

1977

# State of Utah in the interest of Baby Girl Marie v. Nadine Munoz : Brief of Appellant in Answer to Respondent's Petition for Rehearing

Utah Supreme Court

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James R. Hasentager; Attorney for Appellant; Vernon B. Romney; Attorney for Respondent;

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH, in the interest of

BABY GIRL MARIE, a person under  
eighteen years of age;

Case No. 14599

NADINE MUNOZ,

Appellant.

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APPELLANT'S BRIEF  
IN ANSWER TO RESPONDENT'S PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE  
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## ARGUMENT:

POINT I: RESPONDENT HAS BEEN AFFORDED A FAIR HEARING IN THIS CASE BECAUSE THE COMPLETE RECORD WITH ACCOMPANYING BRIEFS OF POINTS AND AUTHORITIES WAS BEFORE THE COURT AND THE ORAL ARGUMENT ITSELF WAS PRESERVED ELECTRONICALLY. . . . .	1
POINT II: IMPECUNIORITY, ABSENT ADDITIONAL CIRCUMSTANCES, WILL NOT SUPPORT A DECREE OF TERMINATION OF PARENTAL RIGHTS UNDER SECTION 65-10-109, U.T.C.A. 1953, AS AMENDED. . . . .	1
POINT III: DISSATISFACTION WITH THE COURT'S HOLDING IS NOT A PROPER BASIS TO SEEK A REHEARING AND RESPONDENT'S PETITION FOR REHEARING SHALL BE DENIED. . . . .	1
POINT IV: RESPONDENT HAS INCLUDED IMPROPER STATEMENTS IN ITS BRIEF WHICH SHOULD BE STRICKEN. . . . .	1
CONCLUSION . . . . .	1

## CASES AND AUTHORITIES CITED

<u>Bangor and Aroostock Railroad Company vs. Brotherhood of Locomotive, Firemen and Engineers</u> , 114 F. Supp. 381 (1973) . . . . .	1
<u>Brown v. Pickard</u> , 4 Ut. 392, 11 P. 512 . . . . .	1
<u>Cordner v. Cordner</u> , 64 P.2d 505 (1937) . . . . .	1
<u>Dredge Corp. v. Husite Co.</u> , 169 P.2d 476 . . . . .	1
<u>Inez Pilling et al vs. Donna Lanza</u> , 13 Ut.2d 417, 46 P. 2d 198 (1973) . . . . .	1
<u>In re State in the interest of Jennings</u> , 17 Ut.2d 31, 41 P.2d 879 (1967) . . . . .	1
<u>In re State in the interest of Mullins</u> , 19 Ut.2d 174, 111 P.2d 721 (1973) . . . . .	1
<u>In re McKnight</u> , 4 Ut. 392, 11 P. 512 . . . . .	1



IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest of

BRYN JORD LARSEN, a person under  
eighteen years of age;

Case No. 1-101

VS. NADINE LARSEN,

Appellant.

APPELLANT'S BRIEF  
IN ANSWER TO RESPONDENT'S MOTION FOR A WRIT OF HABEAS CORPUS

Appeal from Judgment of the District Court of Juvenile Court  
Sevier County, The Honorable Charles W. Smith, Jr., Judge.

The Appellant, Nadine Larsen, on or about January 1, 1968, married  
James D. Laverne, Jr., residing at 1111 West 1000 South,  
Salt Lake City, Utah. The Appellant is the daughter of the Respondent,  
for the reasons set out in Appellant's Affidavit of Marriage, which is  
incorporated by reference.

WHEREFORE, Appellant prays that the writ of Habeas Corpus  
be granted.

DATED this 10th day of April, 1968.

The issue of a successor justice at the appellate level does not present the problems traditionally associated with a successor judge at the trial court level. There were no witnesses, no testimony to be subjected to a credibility test, and no jury. Bangor and Aroostock Railroad Company vs. Brotherhood of Locomotive, Firemen and Engineers, 314 F. Supp. 352, at 355, 356 (1970). In the instant case, with a full and complete record before the court Mr. Justice Hall had the necessary information upon which he could make his review and render his decision in this case. The assertions of the respondent notwithstanding, review is of necessity predicated almost exclusively on the record and briefs filed with the court in this case. The respondent is in a very shaky position asserting that it was prejudiced by the resignation of Mr. Justice Henriod and the participation of Mr. Justice Hall in the decision of this case. However, when coupled with the electronic recording of the oral argument by the court itself, the respondent simply has no position at all.

Oral argument was held on November 11, 1976, at which time counsel for both the appellant and the respondent presented their cases to the court. At that time, oral argument was recorded electronically and a record of that session was preserved. The recording was in existence and available for rehearing if any members of the court later desired to listen to that session. Cases cited to the court by the respondent are not only not on point to the issue raised by the respondent but are also forty years old as well. Gordner v. Gordner, 64 P.2d 828, primarily relied on by respondent, is a 1937 case. It takes little sense for the court to not recognize and incorporate into the efficient

administration of its judicial business the accuracy and quality of modern electronic recordation equipment. In the instant case a full and complete record was before the court for review; the oral argument was preserved and available for use by the court in reaching its decision; the respondent's position is not well taken and should be rejected.

## POINT II

IMPECUNIORITY, ABSENT ADDITIONAL CIRCUMSTANCES, WILL NOT SUPPORT A DECREE OF TERMINATION OF PARENTAL RIGHTS UNDER SECTION 55-10-109, U.C.A. 1953, AS AMENDED.

Respondent has alleged that the court reached an improper conclusion of law when the court stated on page two of the original decision that "Impecuniosity will not support a termination decree." Respondent further urges on the court the proposition that impecuniosity standing alone will support a termination decree. It is difficult to conceive a position more violative of an individual's equal protection and due process guarantees under both our Federal and State Constitutions. Contrary to respondent's assertions, this court has never taken the position that impecuniosity absent other additional circumstances would support a decree of termination. In all of the cases cited to this court by the respondent, indeed, in all of the cases decided by this court in which a decree of termination was upheld, there were additional circumstances which contributed to the termination decree to provide a totality of circumstances warranting termination. Those additional circumstances have included emotional instability of the parent, In re State in the



Interest of Jennings, 20 Ut. 2d 50, 432 P.2d 879 (1967); a killing of the mother by the father in the presence of the children, In re State in the Interest of Mullins, 29 Ut. 2d 376, 510 P.2d 720 (1973); inadequate parental supervisory skills, poor housekeeping and low moral standards of the mother, State in the Interest of T. G., 532 P.2d 997 (1975); abandonment, State in the Interest of Summers Children, 560 P.2d 331 (1977); and, where the home was clearly inadequate and the parents could not or would not correct the evils which existed in the home, Inez Pilling et al vs. Donna Lance, 23 Ut2d 407, 464 P.2d 395 (1970). Not a single case supports the position of the respondent. As this court properly pointed out, impecuniosity, standing alone, will at best support only a finding of dependency before the juvenile court. In the instant case, none of these additional circumstances were present.

Respondent has conveniently chosen to ignore a central fact of this case in that the appellant was a juvenile at the time of the original termination decree and was impecunious only because of the temporary status in being a juvenile. This type of disability, not of the appellant's making and the only one present in this case, is alleviated very simply through the passage of a short period of time; a circumstance which had been adequately met by the Juvenile Court's original order of November 6, 1974, placing the child in the temporary custody of the Department of Family Services with review in one year.

It would be a major step backwards in the development of the law of this State if this court were to reverse its original holding that "Impecuniosity will not support a termination decree." Appellant urges

the court to categorically reject the proposition that impecuniosity absent other circumstances will support a termination decree.

### POINT III

DISSATISFACTION WITH THE COURT'S HOLDING IS NOT A PROPER BASIS TO SEEK A REHEARING AND RESPONDENT'S PETITION FOR REHEARING SHOULD BE DENIED.

The essence of respondent's final argument is that the respondent is not satisfied with the court's conclusion in its original decision. Respondent has asserted that the court failed to consider the issues raised by Points I and VI of respondent's original brief: to-wit, that the juvenile court had no jurisdiction to vacate its previously entered order and that the welfare of the child and findings of the juvenile court in relation thereto are of paramount consideration on review by this court. However, respondent ignores the holding of this court in its original decision of February 24, 1977, that the juvenile court lacked the jurisdiction to terminate the parental rights of the appellant in the first place; that the juvenile court, a statutory court of limited jurisdiction, may only terminate a person's parental rights when it strictly follows "a clearly expressed statutory standard," Decision, February 24, 1977, page 3; and that the original order of the juvenile court in this matter was void. Respondent appears to be suggesting that no matter how carelessly and error-ridden a juvenile court's initial termination proceeding may be, if the State or adoption agency can act quickly enough in bringing the matter before the district court

on an adoption action, that all prior defects committed by the juvenile court in the original termination are cured. Clearly, the law will not sustain such a position, and of equal clarity is that this court has not ignored Point I of respondent's initial brief.

On the issue of an intervening adoption proceeding, the majority opinion notes in footnote number 2, page 3 of the original decision filed February 24, 1977:

2. Also see 46 Am. Jur.2d, Judgments, Section 752, P. 915: ". . . the defense of laches has been regarded as not available against a motion to open or vacate a void judgment, for the reason that no amount of acquiescence can make it valid . . . . There may be some instances, however, under which laches or delay may be asserted to preclude relief, as where others innocently relied on the record of the judgment.

Additionally, the last paragraph of the majority opinion expresses the recognition by the majority that this case was not an easy decision to be made in light of the personal interest involved. There the court correctly characterized the original error-ridden termination proceeding as "a tragic example which results from a failure to adhere to a clearly expressed statutory standard." Decision, February 24, 1977, page 3. Clearly, the court in reaching its decision in this case did consider the personal interests involved.

Point III of respondent's petition for a rehearing is in substance an emotional appeal grounded upon dissatisfaction with the court's conclusion. Such an argument does not meet the standard for a rehearing set out by the court in the old case of In re McKnight, 4 Ut. 237, 9 P. 299 (1886) or that of Brown v. Pickard, 4 Ut. 292, 11 P. 512 wherein the

court stated:

The appellant moves for a rehearing. He alleges that . . . the court erred in its conclusions. Nothing is now submitted as a reason why a rehearing should be granted that was not fully considered in the argument. No showing is made that satisfies the court that it should review its conclusions, and we are not convinced that we erred. We long ago laid down the rule that, to justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of hearing. Venard v. Old Hickory M & S. Co., 7 Pac. Rep. 408. Where a case has been fully and fairly considered in all its bearings, a rehearing will be denied. People v. Rogerson, 7 Pac. Rep. 410.

All of the issues raised by respondent in Point III of their petition for rehearing were before the court in its original decision, were considered by the court in its original decision, and respondent's petition should therefore be denied. Arguments presented by respondent are in effect re-argument of respondent's original brief. When this is the case, the petition should properly be denied. Dredge Corp. v. Husite Co., 369 P.2d 676.

#### POINT IV

RESPONDENT HAS INCLUDED IMPROPER STATEMENTS IN ITS BRIEF WHICH SHOULD BE SET ASIDE.

Appellant takes exception to, as improperly included in respondent's brief on petition for rehearing, the reference to a March 4, 1977, letter to the Salt Lake Tribune from a child psychiatrist quoted in respondent's brief for a rehearing. Respondent's Petition for Rehearing, page 18. Appellant asserts that it is in effect an attempt to influence

the court through the introduction of what the respondent is obviously characterizing as expert testimony. Such an attempt is improper as review is predicated upon the record of this case as previously established, not upon an opinion generated outside the judicial process, and this reference should be stricken from respondent's brief.

Lastly, appellant asks that the first sentence of respondent's conclusion, Respondent's Petition for Rehearing, page 19, be stricken as well. This is not legal argument proper for consideration by the court in a petition for rehearing, rather it is an attempt at an inflammatory emotional appeal directed solely at dissatisfaction with the court's original decision.

#### CONCLUSION

Appellant submits that the respondent has been afforded a fair hearing in the decision of this case; that the court has not erred as to either fact or conclusions of law; and that respondent's petition is based solely upon dissatisfaction with the conclusion of the court's original decision. All issues raised by the respondent were considered by the court in its original determination.

Therefore, appellant respectfully asks that respondent's petition for rehearing be denied.

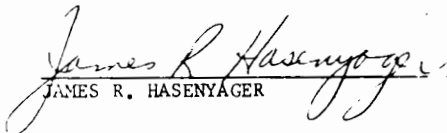
Respectfully submitted,

JAMES R. HASENFAGER

Attorney for Appellant

CERTIFICATE OF MAILING

I certify two copies of the foregoing APPELLANT'S BRIEF IN  
ANSWER TO RESPONDENT'S PETITION FOR REHEARING were mailed this 20<sup>th</sup>  
day of April, 1977, to: Franklyn B. Matheson  
Assistant Attorney General  
(Attorney for Respondent)  
236 State Capitol  
Salt Lake City, Utah 84114

  
JAMES R. HASENYAGER