E-FILED
Court of Special Appeals
Gregory Hilton
5/20/2021 3:50 PM

MARYLAND COURT OF SPECIAL APPEALS

IN RE: D.T.-O	CSA-REG-1360-2020 Circuit Court Case No.: C-05-JV-19-000003

BRIEF OF *AMICUS CURIAE*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE JUDGMENT BELOW

Meghan E. Flinn, Esq.
Counsel of Record
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 2006
meghan.flinn@klgates.com
T: 202.778.9000
F: 202.778.9100

George C. Summerfield, Esq.*
Malory M. Pascarella, Esq.*
Of Counsel
*Motion for Special Admission Pending

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF THE NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. ... 1

II. STATEMENT OF THE CASE ... 2

III. QUESTIONS PRESENTED ... 2

IV. STATEMENT OF FACTS ... 2

V. ARGUMENT ... 3

A. A State Cannot Terminate Parental Rights Over Immigration Status ... 3

B. The State's Failure to Provide Appellant Consistent Access to Qualified Interpreters and Translation Services Violated Her Due Process Rights. ... 9

CONCLUSION ... 11

TABLE OF AUTHORITIES

Page(s)

Cases

In re Adoption of Jason K.,
41 Misc.3d 885 (Family Ct. Queens Co., NY 2013) 7

Arizona v. United States,
567 U.S. 387 (2012)..4

Augustin v. Sava,
735 F.2d 32 (2d Cir. 1984) 9

Chamber of Commerce of United States of America v. Whiting,
563 U.S. 582 (2011)..4

De Canas v. Bica,
424 U.S. 351 (1976)..4

In re E.N.C.,
384 S.W.3d 796 (Tex. 2012) 8

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992)..4

Goldberg v. Kelly,
397 U.S. 254 (1970)..10

Graham v. Richardson,
403 U.S. 365 (1971)..7

In re Interest of Angelica L.,
277 Neb. 984 (2009) 8

Meyer v. Nebraska,
262 U.S. 390 (1923)..5

Pierce v. Society of Sisters,
268 U.S. 510 (1925)..5

Prince v. Massachusetts,
321 U.S. 158 (1944)..5

Santosky v. Kramer,
455 U.S. 745 (1982)....................5

Takahashi v. Fish & Game Commission,
334 U.S. 410 (1948)....................7

Tejeda-Mata v. INS,
626 F.2d 721 (9th Cir. 1980)....................9

Troxel v. Granville,
530 U.S. 57 (2000)....................5

Truax v. Raich,
239 U.S. 33 (1915)....................7

Villas at Parkside Partners v. City of Farmers Branch, Tex.
726 F.3d 524 (5th Cir. 2013)....................6

Yick Wo v. Hopkins,
118 U.S. 356 (1886)....................10

Statutes

8 U.S.C. § 1101 *et seq.*....................4

Immigration and Nationality Act (INA), 66 Stat. 163....................4

Other Authorities

67 Fed. Reg. 41,455, at 41,4626 (June 18, 2002)....................9

MD Rule 1-333....................9

MD Rule 8-511....................1

I. IDENTITY AND INTEREST OF THE NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC.

The National Immigrant Women's Advocacy Project, Inc. ("NIWAP")[1] is a non-profit advocacy organization that develops, reforms, and promotes the implementation and use of laws and policies that improve rights, services, and assistance to immigrant women and children who are often victims of crimes and human-rights violations. NIWAP and its Director Leslye E. Orloff have published legal and social-science research articles on protecting immigrants' parental rights.

NIWAP also offers technical assistance and training to assist a wide range of professionals at the federal, state, and local levels whose work affects immigrant crime victims. As an organization that advocates for immigrant women and children, NIWAP understands how the lower court's opinion harms immigrant parents who are undocumented, detained, and/or deported.

NIWAP files this brief under MD Rule 8-511 concurrently with a motion for leave under MD Rule 8-511(a)(3) because Appellees' counsel does not consent to the filing.

[1] Schweitzer & Scherr, LLC and K&L Gates LLP represent NIWAP pro bono in furtherance of their interest in providing pro bono legal representation to individuals and organizations that cannot afford attorneys.

II. STATEMENT OF THE CASE

NIWAP hereby adopts the Statement of the Case in the Brief of the Appellant mother.

III. QUESTIONS PRESENTED

First, can a state agency rely upon a parent's immigration status as a factor when electing to terminate parental rights despite clear federal preemption in the field of immigration law?

Second, is the failure to provide a Limited English Proficient ("LEP") party consistent access to qualified interpreters and translation services violative of due process rights?

IV. STATEMENT OF FACTS

NIWAP hereby adopts the Statement of the Facts in the Brief of the Appellant mother to the extent factual elements are required. [2]

[2] As NIWAP had no access to the record itself given the confidential nature thereof, it relies herein upon a synopsis provided to it by Appellant mother's counsel. Given the issues addressed by NIWAP as *amicus*, it was unnecessary for NIWAP to have a more detailed understanding of the factual record.

V. ARGUMENT

A. A State Cannot Terminate Parental Rights Over Immigration Status

This appeal poses a single question—can a state agency use a parent's immigration status as a factor in a decision to terminate parental rights despite clear federal preemption in the field of immigration law? Lest states use such termination power to create their own *de facto* local immigration policy, the answer must be "no." As a result, the decision below to terminate Appellant's parental rights should be vacated on appeal.

The facts below are straightforward—a Maryland county Department of Social Services ("DSS") originally assumed custody of appellant's natural minor child through the Children in Need of Assistance ("CINA") process. Appellant, a Guatemalan national, has resided in the United States as an undocumented immigrant. At one point during the process, DSS considered placement of the minor child with an uncle in Pennsylvania, also an undocumented immigrant, but the corresponding agency in Pennsylvania would not conduct the requisite home study for the uncle mandated by the Interstate Compact for the Placement of Children ("ICPC"), given his undocumented immigration status. Otherwise, during the CINA process, the mother was inconsistently provided translation services and or copies of documents in Spanish, and certain hearings were held without the mother's participation. The result of the CINA process was that DSS ultimately determined

to seek termination of the mother's parental rights, placing the minor child for adoption with a non-relative.

The foundation of U.S. statutory law on immigration and naturalization is the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, which sets out the "'terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 587 (2011). Federal preemption of a state law may be express or implied. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 89 (1992). In the case of immigration, the Supreme Court has ruled that the power to regulate in that field "is ***unquestionably*** exclusively a federal power." *De Canas v. Bica,* 424 U.S. 351, 354 (1976) (emphasis added). Therefore, any state law that regulates immigration is "constitutionally proscribed." *Id.* at 356.

Here, the State of Maryland relied at least in part on the mother's undocumented immigration status to terminate her parental rights. While not an action designed to classify the mother's immigration status, it does impose the unique, and uniquely harsh, penalty of parental rights termination on the mother deriving from that status. Obviously, there is no parental right termination provision in federal immigration law. By analogy, the Supreme Court has held that it is not a federal crime for an immigrant to work without authorization, and state laws

criminalizing such conduct are preempted. *See, e.g., Arizona v. United States*, 567 U.S. 387, 403–07 (2012).

In other words, states are not free to create their own unique penalties for violations of federal immigration law. Yet, that is precisely what occurred here when the Maryland court used the mother's undocumented immigration status as a factor in terminating her parental rights in her minor child. There can be no question that permanently taking a child from a parent is a penalty the severity of which is virtually unsurpassed. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding that it is "cardinal . . . that the custody, care and nurture of the child resides first in the parents").

It would be counterintuitive if federal preemption precludes a state from criminalizing the employment of an undocumented immigrant (and the likely minor criminal sanctions attendant thereto), while at the same time allowing a state to deprive a parent of her rights in a child because of her undocumented immigration status.

More generally, allowing a state to terminate parental rights over immigration status is tantamount to giving that state the power to fashion its own immigration policy. By enacting summary and draconian procedures for, *e.g.,* terminating

parental rights based upon immigration status, a state could effectively disincentivize all immigration to that state, irrespective of any federal provision governing such immigration. For instance, in *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, the Fifth Circuit recognized a local alien ordinance as regulation of immigration in disguise when considering whether a Dallas suburb could use a scheme of "occupancy licenses" which criminalized undocumented immigrants living in rental housing within city limits. 726 F.3d 524 (5th Cir. 2013). Both the district court and the *en banc* Fifth Circuit held that the ordinance was preempted. *Id.* The Fifth Circuit reasoned:

> By setting forth *criminal offenses that discourage illegal immigration or otherwise reinforce federal immigration law, and by providing for state judicial review of a non-citizen's lawful or unlawful presence, the Ordinance . . . disrupts the federal immigration framework*, . . . by allowing state officers to hold aliens in custody for possible unlawful presence without federal direction and supervision.

Id. at 528 (emphasis added) (internal quotations and citations omitted).

Likewise, in this case, there is empirical evidence of how such a policy might take shape. As noted above, hearings were held without the mother's presence, and, even when she was present, she did not have consistent access to qualified Spanish language interpreters and qualified translation services for documents, including safety plans and reunification plans, reflecting the realization that she is a non-English speaker who is limited English proficient. Any such infirmities may indeed have been unintentional, but they provide a glimpse into the mechanisms a state

could put in place under the guise of child services to intimidate would-be immigrants.[3]

The question of federal preemption in matters of immigration status where parental rights are at issue appears to be one of first impression in Maryland. One jurisdiction that did address this issue noted that "state adoption statutes cannot be utilized in derogation of the Immigration and Nationality Act of the United States." *In re Adoption of Jason K.*, 41 Misc.3d 885, 891 (Family Ct. Queens Co., NY 2013). In that case, a U.S. citizen attempted to adopt a student in the United States on an F-1 visa in what the court characterized as "an inartfully veiled attempt to utilize this State's adoption statute to circumvent the immigration laws of the United States." *Id.* at 890. The converse of that principle is that federal immigration law should not be used to pervert state adoption laws, such as clearly happened in this case.

---

[3]The United States Supreme Court has repeatedly construed the exercise of state police power over non-citizens as an impermissible usurpation of federal immigration power, even where the statutes do not appear to directly regulate immigration. *See Truax v. Raich*, 239 U.S. 33, 42 (1915) (striking down a law that required employers to employ not less than eighty percent native-born citizens since "to deny to aliens the opportunity of earning a livelihood . . . would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420-21 (1948) (rejecting a ban on residents who were ineligible for citizenship from commercial fishing in California's coastal waters, emphasizing that law prohibited residents "from making a living by fishing."); *Graham v. Richardson*, 403 U.S. 365, 378 (1971) ("State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in area constitutionally entrusted to the Federal Government.").

In apparent contrast, *In re Interest of Angelica L.*, the court addressed the issue of "whether State courts have jurisdiction over child custody disputes when a parent involuntarily faces deportation." *See, e.g., In re Interest of Angelica L.*, 277 Neb. 984, 1002 (2009). NIWAP, however, does not contend that a state's jurisdiction over child custody matters is preempted in cases where a parent's immigration status is undocumented. Rather, NIWAP contends that federal preemption precludes a state from taking into account that immigration status in resolving a custody issue. And, while the court in *Angelica* ultimately did consider immigration status as part of its child custody determination, it held that the mere threat of deportation of a parent was not sufficient for the state to terminate parental rights. *Id.* at 1009. *See also In re E.N.C.,* 384 S.W.3d 796, 805 (Tex. 2012) (finding that the threat of deportation was insufficient to establish a child's endangerment for custody purposes). Thus, the decision in *Angelica* was not inconsistent with NIWAP's position that federal preemption in the field of immigration precludes determining custody issues based upon immigration status.

In short, the termination of Appellant's parental rights by DSS which relied upon Appellant's undocumented immigration status was an improper incursion into federal jurisdiction over immigration law. Similarly, the decision to terminate parental rights based on factors that stem from a parent's undocumented immigration status—including not having a driver's license, not having legal work authorization,

or incorrect assumptions that being undocumented necessarily means that a parent will be deported—violate federal preemption. NIWAP takes no positon regarding whether the action by DSS are consistent with Maryland law, nor does it need to for the issue of preemption.

B. The State's Failure to Provide Appellant Consistent Access to Qualified Interpreters and Translation Services Violated Her Due Process Rights.

While there is no specific constitutional right to an interpreter in a civil case, courts have recognized that interpreters are necessary to ensure meaningful participation. *See, e.g., Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (holding that due process requires an interpreter in an asylum case); *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980) (holding that due process requires an interpreter in a deportation proceeding). Maryland law also provides for the hiring of court interpreters and appointment of interpreters for deaf or non-English speakers. *See* MD Rule 1-333. Similarly, DOJ has stated that the obligation to provide meaningful access requires that "every effort should be taken to ensure competent interpretation for LEP individuals during *all* hearings, trials, and motions during which the LEP individual must and/or may be present," 67 Fed. Reg. 41,455, at 41,4626 (June 18, 2002) (emphasis added), including administrative proceedings. *Id.* at 41,459, n.5.

The failure to provide adequate interpretation and translation services here deprived Appellant of fundamental due process. The U.S. Supreme Court has held

that noncitizens within the United States, regardless of their immigration status are entitled to due process. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens"). The due process requirement of an "opportunity to be heard" which must be "tailored to the capacities and circumstances of those who are to be heard" demands, at minimum, the ability of a party to understand and communicate in their own case. *See Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). It is readily apparent from the record that during the CINA process, Appellant had no access or limited access to qualified interpreters and translation services on numerous occasions throughout the CINA process, including when reviewing important orders and documents affecting her rights. Without suitable language access to qualified interpreters and translation services, any protections contained within the CINA process were rendered meaningless for Appellant. Therefore, excluding Appellant from these services as a non-English speaker was improper and violated her due process rights.

CONCLUSION

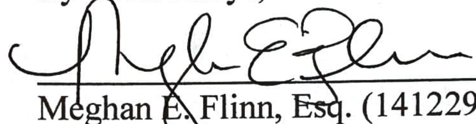
Federal immigration law preempts a state agency from availing itself of a parent's immigration status to terminate parental rights. The court's decision to terminate Appellant's parental rights, relying in part on the parent's immigration status was erroneous, violates Appellant's due process rights, and could have dangerous, far-reaching and unintended consequences. The Court should vacate the lower court's decision to terminate Appellant's parental rights.

Dated: May 20, 2021

Respectfully submitted,

NIWAP, Inc., *Amicus Curiae*

By its attorneys,



Meghan E. Flinn, Esq. (1412290010)
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006
meghan.flinn@klgates.com
T: 202-778-9000
F: 202-778-9100

Of counsel:
George C. Summerfield, Esq.*
K&L Gates LLP
70 West Madison Street
Suite 3300
Chicago, Illinois 60602
george.summerfield@klgates.com
T: 312-372-1121

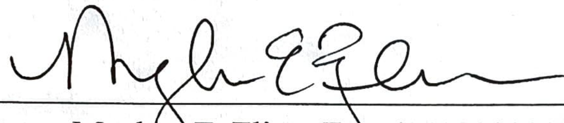
Malory M. Pascarella, Esq.*
K&L Gates LLP
One Newark Center, 11th Floor
Newark, NJ 07102
Malory.Pascarella@klgates.com
T: 973-848-4000

* *Motion for Special Admission Pending*

CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112

1. This brief contains 2,392 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements state in Rule 8-112.



Meghan E. Flinn, Esq. (1412290010)

CERTIFICATE OF SERVICE

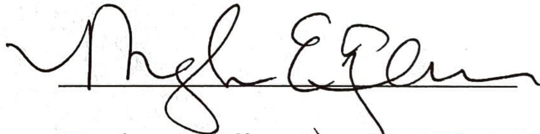
I hereby certify that this **Brief of Amicus Curiae** was filed electronically with the Maryland Court of Special Appeals on the 20th day of May, 2021, which sent electronic notification of filing in accordance with the Master Service List, and also mailed two hard copies to counsel for both parties at the following addresses. This document does not contain confidential or restricted information as defined by Maryland Rule 20-101(r).

Attorneys for Appellant:
Scott M. Swafford, Esq.
Assigned Public Defender
Swafford Law, LLC
41 State Circle
Annapolis, MD 21401
Tel: (202) 670-8677
Email: scott@theswaffords.com

Karl-Henri Gauvin, Esq.
1120 North Charles Street, Suite 410
Baltimore, Maryland 21201

Attorneys for Appellees:
Janet Hartge, Esq.
Assistant Attorney General
Office of the Attorney General
311 West Saratoga Street, Suite 1015
Baltimore, Maryland 21201
Tel: (410) 767-7577
Email: janet.hartge@maryland.gov

Nina Crist, Esq.
Law Office of Nina M. Crist, LLC
111 East Dover Street
Easton, Maryland 21601



Meghan E. Flinn, Esq. (1412290010)