

No. 18-_____

In the
Supreme Court of the United States

In Re D.B., et. al.,

Petitioners.

On Petition for Writ of Certiorari to the
Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Supreme Court has traditionally upheld the principle that parents have the fundamental right to direct the upbringing of their children. The Supreme Court has unwaveringly given parental rights the highest respect and protection possible. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court emphasized “the Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children, to worship God according to his own conscience” *Id.* at 403. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court reaffirmed *Meyer* and asserted the parent’s fundamental right to keep their children free from government standardization. *Id.* at 535. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court made it clear that parent’s rights as outlined in *Pierce* and *Meyer* are fundamental and specially protected under the Fourteenth Amendment. The Court in *Santosky* quoted *Lassiter v. Department of Social Services*, 452 U.S. 18, 37 (1981), wherein, the Supreme Court opined it was “not disputed that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisite of the Due Process Clause.”

QUESTION PRESENTED

Whether the lower court’s denial of the Father’s motion to disqualify the Guardian Ad Litem, when her actions clearly indicated she had ceased being an attorney, and had become a witness, was in error and violated the Father’s parental rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioners

- Jamie W., Mother
- Michael B., Father
- Betty Scott, Guardian Ad Litem
- D.B. (A child under the age of 18 years)
- E.B. (A child under the age of 18 years)

Respondent

- State of Tennessee Department of Children's Services

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JURISDICTION

The Tennessee Supreme Court entered the Denial of the Application for Permission to Appeal on September 18, 2018. *See* App.1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The right of a parent is an un-enumerated right, protected from governmental interference by the Due Process Clause of the fifth and fourteenth amendments. The liberty of the Due Process Clauses safeguards those substantive rights. There is a fundamental right of parents to make decisions concerning the care, custody and control of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).



INTRODUCTION

The United States Supreme Court has traditionally upheld the principle that Parents' have the fundamental right to direct the upbringing of their children. The Supreme Court has unwaveringly given parental rights the highest respect and protection possible. In *Meyer v. Nebraska* 262 U.S. 390 (1923) the Supreme Court emphasized "the Fourteenth Amendment guarantees the right of the individual . . . to establish a home and bring up children, to worship God according to his own conscience" *Id.*, at 403. In *Pierce v. Society of Sisters* 268 U.S. 510 (1925) the Supreme Court reaffirmed *Meyer* and asserted the parent's fundamental right to keep their children free from government standardization. *Id.* at 535. In *Prince v. Massachusetts*, 321 U.S. 158 (1944) the Supreme Court opined that it is "cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder" *Id.*, at 166.

Rule 40A of the Tennessee Rules of the Supreme Court is entitled, "APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY PROCEEDINGS." These Tennessee Supreme Court rules are designed to govern the actions of individuals serving as Guardian Ad Litem. Betty Scott, an attorney licensed by and in the State of Tennessee, was appointed to serve as the Guardian Ad Litem in the dependency and neglect proceedings in the Juvenile Court of Gibson County, Tennessee

and in the parental termination proceedings in the Circuit Court for the Twenty-Eighth Judicial District.

Rule 40A of the Tennessee Rules of the Supreme Court requires that the guardian ad litem function as a lawyer, not as a witness or special master. While serving as Guardian Ad Litem in the proceedings involving dependency and neglect and termination of parental rights, Betty Scott filed pleadings with the Juvenile Court of Gibson County seeking to suspend parental visitation. That said pleadings stated as follows:

“Attorney Scott has personally witnessed the parents harassing foster parents before and after court.” (emphasis added);

[. . .]

“That Mother had an Order of Protection against Father for several months. Subsequent to a juvenile court hearing last winter, while the Order of Protection was in effect, this Guardian Ad Litem specifically asked Mother if she drove Father to court that day. Although mother *denied* it, this Guardian ad Litem observed them driving from the parking lot together in Mother’s vehicle.” (emphasis added)

The Tennessee Supreme Court mandates through its’ rules that a Guardian Ad Litem be appointed in matters where the State is seeking to determine dependency and neglect and in matters involving termination of parental rights. In the case of *D.B. et. al.*, Betty Scott was appointed to be the Guardian Ad Litem in the dependency and neglect action in Juvenile

Court and the termination of parental rights in the Circuit Court. Both actions were filed and pending at the same time. The commentary under Rule 40A of the Tennessee Rules of the Supreme Court states as follows: “Current Rule 40A differs from the prior rule in that the guardian ad litem now functions as a lawyer, not as a witness or special master.” That said commentary continues, “(1) A Guardian Ad Litem may not be a witness or testify in any proceeding in which he or she serves as a Guardian Ad Litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Rule of Professional Conduct 3.7.” (emphasis added).

The conduct of the Guardian Ad Litem, by and through her actions of becoming a witness adversely impacted the ability of the Father to receive a fair and impartial hearing in regards to the termination of his parental rights.

In *Santosky v. Kramer* 455 U.S. 745 (1982) the Supreme Court made it clear that parents’ rights as outlined in *Pierce* and *Meyer* are fundamental and specially protected under the Fourteenth Amendment. The Court in *Santosky* quoted *Lassiter v. Department of Social Services* 452 U.S. 18, 37 (1981), wherein, the Supreme Court opined it was “not disputed that state intervention to terminate the relationship between a parent and a child must be accomplished by procedures meeting the requisite of the Due Process Clause”.



STATEMENT OF THE CASE

Michael B. is the Father of D.B. and E.B. D.B. was born in 2013. E.B. was born in 2015. The children and both parents, Michael B. and Jamie W., were all living in the same household whenever the children were removed from the home on July 2, 2015. Upon removal of the children, the Tennessee Department of Children's Services filed a Dependency and Neglect Petition in the Juvenile Court of Gibson County, Tennessee at Trenton, under docket number 26379. The Tennessee Department of Children's Services later filed a Petition to Terminate Father's Parental Rights claiming he was in violation of several statutory grounds for termination under T.C.A § 36-1-113(c). In addition, the Tennessee Department of Children's Services asserted the termination of the parent's rights were in the best interest of the children. The Father, in an effort to prevent his parental rights from being terminated, signed a permanency plan, which outlined conditions to which he needed to satisfy before the children would be returned to him.

The Tennessee Department of Children's Services took the position that the Father did not fulfill the conditions requested of him. Betty Scott, a licensed attorney serving as the Guardian Ad Litem in the dependency and neglect proceedings in Juvenile Court and the Termination of Parental Right proceedings in Circuit Court joined in the decision of the Tennessee Department of Children's Services to move forward with termination of parental rights.

On May 10, 2017, in the Juvenile Court of Gibson County, the Guardian Ad Litem, Betty Scott, filed a Motion to Modify Visitation. That said motion was filed while the Petition to Terminate Parental Rights was pending in the Circuit Court of Gibson County. As previously noted, Betty Scott, was also serving as Guardian Ad Litem in the parental termination proceedings. That based on this motion, the Guardian Ad Litem obtained an ex parte order, which suspended the rights of the parents to visit with their minor children. That the Motion to Modify Visitation, which was filed in support of obtaining the ex parte order, stated in part as follows:

“Attorney Scott has personally witnessed the parents harassing foster parents before and after court.” (emphasis added)

The Guardian Ad Litem further asserted:

“That Mother had an Order of Protection against Father for several months. Subsequent to a juvenile court hearing last winter, while the Order of Protection was in effect, this Guardian Ad Litem specifically asked Mother if she drove Father to court that day. Although mother denied it, this Guardian ad Litem observed them driving from the parking lot together in Mother’s vehicle.” (emphasis added)

The allegations contained within said motion demonstrate that the Guardian Ad Litem functioned as a witness, and was no longer performing her duties as an attorney. Furthermore, the decision of the Guardian Ad Litem to file a pleading asserting accusations based on personal observation created and caused

irreparable damage to the Father. The only remedy available to the Father was to challenge the Guardian Ad Litem's statements of alleged personal observation. The Father could only challenge the statements of the Guardian Ad Litem through cross-examination of the Guardian Ad Litem on the witness stand. The statements of the Guardian Ad Litem prejudiced the Father. That the prejudicial effect included, but was not limited to, allegations that he had violated Court orders and that he participated in harassment of potential witnesses in the case.

On June 26, 2017, the father filed a Motion to Disqualify Guardian Ad Litem with the Circuit Court of the Twenty-Eighth Judicial District at Trenton, Tennessee. The purpose of said motion was to disqualify the Guardian Ad Litem from any and all further proceedings due to her functioning as a witness, and no longer as an attorney, to a contested issue in the case. On August 4, 2017, the Circuit Court denied the Motion to have the Guardian Ad Litem disqualified.

Rule 40A of the Tennessee Rules of the Supreme Court is entitled, "APPOINTMENT OF GUARDIANS AD LITEM IN CUSTODY PROCEEDINGS." In Tennessee Rules of Supreme Court 40A, Section 6, the Guardian Ad Litem is required to represent the child's best interest by presenting results of the investigation in the same manner as any other lawyer presents his or her case on behalf of a client: by calling, examining, and cross-examining witnesses, submitting and responding to other evidence in conformance with the rules of evidence.

That the commentary under Rule 40A states as follows: "Current Rule 40A differs from the prior rule

in that the guardian ad litem now functions as a lawyer, not as a witness or special master.” That said commentary continues, “(1) A Guardian Ad Litem may not be a witness or testify in any proceeding in which he or she serves as a Guardian Ad Litem, except in those extraordinary circumstances specified by Supreme Court Rule 8, Rule of Professional Conduct 3.7.” (emphasis added).

That pursuant to Rule 8, Rule of Professional Conduct 3.7 of the Tennessee Rules of Supreme Court, there are specific guidelines governing a lawyer as a witness. It states as follows: “[A] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client.” The comment with this particular rule states, “[C]ombining the role of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and the client.” The rule further states, “[T]he tribunal has a proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has a proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others”. (emphasis added).

The Circuit Court held that the Guardian Ad Litem was not a “necessary witness,” as required under Rule

8, Rule of Professional Conduct 3.7(a) of the Tennessee Rules of Supreme Court and therefore there is no need for disqualification.” The Court’s finding that the Guardian Ad Litem in this case was not a “necessary witness,” was in error. The alleged observations of the Guardian Ad Litem occurred outside the presence of the Court. These observations, recorded by an eye witness, (to wit the Guardian Ad Litem) could have been challenged as unreliable if the Guardian Ad Litem had testified. These observations were intended to damage the credibility of the Father. The Father was entitled to rehabilitate himself in light of these allegations by and through his cross-examination of the Guardian Ad Litem, as well as testimony of the events as he experienced them. The reality of the fact is that eye witness testimony is not always the same; often times there are discrepancies in testimony and versions are different.

Furthermore, the Guardian Ad Litem created controversy centered on the determination of what is in the best interest of the children. The Guardian Ad Litem stated she witnessed events that prejudiced the father, and placed herself as a witness by her own pleading. Her assertions, coupled with the Father’s denial, directly impacted factors to be considered in determining the best interest of the children. This includes suspension of the visitation and violating a court order. Tenn. Code Ann. § 36-1-113(i)(3) and (7).

The Guardian Ad Litem crossed the line from being an attorney to becoming a witness. This is clearly demonstrated by the assertions contained in the Motion to Modify Visitation. As such, the statements, observations, and conclusions create a difficult, if not impos-

sible situation, wherein the Father is prejudiced by conduct of an attorney acting as a witness and reporting information based on personal observations. Therefore, the only manner by which the Guardian Ad Litem can properly relate this to the Court is through testimony, thus making her a witness and not an attorney. This is especially critical because the observations alleged by the Guardian Ad Litem were vehemently denied by the Father. Accordingly, the actions of the Guardian Ad Litem should have resulted in her disqualification in these proceedings.

The Circuit Court for the Twenty-Eighth Judicial District found in favor of some, but not all of the grounds for termination, as well as finding that parental termination were in the best interest of the children. The Court of Appeals affirmed the decision of the Circuit Court. The Supreme Court of Tennessee denied the Father's Application for Permission to Appeal.



REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In this case the lower court denied the Father's motion to disqualify the Guardian Ad Litem when her actions clearly indicated she was had ceased being and attorney and had become a witness. The lower court decided an issue that involves a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. There is a need for guidance and direction by the Supreme Court as it relates to the actions of Guardian Ad Litem in parental termination cases. Each and every aspect of the procedure to be followed in termination of parental rights should assure that the fundamental rights to be a parent which are guaranteed by the Due Process Clause of the Fourteenth Amendment are being protected. The appointment of a Guardian Ad Litem is an essential part of the process in determining if parental rights should be terminated. There is a need for a uniform rule which will serve to define the role of the Guardian Ad Litem. There should be a uniform standard of conduct to be followed when a Guardian Ad Litem has been appointed in a parental termination action. There should be a uniform procedure to be followed when objections are raised as to the actions of the Guardian Ad Litem in parental termination cases.

The responsibilities of the Guardian Ad Litem in parental termination cases are in need of clarification and definition. The procedure to be followed when the conduct of the Guardian Ad Litem is called into question needs to be established. The treatment by the lower courts as to this issue is in disarray and varies by State. This is an issue of national importance and is in need of review by the Supreme Court.



CONCLUSION

For the aforementioned facts and law, Michael B. would respectfully request this Honorable Court grant the Petition for Writ of Certiorari.

Submitted this the 22nd of March, 2019.

Respectfully submitted,

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