IN THE SUPREME COURT OF TEXAS

NO. 08-0524

IN RE DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued November 12, 2008

JUSTICE BRISTER, joined by JUSTICE HECHT, JUSTICE O'NEILL and JUSTICE MEDINA, dissenting.

Surely no one — not even a mother fighting to keep her kids — can ask for a new trial and then demand dismissal because she got it. There *was* a final order before the statutory one-year deadline in this case, but the mother asked the trial court to set it aside and give her a new trial and later a resetting after the deadline had passed. Having gotten what she wanted, she is not entitled to complain that the trial court should have turned her down. Because the Court holds otherwise, I respectfully dissent.

The Family Code prohibits parties from extending the one-year deadline by agreement, but it expressly allows them to waive the deadline by inaction.[1] This is not a subtle distinction: litigants (for example) cannot change the Constitution by agreement, but they can certainly waive

[1] *See* TEX. FAM. CODE § 263.402.

constitutional complaints.[2] Even the analogous right to a speedy trial (an explicit constitutional right) can be waived if the accused is responsible for the delay.[3] By holding this deadline nonwaivable, the Court makes it stricter than the Legislature did, stricter even than the Constitution itself.

It has long been the rule in Texas that a party cannot complain of an error it invited:

> The principle is that if, during the progress of a cause, any party thereto request or move the court to make an erroneous ruling, and the court rule in accordance with such request or motion, he cannot take advantage of the error upon appeal.[4]

This rule "is grounded in justice and dictated by common sense."[5] If a party can consent to an order and then seek reversal if it is granted, then both justice and common sense have been set aside. It makes no difference that this is a parental-termination case; justice and common sense apply there too.[6]

Until today there has been only one exception to the invited-error doctrine: absence of subject-matter jurisdiction. That is not an issue here, as the Legislature allowed this deadline to be

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[2] *See, e.g.*, *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005); *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003); *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003); *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

[3] *See Barker v. Wingo*, 407 U.S. 514, 529 (1972); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[4] *Gresham v. Harcourt*, 53 S.W. 1019, 1021 (Tex. 1899); *see, e.g.*, *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 668 (Tex. 1984); *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955); *Ne. Tex. Motor Lines v. Hodges*, 158 S.W.2d 487, 488 (Tex. 1942); *Patton v. Dallas Gas Co.*, 192 S.W. 1060, 1062 (Tex. 1917).

[5] *Tittizer*, 171 S.W.3d at 861; *Hodges*, 158 S.W.2d at 488.

[6] *See In re B.L.D.*, 113 S.W.3d 340, 351, 354 (Tex. 2003) (declining to review unpreserved complaints in parental-termination case).

waived.[7] By creating a second exception, the Court invites future error by suggesting parties can sandbag a trial court and then ask the court of appeals to create new exceptions for them too.

The Court states two reasons for this unprecedented step. First, it says we cannot apply the invited-error doctrine because the Department did not raise it in its appellate brief. But invited error is an issue of error preservation;[8] a party who invites error has not obtained an adverse ruling when they get it. Because the mother failed to preserve error regarding this deadline, she cannot prevail even if the Department had filed no brief at all.

Second, the Court says this is not a case of invited error because the mother complains only of denial of her motion to dismiss and not the granting of her earlier motions for a new trial and a resetting. Surely we cannot be so naïve. While her last motion requested dismissal, the only bases for that motion were her earlier motions asking the trial court to set aside its final order and give her a new trial after all deadlines had passed.

Twice in recent years we have rejected attempts to focus the invited-error rule narrowly on the contested motion and not on the surrounding context. In 1999 and 2008, we held the invited-error doctrine did not bar a party from complaining about a jury question it had requested, because in both instances the party had made clear throughout the case that it objected to submission but

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[7] *See Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (holding subject-matter jurisdiction cannot be waived).

[8] *See* TEX. R. APP. P. 33.1.; *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 777 (Tex. 2008) (addressing invited error under the heading "Preservation of Error").

nevertheless wanted to make sure the issue was properly drafted.[9] The Court now takes the opposite approach, reviewing only the last motion and disregarding the context in which it occurred.

Finally, the Court also ignores the context and consequences of its own ruling. It is hard to find anything in today's opinion about the best interest of these children; indeed, the Court resolutely refuses to consider what may happen to them, or whether this case will start over from scratch. While "it is not this Court's business" to make factual determinations,[10] it must be our business to consider the potential consequences of statutory construction, because the Legislature has instructed us to do so.[11]

The Court blames "the Legislature, not the judiciary" for whatever may happen to these children, but it is the Court not the Legislature that says the *exclusive* means of waiving complaints about these deadlines are the two in the statute. The Court says the possibility of starting the case over "is not before us,"[12] but we are ordering this case dismissed; is that with or without prejudice? And shouldn't a court think about these questions before deciding whether rigid application of these deadlines will actually ensure "prompt and final resolution of parental-rights termination cases"?[13]

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[9] *See Ulico*, 262 S.W.3d at 777; *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999).

[10] ___ S.W.3d at ___.

[11] *See* TEX. GOV'T CODE § 311.023(5).

[12] ___ S.W.3d at ___.

[13] *Id.* at ___.

Because a party cannot complain of a ruling it asked for, I would reverse the court of appeals' judgment and remand the case to the trial court for an immediate trial. Because the Court holds otherwise, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: January 9, 2009