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# IN RE S.A.W.: THE ULTIMATE PROTECTION OF CHILDREN'S WELFARE

## I. INTRODUCTION

The United States Supreme Court and the Oklahoma Supreme Court have both recognized that the relationship between parents and their children is a fundamental, constitutionally protected right.<sup>1</sup> As such, parental rights may be terminated only to promote a compelling state interest.<sup>2</sup> In Oklahoma, this means that parental rights may be terminated only to protect the child from harm or to serve the best interests of the child.<sup>3</sup>

The Oklahoma Supreme Court requires certain procedural safeguards during termination proceedings.<sup>4</sup> First, parents are entitled to appointed counsel if they are indigent.<sup>5</sup> The trial court is required to advise parents of this right.<sup>6</sup> Second, children have the right to independent counsel, free of charge, during termination proceedings.<sup>7</sup> Prior to *In re S.A.W.*,<sup>8</sup> this right of the child was applicable only to state-initiated proceedings. However, *S.A.W.* expanded the child's right to separate counsel to include all parental rights termination proceedings, whether privately or state-initiated.

The expansion of the child's rights in *S.A.W.* allows all parties to argue their positions in the termination proceedings so that the trial court will be able to determine what is truly in the best interests of the child. In addition, the expansion of the right of the child to independent counsel will lessen the chance of termination of parental rights when it is not in the child's best interests.

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1. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *In re Chad S.*, 580 P.2d 983, 985 (Okla. 1978).

2. *Chad S.*, 580 P.2d at 985.

3. D. Marianne Brower Blair, *Parent-Initiated Termination of Parental Rights: The Ultimate Weapon in Matrimonial Warfare*, 24 TULSA L.J. 299, 321 (1989).

4. *Chad S.*, 580 P.2d at 985.

5. *Id.*

6. *Id.* at 986.

7. *Id.* at 985.

8. *In re S.A.W.*, 856 P.2d 286 (Okla. 1993).

II. STATEMENT OF *IN RE S.A.W.*A. *Facts*

S.A.W. was born on December 22, 1985, and is the daughter of the appellants, Eric Winbigler and Deborah McCallum.<sup>9</sup> Since March 4, 1988, S.A.W. has lived continuously with the appellee, Joan Torres, and her husband, Juan Torres, Jr.<sup>10</sup> On March 21, 1988, Torres was given letters of guardianship of S.A.W., but within three months of those letters, Winbigler and McCallum moved to terminate the guardianship.<sup>11</sup> The motion to terminate was denied, and the Court of Appeals affirmed.<sup>12</sup>

On November 29, 1989, Torres filed a petition to terminate the parental rights of the appellants, and to declare S.A.W. eligible for adoption without their consent.<sup>13</sup> The reason for the termination was the parents' alleged failure to provide support for the twelve months preceding the filing of the petition.<sup>14</sup> In particular, the petition to terminate alleged the failure of Winbigler and McCallum to support S.A.W. within their means and earning capacity.<sup>15</sup>

A hearing occurred on January 8, 1990. The parents appeared without an attorney.<sup>16</sup> They informed the court that they were indigent, and the court appointed a public defender to represent them.<sup>17</sup> The hearing was reset to January 10, 1990.<sup>18</sup> The testimony at this hearing was unclear as to the financial condition of Winbigler and McCallum.<sup>19</sup>

Winbigler and McCallum testified that they bought Christmas and birthday gifts for S.A.W. in 1988 and 1989.<sup>20</sup> Deborah McCallum made phone calls to Torres and spoke with her daughter. She also sent eight letters.<sup>21</sup> However, Torres testified that she did not read the

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9. *In re S.A.W.*, 856 P.2d 286, 287 (Okla. 1993). The appellants were not married. *Id.*

10. *Id.* Joan Torres is S.A.W.'s aunt. *Id.*

11. *Id.*

12. *Id.*

13. *S.A.W.*, 856 P.2d at 287.

14. *Id.*

15. *Id.* The guardianship court had not ordered payment of child support by Winbigler and McCallum. *Id.*

16. *Id.* at 288.

17. *S.A.W.*, 856 P.2d at 288.

18. *Id.*

19. *Id.* The testimony showed that they worked for their landlord for a portion of 1988 in exchange for rent and food. There was no evidence of steady income from March 1988 to November 1989. Both Winbigler and McCallum testified that they were employed in the towing business in 1990, although their incomes were subject to expenses for their tow trucks. *Id.*

20. *Id.*

21. *S.A.W.*, 856 P.2d at 288.

letters to S.A.W., nor did she tell her about them.<sup>22</sup> Torres further testified that S.A.W. referred to Mrs. Torres as her mother and to Mr. Torres as her father.<sup>23</sup>

After hearing the evidence, the trial judge ordered termination of the parental rights of Winbigler and McCallum, and ordered an adoption proceeding without their consent.<sup>24</sup> The judge determined that it would not be in the best interests of S.A.W. to return her to parents whom she does not know.<sup>25</sup> The Court of Appeals affirmed this judgment.<sup>26</sup>

### B. *Issue*

The Supreme Court of Oklahoma granted appellants' petition for certiorari to determine whether independent counsel should have been appointed for the minor child.<sup>27</sup> Winbigler and McCallum argued that independent counsel should have been appointed to protect the interests of S.A.W. in the termination proceedings.<sup>28</sup> They observed that a termination of parental rights has profound implications upon the rights of the child, as well as upon those of the parents.<sup>29</sup> For instance, S.A.W. has a younger brother with whom she could lose contact.<sup>30</sup> In the Torres' answer, they contended that the child's interests were protected by the Torres, since the action to terminate parental rights for willful failure to support is actually brought for the benefit of the child.<sup>31</sup> The Torres asserted that the legal contest is not between the guardian and the parents, but between the child and the non-supporting parents.<sup>32</sup>

## III. OKLAHOMA LAW PRIOR TO *IN RE S.A.W.*

### A. *Parents' Right to Counsel*

In *In re Chad S.*,<sup>33</sup> the court held that during a termination proceeding a parent has a constitutional right to assistance of counsel,

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22. *Id.*

23. *Id.*

24. *Id.*

25. *S.A.W.*, 856 P.2d at 288.

26. *Id.* at 287.

27. *Id.*

28. *Id.* at 288.

29. *S.A.W.*, 856 P.2d at 288.

30. *Id.*

31. *Id.*

32. *Id.*

33. 580 P.2d 983 (Okla. 1978).

and that counsel must be appointed for indigent parents—unless they knowingly and intelligently waive that right.<sup>34</sup> With this holding, the court reversed the trial court's decision to terminate a mother's parental rights. It did so on the grounds that the mother had no counsel, and was not advised that the court would appoint counsel if she was indigent.<sup>35</sup> The court recognized that Oklahoma statutory authority requires the appointment of counsel to indigent parties in a termination proceeding.<sup>36</sup> However, the court noted that it had never previously required the trial court, as a matter of constitutional due process, to advise parents of their right to court-appointed counsel.<sup>37</sup>

Since the parent-child relationship is a fundamental, constitutionally-protected right, the court found "that the full panoply of procedural safeguards must be applied to child deprivation hearings."<sup>38</sup> Therefore, the court in *Chad S.* held that parents must be advised of their right to counsel.<sup>39</sup> In reaching this conclusion, the court was persuaded by the rationale in *Davis v. Page*.<sup>40</sup> The district court in *Davis* equated child dependency hearings involving the state with criminal trials, stating:

While a dependency proceeding is not a criminal proceeding, it is substantially similar. The state is the initiating party, the proceeding is formal, and the potential loss is quite substantial. Since the state is threatening the deprivation of a fundamental interest, it

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34. *Id.* at 985-86; see also *In re S.A.W.*, 856 P.2d 286, 288-89 (Okla. 1993).

35. *Chad S.*, 580 P.2d at 983.

36. *Id.* at 985. The court cited OKLA. STAT. tit. 10, §§ 24(a), 1109(b) (1971). Section 24 (a) provides:

When it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or guardian, provided that in all counties having Public Defenders, said Public Defenders shall assume the duties of representation in proceedings such as above.

OKLA. STAT. tit. 10, § 24(a) (1971).

Section 1109(b) states:

If the child or his parents, guardian, or other legal custodian requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court if the child is being proceeded against as a delinquent child, or a child in need of supervision, or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the child or of other parties.

OKLA. STAT. tit. 10, § 1109(b) (1971).

37. *Chad S.*, 580 P.2d at 985.

38. *Id.*

39. *Id.* at 986.

40. *Id.*; see also *Davis v. Page*, 442 F. Supp. 258 (S.D. Fla. 1977).

must provide counsel to indigent parents unless it can demonstrate a compelling state interest in not providing counsel. Since the state has no compelling interest in not providing counsel, the equal protection clause of the Fourteenth Amendment requires the provision of counsel to indigent parents in dependency proceedings.<sup>41</sup>

The court in *Davis* also noted that implicit in the right to counsel is the right to notice that such counsel will be provided without expense to indigent parents.<sup>42</sup> Therefore, under *Chad S.*, when the assistance of counsel is constitutionally mandated, the right to counsel does not depend upon a request.<sup>43</sup>

### B. *Child's Right to Counsel*

Two years after the Oklahoma Supreme Court's decision in *In re Chad S.*, the court decided *In re T.M.H.*<sup>44</sup> In *T.M.H.*, the court found that a trial court's failure to appoint counsel to represent the child was grounds for reversal of an order terminating parental rights.<sup>45</sup> Once again, the court found statutory authority that mandated the appointment of counsel to the child, if counsel had been requested on behalf of the child.<sup>46</sup> The court also found statutory authority which mandates the appointment of counsel to the child when the court finds it is necessary to protect the interests of the child, even if no request for counsel is made.<sup>47</sup> Based on these statutes, the court held that "independent counsel must be appointed to represent the child[ ] if termination of parental rights is sought."<sup>48</sup>

The court reasoned that if a child is not represented by independent counsel during a termination proceeding, the child will be caught in the middle while each attorney presents arguments from the viewpoint of that attorney's client.<sup>49</sup> And, even though each side will argue for the best interests of the child, each attorney has an underlying desire to prevail for the client.<sup>50</sup> Thus, by appointing an attorney for

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41. *Chad S.*, 580 P.2d at 985-86 (quoting *Davis*, 442 F. Supp. at 264).

42. *Davis*, 442 F. Supp. at 265.

43. *Chad S.*, 580 P.2d at 986; see also *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

44. 613 P.2d 468 (Okla. 1980).

45. *Id.* at 469.

46. The court in *In re T.M.H.*, as in *Chad S.*, cited OKLA. STAT. tit. 10, §§ 24(a), 1109(b) (1971).

47. *T.M.H.*, 613 P.2d at 469. The court noted that OKLA. STAT. tit. 10, § 1109 (1971) was amended in 1977 to make appointment of counsel to the child mandatory if it is necessary to protect the interests of the child. *Id.*

48. *T.M.H.*, 613 P.2d at 471.

49. *Id.* at 470.

50. *Id.*

the child, a court assures that testimony will be presented, and cross-examination will be done, by an advocate who will be interested solely in the child's welfare.<sup>51</sup>

However, in *Davis v. Davis*, the court held that independent counsel for the child in a private proceeding to terminate parental rights is not required.<sup>52</sup> In *Davis*, the court noted that it had previously distinguished between private and state remedies.<sup>53</sup> The court observed that a termination proceeding under Oklahoma Statutes title 10, section 1130 is a state remedy in which potential conflicts exist between the interests of the child and those of the state and the parents.<sup>54</sup> Therefore, the court found that a court must appoint an independent counsel to represent the child whenever tripartite concerns are pressed in the context of proceedings under section 1130.<sup>55</sup> The court further observed that an adoption without consent under Oklahoma Statutes title 10, section 60.6 is a private remedy in which counsel for the child is not required.<sup>56</sup>

The court noted that, at common law, a parent's bond with the child is indestructible and not terminable by judicial decree.<sup>57</sup> Therefore, section 1130 is a statute that only partially abolishes the common law, because it contains no language to suggest that it is applicable to private litigation.<sup>58</sup> In short, the court found that valuable common-law rights, such as parental rights, cannot be destroyed by statutes which do not explicitly or implicitly address themselves to interparental contests.<sup>59</sup>

In addition, the court stated that only the demonstration of a compelling state concern will justify intrusion upon the privacy and sanctity of the parent-child relationship.<sup>60</sup> Unless the child is subject to harm, the state may not intervene.<sup>61</sup> "Resort to state-action remedies by private individuals would result in gross distortion of the legal

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51. *Id.*

52. *Davis v. Davis*, 708 P.2d 1102 (Okla. 1985).

53. *Id.* at 1110.

54. *Id.*

55. *Id.* at 1102. The court noted that mandatory representation for the child in all state termination proceedings is based on the state's responsibility to protect the interests of the child.

56. *Davis*, 708 P.2d at 1102.

57. *Id.* at 1111.

58. *Id.*

59. *Id.*

60. *Davis*, 708 P.2d at 1109.

61. *Id.*

demarcation line that historically has separated purely private interspousal claims from the legislatively-sanctioned process governing state intrusion into the traditional pre-[Juvenile] Code areas of family immunity."<sup>62</sup> Accordingly, the court found that a child is not entitled to appointed counsel in a private proceeding involving termination of parental rights.<sup>63</sup>

### C. *Payment of the Child's Attorney Fees*

In *In re Christopher W.*, the court held that "parents or other litigants are not responsible for paying for the services of an attorney appointed because of a conflict of interest between parent and child."<sup>64</sup> In so holding, the court reversed the trial court's order that Christopher's parents and grandparents each pay a portion of Christopher's attorney fees and professional witness fees.<sup>65</sup> The court reasoned that it was the intent of the legislature that the state be responsible for assuring that the child is adequately legally represented when it is necessary for the child to be represented in termination proceedings, and in proceedings to have a child declared dependent or neglected.<sup>66</sup>

The court examined Oklahoma Statutes title 10, section 1109 and noted that the statute deals with the appointment of attorneys for two separate classes.<sup>67</sup> The first class is that of the parents, guardians, or other legal custodians, while the second class is that of children.<sup>68</sup> When addressing the appointment of counsel to children, the legislature does not require that the child or his parents be indigent, in order for counsel to be appointed.<sup>69</sup> Nor does the legislature require a request to be made for counsel.<sup>70</sup> Instead, appointment can be made when it is necessary to protect the interests of the child.<sup>71</sup> Therefore, the appointment of an attorney to represent the parents, guardian, or

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62. *Id.*

63. *Id.* at 1110.

64. *In re Christopher W.*, 626 P.2d 1320, 1323 (Okla. 1980). Appellee argued that the attorney fees were authorized under OKLA. STAT. tit. 10, § 1121 (1971). *Id.* at 1322.

65. *Christopher W.*, 626 P.2d at 1323. Christopher's paternal grandparents had initiated a petition seeking the termination of parental rights of Christopher's parents. The trial court found that there was a conflict of interest between Christopher and his parents, and therefore appointed separate counsel to represent Christopher. *Id.* at 1321.

66. *Id.* at 1322.

67. *Id.*

68. *Id.*

69. *Christopher W.*, 626 P.2d at 1322.

70. *Id.*

71. *Id.*



legal custodian is related to the financial ability of the parents, guardian, or legal custodian, while the appointment of counsel to the child is not.<sup>72</sup>

Although section 1109 addresses the appointment of counsel to the child, it is silent as to who pays for the child's counsel.<sup>73</sup> However, the court observed that Oklahoma Statutes title 10, section 24 does address the payment of attorney's fees for the child.<sup>74</sup> The court found that in consideration of section 24, the county is to compensate the child's attorney out of that county's court fund, if a public defender is not available.<sup>75</sup> And, if a public defender is available, the Public Defender's office is to provide such services.<sup>76</sup>

#### IV. DECISION OF *IN RE S.A.W.*

In *S.A.W.*, the court expanded its holding in *T.M.H.* to include privately initiated petitions for termination of parental rights.<sup>77</sup> As noted above, the court in *T.M.H.* held that when termination of parental rights is sought, independent counsel must be appointed to represent the children.<sup>78</sup> But, the court limited this requirement of independent counsel in *Davis v. Davis* by holding that separate counsel is required only in state-initiated proceedings.<sup>79</sup>

In expanding its holding in *T.M.H.*, the court noted that *Davis* held termination of parental rights under Oklahoma Statutes title 10, section 1130 was available only for state-initiated cases.<sup>80</sup> However, the court in *S.A.W.* observed that in 1986 the legislature added subsection D to section 1130, which allows private suit for the termination of parental rights.<sup>81</sup> Thus, state-initiated termination proceedings and privately-initiated termination proceedings now fall under the same

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72. *Id.*

73. *Christopher W.*, 626 P.2d at 1323.

74. *Id.*

75. *Id.*

76. *Id.*

77. *In re S.A.W.*, 856 P.2d 286, 290 (Okla. 1993).

78. *In re T.M.H.*, 613 P.2d 468, 471 (Okla. 1980).

79. 708 P.2d 1102 (Okla. 1985).

80. *S.A.W.*, 856 P.2d at 290.

81. *Id.* OKLA. STAT. tit. 10, § 1130(D) (1991) provides:

A parent or guardian of a child may petition the court to terminate the parental rights of a parent or the parents of a child for any of the grounds listed in paragraphs 1, 2 or 5 of subsection A of this section. A prior finding by a court that a child is delinquent, deprived or in need of supervision shall not be required for the filing of such petition by the parent or guardian.

(Subsection D is now subsection C in OKLA. STAT. tit. 10, § 1130 (Supp. 1994)).

statute.<sup>82</sup> With this change, the court in *S.A.W.* saw no rational reason to hold that a child is not entitled to independent counsel in a privately-initiated proceeding.<sup>83</sup>

When the court in *S.A.W.* applied this new rule to the facts of the case, it was clear that the requirement of counsel could work for the benefit of S.A.W.<sup>84</sup> The trial court's concern was the parents' failure to make any payment, other than gifts, in the year before the petition was filed.<sup>85</sup> The trial judge stated that termination of parental rights was in the best interest of the child, although no independent counsel was present to argue the child's best interest.<sup>86</sup> Had counsel been present, evidence might have been presented showing that maintaining parental ties was in the child's best interests.<sup>87</sup> In addition, independent counsel might have clarified the confusing testimony regarding the financial status of the parents.<sup>88</sup>

Since S.A.W. was entitled to separate counsel, but was not appointed one, the Oklahoma Supreme Court vacated the decision of the Court of Appeals. It reversed and remanded the judgment of the trial court for disposition of the case in a manner consistent with the views expressed by the Oklahoma Supreme Court.<sup>89</sup>

#### V. ANALYSIS OF *IN RE S.A.W.*

The only compelling interest that a state can have in terminating a parent's rights is the welfare of the child.<sup>90</sup> However, there is no possible way to determine the best interests of the child without independent counsel. When an adult hires an attorney, or has an attorney appointed, to act as counsel in a parental rights proceeding, the adult is that attorney's client. The attorney has a duty to zealously represent his client. This means that the attorney will argue for what is in the best interests of his client, and sometimes this will conflict

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82. *S.A.W.*, 856 P.2d at 290. As noted in the preceding text, the court in *Davis v. Davis* found that privately-initiated termination proceedings were actionable under OKLA. STAT. tit. 10, § 60.6 (1981), and not under section 1130. *Davis*, 708 P.2d at 1112.

83. *S.A.W.*, 856 P.2d at 290.

84. *Id.*

85. *Id.*

86. *Id.*

87. *S.A.W.*, 856 P.2d at 290. Since fundamental rights are involved, a trial court has inherent discretion in cases concerning the termination of parental rights. *Id.* at n.11 (citing *In re Adoption of A.G.K.*, 728 P.2d 1, 4-5 (Okla. Ct. App. 1986)).

88. *Id.* at 290.

89. *Id.*

90. *Id.*

with what is in the best interests of the child involved in the proceedings. However, the attorney is not in the position to determine if his client's wishes are in line with what is best for the child. Therefore, the child is left without a voice during parental rights termination proceedings.

*In re S.A.W.* solved this problem by giving the child an advocate who will argue for the child's best interests. Counsel may determine that the child's best interests are to maintain parental ties, or counsel may choose to argue that the child would be better off without his parents. Whatever counsel chooses to argue, it is certain that it will be for the welfare of the child.

It is only logical that the court would expand the protection of the welfare of the child to allow independent counsel in all termination proceedings—including those that are privately initiated. In *S.A.W.*, the court noted that there would more likely be a conflict of interest in privately-initiated proceedings than there would be with state-initiated proceedings.<sup>91</sup> This reasoning is well-grounded, since the state has nothing to gain, except protection of the child from harm, when it seeks termination of parental rights. On the other hand, private parties cannot possibly remain neutral when they are fighting for the custody of a child.

Further, the court in *S.A.W.* recognized that the Oklahoma Legislature had amended section 1130 by adding subsection D, which allows a private suit for termination of parental rights.<sup>92</sup> Now, both state-initiated and privately-initiated proceedings are governed by the same statute. This change invalidates the court's finding in *Davis v. Davis* that appointment of independent counsel to a child was not required in a private suit, because there was no language in section 1130 to show the legislature's intent to include private suits in section 1130. Therefore, the expansion of the child's rights in termination proceedings flows not only from the Oklahoma Supreme Court's preceding cases and policies, but also from statutory amendments.

## VI. CONCLUSION

The holding of the Oklahoma Supreme Court in *In re S.A.W.* gives children the ultimate protection during termination of parental rights proceedings. By expanding the protections afforded to children

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91. *S.A.W.*, 856 P.2d at 290.

92. *Id.*

in termination proceedings, the court lessens the chance of unnecessary termination. Under *S.A.W.*, children are afforded an advocate who will argue for the best interests of the child in all termination proceedings, whether privately or state-initiated. When this protection is combined with the parents' rights to appointed counsel, the court has ensured that future termination proceedings will produce results which truly are in the best interests of the child.

*Cathleen Ryan*

