

CERT SOUGHT OVER RIGHT TO COUNSEL IN PARENTAL-RIGHTS TERMINATION CASE

by MARY ALICE ROBBINS

An indigent woman unrepresented by counsel when a court terminated her parental rights in a suit filed by her child's foster parents is challenging the state law that allowed the court to ignore her request for an appointed attorney.

In a petition for writ of certiorari filed June 25 in the U.S. Supreme Court, Tracy Rhine asks whether Texas Family Code §107.013, which provides court-appointed counsel to indigent parents facing termination of their parental rights in state-initiated suits — but not in privately initiated actions — violates the Equal Protection Clause of the 14th Amendment.

Rhine also asks the high court in her cert petition in *In the Interest of J.C., a Child* whether the cumulative denial of multiple safeguards in her case violated her due-process rights. In connection with that issue, Rhine asks the court to consider what role traditional preservation-of-error rules may play, consistent with the due-process clause, in denying appellate review to an indigent parent who represented herself in a parental-termination suit.

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Plano solo Chad Baruch, Rhine's lead counsel, says the trial court terminated Rhine's rights without appointing her an attorney and then denied her a free transcript of the trial. Baruch says Fort Worth's 2nd Court of Appeals then denied review of Rhine's challenge to the sufficiency of the evidence supporting the termination because there was no transcript, and the appeals court denied review of Rhine's constitutional issues because, as a pro se litigant, she failed to preserve those issues for the appeal.

"Due process means was it fair," Baruch says. "You just can't stack this many things and look at what happened to this woman and say this is fair."

Rhine's cert petition alleges the following background and trial court proceedings: J.C. tested positive for drugs following her Aug. 10, 2004, birth, and Child Protective Services (CPS) of the Texas Department of Protective and Regulatory Services removed the female infant from her mother's custody. The department filed a suit in Dallas County to terminate Rhine's parental rights and then placed J.C. with foster parents, identified by the fictitious names of Mr. and Mrs. Smith. The department and Rhine settled the termination action with a "binding and irrevocable" agreement that permitted Rhine to regain custody of J.C. if she fulfilled certain conditions. The department and Rhine presented the settlement agreement to the trial court in

Dallas. The Smiths attempted to intervene in the suit, but the Dallas court struck their intervention because the Smiths filed it after the enforcement hearing. Prior to a ruling by the Dallas court, the department nonsuited its suit, and the Smiths filed their own termination suit on the same day in the 324th District Court in Tarrant County, seeking to adopt J.C. and terminate the parental rights of her parents. In a letter to the Tarrant County court, Rhine expressed her love for J.C. and requested the court to appoint her an attorney. The trial court refused to appoint counsel for Rhine and terminated her parental rights after a trial. Rhine filed a motion for new trial and again requested appointed counsel. The trial court denied the motion.

Rhine appealed to the 2nd Court in 2007. As noted in Rhine's cert petition, when Rhine requested appointment of appellate counsel, the 2nd Court remanded the case to the trial court for a hearing to determine whether she is indigent. Although the trial court found Rhine indigent, it held she was not entitled to a court-appointed attorney because a governmental entity had not filed the termination suit. According to the cert petition, the trial court entered an order waiving the costs of appeal but ordering Rhine to pay \$405 for the trial transcript.

Rhine represented herself pro se in the 2nd Court but was unable to afford the transcript. In its March 2008 opinion, the 2nd Court held that indigent parents have no statutory right to appointed counsel in a private suit to terminate their parental rights. Because the trial court terminated Rhine's parental rights in a private termination action, she had no statutory right to appointed counsel, according to the 2nd Court's opinion written by Justice Sue Walker. Justices Lee Ann Dauphinot and Terrie Livingston joined in the decision.

However, Walker wrote in the 2nd Court's opinion that the Smiths' filing of the private termination suit on the same day CPS nonsuited its termination was a "coordinated maneuver."

Dean Swanda, the Smiths' appellate attorney and managing partner of Swanda & Swanda in Arlington, says he does not know whether the Smiths coordinated with the state agency in filing their termination suit. Kelye Swanda, the Smiths' trial attorney, did not return a telephone call seeking comment before presstime July 9.

Patrick Crimmins, spokesman for the Texas Department of Family and Protective Services, declines comment. The Texas Legislature created the agency, effective as of Jan. 1, 2004, to replace the Department of Protective and Regulatory Services.

Rhine petitioned the Texas Supreme Court for review. Without explanation, the state Supreme Court denied Rhine's petition for review on Feb. 13 and denied Rhine's motion for rehearing April 3.

Baruch says he began representing Rhine pro bono in the state Supreme Court. Rhine now has four pro bono attorneys: Baruch; Ike Vanden Eykel, managing partner of Koons, Fuller, Vanden Eykel & Robertson in Dallas; Eliot Shavin, a Dallas solo; and Erwin Chemerinsky, dean of the University of California, Irvine School of Law.

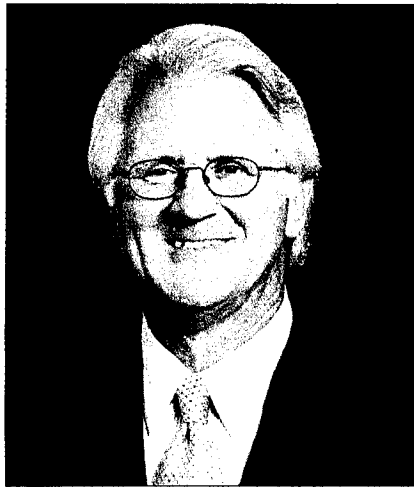
Vanden Eykel says Baruch asked if he would be interested in representing Rhine. After reading about the case, Vanden Eykel says he joined Rhine's legal team. The case "shakes you," he says.

"It's not right," Vanden Eykel says. "Termination is the civil version of the death penalty."

Vanden Eykel says the state not only takes children away from their parents, the parents have their parental rights terminated permanently. "It is clearly a violation of constitutional rights to go through the process without representation," he says.

But a decision by the nation's highest court almost three decades ago allows that to happen. In 1981's *Lassiter v. Department of Social Services*, the U.S. Supreme Court held that due process does not necessarily require court-appointed counsel for every indigent parent in a termination proceeding.

According to Rhine's petition, after *Lassiter*, Texas law guaranteed court-appointed attorneys to all indigent parents



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facing termination of their parental rights. But the Texas Legislature amended Family Code §107.013 in 2003 to guarantee appointed counsel only in state-initiated termination suits, Rhine noted in the petition.

Swanda says, "It's a tough spot for everybody involved, because the statute has backed us into a corner."

The trial court could have appointed an attorney for Rhine if the court chose to do so, Swanda says. Texas Family Code §107.021 gives a court the discretion to appoint counsel for a parent in a parental-termination suit that is not state-initiated.

Swanda says the trial court appointed an attorney to represent J.C. in the termination suit, as required by Family Code §107.011. The trial court also appointed an attorney to represent J.C.'s father, who could not be found, he says.

The Smiths had to pay for the attorney who represented the child and the attorney who represented the father, Swanda says. The 324th District Court's Jan. 4, 2007, order of termination awarded about \$6,700 in fees to those two attorneys.

According to Rhine's cert petition, her case presents the U.S. Supreme Court an opportunity to address state trial courts' apparent continuing refusal to follow the directive in *Lassiter* that courts evaluate the need for court-appointed counsel using the factors the high court established in 1976's *Mathews v. Eldridge*. To determine whether an individual has received due process under *Mathews*, a court must consider the importance of the individual liberty or property interest at stake, the risk of deprivation of that interest by the procedures used and the government's interest.

Jack Sampson, a University of Texas School of Law professor and family law scholar, says the Supreme Court might not grant certiorari in *J.C.* because the court decided in *Lassiter* that an indigent parent does not have a right to counsel in a termination proceeding. But if the Supreme Court grants certiorari, the case "could yield a very narrow decision," Sampson says.

Sampson says the Supreme Court could create an exception under *Lassiter* that would cover cases in which a party coordinated the filing of a private suit to terminate parental rights with the dismissal of a state-initiated termination suit. The court could require court-appointed attorneys for indigent parents in those situations, he says.

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