

1976

State of Utah in the interest of Baby Girl Marie v. Nadine Munoz : Brief of Respondent

Utah Supreme Court

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BABY GIRL MARIE, A Person Under
Eighteen Years of Age,

Case No. ~~252370~~ 14589

Appellant

BRIEF OF RESPONDENT

APPEAL FROM JUDGMENT OF THE FIRST DISTRICT
JUVENILE COURT, WEBER COUNTY, the HONORABLE
CHARLES E. BRADFORD PRESIDING.

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Clerk, Supreme Court, Utah

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AUG 12 1976

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest of: :
BABY GIRL MARIE, A Person Under :
Eighteen Years of Age, :
 :
 :
 :
NADINE MUNOZ, :
 :
 :
Appellant :

Case No. 252370

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JUVENILE COURT, WEBER COUNTY, the HONORABLE
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest of: :

BABY GIRL MARIE,

A Person under Eighteen Years of Age :

Case No. 2

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF THE CASE

This is an appeal by the natural mother from an Order and Judgment of the Juvenile Court entered on January 9, 1975, permanently depriving her of all parental rights in connection with her child, baby girl Marie; and from a decision of the Juvenile Court on May 4, 1976, refusing to vacate and set aside as null and void its Order entered on January 9, 1975.

DISPOSITION IN LOWER COURT

The Juvenile Court, upon petition of the Utah Division of Family Services, found that the natural mother was unable to adequately provide for all the needs of said child and agreed with the mother that it was in the best interest of the child for parental rights to be terminated and for the child to be placed for adoption. On April 22, 1976, a hearing was held at which the Juvenile Court refused to vacate and set aside its order of January 9, 1975, terminating parental rights.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Juvenile Court order of January 9, 1975, terminating parental rights, set aside as null and void, and for reversal of the Juvenile Court order of May 4, 1976, refusing to vacate its Order of January 9, 1975.

STATEMENT OF FACTS

Respondent substantially agrees with Appellant's Statement of the Facts. Exception is taken, however, to several voluntary statements which are not supported by the record. For example:

1. It is stated: "Appellant at no time wanted to give the baby up for adoption, but was receiving extreme pressure from her parents to do so...." (Appellant's Brief, pg. 2). There is no direct testimony in the record about extreme parental pressure on appellant to give up the baby. Attorney Daines quotes the parents only to the effect that appellant could not stay home if she kept the child, (R.18) and wanted nothing to do with the baby. (Tr. 2). Appellant testified only that her parents didn't want appellant to keep the baby in their home because "they just have a small apartment." (Tr. 3). As to Appellant's feelings about giving up the baby, it is apparently true that she desired to keep the child (R. 18), but on January 9, 1975, she appeared at Court intent upon giving up the baby. After a probing discussion with the Court she restated her previous decision that it was in the best interests of the child to give it up and voluntarily did so in open court. (Tr. 3). It is a deceptive play on words for Appellant to state "Appellant at no time wanted to give the baby up for adoption." It could as accurately be stated that on January 9, 1975, she did want to give the baby up.

2. It is stated twice by Appellant that the DFS Social Worker advised Appellant to give up her child for adoption. (Appellant's Brief, pg. 2 and 3). That the DFS felt adoption advisable in the best interest of the child is evident from the fact that the DFS filed the petition for termination of parental rights. But there is nothing in the record to

indicate that such advice was directly given to Appellant, nor that alternative counsel may not also have been given to her.

3. The second paragraph of page 4 of Appellants brief is an alleged statement of facts as to Appellants' actions in relation to the child during the period from 1-9-75 to March 1976. There is absolutely nothing in the record of evidentiary nature concerning these activities or relating to this period of time. There is nothing in the record that would verify Appellant's alleged interest in the child as recounted in this paragraph.

Respondent suggests a summary of the significant established facts as follows:

1. Appellant voluntarily places custody of the child in the DFS shortly after its birth on or about August 14, 1974. (R.12).

2. DFS files petition for termination of parental rights on August 22, 1974. Father served by publication. Mother served personally and advised of right to counsel. (R. 4).

3. Hearing held 10-24-74. Counsel present. Continued to November 6.

4. Hearing held before Judge Roland Anderson 11-6-74. Counsel present. Custody in DFS continued. (R. 13).

5. Revised petition filed by DFS on 12-2-74. (R. 19). Father served by publication. Mother served personally and advised of right to counsel (AR

6. Hearing held before Judge Bradford on 1-9-75. Counsel waived and not present. Court finds it is in best interest of child that parental rights be terminated and child be placed for adoption. (R. 20; Tr. 1-4).

7. Adoption of child finalized August 27, 1975. (Tr. 12).

8. On one year automatic review matter terminated in Juvenile Court by Judge Anderson, 12-4-75. (R. 21).

9. Petition to set aside and vacate Juvenile Court decree filed by Petitioner on April 2, 1976. (R. 33).

10. Hearing held April 22, 1976. Counsel for Appellant present (R. 34; Tr. 1-24).

11. Memorandum Decision filed by Court 5-11-76. (R. 35-38).
Court finds:

- (1) Appellant duly afforded counsel and informed of her rights thereto at 1-9-75 hearing.
- (2) Appellant guilty of laches in bringing petition for review.
- (3) Appellant voluntarily relinquished parental rights.
- (4) Appellant was incompetent and incapable of providing necessary care for the child.
- (5) It was in the best interest of the child not to revoke the termination order.

ARGUMENT

POINT I.

THE JUVENILE COURT HAD NO JURISDICTION TO VACATE ITS PREVIOUSLY ENTERED ORDER

Appellant argues that the Juvenile Court has inherent power, pursuant to the provisions of Section 55-10-106, U.C.A. 1953 as amended, to vacate a previous order at any time. Respondent submits that this right of review is not absolute or unqualified. Section 55-10-106 must be interpreted in pari materia with other statutory instruction and applied according to case decision.

1. For example, as an adoption matter has been instituted regarding Baby Girl Marie, it is obvious that the right of the Juvenile Court to revoke a previous order regarding said child must be tempered by the relationships created in the adoption proceedings.

Section 55-10-78 U.C.A. 1953, in speaking of the juris of the Juvenile Court, states "Nothing contained in this act shall deprive the district courts of jurisdiction in adoption proceedings."

Section 78-30-7 U.C.A. 1953 places exclusive jurisdiction in regard to adoption proceedings in the District Court.

In the case of In re Trimibles' Adoption, 16 Utah 2d 188, 398 P.2d 25 (1965), the District Court declined jurisdiction in an adoption proceeding to rule on a question of consent to adoption by reason of desertion, taking the position that the Juvenile Court had exclusive jurisdiction in such situation. The Supreme Court issued a writ of mandamus to the District Court, stating:

Juris of the district court in adoption proceedings arises when a petition is filed with the clerk of the district court. Once that jurisdiction is obtained the district court is to decide all issues necessary to the adoption. The issue of necessity of consent because of desertion, when such issue arises, is a necessary issue to be decided by the district court. The juvenile court is a creature of statute and a court of limited jurisdiction...To follow the necessary procedural steps in obtaining juvenile court jurisdiction every time the issue of necessity of consent arose would be to introduce confusion into the adoption proceedings. (Ibid, 398 P.2d 26; emphasis added).

We submit that once the jurisdiction of the District Court was invoked by the filing of an adoption petition, the jurisdiction of the District Court became paramount in deciding all issues necessary to the adoption, including whether or not Appellant voluntarily consented to termination of the parental rights and whether or not she was afforded due process in the termination proceeding. The Juvenile Court has lost jurisdiction to reconsider and revoke its termination order by the intervention of the District Court in the adoption proceeding. To hold otherwise would put the Juvenile Court on a

collision course with the District Court, allowing it, by revocation of a previous termination order, to interfere with a new parent-child relationship created by the District Court. Or, assuming the District Court ignores or refuses to recognize any change in status ordered by the Juvenile Court, then the entire review procedure by the Juvenile Court becomes an effort in futility. The chaos that could result, by recognizing any continuing jurisdiction by the Juvenile Court over baby girl Marie, staggers the mind.

None of the cases cited by Appellant as authority for the Juvenile Court to reopen a case and modify its prior order involve circumstances where there has been intervening jurisdiction interposed by a constitutional court of unlimited jurisdiction involving the same matter previously disposed of in the Juvenile Court.

2. In any event, the Juvenile Court can of its own power, and did in this case, terminate its continuing jurisdiction. Section 55-10-101 U.C.A. 1953 provides: "The continuing jurisdiction of the court shall terminate (1) Upon order of the court...." etc.

Pursuant to the very authority argued by Appellant, the Juvenile Court terminated the decree entered by it on January 9, 1975, at a review hearing. (R. 21) The question of review and revocation, urged by Appellant, is actually moot. There is nothing for the Juvenile Court to modify or set aside. The order under consideration no longer exists and the court's continuing jurisdiction in relation to the substance thereof has been terminated.

3. It is also submitted that modification of the termination order, which of necessity could also modify the custody order made a part thereof, is specifically prevented by statute. Section 55-10-108 U.C.A. 1953 reads:

No petition by a parent may be filed under this section (modification of custody order) after his or her parental rights have been terminated in accordance with Section 55-10-109.

The intent of the Legislature seems to be that a parent does not have standing before the court to petition for restoration of custody once a termination order has been entered. The reason is obvious. There can be no certainty in regard to future disposition of a child if a parent may petition for modification of a decree once termination of parental rights has been ordered. The available recourse to the parent is appeal. (Section 55-10-109(3)).

4. Third parties are now vitally concerned in any revocation of the termination order; viz the adoptive parents. Their rights have now intervened and must be considered. As they were not and would not be parties in a Juvenile Court proceeding, we submit the Juvenile Court now has no jurisdiction to revoke the termination order in derogation of their interest in the adoptive child. This matter cannot now be reconsidered by the Juvenile Court in a vacuum, ignoring the very vital concerns of the adoptive parents, in considering whether a consent to place for adoption may be revoked. In the instant case the equities should surely be heavily balanced on the side of the adoptive parents who have had the child since birth as against a mother who waited 15 months to challenge a termination decree.

In summary, therefore, it is submitted, that the Juvenile Court has no jurisdiction to modify, set aside or otherwise reconsider its order of January, 1975, terminating Appellant's parental rights for these reasons:

1. The jurisdiction of the District Court, as a result of the adoption proceedings, is now paramount and exclusive in regard to termination of Appellant's parental rights.

2. The Juvenile Court, by its own act in terminating the termination order, has discontinued its continuing jurisdiction over the matter.

3. The parents only recourse by statute from a termination order, is appeal.

4. Intervening rights of the adoptive parents preclude reassertion of jurisdiction by the Juvenile Court.

POINT II.

APPELLANT DID NOT TIMELY APPEAL

The hearing regarding termination of Appellant's parental rights was held on January 9, 1975. (R. 18). Findings of Fact and a Decree ordering that Marie be placed in the custody of the Utah State DFS for the purpose of adoption were entered by Juvenile Court Judge Charles Bradford on the same date, January 9, 1975. (R. 20)

Section 55-10-109(3) provides:

(3) Unless there is an appeal from the order terminating the rights of one or both parents, the order permanently terminates the legal parent-child relationship and all the rights and duties, including residual parental rights and duties of the parents or parents involved.

Section 55-10-112 U.C.A. 1953 provides:

An appeal to the Supreme Court may be taken from any order, decree, or judgment of the juvenile court... The appeal must be taken within one month from the entry of the order, decree, or judgment appealed from. (emphasis added).

Therefore the appeal time on the January 9, 1975 order expired February 9, 1975. Appeal was the only recourse open to Appellant from the January 9, 1975 Order. Technically, an appeal has never been taken from that Order. (The Notice of Appeal filed in this case on May 11, 1976, is from the order of the Juvenile Court dated May 4, 1976, not from the January 9, 1975 order. See R. 44). Assuming the Juvenile Court had no

jurisdiction to hear the Petition to Vacate, as argued by Respondent under Point I, and that Appellant has never in fact appealed from the January 9, 1975 Order as herein pointed out, this appeal is illusory and should be dismissed.

Irrespective of such position, and assuming an appeal has been taken as apparently intended by Appellant from both the January 9, 1975 order and the May 4, 1976 decision, it is nevertheless herewith argued that this appeal is untimely and that Appellant is estopped from this appeal because of laches.

The Petition to Set Aside and Vacate A Decree Terminating Parental Rights was filed by Appellant on April 2, 1976. (R. 33). This 15 months after the Decree was entered on January 9, 1975. (R 20). During this time Baby Girl Marie had been placed for adoption, the adoption finalized and the child grown from an infant of 5 months to a toddler of 20 months, stabilizing herself in the home of her adoptive parents.

The record reflects no attempt by Appellant or any attorney on her behalf to petition the court for review of the January 9, 1975 Decree until April 5, 1976. Appellant argues that she was an unexperienced juvenile, unwed mother, of age 16 caught up in a traumatic experience and therefore could not be expected to be aware of the technical points of law. The record belies any claim that Appellant was an inexperienced litigant. Appellant was present in Juvenile Court with counsel on at least two occasions - 10-24-74 and 11-6-74 (R. 9, R. 13). Certainly she was aware of the availability of counsel should she be of a mind to contest the January 9, 1975 order. The fact is that on January 9 she was resolved to give up the baby, did not want counsel, and had no intention to resist a Termination Order. (Tr. 1,3); Tr. 2,4,11,15). Appellant paints the picture of a distraught mother, spending

a frantic year trying to learn of her child, and finally going to legal counsel on advise of the DFS social worker 15 months later. (Appellant's brief, pg. 4). At what point did the mother's resolve of January 9 to give up her baby change? At that point why didn't she go to her former counsel, with whom she was familiar for advise? Why would the social worker wait 15 months before recommending the Appellant see an attorney? Are we to believe there was some attempt by the social worker to deceive the mother, some dereliction of duty on the part of her former counsel who was well aware of the proceedings, or some conspiracy between the both of them to hurt this young frightened mother? It appears more to be a rather delayed case of seller's remorse, which wouldn't be quite so tragic if we were dealing with a piece of goods rather than a living child.

Appellant contends that laches does not apply in this case because Appellant was not advised of her right to appeal. (Appellant's Brief pg. 8). Judge Bradford admits that he did not orally so advise the Appellant at the conclusion of the termination hearing. (R. 36). We suggest two mitigating factors: First, Section 55-10-96 U.C.A. 1953, upon which Appellant relies, does not require the Juvenile Court to advise the parent of his right to appeal at the conclusion of a hearing unless the parent was not represented by counsel. Appellant was not represented by counsel at this particular hearing, but she had been throughout the proceedings. Appellant could have had counsel at the hearing if she had so desired, and counsel was aware of the January 9, 1975 hearing and the purpose thereof. (R. 34, Tr. 1,4). In view of these circumstances it seems insignificant and unprejudicial that the Juvenile Court Judge said nothing about appeal at the conclusion of the January 9 hearing. In any event it is probable that he did so before the hearing. (Tr. 2,15). Secondly, Appellant acknowledges that Appellant appeared at the January 9 hearing "in response to a summons." (Appellants Brief

pg. 3, AR. 1). If this is the case then Appellant was aware from the summons that she had a right of appeal as the legend on the summons reads:

To Parent(s), Guardian or Custodian--
(6) You may appeal the Judge's decision to the Utah Supreme Court if initiated within 30 days of the Juvenile Court Judge's decision.

The doctrine of "laches" is defined as follows:

The established doctrine of equity that, apart from any question of statutory limitation its courts will discourage delay and sloth in the enforcement of rights. Equity demands conscience, good faith and reasonable diligence. In their absence the court will not act. The object of the doctrine of laches is to exact of the complainant fair dealing with his adversary and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes, there is danger of doing injustice, and there can be no longer a safe determination of the controversy. (The Self-Pronouncing Law Dictionary, Second Students Edition, Lawyers Co-Operative Publishing Co., Rochester, New York, pg. 473).

We submit that the position of Appellant in this matter is on all fours with this definition. This court should not countenance Appellant's delay in seeking revocation of a 15 month old court order, especially in view of the intervention of third-party equities and the grave danger of doing injustice to said parties. Respondent entirely agrees with Appellant that this is an equity matter of the highest degree. We cannot consider this matter in an academic vacuum as to whether or not certain procedural steps were followed.

The theory of laches focuses upon two elements. (1) Lack of diligence on the part of Appellant and (2) injury to respondent owing to appellant's lack of diligence. Paponikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates, 535 P.2d 1256, 1975. In considering the question of lack of diligence in cases similar to the instant case where revocation of previous relinquishments is involved, this court has placed emphasis on the passage of

time between relinquishment and attempted revocation. In the case of D— P— v. Social Service and Child W. Dept., 19 Utah 2d 311, 431 P.2d 547 (1967), this court ordered restoration of custody to a natural mother. The court discussed at some length the diligence exercised by the natural mother, being obviously influenced thereby. In that case the natural mother executed a release to the social agency within 24 hours following the birth of her child. Seven days later she contacted her doctor in an effort to get the baby. Five days later she contacted the placement agency for the same purpose. Four days later a petition was filed - only three weeks and one day after the birth of the baby. Trial was held when the baby was only one month old - two weeks later the findings and conclusions were signed. The court, of course, was influenced by other things, including the mother's physical state at the time she gave the consent as well as the fact that as of the date of trial petition for adoption had not been filed. But the court then contrasted that case with other Utah cases where longer waiting periods had been involved with different results. The diligence of the natural mother and the lack of injury to respondent attributable to her were to a large part dispositive of the case. In the instant case to the converse the lack of diligence on the part of the mother with resultant grave injury to the real respondents (adoptive parents) certainly would dictate a much different result. Mr. Justice Crockett recognized these variables and even that intervening rights may be vested when he stated in an earlier case:

Reading of many cases on this subject teaches that each depends upon its own facts: the circumstances of the placement of the child, those under which the consent was given, the length of time the adopting parents have had the child, any "vested rights" that have intervened, the welfare and the

child; the conduct, as well as the character and ability of the respective claimants; these and the particular governing statute are all given consideration in determining whether the consent can be revoked. (In re Adoption of D. 122 Utah 525, 252 P.2d 223 (1953)).

Applying these considerations as if a test as to whether termination of parental rights should be revoked in the instant case a fair application dictates as follows:

1. The child was placed by an authorized government agency with no questions as to the appropriateness thereof.
2. A consent to the termination of parental rights was voluntarily given in open court after considered resolve.
3. The child is now almost two years old, has never been in the custody of the natural mother, and has been in an adoptive house for over one year.
4. The welfare of the child is obviously best served in the home of the adoptive parents. The natural mother still resides with parents (appellant's brief pg. 4) who refuse to board the child or have anything to do with it, and there has been no evidence produced that she is in any way better able to provide and care for the child now than when the Juvenile Court found her ". . . incompetant and incapable of providing the necessary care for the child." (R 35)
5. As to the "application of a particular governing statute" this will be treated in the next point.

It is submitted, therefore, that laches prevents any revocation of the previous termination order.

POINT III.

THE APPELLANT'S PARENTAL RIGHTS
WERE LEGALLY AND PROPERLY TERMINATED
BY THE JUVENILE COURT.

Appellant goes to some lengths to analyze Section 55-10-109 U.C.A. 1953 (Termination of Parental Rights) and quotes several cases providing various examples of "conduct or condition seriously detrimental to a child" wherein termination was or was not upheld under said statute. We take no particular issue with the analysis of the statute. We simply contend that the statute does have application in the instant case. Section 55-10-109(1) (a) provides:

(1) The court may decree a termination of all parental rights with respect to one or both parents if the court finds:

(a) That the parent or parents are unfit or incompetent by reason of conduct or condition seriously detrimental to the child; or (emphasis added).

That the Petition for Termination (R. 19) alleges appellant was "not at fault" does not prevent termination where a condition seriously detrimental to the child exists, appellants argument to the contrary. There was a reason why the Legislature added the phrase "or condition" - a reason aptly illustrated by the present case. After reviewing the facts that (1) The child in the care of appellant would be homeless, (2) The appellant could not provide financial support for the child, (3) The appellant's parents were unwilling to care for the child, (4) The natural father was unknown and had no interest (R. 19,20). (5) And that after 15 months there was no indication the circumstances had changed, the court properly concluded that its original order of January 9, 1975 terminating parental rights because of such conditions involving the natural parents was in the best interest of the child and there was no reason to revoke said order 14 months later. The Juvenile Court,

trier of the facts with direct information and impression regarding the circumstances, found that the appellant was in fact incompetent and incapable of providing necessary care for the child, a "condition seriously detrimental to the child" as the statute requires. In open court appellant agreed all these conditions were true. (Tr. 3) Try as we may we cannot see how the provisions of Section 55-10-109(1) (a) do not fit the instant case as appellant contends.

It should be remembered that the Juvenile Court treated this case as a hybrid situation under both the involuntary termination provisions of Section 109(1) and a voluntary termination under Section 55-10-109(5). (R. 35). Appellant says the court cannot do this. (Appellant's Brief, pg 12-13) Why not? How else could the interest of the child be protected where the mother voluntarily relinquishes and the father is unknown. Why can't the Juvenile Court hang a termination on "both pegs?" As we read the court's Memorandum Decision, he terminated the unknown father's rights on an involuntary basis, and the appellant mother's parental rights on both a voluntary and an involuntary basis. (R. 35) Does that do violence to the statute? There is no disjunctive function word between Sections 55-10-109(1) and 55-10-109(5). Assume a situation where an involuntary petition for termination of parental rights is filed against X. X is served. X voluntarily appears at the hearing and voluntarily relinquishes his rights. Would appellant have us take the position that the court could not act and that the proceeding was a nullity? Does appellant seriously contend that because appellant voluntarily consented the termination order as to the unknown father is void and he still has parental rights in the child? (Appellant's Brief, p. 17).

We conclude that Appellant's parental rights were legally and properly terminated by the Juvenile Court.

POINT IV.

APPELLANT WAS NOT DENIED HER
RIGHT TO COUNSEL AT THE HEARING ON
THE PETITION TO TERMINATE PARENTAL
RIGHTS.

Appellant argues that she was denied the right to counsel at the January 9, 1975 termination of parental rights hearing. This argument is based upon the fact that the transcript typed from a recording of the January 9, 1975 hearing indicates no reference to representation of counsel for Appellant.

This issue was raised at the hearing on the Petition to Set Aside And Vacate a Decree Terminating Parental Rights held on April 22, 1976 (Tr. 2-23). The Juvenile Court Judge addressed the issue in his Memorandum Decision of May 4, 1976 (R. 35-38). He concluded that the petitioner (Appellant) was duly afforded counsel and duly informed of her rights thereto.

In that decision the Judge recounts that Appellant had been represented by counsel at three prior proceedings involving the same parties and substantially the same issues. Attorney William Daines had been appointed by the court for Appellant at the first hearing, after she was advised of her right to counsel and indicated her desire for appointed representation. Mr. Daines stood ready to appear with appellant at the January 9, 1975 hearing, according to the judge, but was not wanted by the appellant. (Deputy County Attorney Jones proffered proof at the hearing that Attorney Daines, who had represented Appellant in the past, stated that appellant had contacted him but had decided to proceed without counsel. (R 34).

The Memorandum Decision also sets forth the recollection of the court that a discussion was had by and among Appellant, the County Attorney, Division of Family Services workers and the court regarding the mother's

decision to come before the court and voluntarily relinquish her rights to Baby Girl Marie by not contesting the Petition to Terminate Parental Rights. The court was convinced that Appellant neither wanted nor needed counsel for the January 9, 1975 proceedings. Section 55-10-109(2) requires only that parties to a termination proceeding be advised of their right to counsel. Actual presence of counsel is not predicated to a valid proceeding. A right to be represented by counsel does not imply that a party must have counsel even against their own wishes or desires.

Respondent would urge the court to consider the transcript of both the January 9, 1975 hearing and the April 22, 1976 hearing on the Petition to Vacate (Tr. 1-4; 1-23) and, further, the Memorandum Decision of the court dated May 4, 1976 (R. 35-38). Summons personally served upon Appellant (R.A 1) in connection with the January 9, 1975 hearing specifically advised appellant of her right to counsel, as well as her right to appeal. These parts of the record in particular, and the record read as a whole, refute Appellant's claim that she was denied the right to counsel.

POINT V.

THE EVIDENCE FULLY SUPPORTS THE DECISION BY THE JUVENILE COURT TO ORDER A TERMINATION OF THE PARENTAL RIGHTS OF THE APPELLANT.

The Statutory test for termination of parental rights requires a finding of conduct or condition that is seriously detrimental to the child. (Section 55-10-109(a) U.C.A. 1953). Proof must be by a "preponderance of evidence." (State v. Lance, 23 Utah 2d 407, 464 P.2d 395 (1970)).

In the instant case the Juvenile (trial) court found: (1) The mother was unwed. (2) The natural father was unknown and could not be determined by the court. (3) The natural mother was unable to adequately provide for all the needs of the child (4) The maternal grandparents refused to care for or provide a home for the child. (5) The natural mother (appellant) agreed

it was in the best interest of the child for parental rights to be terminated and the child be placed for adoption. (R. 18,20) At the time of the subsequent hearing 15 months later the conditions had not changed. (R. 38) The record supports the findings as to said conditions and appellant has not contradicted the existence of said conditions in its brief on appeal.

In effect the child was at birth homeless and would have, and apparently still would be, in that same condition if custody had been maintained with or were now restored to appellant. It is impossible to conceive a circumstance more seriously detrimental to the child. The preponderance of the evidence certainly substantiates that it was in the best interest of the child to terminate the appellant's parental rights. There is actually no evidence to the contrary. The only evidentiary grounds left to appellant is the presumption of preference afforded to the natural mother - to which, however, the welfare of the child is paramount. (In re State In Interest of Jennings, 20 Utah 2d 50, 432 P.2d 879 (1967) .

Appellant cites the dissent of Chief Justice Henriod in the case of State of Utah, in the interest of T.G. 532 P.2d 997 (1975) in arguing insufficiency of evidence in the instant case. In the T.G. case the majority opinion affirmed a termination order of the Juvenile Court on findings by that court that (1) The natural mother had no necessary skills to train and supervise a child, (2) housekeeping standards jeopardized the child's well being, and (3) the natural mother was of low moral standards. We submit none of these circumstances, as detrimental as they may be, are as detrimental as being homeless. Justice Henroid dissented, not on the basis of insufficiency of evidence, but because he has a question regarding the constitutionality of the termination statute itself, in view of the permanency of deprivation authorized thereby.

Appellant also cites the case of State of Utah, in the interest of Pitts, 535 P.2d 1244 (1975) as additional authority for insufficiency of evidence in the instant case. We believe the Pitts case is clearly distinguishable from the instant case for many reasons. In the Pitts case two infant children were left at a hotel in care of a friend by the natural parents. The hotel had a fire and the children were delivered by the friend to the paternal grandmother. The grandmother kept the children for a time until she could no longer care for them, and then delivered them to the Division of Family Services. The DFS subsequently filed a petition for termination of parental rights which was granted by the Juvenile Court. The natural parents then appealed from a refusal of the Juvenile Court to vacate such order. Evidence in the Pitts case indicated the following distinctions from our present case: (1) The natural parents were not duly notified of nor present at the original termination hearing. (2) The natural mother had maintained contact with the children and made efforts to see to their care when absent from them. (3) The natural parents had not given their consent to termination of parental rights. (4) The DFS had not made diligent inquiry to locate the parents. (5) There was no evidence the children had been placed for adoption.

These differences are greatly significant and present a whole different situation from the instant case, where a homeless infant, never in the care of the natural mother, father unknown, is placed for adoption with the consent of the natural mother adopted, and months later a revocation is attempted.

Appellant also cites the case of State of Utah, in the Interest of Inez Pilling, et al, 23 Ut. 2d 407, 464 P.2d 395 (1970), wherein a juvenile court termination order was reversed by this court. Once again the case is clearly distinguishable from the instant case. In the Pilling case, three

daughters and one son were taken from the parents by the Juvenile Court. Custody of the three daughters was placed with their natural father, a previous husband, and all parental rights were terminated to the son. The distinguishing facts are as follows: (1) The children were older, two being of school age, and had lived with their mother for some time. (2) No evidence that mother would not or could not correct certain problems in the home was introduced. (3) The natural parents had not consented to termination (4) The juvenile court had withheld certain "secret evidence" (social reports) from the appellant, and (5) there had been no adoption of the children.

We submit that the evidence adduced in the instant case clearly preponderated a condition seriously detrimental to the child and supported the termination order.

POINT VI

THE WELFARE OF THE CHILD AND FINDINGS OF THE JUVENILE COURT IN RELATION THERETO ARE OF PARAMOUNT CONSIDERATION ON REVIEW BY THIS COURT.

Though the presumption that a natural mother is the best parental influence on a child has been recognized by this court, a paramount interest has been enunciated as follows:

While ordinarily the parents have a right to custody of their children, the State also has an interest in the welfare of children, which is paramount thereto. (In re State of Utah in the interest of Ronald Jennings, et al., 60 Utah 2d 50, 432 P.2d 879 (1967)).

We submit the Juvenile Court, in the interest of Baby Girl Marie, made the right decision in terminating the parental rights of appellant, and later in refusing to set aside such decision after the adoption of the child. Hearings in Juvenile Court involving custody of children are not adverse, but are highly equitable in nature, designed to inquire into the welfare of the

children, not the desires of the parents. (State in the Interest of K— B—, 7 Utah 2d 398, 326 P.2d 395 (1958). No one has a "right" in the life of another human being contrary to the happiness or best interest of said being.

It is also axiomatic that the trial judge, because of his closeness to the situation, has a good vantage point regarding the evidence. As stated by this court:

Beuase of the advantage possessed by the trial judge, we feel reluctant to change his findings unless we are convinced that they are not supported by the evidence. (In re State of Utah in the Interest of Ronald Jennings, et al., supra).

We are aware the court is somewhat sensitive about being reminded of this axiom, but we submit that it is particularly apropos in the instant case, particularly as to the demeanor and understanding of the appellant at the January 9, 1975 termination hearing.

CONCLUSION

Respondent is not unsympathetic or calloused to the alleged position and feelings of the natural mother, appellant in this case. The writer of this brief has been on the natural mothers' side. (D— P— v. Social Services, supra). We agree with Appellant's counsel that extreme grief will undoubtedly occur not matter how the question is finally resolved.

But our sympathies with the young mother should not be allowed to cloud our vision or understanding of the true circumstances of this case. The procedural rights of appellant were not denied or circumvented. She was advised of her right both to counsel and to appeal in relation to the January 9 termination hearing. (Summons - AR 1, Memorandum Decision - R 38). She was advised in the Summons that it was proposed to terminate her parental rights, as the statute requires. The Juvenile Court judge also probed her understanding of this possibility with her. There was no disregard for procedural

due process nor haste in the proceedings, except as may have been dictated and justified by the circumstances of the child.

The fact remains that appellant had no way to provide for her child, or at least gave no evidence of such ability or effort to find a way. Though this circumstance may be a tragic indictment of our social degeneration, it cannot be allowed to prejudice the homeless, helpless, irresponsible infant. A condition seriously detrimental to the child existed, the Juvenile Court had little choice than to proceed as it did.

As a matter of legal principles, we believe this case presents the court, among other things, with opportunity to clearly enunciate a position in regard to jurisdiction to review termination orders when adoption proceedings have intervened, as argued in our Point I.

We urge the Court to affirm the termination order of the Juvenile Court and its subsequent refusal to vacate said order.

Respectfully submitted

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