



## **Important State Court Child Welfare/Immigration-Related Opinions Summarized by Howard Davidson, Director, ABA Center on Children and the Law**

***In the Interest of E.N.C. et al.*** (Supreme Court of Texas, \_\_\_ S.W.3d \_\_\_, 2012 WL 4840710, October 12, 2012)

Child welfare agency took custody of children from mother, and obtained an order terminating parental rights of both custodial mother living in Texas and their father who resided in Mexico. Father was banned from re-entering U.S. because of an old probation violation related to a decades-earlier arrest for a sexual relationship he had with an underage girl, long before his children were born. However, he kept in contact with them and their caseworker by telephone and his father visited the children while in foster care. The agency neither sought support from father, nor offered him any service plan. Father appealed, and agreeing with the court of appeals that his deportation alone was insufficient to support a finding of child endangerment supporting termination, the Court remanded the case for retrial, holding his old offense, without more evidence, couldn't support TPR and that there was insufficient evidence that TPR would be in his children's best interests. If the agency were to now offer father a service plan, the Court said the fact he "resides in Mexico should not seriously hamper the Department's efforts" (citing the *Angelica L.* decision, below).

***In re Y.M.*** (California Court of Appeals, Fourth District, 144 Cal.Rptr.3d 54, 2012 WL 2866309, July 13, 2012)

Y.M., a minor child from Guatemala, was sexually abused, and allegedly trafficked, by her father in California. After an altercation with him, she was declared a dependent of the juvenile court. He was arrested and deported to Mexico, and upon her designation as a victim of sex trafficking, at the request of the county child welfare agency she was placed in the custody of HHS' Office of Refugee Resettlement. Although Y.M. was potentially eligible for T-Visa status, she also sought findings from the state dependency court to allow her to obtain SIJS status. However, her dependency case was dismissed, over her objection, and she appealed that decision.

The court of appeals found her "entitled to protections afforded by both systems" ("guided by concurrent jurisdiction principles") and, although there was a Guatemalan Protocol on sex trafficking and she was in ORR custody, those facts did not preempt state dependency law. The appellate court also pointed out that in the continuing dependency proceedings she would have the benefit of a court-appointed attorney. The order terminating dependency jurisdiction was reversed and her case remanded to provide for a new 6-month case review hearing and for prompt court consideration of her request for SIJS predicate findings.

The appellate court affirmed the dependency court's decision to deny mother's petition to return Y.M. to her custody in Guatemala as well as its decision to deny Y.M.'s request to be removed from federal custody (where she had been placed in a locked psychiatric facility due to severe behavioral and mental health problems) and placed in a county foster home. See also, *B.F. v.*

*Superior Court*, 207 Cal.App.4th 621 (2012) (probate court was authorized to make findings required for SIJ status).

***In re Doe*** (Supreme Court of Idaho, 281 P.3d 95, June 20, 2012)

Father, a Mexican citizen and resident, twice appealed a termination of his parental rights of a daughter born in the U.S., based upon grounds of abandonment. Father and mother had married in Idaho, but later he was arrested in Oregon attempting to open a bank account with a false social security number, and after being jailed he agreed to voluntarily leave the U.S. and returned to his parents' home in Mexico. Another child in the mother's home was found abused and neglected, and father's daughter was placed in agency custody. He informed caseworker that he wanted to be involved in his daughter's life, participated by phone in a case plan meeting at which reunification with her mother was originally the goal, and if that wasn't possible he said he wanted her to come live with him in Mexico. The girl had been in foster care for several years living with foster parents, one of whom *was a child welfare agency employee who wanted to adopt her.*

With Mexican Consulate support, father obtained a favorable home study in Mexico, but it was never presented to the court because, as the caseworker testified, the Department had already decided to terminate father's parental rights. Case was ordered reopened upon father's petition to the appellate court that he had not been granted proper notice of the TPR hearing, but at retrial the court again terminated father's parental rights due to abandonment. The appellate court again reversed the TPR, finding there was no contention father had abused or neglected his daughter, nor that he was unfit to have custody, and that there was no evidence he had been given the ability to establish a relationship with her since he was legally barred from entering the U.S. It noted that the "fact that a child may enjoy a higher standard of living in the United States than in the country where the child's parent resides is not a reason to terminate the parental rights of a foreign national." It again reversed the TPR and remanded the case with instructions "for the court to order the Department to take all reasonable steps to promptly place Daughter with Father in Mexico."

***In Re. Dependency of M.R.*** (Court of Appeals of Washington, Division One, 270 P.2d 607, February 16, 2012)

The appellate court reversed the trial court's order to remove M.R., from the Department of Social and Health Services' placement with her paternal grandparents, holding the trial court erred in concluding paternal grandparents' undocumented immigration status was sufficient cause to remove the child from their care. The court relied heavily on the decision of *In re Dependency of J.B.S.*, 863 P.2d 1344 (1993), which found that in determining placement of a child in a dependency proceeding, the court's paramount duty is to protect the best interests of the child. The J.B.S. court identified several factors that should be evaluated when determining placement, noting that while immigration status alone is not a dispositive factor, the court does have discretion to consider it as one factor to the extent that it may affect the child's permanency. Further, the court relied on *In re Welfare of Aschauer*, 611 P.2d 1245, which held that multiple changes in custody as a result of judicial proceedings are to be avoided so as not to harm the child.

The court found that M.R. had a strong emotional and psychological bond with her paternal grandparents, that the paternal grandparents fostered the child's relationship with other family members, and that they provided an appropriate cultural environment. The record showed that removing M.R. from her paternal grandparents' care would be a detriment to M.R. The paternal grandparents had been in the United States for 17-18 years without issue, which caused the court to believe that they were not in danger of deportation, and that M.R.'s placement with

them would remain stable. Therefore, the appellate court found that that the trial court erred in removing M.R. from the grandparents' home based solely on their immigration status.

***In Re. P.S.S.C. and P.D.S.C (Appeal of R.S.A., Father)***, (Superior Court of Pennsylvania, 32 A.3d 1281, Nov. 29, 2011)

Mother of children abandoned them in Pennsylvania and child welfare agency took custody. Spanish-speaking father was incarcerated in Puerto Rico, and agency obtained that information and sent him case plans and notices of court hearings, but only in English. No attempt was made to ascertain whether he understood English or had actually received the materials. Agency later changed case plan to adoption, and even though father had been released from prison it did nothing to facilitate father-child contact. Agency claimed father lacked interest/contact with his children, and his parental rights were terminated.

Upon father's appeal, court noted the agency's permanency plan didn't even list him, or any goals related to him, that inadequate resources to help him keep in contact with his children were provided during his incarceration, that his language barrier impeded communication with his children and caseworkers, and that his lack of counsel until four months before the termination hearing made it impossible for him to adequately understand and act upon his parental rights and responsibilities regarding the termination proceedings. TPR was reversed.

***In Re. R.W. and N.W.*** (Supreme Court of Vermont, 39 A.3d, 682, Nov 18, 2011).

This termination of parental rights case considered appeals pertaining to mother's and father's respective rights to their two daughters, seventeen-year-old R.W. and thirteen-year-old N.W. The parents and children were citizens of Sri Lanka and, although mother and the children had been residents of Vermont for a number of years, father continued to reside in Sri Lanka and never had been to Vermont. The Department for Children and Families (DCF) petitioned to terminate both mother's and father's parental rights. The trial court granted TPR as to mother, but concluded it lacked personal jurisdiction over father. Mother appealed the termination of her parental rights, arguing that the trial court applied the incorrect standard of proof with respect to changed circumstances, and the Supreme Court agreed. DCF filed a separate appeal as to the father, arguing that even though father lacked "minimum contacts" with Vermont, the court did have jurisdiction to adjudicate the status of his children, who were within the court's jurisdiction.

As to jurisdiction over the father, the Supreme Court agreed with DCF, based on a conclusion that TPR actions are included in "custody proceedings" under the Uniform Child Custody Jurisdiction and Enforcement Act. However, it found that father (who had requested the opportunity to participate in the proceedings) had not been given the opportunity to participate in the hearing, such as through telephone participation, interpreter services, and assignment of counsel, and that there were no facts relied upon at trial to terminate his parental rights. The Supreme Court reversed the court's decision as to both parents and remanded the cases for further trial court proceedings. The Court also noted DCF's failure to notify the Sri Lankan consulate of the TPR proceedings (pursuant to U.S. requirements under the Vienna Convention on Consular Relations), and during the pendency of the appeal the Court ordered that such notification take place. A lengthy concurring opinion chastises the agency and trial court for the "total lack of notice" to the father of the neglect proceedings involving his children, and making contact only at the point (over three years later) when the agency sought to terminate parental rights.

***In Re. Adoption of C.M.B.R.*** (Supreme Court of Missouri, 332 S.W.3d 793, January 25, 2011)

Mother, a citizen of Guatemala, entered the U.S. in 2006 when she was pregnant with the child. In 2007, ICE conducted a workplace raid in which she was arrested. Her son, then seven

months old, was left in the care of her brother and his family, but they placed child with mother's sister. The sister was referred to a local clergy couple for babysitting, and that relationship soon led to the couple being asked to care for the child. That couple knew a family interested in adopting the child, something the mother clearly objected to (and she was surprised to learn that the child was not being cared for by a member of her family). Up to the time of the adoption proceedings in 2008, mother remained incarcerated, out of state, on a federal identity theft charge. Mother's parental rights were terminated and the adoption approved on the grounds of abandonment, with the court concluding she had made no effort to locate her child. The Supreme Court agreed that there was clear and convincing evidence of abandonment, but that requirements of state law had not been followed (calling the case a "travesty in its egregious procedural errors, its long duration, and its impact"), and thus reversed the termination and ordered a new trial in which mother would have opportunity to present evidence (at that retrial, mother's parental rights were again terminated).

A joint concurring/dissenting opinion, in which several justices joined, said that the termination and adoption should be reversed without any new hearing, due to the "manifest injustice" resulting from the failure to give the mother notice, and the due process violation inherent in the conflict of mother being represented (at trial) by counsel hand-picked by the adoptive parents. These justices stated that the child should be returned to the mother's custody. Also, they found no evidence that mother had been given any opportunity to call her family to make arrangements for her son upon her arrest, that it was not unreasonable for her to assume her family would continue to care for him, and that she had no opportunity to contact her family to inquire about her son. It also noted evidence that she had asked for help in getting a passport for her son so he could go live with another sister of hers in Guatemala, that an application for a passport had been filed before the adoption petition was filed, and that the evidence was "entirely consistent with the mother's assertion that she wished to take her son home with her after release." Finally, another concurring/dissenting opinion noted the fault of the trial court, and counsel, to observe the Vienna Convention on Consular Relations, saying that consulates should be viewed as "sources of help in these situations."

***In Re. Interest of Angelica L. and Daniel L.*** (Supreme Court of Nebraska, 767 N.W.2d 74, June 26, 2009)

This case involved the balancing of the conflicting right of an undocumented immigrant mother, Maria L., to maintain custody of her children, with the State's duty to protect her children who came with her or were born in this country. It was initially alleged that Maria failed to take her child, Angelica L., for a follow up doctor's appointment despite a diagnosis of a respiratory virus and her worsening condition, which failure led to Maria's arrest and deportation. Maria's other child, Daniel L., and Angelica were placed in temporary emergency custody with the Nebraska Department of Health and Human Services (DHHS), and they were not allowed to reunite with Maria when she was eventually deported to Guatemala. Despite Maria's attempts to satisfy a DHHS case plan to regain custody, her parental rights were eventually terminated. The Court saw the children as caught in the clash of laws, culture, and parental rights that occur when their parents cross international boundaries. But, the Court ruled, ultimate responsibility initially lies with child protection workers and courts in the State's juvenile system. The Court concluded that the evidence was insufficient to terminate Maria's parental rights, as it was not shown by clear and convincing evidence that she was unfit or that termination was in her children's best interests. It noted that home studies indicated that Maria had established, in Guatemala, a stable living environment and could provide for her children's basic needs.

The Court noted that in this case, the task of the child protection workers, and consequently the courts, would have been much easier if the Guatemalan consulate had been included in these proceedings earlier, through prompt notice under the Vienna Convention on Consular Relations.

In a follow-up case, ***In re. Interest of Antonio O. and Gisela O.***, 784 N.W.2d 457, June 1, 2010, the Nebraska Court of Appeals affirmed a termination of parental rights, even though the Vienna Convention's notification requirement had not been followed, noting that it was not a jurisdictional prerequisite [citing 867 P.2d 706 (1994)].