Cause No. 02-02-00148-CV

IN THE SUPREME COURT FOR THE

STATE OF TEXAS

AUSTIN, TEXAS

IN THE MATTER OF J.P., A JUVENILE

APPEALED FROM THE SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH, TEXAS

ORIGINALLY APPEALED FROM CAUSE NUMBER J-00588

COUNTY COURT AT LAW, HOOD COUNTY, GRANBURY, TEXAS

HONORABLE RICHARD HATTOX, JUDGE *PRO TEM*, PRESIDING

Amicus Curiae Brief of Texas Appleseed; Joe K. Crews; Allene D. Evans; Ivy, Crews & Elliott, P.C.; Michael Lowenberg; Benigno (Trey) Martinez; Martinez, Barrera & Martinez, L.L.P.; Tracy McCormack; and Luis Wilmot In Support of Juvenile J.P.'s Petition for Review

---

Of counsel:
John M. Vernon
Kirkpatrick & Lockhart LLP
2828 North Harwood Street, Suite 1800
Dallas, Texas 75201

Allan Van Fleet
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case, in addition to those persons previously identified by the parties to the appeal. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Texas Appleseed

Law Firms

Ivy, Crews & Elliot, P.C.
Martinez, Barrera & Martinez, L.L.P.

Board Members of Texas Appleseed

Joe K. Crews
Allene D. Evans
Michael Lowenberg
Benigno (Trey) Martinez
Tracy McCormack
Allan Van Fleet
Luis Wilmot

TABLE OF CONTENTS

STATEMENT OF IDENTITY

Texas Appleseed is a non-profit corporation organized exclusively for charitable and educational purposes, including, but not limited to, providing an effective voice for the public at large and for individuals and groups that otherwise would be unable to obtain effective legal representation in Texas; furthering the public interest in the development and application of the law and public policy by courts, agencies, legislative bodies, and others in Texas; assisting in the advancement and improvement of the administration of justice; advancing the cause of social, economic, and political justice in Texas; and empowering the residents of Texas to become more effective advocates for their own rights in critical areas of concern. Texas Appleseed has assembled a Board of Directors that consists of distinguished legal practitioners from various sectors of the Texas Bar to pursue these goals.

INDEX OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

ARGUMENT

The Family Code is designed to protect the best interests of a child. Without the protections provided by the Family Code, children that run afoul of the law would otherwise be treated like any other adult criminal. Section 51.01(5) of the Family Code requires that "Title 3 be construed to achieve its purposes 'in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety' . . . ." *In the Matter of J.T.H.*, 779 S.W.2d 954, 960 (Tex. App.—Austin 1989, no writ). The overwhelming emphasis of the Family Code is on preserving the environment of the family because state supervision is not a good or adequate substitute for family.

A split between courts of appeals currently exists with regard to whether the mandatory findings required by Texas Family Code Section 54.04(i) are required for commitment of a juvenile to the Texas Youth Commission ("TYC") upon modification of a disposition. Section 54.04(i), which addresses the original disposition, provides:

> If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:
>
> (1) shall include in its order its determination that:
>
> (A) it is in the child's best interests to be placed outside the child's home;
>
> (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and
>
> (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation; and

> (2) may approve an administrative body to conduct permanency hearings pursuant to 42 U.S.C. Section 675 if required during the placement or commitment of the child.

TEX. FAM. CODE. ANN. § 54.04(i). At least three courts of appeals have held that the Section 54.04(i) findings are not required for commitment of a juvenile to TYC upon modification of a disposition. *See In the Matter of D.R.A.*, 47 S.W.3d 813, 814-815 (Tex. App.—Fort Worth 2001, no pet.); *In the Matter of M.A.L.*, 995 S.W.2d 322, 324 (Tex. App.—Waco 1999, no pet.); *In re H.G.*, 993 S.W.2d 211, 214 (Tex. App.—San Antonio 1999, no pet.). These courts based their holdings on Section 54.05(f), which provides that the court may commit a child to TYC "if the court after a hearing to modify disposition finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court." TEX. FAM. CODE ANN. § 54.05(f).

However, despite these holdings, the El Paso Court of Appeals' decision in the *In re L.R.* case is more in keeping with the rationale of Title 3 of the Family Code. 67 S.W.3d 322 (Tex. App.—El Paso 2001, no pet.). The court found that the approach taken by those courts allows commitment of a child to TYC for "even a relatively minor violation of a trial court's order" without any inquiry into the three findings required by Section 54.04(i). *Id.* at 336. Therefore, the court questioned the validity of the holdings in those cases because the approach taken by the courts "fails to effectuate Title 3's stated purpose of preserving the family environment and separating a child from his parents only when necessary for the child's welfare or in the interest of public safety." *Id.* (citing TEX. FAM. CODE ANN. § 51.01(5) (Vernon 1996).).

The court continued by applying well-established rules of statutory construction in interpreting the requirements for modifying a disposition in Section 54.05. Both Sections 54.04 and 54.05 require that the juvenile court specifically state in the order its reasons for the disposition or modifying the disposition. TEX. FAM. CODE ANN. §§ 54.04(f) and 54.05(i). Given these similar requirements in Sections 54.04 and 54.05, the court states:

> ***If the only question on appeal is that raised by Section 54.05(f)—whether the child violated a reasonable and lawful order of the court—and the child may not challenge the disposition on any other ground, then the Legislature's requirement in Section 54.05(i) that the trial court specifically state the reasons for disposition is rendered meaningless.*** Such a result is, of course, contrary to well established rules of statutory construction that a court must presume that the entire statute is intended to be effective. *See* TEX. GOV'T CODE ANN. § 311.021(2) (Vernon 1998); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).
>
> . . . .
>
> Instead, we find that a juvenile court which modifies disposition so as to place the child on probation outside of the child's home or to commit the child to the Texas Youth Commission must state sufficient reasons to justify such a decision. ***These reasons must include, but are not limited to, the findings stated in Section 54.04(i).*** On appeal, then, a juvenile may challenge both the juvenile court's finding that he violated a term or condition of probation and those reasons for disposition stated in the order pursuant to Sections 54.04(i) and 54.05(i).

67 S.W.3d at 336-37. (Emphasis added.)

The requirement that the court make the findings set out in 54.04(i) derives from federal law. 42 U.S.C. § 671 requires that judicial findings that removal of the child from the home is necessary be made in order for states to receive certain federal government funds for children who are placed outside their homes. *See* ROBERT O. DAWSON, TEXAS

JUVENILE LAW 179 (Texas Juvenile Probation Commission, 5th ed. 2000). Whether the child is removed from the child's home at the original disposition proceeding or upon a modification of disposition hearing, the same findings should be required. While Professor Robert O. Dawson, University of Texas School of Law, states that the findings required by 54.04(i) are not required to be made in a modification of disposition proceeding, he also notes that "the rationale for requiring them applies as strongly to modification as to original disposition . . . ." ROBERT O. DAWSON, TEXAS JUVENILE LAW 224 (Texas Juvenile Probation Commission, 5th ed. 2000).

Further, given that juvenile courts are vested with broad discretion in determining the proper disposition of children, whether in an original disposition proceeding or a modification of disposition hearing, juvenile courts should be required to make the findings required by 54.04(i) and federal law whenever a child is removed from the child's home--whether this occurs at the original disposition or a modification of disposition. Failure to require as much basically strips the juvenile of any basis upon which to make an appeal of the commitment decision.

In a concurring opinion to the *In re H.G., a Juvenile* case, Justice Tom Rickhoff states:

> If this were an original disposition with the mandatory determinations required by Sections 54.04(i), I could not find that commitment to the Texas Youth Commission met the "no evidence" standard. ***The reason we have section 54.04(i) is because commitment is our most significant resource; it should be reserved for serious offenders.***
>
> . . . .

> The majority has correctly set forth the standard of review as abuse of discretion. While we must trust our trial judges to reach these difficult revocation decisions, I would be more comfortable with a record that demonstrates a need for commitment than this record, which I believe merely shows a predictable failure of probation.

993 S.W.2d 211, 214-215 (Tex. App.—San Antonio 1999, no pet.). (Emphasis added.) Commitment of a juvenile to TYC is not only the State of Texas' most significant resource, but also the most severe action that can be taken against a child, short of certifying the child to stand trial as an adult within the criminal court system. Commitment is a last-ditch effort that should not be entered into lightly. By not requiring the juvenile court to make the Section 54.04(i) findings ***every time*** the court considers removing a child from the child's home, the rationale of preserving the family environment is lost.

Further, it is clear by the facts of this case that the trial court's commitment of J.P. to the Texas Youth Commission has failed. The trial court ruled as follows:

> So I'm going to find that all reasonable efforts have been made to place the child in a less secure environment and I'm also going to make the finding that all our local resources have been exhausted here, and I'm going to ask the child be sent to the Texas Youth Commission. ***Maybe there they can address and meet whatever his challenges are and can help return him back to society***, but in the meantime I'm afraid to take a step backward until I see some positive improvement in the child and without that positive improvement on the record, I'm not going to run the risk of him hurting anyone else or hurting himself, and I think I owe that to [J.P.] to do the best we can with what we have and not take too great a risk at this time.

Trial Court Record at 57. The court committed J.P. to TYC on April 22, 2002. Despite the court's aspirations that TYC would "address and meet whatever his challenges are,"

J.P. has made no progress whatsoever in the 21 months he has been at TYC. TYC has failed to provide the mental health services J.P. requires.

"[A]ppellate courts uphold the trial court's ruling on appeal absent an "abuse of discretion." That is to say, as long as the trial court's ruling was at least within the zone of reasonable disagreement, the appellate court will not intercede. The trial court's ruling is not, however, unreviewable." *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (en banc) (Opinion on Rehearing on Court's Own Motion On Appellant's Petition for Discretionary Review). J.P.'s stepfather, the only father J.P. had ever known, died within a week and a half of his placement in the Post-Adjudication Program at the Hood County Regional Detention Center. Given that fact, coupled with J.P.'s obvious mental health issues, it is no wonder that J.P. was not able to successfully complete the terms of his probation, thereby resulting in the modification of disposition hearing that sent him to TYC. The trial court gave little, if any, serious consideration to the impact the loss of J.P.'s father had on J.P., with the trial court simply stating in its ruling, "And I understand his grief from losing his father. I'd have a lot of grief if I lost mine." Trial Court Record at 56. Given the foregoing, the trial court should have paid more attention and given serious consideration to the impact of the loss of J.P.'s father on J.P.'s ability to successfully complete the terms of his probation. The trial court's failure to do so places its ruling outside the "zone of reasonable disagreement" and constitutes an abuse of discretion.

Further, the trial court's order does not contain the finding or "determination" required in Section 54.04(i)(1)(C) as a prerequisite to commitment to TYC. As stated in

the Brief for Appellant, "Since the finding is absent, the reviewing court must presume that the trial court concluded that the moving party failed to carry its evidentiary burden with regard to the particular issue addressed by the language of § 54.04(i)(3) [sic]." Brief for Appellant at 5, *In the Matter of J.P.*, (Tex. App.—Fort Worth 2002) (No. 02-02-00148-CV) (citing *Public Utility Comm'n of Texas v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 416 (Tex. 1995).). By failing to not only make the required findings for commitment to TYC, but also failing to state why it made no finding, the trial court acted outside of its authority under Section 54.05(i), which requires that the juvenile court state in its order the reasons for modifying the disposition. Therefore, the trial court's decision is outside the "zone of reasonable disagreement" because the trial court acted in an arbitrary and capricious manner and abused its discretion in committing J.P. to TYC. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (en banc) (Opinion on Rehearing on Court's Own Motion On Appellant's Petition for Discretionary Review).

The trial court should determine what is in the best interest of the child, not what is most convenient for the state. In a speech titled "Protecting the Best Interests of Our Children," Justice Harriet O'Neill recounts the rise of the juvenile justice system in the late 1800's. *See* Justice Harriet O'Neill, Protecting the Best Interests of Our Children, 2001 Judge Edward R. Finch Law Day Speech.

> It seemed that informal civil procedures protected the best interests of the child. Again I quote from the 1909 *Harvard Law Review* article describing the picture of a typical juvenile court proceeding as
>
> "one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise

> institutions of the State provided guidance and help to save the child from a downward career."

Id. However, the United States Supreme Court found that the idealistic goals of the juvenile justice system also created due process concerns for a child, who was not provided notice, a recorded hearing, an attorney or an opportunity to confront witnesses. Justice O'Neill notes,

> The Court found that these informal procedures often led to arbitrariness and that such procedures might themselves be an obstacle to the child's effective treatment – at least to the extent the child senses injustice at the hands of a seemingly all-powerful and challengeless exercise of authority by judges and probation officers.

Id. By being required to make the Section 54.04(i) findings, the trial court would have necessarily given the proper attention to the quality and level of support J.P. needed to successfully complete the terms of his probation.

In many cases, a child does not have a caring, loving family willing to help work through the child's problems and overcome the child's obstacles. However, for J.P. quite the opposite is true. J.P.'s grandfather offered a viable, family environment with the necessary resources to get J.P. the help he needed, as opposed to commitment to TYC, where J.P. had, at that time and has at this time, no hope of addressing and meeting the many challenges he faces.

PRAYER

WHEREFORE, Texas Appleseed prays that this Court reverse the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP
2828 North Harwood Street
Suite 1800
Dallas, TX 75201
(214) 969-4900 (Phone)
(214) 969-4949 (Fax)

By:_____

John M. Vernon
TSB #20549900
Kirstin D. Dietel
TSB #24032019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this ___ day of January, 2004, a true and correct copy of the above and foregoing *Amicus Curiae* Brief of Texas Appleseed has been forwarded by U.S. Mail postage prepaid, to:

Robert Kersey
Counsel for Appellant
123 E. Pearl, Suite 210
Granbury, Texas 76048

R. Kelton Conner
County Attorney
Hood County, Texas
130 North Houston Street
Granbury, Texas 76048

Amy Mayer
Mother of J.P.
6501 Dayla Court
Granbury, Texas 76049

_____
John M. Vernon