

Case No: SC87548

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF BABY GIRL P.

E.P.,
Appellant,

vs.

A.M. AND L.M.
and
Adoptions of Babies and Children Inc.,
Respondents.

AMICUS BRIEF IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF), a nonprofit Latino civil rights organization, has as its primary objective the protection and promotion of the civil rights of Latinos living in the United States. Founded in 1968, MALDEF seeks to empower the Latino community to participate fully in American society through impact litigation, advocacy, research, community outreach, leadership development and education. The issues at the heart of this case – the deprivation of due process, the lack of procedural safeguards for persons with limited English proficiency, and the use of vague statutes that encroach on civil rights – are important civil rights issues for Latinos and MALDEF. MALDEF submits this brief to bring a civil rights perspective to help establish the context for this Court’s review of the central questions before it: whether the proper due process procedural safeguards were in place to allow a mother with limited English proficiency to withdraw her consent to adoption pursuant to Section 453.030.7 RSMo.

SUMMARY OF ARGUMENT

Appellant has shown ample evidence of her desire to withdraw her consent to the adoption of her child and but for the violation of her due process rights, the lack of procedural safeguards, and the vagueness of § 453.030.7 RSMo. she would have had custody of her child nearly two years ago. The facts of this case present a shocking glimpse into the life of a language minority in the state of Missouri. Rather than providing for safeguards that ensure for the protection of children, birth mothers, and adoptive parents, the adoption system created unnecessary confusion and frustration. Furthermore, the perils suffered by Appellant show the inherent danger in not respecting an individual's due process rights.

The lack of procedural safeguards and deprivation of due process are that much more glaring because Appellant lacked knowledge of the American legal system, was unaware of her rights under the Constitution, and is limited in English proficiency. These factors should be considered when assessing whether she voluntarily consented to the adoption of her child and these same factors should be used to assess her desire to withdraw her consent.

JURISDICTIONAL STATEMENT

Amicus curiae MALDEF hereby adopts the jurisdictional statement set forth in the Appellant's brief.

STATEMENT OF FACTS

Amicus curiae MALDEF hereby adopts the statement of facts set forth in the Appellant's brief.

ARGUMENT

I. PARENTS ARE ENTITLED TO DUE PROCESS PROTECTIONS

The U.S. Supreme Court has long recognized that state intervention in a parent-child relationship is subject to constitutional oversight. *See, Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court has held that a familial relationship is a liberty interest entitled to substantial due process. *Lehr v. Robertson*, 463 U.S. 248 (1983). While the concept of due process defies precise definition, it embodies and requires fundamental fairness. *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981). In *Lassiter*, the Supreme Court observed:

For all its consequences, “due process” has never been, and perhaps can never be, precisely defined. “[U]nlike some legal rules,” this Court has said, due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” [Citation omitted.] Rather, the phrase expresses the requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what “fundamental fairness” consists of in particular situation by first considering any relevant precedents and then by assessing

the several interests that are at stake . . . A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.

452 U.S. at 24-25; 27. In *Santosky v. Kramer*, the Court noted that, “Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.” 455 U.S. at 754. It is important to note that the “Due Process clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Procedural due process limits the ability of the government to deprive people of interests which constitute “liberty” or “property” interests within the meaning of the Due Process Clause. *Id.* Throughout the adoption process E.P. was deprived of her due process rights.

II. E.P. WAS DEPRIVED OF DUE PROCESS BY COUNSEL

Ineffective assistance of counsel can be a deprivation of the right to due process. *In the Interest of J.M.B.*, 939 S.W.2d 53, 56 (1997). “In Missouri, the test is whether the attorney was effective in providing his client with a meaningful hearing based on the record.” *Id.* Adoption of Babies and Children, Inc. (“ABC”) arranged for Kevin Kenney to act as E.P.’s attorney in the consent to adoption hearings. Unlike the attorney in *J.M.B.*, Mr. Kenney did actively participate in E.P.’s consent to adoption hearings. The troubling aspect of Mr. Kenney’s

representation was in the pre-hearing phase where it appears he did nothing to counsel his client regarding her ability to withdraw her consent before it was accepted by another judge. It also appears that he may have given her incorrect legal advice regarding the withdrawal; mainly, that the withdrawal was irrevocable absent being under the influence of drugs. (TR 252, 1.25- 253, 1.8). Furthermore, Mr. Kenney may have added to E.P.'s confusion regarding her withdrawal rights during the consent to adoption hearing:

“Q: Let me rephrase that. You understand that we’re here today to ask the judge to allow you to give your baby up for adoption?

INTERPRETER: Yes.

Q: And if he signs the order allowing you to give your baby up for adoption, you can’t change your mind later.

INTERPRETER: Yes.” (TR 12-13).

According to § 453.030.7 RSMo. E.P. still had a window of opportunity to withdraw her consent to adoption after the June 18, 2004 hearing, but before the Judgment was signed on June 22, 2004. These facts taint the record, and call into question Mr. Kenney’s effectiveness in representing the E.P.’s interest.

The record details a strained attorney-client relationship. On June 11, 2004 at approximately 9:30 a.m. a mere fifty-six (56) hours after giving birth to Baby P, E.P. found herself escorted to the offices of Mr. Kenney by Catherine Welch¹, from the ABC adoption agency. (Tr 121). It was at this initial meeting that E.P. signed

¹ Catherine Welch acted as birth parent coordinator for E.P. (TR 98-99).

the “Petition For Approval of Consent to Termination of Parental Rights and Consent to Adoption” (hereinafter “Petition”) that she was led to believe finalized the adoption of Baby P. She signed the Petition a mere 28 minutes after meeting with Mr. Kenney. (L.F. 3-4). The record indicates that her Consent was filed on June 11, 2004 at 10:39 a.m., approximately 40 minutes after signing the Petition. Thus, a minimal amount of time was spent fostering an attorney-client relationship and explaining E.P.’s legal rights.

The Petition provides other clues of the lack of effective assistance. Paragraph 1 states that E.P. is “a citizen and resident of Kansas City, Jackson County, Missouri.” Later, the record shows that E.P. is in fact not a citizen of the United States. Mr. Kenney failed to make adequate inquiries into E.P.’s citizenship status to effectively represent her interests. Whether his failure to make adequate inquiries into E.P.’s citizenship status stemmed from disinterest or haste it is clear evidence that Mr. Kenney was not effective in identifying the important issues his client may face in the withdrawal proceedings.

During the June 11th meeting, E.P. signed a “Consent to Termination of Parental Rights and Consent to Adoption.” (hereinafter “Consent”). The Consent was filed on June 11, 2004 at 10:42 and also provides insight into the attorney-client relationship between E.P. and Mr. Kenney. Paragraph 2 sub B states, “Because I believe it is in the best interest of the Child and his future welfare, I voluntarily and of my free own free will forever consent to any lawful adoption of the Child.” (emphasis in original). While it may appear to be a slight oversight to mistate the

sex of Baby P, it shows a hurried approach to the matter. Mr. Kenney was so intent in filing the Consent he failed to review it and possibly failed to review it with his client who would have noted the mistake.

E.P. signed the Consent at 9:58 a.m. The brevity of the meeting as indicated by the time documents were signed and filed calls into question how long Mr. Kenney spent with E.P. in explaining her rights and the significance of the proceedings she was about to undertake. Unlike Mr. Kenney's other clients E.P. required translation be provided for her which should have made the meeting last longer than a typical first meeting with a mother seeking to place her child up for adoption. Her lack of formal education should have necessitated more explanation which would have made for a longer meeting. It is hard to fathom how a thorough explanation of complex legal rights and ramifications along with a verbatim translation could have occurred in 40 minutes.

Further complicating the attorney-client relationship between E.P. and Mr. Kenney was ABC's undue influence in this initial meeting. The adoption agency had selected the lawyer and provided E.P. with transportation to his office. (TR 121). Enequina Garza Wilbers, the translator hired by ABC for the June 11th meeting and a witness the Circuit Court found credible, testified that Mr. Kenney introduced himself and stated that he was hired by the adoptive parents to be E.P.'s attorney. (TR 203, 1.13-17). Furthermore, Catherine Welch was present at the meeting between E.P. and Mr. Kenney for all but five to ten minutes of it. (TR 202, 1.4-17).

This is yet another disturbing impediment to the creation of an independent and effective attorney-client relationship.

The Consent also indicates that ABC played a weighty role between attorney and client. The Consent was executed in front of none other than Catherine Welch, the case worker from ABC. (L.F. 4). There was no one independent of ABC to ensure that E.P. willingly signed the Consent. When E.P. met with Mr. Kenney everyone was in some way connected to ABC.

Moreover, E.P. lacked the social capital because of her limited English proficiency, lack of education, and immigration status to demand better representation and Mr. Kenney did not attempt to remedy these deficiencies to effectively represent his client. Mr. Kenney could have better ensured that E.P. was making a free, voluntary and informed decision by having the Petition and Consent translated and provided to E.P. The translation of the documents should have been common sense. In “Avoiding the Pitfalls in Voluntary Termination of Parental Rights: A Guide to Practitioners” it states:

Frequently, a document signed by the parent is presented to the court as evidence of the parent’s desire to consent. This document should contain a statement regarding the parent’s ability to read, write and comprehend English. An inability to communicate in English would dictate the use of an interpreter in any court proceeding. In addition, **when a parent is not fluent in English, any document should be translated into the parent’s native language.** Both documents containing the parent’s native language and the

English translation should be presented to the court and made part of the record.

(Emphasis added). The documents Mr. Kenney filed are legally correct, and a properly translated Consent would have provided E.P. notice that she could have withdrawn her consent prior to the recommendations of the commissioner being accepted by a competent court.

III. E.P. WAS DEPRIVED OF DUE PROCESS BY ADOPTION AGENCY

Because E.P.'s relationship with Baby P is entitled to due process protection and further, since a parent has a recognized interest in avoiding an erroneous termination, Missouri procedure must provide reasonable assurance that a parent may avoid an erroneous termination. While due process protections apply only to state actions, Courts have found that the work of adoption agencies is so entwined with governmental action that Due Process protections should be afforded. *See, Tyler v. Children's Home Society of California*, 35 Cal.App.4th 511, 545 (1994) (citing *Adams v. Department of Motor Vehicles*, 11 Cal.3d 146, 152 (1991)). Citing *Scott v. Family Ministries* the California Court of Appeals in *Tyler* found that,

The [adoption] agencies are delegated the governmental case work function in the adoption process. The state delegates to them the process of investigation and reporting to the court that in nonagency adoptions must be performed by the [state]. The state delegates to the private licensed agencies

the state's power and obligation to select parents and bar all others from the right to adopt the particular child . . .

Id. The state of Missouri has delegated to ABC its powers in making decisions regarding adoptions. Thus, ABC should be held to the same Due Process requirements as the state of Missouri.

The deprivation of E.P.'s due process rights centers around ABC's failure to establish and maintain a framework that would allow a mother to exercise her right to withdraw consent. While an English speaking mother would have likely had more success in withdrawing consent, ABC was obligated to afford E.P., a mother with limited English proficiency, the opportunity to withdraw. In the July 30, 2004 Findings and Recommendations the Commissioner Allen found that the "agency elected to work with a non-English speaking birthmother though it had no Spanish speaking staff nor Spanish-speaking attorneys on contract or readily available." (L.F. 45). Commissioner Allen recognized that adoption agencies that contract with someone with limited English proficiency should be properly equipped to handle the special needs of this population.

Ms. Welch admitted during the hearing that she was E.P.'s primary contact at ABC during her pregnancy, provided her with transportation on various occasions, and had informed E.P. about what she believed were the laws of the state of Missouri. (TR 102-109). Ms. Welch testified that she did not speak Spanish and would not know whether the interpreters were conveying her exact words to E.P. (TR 101, 1.4 – 102, 1.2). This was the first time Ms. Welch worked with a limited

English proficiency client. (TR 102, ll.3-5) While ABC could have contracted someone to work with E.P. who spoke Spanish, ABC instead relied on interpreters to assist them in the adoption of Baby P. ABC never provided a Spanish-speaking contact person for E.P. Instead, they relied on various interpreters to assist Ms. Welch. In addition, ABC did not have interpreters on-call who they could have assist them at anytime.

Ms. Welch testified that E.P. contacted her on June 19, 2004 but because of the language barrier Ms. Welch did not understand why E.P. was calling her and was not sure that E.P. wanted her child returned to her. (TR 129, ll. 5-7). Ms. Welch acknowledged that she had reason to believe that E.P. wanted to withdraw her consent to adoption. (TR 132, ll. 11-15; TR 132, l.25 – 133,1.4). Yet, on June 19, 2004 within the period § 453.030.7 RSMo. proscribes that a natural parent may withdraw their consent to adoption Ms. Welch made no attempts to contact an interpreter to find out what exactly E.P. wanted. (TR 129, l.21 – 131,1.1). Ms. Welch did not attempt to help E.P. Ms. Welch failed to advise E.P. to contact her attorney despite the fact that she had reason to believe that E.P. no longer wanted to place the baby for adoption. Ms. Welch failed to contact Mr. Kenney to advise him that his client may need his professional advice. Ms. Welch instead contacted Susan Dunaway, her colleague at ABC who had been working with the couple attempting to adopt Baby P. (TR 131, ll. 5-9). In addition, on June 19th Ms. Welch also called Jennifer Agee, the director at ABC. (TR 133, ll.20-24).

Furthermore, Ms. Wilbers, who provided the translation at Mr. Kenney's office on June 11, 2004, testified that E.P. contacted her on June 21, 2004. While Ms. Wilbers attempted to draw a distinction between what E.P. told her when she called and withdrawal of consent in her testimony, she ultimately admitted that she believed E.P. had changed her mind and wanted the baby returned to her. (TR 230, ll. 13-24). After E.P. contact Ms. Wilbers on June 21, 2004 she contacted Mr. Kenney that same day to apprise him of her conversation with E.P. (TR 214, ll.16-25). During Ms. Wilbers' conversation with Mr. Kenney she made sure to tell him that E.P. was upset, but did not discuss whether E.P. had changed her mind. (TR 215, ll. 1-11). Mr. Kenney did not contact his client despite the fact that he knew she was upset. Moreover, had Mr. Kenney contacted his client on June 21, 2004 he could have filed a motion that would have allowed E.P. to withdraw her consent to adoption.

It is these failures that constitute a deprivation of due process. As noted previously, the Supreme Court has held that due process must be made available to birth parents due to their "liberty" or "property" interests in their children. The failure to establish and maintain policies for mothers of limited English proficiency denied E.P. all the process that she was constitutionally due. The focus of this inquiry should not be on E.P.'s efforts but on the lack of process once E.P. made it known she wanted to withdraw her consent. To limit the inquiry as to whether E.P. withdrew consent to whether she used the appropriate verbiage to withdraw defies

logic². The Appellate Court erred in finding that E.P.’s inability to communicate withdrawal of consent was legally equivalent to *not* withdrawing consent.

Summarily, ABC’s failure to have a framework in place to allow a limited English proficiency parent to orally withdraw consent to adoption is tantamount to the denial of due process.

IV. THE WITHDRAWAL STATUTE IS VAGUE

Ultimately, the source of this confusion is the statute itself. Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below.

A statute is impermissibly vague if the terms convey such an uncertain meaning or are so confusing that courts cannot discern with reasonable certainty what is intended. *In re C.L.P.*, 673 S.W.2d 18, 20 (Mo. Banc 1984). The language in § 453.030.7 RSMo. fails to provide certainty, “The written consent required in subsection 3 of this section may be withdrawn anytime until it has been reviewed and accepted by a judge.” A parent seeking to withdraw their consent is left no guidance as to how to effectively withdraw. As the record shows E.P.’s various attempts to withdraw her consent to adoption were unsuccessful. She painstakingly attempted to withdraw by calling the adoption agency, calling the lawyer the

² The cases cited by the Circuit Court are inapplicable to the case at bar.

adoption agency hired for her, and calling the interpreter she met at Mr. Kenney's office.

Had the statute been clear E.P could have taken the appropriate steps in the withdrawal. For instance, had the statute provided that written notice was required to the Court within three days, a parent could effectuate withdrawal without the need to contact counsel or the adoption agency. A bright line rule would serve the dual purposes of clarity and would allow any parent contemplating adoption the right to withdraw consent without having to encounter the potentially embarrassing situation of having to explain their decision to counsel or an adoption agency.

V. THE RISK THAT IMMIGRATION STATUS WAS TAKEN INTO ACCOUNT

In Prof. David Thronson's law review article "Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts" he concludes that, "The patterns that emerge from reviewing family court decisions indicate that the impact of immigration status in family court is not an irregular occurrence. Whether family courts are discriminating, manipulating, obfuscating or accommodating, immigration status influences, sometimes determinatively, the outcome of cases." *Id.* at 71-2.

While there is no indication that E.P.'s immigration status determined the outcome, the record contains eight instances where Mr. Waits and Mr. Krigel, the attorneys for Respondents, asked E.P. about her immigration status. *See, Tr at 287;*

296; 299; 306; 307; 341; 343 - 347; and 348. Thronson’s article is instructive, “Especially when fundamental rights such as rights arising from the parent-child relationship are at stake, courts need to consider skeptically the constitutionality of arguments asserting the relevance of immigration status.” *Id.*

More often than not, a party raising immigration issues that are not central to the proceedings, such as the case at bar, seeks no more than to intimidate the other party. Some Courts have “recognized the in terrorem effect of inquiring into a party’s immigration status when irrelevant to any material claim.” *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002). Moreover, “courts have noted that allowing parties to inquire about the immigration status of other parties, when not relevant, would present a ‘danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.’” *Id.*, (quoting *Liu v. Donna Karan Int’l, Inc.*, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002) (granting protective order against inquiry into immigration status)). The inherent dangers of inquiry into immigration status are presented in the record:

“Mr. Krigel: Your Honor, I think it’s the key here today [E.P.’s undocumented status]. One of the most salient issues, if not the most salient issue is what ends will this woman go to to [sic] lie to this Court, lie to immigration officials, lie to her employer to get the ends that she seeks. (TR 345).

There was simply no valid reason for inquiring into E.P.’s immigration status. It had no bearing on whether her oral withdrawal was effective or whether she could withdraw her consent based on “force of circumstances.” Repeatedly

asking E.P. questions regarding her immigration status was meant to intimidate and stoke her fears that immigration officials might apprehend her for exercising her rights.

CONCLUSION

E.P.'s was deprived of her due process rights because her counsel was ineffective; the adoption agency did not maintain a procedure for handling instances where a mother of limited English proficiency wanted to withdraw consent to adoption; and the withdrawal statute is vague. The deprivation of due process and the specter that the basis for Commissioner Allen's recommendation was E.P.'s immigration status should warrant reversal of the trial. There is simply no persuasive rationale to justify the egregious deprivation of due process rights considering the vital interest at stake. Therefore, E.P. should be allowed to withdraw her consent to the adoption of the child.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 18th of April, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Supreme Court Rule No. 84.06(b), and that the brief contains 4,342 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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