
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Grandparents could not substitute counsel for child after mother was removed and they were replaced as conservator for the child. [Greene v. Ellis](05-2-12)

On March 1, 2005, the U.S. District Court (S.D.Tex.) refused to substitute counsel hired by grandparents for counsel hired by mother, after mother had been removed as conservator for the child.

05-2-12. Greene v. Ellis, Civil Action H-05-520, 2005 U.S. Dist. Lexis 3750 (U.S.D.C. S.D.Tex. 3/1/05).

Facts: 1. *Introduction.* Fraternal grandparents have been named conservators of their grandchild. He has been charged with the murder of his father. They want to fire the lawyer representing the child. Their complaint with him is that the child's mother hired him. She is their former daughter-in-law, and the victim is their son. They have asked this court to compel the state judge to substitute counsel. This court will abstain. If it had not abstained, it would not have replaced the lawyer.

2. *Background.* The murder case is complicated by the overlapping and competing relationships among grandparents, parent, child, and parent-victim.

In late August 2004, Rick Lohstroh was shot dead. His ten-year-old son was charged with killing [*2] him. Deborah Geisler, the child's mother, hired Christopher Tritico to defend him. In September, District Judge Kent Ellis -- the judge of the juvenile court in Houston who will preside over the trial -- appointed Brian Fischer as the child's guardian for those proceedings. Fischer ratified Geisler's choice of Tritico, making him at that point the guardian's choice.

Geisler and Lohstroh were divorced; the family court in Galveston had appointed them joint managing conservators for the child. When Lohstroh was killed, Geisler became the surviving managing conservator. In early October, however, a court in Galveston removed her as the child's conservator because of reports that her influence had prompted the child to kill his father. That court made Jo Ann and Richard Greene -- the mother and stepfather of Rick Lohstroh, the victim -- temporary managing conservators of their grandchild.

The Greens want to replace Tritico with Anthony Griffin, whom they have retained, as the child's attorney. On the day they were appointed conservators, they asked Judge Ellis to substitute lawyers, and he denied their request. They then asked the court of appeals to compel the substitution. It refused. [*3] The Greens appealed to the Texas Supreme Court, and it also said no.

The Greens now ask this court for relief. They say that Judge Ellis's refusal to substitute Griffin for Tritico violates the child's right to counsel under the Constitution.

Parenthetically, this court knows that the delinquency proceeding is technically a civil action, but in this instance, its function and consequences are indistinguishable from an ordinary criminal prosecution. The protections attendant on a criminal prosecution are assumed to apply in full force.

Held: Court abstained.

Opinion: 3. *Guardian*. At first look, Judge Ellis saw an immediate need for a level of disinterestedness that he was not confident could come from the joint relatives of the victim and accused. This was not necessarily a specific conflict of interest. The relatives would have had a confusion of motives and cross currents of frustration, anger, disappointment, and bitterness that are -- not surprisingly -- part of this case. For the sake of his litigation, Judge Ellis decided that these complexities prevented an objective, child-centered evaluation by parent or grandparent. To furnish the necessary independent perspective, he authorized Fischer to [*4] exercise his judgment about the child's interests in the prosecution.

Judge Ellis's decision was confirmed in part by the family court when it decided to shift general authority for the child's decisions to the grandparents. Judge Ellis addressed the specific needs in the case before him, and the family court addressed the residual needs. These decisions do not conflict. Judges are obliged to appoint temporary guardians for litigation when the natural or court-appointed conservators have a conflict -- pecuniary or otherwise. Fischer is to be the disinterested evaluator and decisionmaker for the child in this prosecution. The Greenes, through the Galveston County district court, have the residual authority to assist the child in managing his life.

4. *Counsel*. The child will have counsel. The question is who may choose the particular lawyer. In principle, a court's appointing a guardian for a minor defendant who then hires a lawyer is no different than a court's appointing a lawyer for an indigent defendant.

Ordinarily, a defendant may choose his counsel. There may be, however, substantial qualifications. For example, the right is limited by something as simple as licensure [*5] in most cases and conflicts of interest in others. In the majority of criminal cases in this era, counsel are paid for by the people of the United States or Texas. The gratuitous waste of those resources is not part of the opportunity either to be assisted by counsel or to have counsel furnished.

Retention -- initial selection and payment -- of the lawyer by Geisler is not in itself a conflict. The potential for conflict was there, so Ellis interposed Fischer. Payment cannot be an abiding taint because alternative counsel would be retained and paid by someone other than the child himself, too. In this case, the alternative counsel would be selected and paid by the parents of the victim, and their potential conflict is equal to Geisler's.

Fischer's ratification of Geisler's choice of Tritico is not suspect. Nobody has suggested that Tritico is secretly acceding to demands, requests, or suggestions of Geisler that do not independently -- in his professional judgment -- make for sound advocacy in the interest of the child. They have only suggested that he is unreliable because he cashed her check and she chose him. Those decisions have been ratified by a legally trained substitute parent. [*6] Nothing about that process offends the United States Constitution's assurance of a fair trial generally or the assistance of counsel specifically.

The authority of Fischer to choose for the child and the authority of Judge Ellis to impose Fischer are consistent with the constitutional protections of counsel in this case and the general concepts embodied in the phrase "due process of law" in the United States Constitution or "law of the land" in the Texas Constitution.

The only question that could be before this court is simply whether this combination of state family-law arrangements and the state court's authority to manage litigation before it cripples the child's opportunity to defend himself. The Greenes' position is that Ellis's management of this litigation conflicts with that constitutional opportunity. The Greenes ask this court to constitutionalize one part of the family code and, in the process, completely denigrate trial-court management in general.

The Greenes also argue that it is unconstitutional for the court to interfere with the choice of retained counsel. The problem is the word "interfere." The right to assistance of a lawyer is firm but nonetheless limited. Guardians [*7] frequently advise courts that counsel retained by the parents are not doing a responsible job for the child. In those instances, the court fires the retained lawyer. This court has also been obliged to deny people their selection of counsel with some frequency because counsel has represented a co-defendant or witness in a parallel case. Conflicts with other clients -- or the defendant, as in this case -- is the most common reason for disallowing representation.

5. *Abstention.* The grandparents' request has been addressed by four competent courts: the Harris County district court, the Galveston County district court, the Fourteenth Court of Appeals, and the Supreme Court of Texas. The issues were presented to them, and they were denied. If those courts had thought that there had been violations of the United States Constitution, or even Texas procedural rules, there is no reason to believe that they would not have said something.

The issue for this child is not his constitutional right to have counsel or to choose counsel, but who, under Texas law, has the authority to choose for him. The state-court adjudications are not in conflict; the Galveston County district court and [*8] Harris County district court appear to agree. Moreover, Judge Ellis's decision was first. The Galveston court did not address the Greenes' conflict because it did not need to: Fischer had already eliminated it. Even if Ellis had not appointed Fischer before the family court's decision, the family court could have made the Greenes the decisionmaker for the child's life. Ellis then could have appointed Fischer in this case, as he might supercede the natural guardian. That result would have been no different.

Technically, the Greenes should have taken to United States Supreme Court their objection to the adverse decision of the Texas Supreme Court, rather than start over with a federal trial court.

This court will abstain because the harm resulting from error in this instance is not so irreparable, immediate, and substantial to require collateral intervention. The error, if there is one, will be addressed in the appeal from the ultimate decision by Judge Ellis about delinquency. There are three levels of appeal: the Court of Appeals in Texas, the Supreme Court of Texas, and the United States Supreme Court. Under these circumstances, sufficient safeguards exist for protecting the constitutional [*9] rights implicated in a trial of a child under these circumstances.

Conclusion: For these reasons, this court will abstain from intervening in the process.