECHT: I was unclear about whether there was objection to that. Was there objection at the time?

LAWYER: No. The way I understand the rule that no objection needs to be lodged whenever the judge comes in and testifies. And testify, there is a lot of argument about that. What his testimony? Is it the admission of those documents? Does he have to get off the bench and go sit in the witness

stand? There are cases that go both ways. They just say different things. Some of them say, yes, he has to come down and take the witness box, get sworn in to testify. There are other ones that say that's not really accurate, that's not what they meant that he has to actually go take the witness stand. What it means is that the judge is sitting there giving the jury facts and findings that he's already made. That's the same as testimony as far as I can see and as far as most of the case law provides.

As far as the mediation agreement, we have this mediation agreement where the court orders mediation within a month of trial. They go to mediation and down in our county in mediations they go through the same process. It's confidential. Nobody is to be told what's going on. Nobody is going to know about what's happening here. Well they turn around, they go to trial, they introduce the mediation agreement.

HECHT: You don't think the agreement is public after it's signed?

LAWYER: The fact that it's a - I don't believe so. I think that gets past the authentication of the document. I still don't think it gets past the hearsay of what was going on in there.

HECHT: An agreement is not - If A and B contract and agree to do thus and so that's no hearsay. That's their agreement.

LAWYER: The agreement as I saw it made all the same findings that the jury was there to determine. She's going to get a house. She's going to get a job. This poor lady - I mean obviously she's indigent. She has 5 children. She's 30 years old. Only one person is paying child support.

The next argument that we're bringing up is whether she had to file a motion for a new trial. This one here causes us some concern. The way I understand the case law is that in certain instances when the interests are so demanding that the court is going to not look at the procedural aspects of it, but get to the substantive parts of it. A couple of courts have said that you don't have to do that to go ahead and present it to us. There was one where they terminated her on grounds not pled. Well in this case, Ms. Strickland had asked her court appointed attorney to protect her appellate rights that she wanted to appeal it. And basically he told her it was too expensive. Well I don't know why it was too expensive if he was court appointed on it. But that's what her testimony was in the record. And it seems that under these circumstances the difference between the preponderance of the evidence and proof beyond a reasonable doubt, we put our clear and convincing in there. It's our position that clear and convincing leads toward the criminal aspect of your filing a motion for a new trial complaining of sufficiency of the evidence. We would argue that the fact that she didn't file it that would kind of go to her effective assistance of counsel claim. And at the same time we would also say that based on the severity and the finality of these types of actions that she shouldn't have been required to under those circumstances.

And the last one. Ineffective assistance of counsel. We've argued that Ms. Strickland's trial counsel was ineffective for a variety of reasons. He didn't have voir dire, charge conference, closing arguments. He didn't have any of that recorded. I don't know why. I don't see any...

HECHT: Was there any showing of harm there? Any bystander's bill?

LAWYER: By the time I was appointed on the case, the time had gone. I was appointed on it, like two weeks after she filed a notice of appeal. Then I was taken off of it. Then the 9th district came back and said have a hearing on it. And by the time I was actually appointed on the case, to file a bystander bill at the time for that had expired.

PHILLIPS: The CCA has said that that's not automatic harm to not have these preliminary and ancillary matters recorded. Why should it be different in a termination case than it is in a criminal case?

LAWYER: I don't see any reason why they shouldn't be - I mean I think it would be mandatory to have them recorded. To say that well you don't have to have them recorded, well I think that's trial counsel's fault. Otherwise...

PHILLIPS: You're asking us to come out differently than our sister court has in criminal cases. You're saying they are wrong.

LAWYER: I understand that's what they are saying. I'm saying it should have been done. There is no reason not to do it. As the judge said, I don't have any way of putting on a bill of exception at this point, or at the time I was appointed.

JEFFERSON: Is there error in the charge that you are claiming here?

LAWYER: No.

JEFFERSON: Then why would we need the charge conference, the record of the charge conference?

LAWYER: I don't know what was said. I'm trying to say he was ineffective for something I can't prove. I understand my argument is kind of tenuous at best.

JEFFERSON: We could at least eliminate the charge conference. If there is no error in the charge, and you're not claiming error, then it doesn't matter that the charge conference wasn't recorded.

LAWYER: No. Sir.

JEFFERSON: And there is no - you haven't alleged that there are any problems with the jury, that someone that was a felon was sitting on the jury now or anything like that. We haven't seen that in this record.

LAWYER: No.

JEFFERSON: And so we're trying to find something that would link an error for a refusal to record

to something that would cause harm. And I'm just having a tough time making that connection.

LAWYER: And by the time that there was any ability to do that it was too late. There was no time to go out and do that at that time. By the time I was actually on the case it was too late to go back and try to supplement the record, try to find anything for any kind of juror misconduct or anything of that nature.

The other issues that I believe Ms. Strickland's attorney failed to do was to file any alternative pleadings. I understand the state said, well this is kind of one of those all or nothing deals. You can put it up there and if it doesn't stick you get your kids. I concede there was no reason not to under the circumstances of the case. There could have been alternative pleadings to allow Ms. Strickland to be a possessory conservatory. I don't understand any reason why not to do it. I think he should have done it.

The worse thing I believe that happened in this case, as the way I read the record and as the way I view the evidence, is the failure to file the motion for new trial. By doing that, depending on how the court rules on do you have to file a motion for new trial complaining on the insufficiency of the evidence, it would alter my argument. By failing to do that he basically foreclosed any type of issue that she could bring up based on the motion for new trial. And that puts her in a position where she is unable to protect her appellate rights. I believe that was the - I had the biggest problem with that as far as reading the record and seeing what her attorney did.

O'NEILL: So if we were to find that that challenge doesn't need to be preserved by motion for new trial, does your effectiveness of counsel claim go away?

LAWYER: I would argue that regardless, because just the failure to do certain things that I think should have been done at trial. There are other things that are outside the record that I know that - it's inconsequential now, but I still believe that there were several issues that her attorney could have done a better job, at least protected the record. I've argued that well should there be any Batson(?) challenges? Well I meant Batson(?) and its progeny, any type of challenge based on sex, gender. There is no way to know that. There is no way to see it. And how to argue that something was wrong when you can't prove it, that's one of my disagreements with the way he represented her.

SCHNEIDER: What was the makeup of the jury?

LAWYER: I have no idea.

SCHNEIDER: You say that it was incompetent or ineffective because she didn't challenge Batson?

LAWYER: No. I'm not saying it was ineffective not to raise a Batson(?) challenge. I'm saying that there is no way to determine whether a Batson(?) challenge should have been raised or any type of challenge that should have been raised during voir dire, or during closing arguments, that there

is just no way to tell.

SCHNEIDER: Don't they keep those records about who served on the jury in there?

LAWYER: If they do, I don't have them. I didn't see them in the record.

JEFFERSON: Are you basing your right - that there is a right to effective assistance of counsel on the US Constitution to the 5th amendment? What's the source of the right?

LAWYER: Due process of the 14th.

JEFFERSON: And does the right extend both to indigent and non-indigent parents, or is it just indigent?

LAWYER: I see no reason why it should not extend to both.

JEFFERSON: So in all the cases involving parental termination, you're asking the court to undertake constitutional analysis and determine whether the lawyer was competent?

LAWYER: Yes.

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RESPONDENT

LAWYER: The issue here is not whether there is a constitutional question about due process. The issue here is what procedure, if any, is required under the state statutory construct as it exist right now when you appoint an indigent parent counsel under 107.013 of the family code?

Now I wrote down the questions that you asked in the previous oral argument on BLD. I'm going to start with answering those questions. J. Hecht you asked what happens if someone comes in as an attorney, he's completely incompetent? He is absolutely drunk. Knows nothing about the law. Sleeping, whatever. I think there are a couple of tings that you need to look at when you ask that question. First of all, let's look at the real risk that exist in this kind of situation. Let's first look at the extent of the problem. That's specifically addressed in the Ft. Worth CA case, KL in which they addressed the ineffective assistance of counsel. The Ft. Worth CA said in their due process analysis "we recognize that in the vast majority of cases counsel will render effective assistance, and, therefore, ensure that the termination decision is accurate and just. So if we're looking at the extent of your concern about someone who is just absolutely incompetent, the risk of that is very minimal.

HECHT: If we had the right and enforce it, it won't take any time and it won't delay things at all.

LAWYER: No. That's not correct. Here's the problem. First, you're looking at a very slight risk

of ____ parents because there is a very few number of cases in which this might even be an issue. However, you're not just talking about the rights of the parent. What you're talking about is that the possibility, if you do say that there is ineffective assistance of counsel and it should be applied in these cases, what you're talking about is the same situation that the appellate courts are now looking at in criminal cases. In criminal cases as an appellate attorney you file an ineffective assistance of counsel claim as a matter of due course. And if you allow ineffective assistance of counsel in parental termination cases, then what you will have is you will have appellate attorneys in termination cases who will file these ineffective assistance of counsel claims as a matter of due course.

HECHT: Surely it doesn't take too long to turn them down. How long does it take to say no?

LAWYER: It has to go to the appellate court.

HECHT: You think there wouldn't be appeals otherwise? That's your fear?

LAWYER: My problem is, there is no way in the statute as it now exist to have anyone look at that issue other than appeal it as part of your issues that you are going to raise on appeal, and then it goes to the appellate court and you're talking about the delay.

ENOCH: But isn't that an issue that got decided back when we decided we just didn't want innocent people going to jail? Aren't we passed that discussion? Once you've decided that you've got a constitutional right to be represented by counsel, don't we just take the problems of ineffective assistance of counsel and that's just something we've got to live with because we err on the side of assuring that an innocent person doesn't go to jail?

LAWYER: You're correct, but you're looking at a criminal case.

ENOCH: Hasn't the US SC said that there is a context where the parents' right to raise their children rises, maybe not all the way to loss of personal liberty, but it is a liberty interest that gets real close to there that would say well if you're going to say you've got have appointed counsel to represent a parent when these rights are at stake, don't we then say well wait a minute, we're kind of erring on the side that parents don't lose their right to children unless the state by clear and convincing evidence demonstrates that they are bad parents and we're going to kind of err on the side of the child gets reunited with the parent.

LAWYER: First of all, you're talking about - when you talk about a liberty interest, in Lassiter the SC specifically said when you're talking about the 6th amendment, you are talking about actually being locked up, the loss of personal liberty. In fact, the 6th amendment right to effective assistance of counsel doesn't apply even in criminal cases in which you're not getting locked up. So there is one distinction. The second distinction is when you're talking about the allocation of burden. When you're talking about the time it's going to take to appeal this, and who it affects. In a criminal case, you're talking about a criminal defendant who has been convicted who is saying I didn't get effective

assistance of counsel...

O'NEILL: It seems to me like all you're saying is because it takes a lot of time we shouldn't recognize it. When that doesn't seem like the focus of our inquiry. It's been granted by statute and I think in the prior case it was acknowledged that if we were to say yes there is a right to counsel in Texas but not effective counsel, then we'd be alone among the states that have recognized the statutory right in saying that.

LAWYER: That's not quite correct. I heard Mr. Hughes's response. In fact there is a case called In re Adoption of KLP. It is out of the SC of Illinois. It is a 2002 case 763 N.E.2nd 741. And I think it explains the differences that we're having here when you're talking about statutory entitlement to an attorney rather than constitutional entitlement. And what they say is, an indigent parent in a termination proceeding is entitled to court appointed counsel not because the due process clause of the US Constitution mandates it, but because the legislature has chosen to guarantee the assistance of counsel to indigent parents rather than requiring courts to engage in the case-by-case determination that is setup in Lassiter.

So the court by the Texas legislature establishing 107.013 that that does not mean that the Texas legislature says we recognize a constitutional right to effective assistance of counsel.

PHILLIPS: Did the Illinois court address whether or not there was statutory right for that appointment to be meaningful?

LAWYER: No. They did not. They looked specifically at the constitutional right and said there was no constitutional right.

OWEN: Assuming we agree that the statute doesn't give rise to a constitutional right, it seems like the statute is pointless unless it means effective counsel. At some level that there's effectiveness inherently in that statute.

LAWYER: There are two SC cases that specifically address statutory entitlement to attorneys. They are Philadelphia v. Finley, and Coleman v. Thompson. Both of those cases involved state appointment of counsel for a post-conviction habeas proceedings. And in that, the SC in both cases found that there was no constitutional entitlement to...

HECHT: But the question was. Even if we agree with that, we might think that the statute means when it says counsel competent counsel. Otherwise what's the point of the statute apart from the constitution?

LAWYER: The CCA has addressed that specific issue in Ex parte Graves(?). And in fact the statute, and it's a post-conviction habeas proceeding as well, specifically says that they are entitled to competent counsel in the habeas proceeding. And what the Graves court found is that there was not an entitlement to effective assistance of counsel.

ENOCH: On that point, was the court really acknowledging that there was not a constitutional right to counsel in the habeas, or what are they saying? There's a statutory right but not a constitutional right to counsel in habeas.

LAWYER: They found that there was not a constitutional right in a habeas.

ENOCH: Would the CCA come to the same conclusion if, under some circumstances, there was a constitutional right to counsel but not necessarily under all circumstances? The parental termination cases there are some circumstances in which the parent would not be entitled to constitutional right to counsel, but other circumstances where they would. Under those circumstances if the legislature says we don't want the courts deciding on a case-by-case basis if this is the case that gets constitutional interest. We're just going to say if the parental termination case or indigent they get counsel. Under those circumstances isn't the better course for this court to decide we're just going to apply ineffective assistance of counsel under those circumstances because it will apply in some cases, not necessarily in others, and we don't want to take our time trying to decide is this type the type of case that gets ineffective assistance of counsel or not.

LAWYER: I think that is at the absolute crux of this issue. The question that we have here is if parental rights are so important and we've appointed counsel for them why shouldn't we give them the full protection afforded at least analogous to the constitution due process rights? And here is the answer that I would give that you cannot have ineffective assistance of counsel in parental termination cases. First of all, I go back to the answer that I gave J. Hecht quoting the Ft. Worth CA who said in the vast majority of cases you don't have ineffective assistance of counsel. So you've got a very small number of cases, which in a due process analysis you first look at the possibility of risk of error and you look at that in the run of the mill cases not the rare exception. So when you're doing a due process analysis, and we're doing a quasi due process analysis here, you first look at the problem that you're trying to address. So the risk is very minimal. There is a few number of cases.

JEFFERSON: So except in a few number of cases children being removed from their parents with no basis in law. In fact, because of the incompetence of a lawyer the court has to accept that.

LAWYER: No. That's part of the balancing test when you're looking at competing rights. And there is a small risk of error.

JEFFERSON: In a regular civil case, if the lawyer commits malpractice you can sue that lawyer and there is insurance presumably and you can recover. There is a remedy for that. But in these cases let's assume that the lawyer makes just a grossest mistake and as a result the children are removed from parents in which they should not have been removed from. What's the remedy for that parent? You can sue the lawyer but you don't get the kids back. The court needs to address this somehow don't you think?

LAWYER: One of the issues that you have is, is you have civil appointments. And civil

appointments need to be addressed in civil remedies. And you have several civil remedies. First of all, it's the TC who specifically appoints the attorneys to these cases. And in a lot of those areas they have pools of attorneys that they appoint. And these people come in and they handle these cases on a regular basis. So my answer would be instead of addressing this as an ineffective assistance of counsel in a parental termination case, this is better addressed in the civil procedures that are available first of all to the TC. The TC has the ability if they appoint someone as J. Hecht was talking about who is absolutely, totally incompetent. Questionable if they ever would. But if they find that the TC first has the chance to redress that prior to the case ever going to trial. Second, you also have state bar remedies that can be addressed...

JEFFERSON: Okay. Let's say all those remedies are in place but someone slips through the cracks and that lawyer has been completely incompetent, waived error left and right, resulting in the children being removed from their parents when they shouldn't have been. Under the law or under the fact, what is the remedy for that parent?

LAWYER: I'm not sure there is a remedy. To be honest with you, I don't know if there is a remedy. However, when you're looking at this issue, you cannot let the possibility that one or two or a very small handful of cases in the next millennia drive the policy of how these cases will be handled. And here's the reason. They have a process of ineffective assistance of counsel in California. And I use the term delay. And J. O'Neill you keep talking about delay: why is that important? That is important because if you have delay in these cases it's costing children. It's costing children. And I have here a quote from a justice in the California CA who is addressing the same issue that's on the flip side of trying to make sure we don't have anything slip through the cracks. The problem with trying to make sure that nothing slips through the cracks is exactly what's happened in California. This is from In re Mika S 198 C.A.3d 557. And this is J. Brower's concurrence and this is what he said. "Delay. An enormous quantum of delay is built into any system providing free counsel. And the problem was significantly exacerbated when incompetence of trial counsel became the most fashionable ploy of appellate lawyers. I have no doubt that the most serious bottleneck is the appeal, and that the plight of children in limbo cannot be ameliorated. Delay far beyond what the professional authorities consider acceptable is the rule rather than the exception in this field. Delay by interfering with a new bonding results in devastating psychological harm to children. The due process rights of parents clash with children's rights of at least equal dignity. Something must be done to afford these small human beings some chance of growth and a glimmer of future happiness. In termination proceedings every right afforded to the parent, and especially every appeal is purchased at the expense of the person who is in law and morality the primary object of judicial solicitude mainly the child."

SCHNEIDER: That's the answer to the whole problem is it that we've got to speed things up.

LAWYER: It's much more complex than that. Actually in 1996, then Gov. Bush appointed a committee to look at the status of children in foster care in Texas. And the first thing they said is these cases are taking too long.

SCHNEIDER: Let's concede that it takes a long time. What has the state got in place in the event if somebody does, as was described here, perform ineffectively or incompetently? What procedures does the State of Texas have in place to continue to protect the procedural due process rights of the parents?

LAWYER: When you're looking at risk, the allocation of risk, the procedural process that we have set up is it's very simple to file a motion for new trial. It's very simple to file the procedural things that you need to file in order to preserve error...

SCHNEIDER: What if they don't do that?

LAWYER: There cannot be any system that absolutely negates all possibility of error.

SCHNEIDER: What further do we have to protect the best interest of the child?

LAWYER: For one thing there was a question by J. Hecht. J. Hecht asked, why does it take up to the 12 months period to get these to trial? The reason is because the statutes involving these family law cases have a series of temporary hearings that must be held. And in those every hearing there is an attorney for the children, there is a guardian ad litem for the children, there's an attorney for the parents. In a lot of cases CASA is involved. And there is a judicial review of whether the child - in fact the burden is if the child isn't in danger, you have to send him home. So from the very removal of the child, the burden is on the state to prove that it needs to keep this child in its custody in foster care. So from the very time the child is removed there are procedures set up within the statute to protect the parent's rights.

PHILLIPS: The SC has recognized a constitutionally protected right entitled to heightened scrutiny in the parent. Is there any corresponding constitutional right that has been recognized for a child to have the state monitor its home situation than to remove it from a dangerous or harmful environment, or is this really an important statutory right? Are we balancing statute against constitutional or is there two constitutional rights?

LAWYER: We're balancing two constitutional rights.

PHILLIPS: What's the child's constitutional rights?

LAWYER: In Lassiter the US SC said child custody must be concluded as rapidly as is consistent with fairness for the sake of the child. In Layman v. Lackland and County Children's Services Agency which is another US SC case, it recognized that children require secure stable long-term continuous relationships. And extended uncertainty would be inevitable in many cases if you continue on with an appeal...

PHILLIPS: Just give me a constitutional provision?

LAWYER: Courts have recognized that in Stancosky and in Stanley that the child has also an important right...

PHILLIPS: Just give me the constitutional provision?

LAWYER: It's a liberty interest.

OWEN: I thought the court had said we should not presume that the child's interests are at odds with the parent.

LAWYER: There is that initial - there's an interest in all parties, both the private parties - the parent and the child. Also in the state that you have a just and accurate result. It is true that because the first belief is that a child is best off with his parent, that...

OWEN: That's a presumption going around.

LAWYER: That's a presumption. That goes through the law. However, once you have a removal under the statute saying that to place the child back would endanger the child, or would endanger its welfare, then also the child has a liberty interest...

OWEN: But at every stage as you've pointed out, the legislature - I thought the US SC as well said it's the state's burden to continue to prove at every turn that the parent doesn't get child back, that the state has the right to keep the child. In the child's best interest it's always the state's burden. It's never the parent's burden to prove I get my child back.

LAWYER: That's correct. But it is a liberty interest for the child to have the right to be in a stable environment. And as that statute said the right of a child or the case out of California the right of a child to be in a stable environment and to be protected is at least as important as the parent's right.

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REBUTTAL

LAWYER: While we understand the children do need some finality to things, the risk of a wrongful termination is also an unjust result.

SCHNEIDER: Would you retain counsel to the same duty as appointed counsel?

LAWYER: Yes.

SCHNEIDER: So we would need to review those too. We would be opening up a situation where we would need to be taking a look at those activities. Any difference in the standard of review?

LAWYER: Not that I am aware of. I think it's the same. The termination part of it, what bothers me is in a civil case you go sue him, maybe get you some insurance money. But in a termination case, you just can't go sue your attorney and go get your kids back.

OWEN: Would you equate reversible error with ineffective assistance?

LAWYER: Yes.

PHILLIPS: If I'm accused of a crime and I hire a stupid counsel, is the court going to take care of me on appeal? Let me have another trial?

LAWYER: I believe that's the way it is now.

PHILLIPS: So you want a higher burden in these cases?

LAWYER: Yes. Just of losing your kids. To me that's the worst thing that possibly could happen to a parent.

SCHNEIDER: What about losing them another way? I mean not just parents losing them but maybe they would be in a situation - you know what the argument is. If they were in a bad situation you would lose them that way too wouldn't you?

LAWYER: Yes. The only other response I have is the Ex parte Graves, the 11.071 writ. I would point out that by the time we get to post-condition habeas, he's already had trial counsel and a public counsel that were both under effective assistance of counsel _____.