

1978

State of Utah v. P. L. L. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest)

of)

P.L.L. a person under 18)
years of age.

BRIEF OF APPELLANT

Appeal from an order of the
of the First Judicial District Court,
County, Utah terminating appellant's
her child P.L.L.

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STATE OF UTAH, in the interest)

P.L.L., a person under 18 years of age.

PRELIMINARY STATEMENT

DISPOSITION IN LOWER COURT

RELIEF SOUGHT ON APPEAL

Appellant desires an order from the Utah Supreme Court setting aside the juvenile court's order terminating her parental rights to her child P.L.L.

In 1973, while married to Robert Lavine, appellant gave birth, on July 10, 1973, to her minor daughter P.L.L.

(TR. 207) The child was born with serious medical problems including a severe cleft palate. (TR. 163) As a result, the

child was placed, at birth, in a foster home of the Utah Division of Family Services. (hereafter DFS) From the child's birth until November, 1973 no visitation was arranged between parents and child.

During November, 1973 Mr. David Mullens, a DFS caseworker, acquired the case. (TR. 69) He was in charge of the case until April or May, 1974. (TR.70) Mr. Mullens promptly arranged a visit between appellant and child during November, 1973. (TR.78) A second visitation took place on January 18, 1974 (TR.78) followed by at least two more visitations between January 18, 1974 and March, 1974. (TR.78) Several other scheduled visitations were cancelled from time to time because either appellant, her husband, or the child were sick and unable to attend the scheduled visitations. (TR.7) Although the child's medical problems required that the child remain in DFS custody for approximately a year and one-half it was Mr. Mullens long range goal to put the child back into appellant's home if the appellant was able to manage the necessary care for the child. (TR.79) Indeed, Mr. Mullens acknowledged that had the child not been a handicapped child efforts would have been made much sooner to put the child into appellant's home. (TR.80) Also, during Mr. Mullens involvement with the case no instruction was given appellant on how to care for her handicapped child (TR.80) nor were any steps spelled out to appellant to be performed in order for appellant to obtain custody of her child (TR.79)

DFS caseworker, Vickie Rowe, assumed management of the case in either June or July, 1974. (TR.84) She was responsible for the case until approximately June, 1975. (TR.84) During the two month interim period between David Mullens relinquishment of the case and Vickie Rowe's assumption of case management there were two more visitations between parent and child. (TR.108) Those visits went well, with appellant's concerned about and relating well to her child. (TR.107) While Mrs. Rowe was in charge of the case numerous, periodic visits were arranged between appellant and her child. Some visits during Vickie Rowe's administration of the case were quite successful. Other visits during this period were less successful.

An initial visit under Vickie Rowe's supervision took place on August 1, 1974 for about three hours. (TR.86) Nothing unusual about appellant's care of the child was noted after this visit. (TR.86) A second visitation took place from August 6-7, 1974 (TR.87) followed by two more overnight visitations on August 27 and September 17, 1974 (TR.92) Thereafter, a weeks long visitation occurred from October 22-29, 1974. (TR.96) A sixth visitation was arranged for December 25, 1974 (TR.102) and again on January 13, 1975. The last visit under Ms. Rowe's supervision took place on March 29, 1975. The two month gap in visitation resulted from an illness of the child. (TR.103) Ms. Rowe also testified

that she could recall three or four occasions when the appellant had requested visitation with her child which had been denied because the child was ill. (TR.101) Then, after the Easter, March 29, 1974 visitation, Ms. Rowe's notes reflected that the appellant had contacted her twice more seeking visitation but again, P.L.L. was ill and unable to visit with appellant. (TR.105)

While Ms. Rowe did instruct the appellant on how to care for the child when the child was left at the appellant's home, Ms. Rowe had not had any previous training or experience in working with a mother of limited intelligence. (TR. 109-10) Other than from her immediate supervisor, Ms. Rowe did not seek any other more qualified professional help in terms of training appellant in the skills appellant would need in order to gain custody of her child or improve the quality of care appellant was giving her child. (TR.110) The only referral made by Ms. Rowe seeking outside training for appellant was to the Weber County Mental Health parenting classes which appellant attended regularly from October 29 through December 2, 1974. (TR.113) It is significant to note that the quality of care appellant provided to her child during and after she attended the parenting classes improved considerably. (TR.101-113)

Again, there was a two month span during which the case was managed by one Pat Purcell, another DFS caseworker. No visitations between parent and child nor contacts by DFS with appellant were recorded.

In September, 1975 Ms. Deola Gearhart, yet another DFS caseworker, assumed responsibility for the case of P.L.L. (TR.124) Ms. Gearhart's first contact with appellant was on October 15, 1975 when appellant went to Ms. Gearhart's office and requested visitation with her child. Visitation was arranged and took place on October 17, 1975. (TR. 125) Appellant again contacted Ms. Gearhart on November 28, 1975 requesting a Christmas visitation which occurred on December 24-25, 1975. This Christmas visitation itself went well with no apparent problems being discernible. (TR.129) Between these two visitations Ms. Gearhart made no efforts at all to contact appellant or to arrange any visitation. (TR.127) Indeed, from taking over the case it was Ms. Gearhart's position that all of the responsibility for initiating contacts between DFS and a parent rested upon the parent (TR. 268-69) and the result of no contacts only goes to prove the parent not interested in the welfare of the child. (TR. 269)

At least as early as January, 1976, Ms. Gearhart had made a conscious decision that appellant's parental rights to P.L.L. should be terminated. (TR. 142) As a result no steps were ever taken by DFS to work with appellant to correct any inadequacies in appellant's home. (TR. 131, 134) Indeed, by December 9, 1975, Ms. Gearhart was already taking active steps to terminate appellant's parental rights (TR.155) From December 25, 1975 until March, 1977 appellant had no further visitations with her daughter, although there was testimony

~~from Ms. Gearhart that she did have one occasion to discuss~~
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this with appellant and appellant indicated to Ms. Gearhart that someone had told appellant she wasn't allowed to visit her child. (TR. 130-31)

On January 10, 1977 the juvenile court scheduled a review of DFS custody of P.L.L. Appellant appeared at that hearing and requested custody of her child. (R. 27) A hearing on the custody question was scheduled for February 14, 1977 but that hearing was continued because the county attorney couldn't appear on that day. The hearing was reset for March 2, 1977. (R.30) At the conclusion of the March 2, 1977 hearing the court entered the following order:

That the Division of Family Services prepare a report as to the type and cost of the surgery P__ will need. Further, that this matter be and is hereby continued to the 15th day of March, 1977 at 9 a.m. Further, the above named child's grandparents may visit with said child for a half a day every other week. Visitation with the mother is to be worked out between the mother and the Division of Family Services. (R. 34)

Custody of the child was denied to appellant. Also, the respective grandparents of P.L.L. who had also sought custody of the child were denied custody because while both sets of grandparents had suitable homes, the juvenile court felt the specialized medical needs of the child beyond the capabilities of the grandparents. (R. 36)

Visitation between P.L.L. and the grandparents followed the March, 1977 court hearings. These visitations extended into May, 1977. (TR. 144) Ms. Gearhart was completely aware that appellant would also be present at the respective grand-

parent's home to have visitation with her daughter on those days. (TR. 146) However, at this point, Ms. Gearhart unilaterally stopped these previously court ordered visitations (TR. 146-48) despite repeated calls from the grandparents attempting to exercise their court ordered visitation rights. (TR. 256) These steps were followed on November 28, 1977 by the filing of a petition seeking termination of the parental rights of appellant. (R.41) A denial was entered on January 18, 1978 (R. 78) and trial set for March 30, 1978. That trial setting was vacated because the state failed to file responses to the appellant's discovery requests. (R. 78) Another trial setting was made for April 27, 1978 and again vacated because of the states failure to respond to appellant's discovery requests. On April 12, 1978, appellant had filed a motion to dismiss the state's petition seeking termination of parental rights. (R. 65) but the state was permitted to respond and trial reset for May 18, 1978. That setting was again vacated because DFS would not grant access to subpoenaed records from DFS files. (R. 79) Finally, On June 15, 1978 trial was held resulting in the termination order. (R. 79-80)

ARGUMENT

POINT I

A TERMINATION OF PARENTAL RIGHTS PROCEEDING IS AN ADULT CASE, AND A FORFEITURE PROCEEDING OF A QUASI-CRIMINAL NATURE TO WHICH THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MUST APPLY. THEREFORE, IT WAS REVERSIBLE ERROR TO REQUIRE APPELLANT TO TESTIFY AGAINST HERSELF.

Section 78-3a-48 (1)(a) permits the juvenile court to decree a termination of parental rights with respect to one or both parents if the court finds:

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

While the proceedings to accomplish a termination of parental rights are denominated "civil proceedings" Section 78-3a-44(1) U.C.A. 1953 as amended, the juvenile court is actually a specialized, hybred, court system invested with statutory authority to utilize, from time to time, both the civil and criminal procedural rules. Section 78-3a-19 gives the juvenile court jurisdiction to try adults for criminal offenses committed against children, furthermore, Section 78-3a-20 states:

In proceedings in adult cases the practice and procedure of the juvenile court shall conform to the practice and procedure provided by law or rule of court for criminal proceedings may be commenced by complaint and a trial jury shall consist of four jurors....

It is the examination into the wrongful conduct or condition of the parent or parents which gives the quasi criminal nature to termination proceedings otherwise denominated "civil."

Because it is the wrongful conduct or condition of the parent, seriously detrimental to the child, which is actually on trial in a termination proceeding, a termination case must properly be looked at as primarily an adult case rather than a child's case. This court has begun to recognize this point. In State of Utah, in the interest of Walter B., 577 P.2d 119, 124-25 (1978) this court stated:

The statute does not provide that termination may be predicated on the best interests of the child; this is a standard applicable to a custody disposition. The best interests of the child may be a resulting benefit, but it cannot be the primary point of departure, upon which termination hinges.

Obviously, the primary point of departure upon which a termination may hinge is the wrongful conduct or conditions of the parent or parents, seriously detrimental to the child.

In substance then, a termination proceeding in the juvenile court is actually a forfeiture proceeding whereby a parent may be required to forfeit the parent-child relationship. Upon a showing of wrongful conduct or condition on the part of a parent which cannot or will not be corrected by the parent, after notice and opportunity implemented, by reasonable efforts of assistance, the juvenile court may require a forfeiture of the parent-child relationship.

Nearly a century ago the United States Supreme Court decided Boyd v. United States, 116 U.S. 616 (1886). That case dealt with a situation where the government was seeking a forfeiture of property alleged to have been fraudulently imported without paying the necessary duties. The forfeiture proceedings in Boyd were, like in our juvenile court, denominated civil proceedings. The Supreme Court stated at 622:

...We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be

civil in form, are in their nature criminal... As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself...

In accord with Boyd, the United States Supreme Court decided the more recent case of United States v. United States Coin and Currency, 401 U.S. 715 (1971) which also dealt with a forfeiture proceeding. In United States Coin and Currency the government has instituted a forfeiture proceeding to obtain money seized from a person's possession at the time of his arrest for violating federal gambling registration and tax statutes. The court in citing Boyd, supra reiterated that:

proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.

Therefore, a Fifth Amendment privilege against self incrimination must apply where money liability is predicated upon a finding of the owner's wrongful conduct. United States v. United States Coin and Currency, supra, at 718.

For a termination of parental rights to be ordered by the juvenile court the evidence must show wrongful conduct or condition of the parent extending beyond simple neglect or dependency, which is "such a substantial departure from the norm as to constitute a condition seriously detrimental

to the child." State of Utah, in the interest of Walter B., supra, at 121. It is the examination of the wrongful conduct or conditions of the parent, seriously detrimental to the child, that invests the termination proceeding with the quasi criminal aspects similar to the forfeiture of property proceedings set out in Boyd and United States Coin and Currency. This brings the termination proceeding within the purview of the Fifth Amendment privilege against self incrimination for civil proceedings as spelled out in Boyd and United States Coin and Currency.

In State of Utah, in the interest of Walter B. supra, at 124 this court stated, "A parent has a fundamental right, protected by the constitution, to sustain his relationship with his child." If a Fifth Amendment privilege against self incrimination can be said to attach in a civil forfeiture proceeding involving property certainly the privilege must apply in a civil forfeiture proceeding involving the fundamental Constitutional right to the parent-child relationship.

POINT II

EVIDENCE PRESENTED AT TRIAL FAILED TO ESTABLISH THAT APPELLANT WAS REASONABLY NOTIFIED OF ALLEGED INADEQUACIES IN THE ENVIRONMENT SHE PROVIDED FOR HER CHILD; AND, FAILED TO ESTABLISH THAT REASONABLE EFFORTS OF ASSISTANCE WERE EXTENDED BY DFS TO APPELLANT TO CORRECT ANY INADEQUACIES ALLEGED TO EXIST IN APPELLANT'S ABILITY TO CARE FOR HER CHILD.

State v. Lance, 464 P.2d 395 (1970) and State of Utah, in the interest of Walter B., 577 P.2d 119 (1978) have firmly established that "it is a condition precedent to

termination that the conduct or condition alleged to be seriously detrimental to the child cannot be corrected, after notice and opportunity implemented, by reasonable efforts of assistance." State of Utah, in the interest of Walter B., supra at 124.

In reaching its decision to terminate appellant's parental rights to P.L.L., the juvenile court placed heavy reliance upon the fact that while training might assist the mother in providing basic survival care for her child, that it would not enable appellant to provide her child with proper parental care and protection. (R. 91) This finding has two fundamental errors. First, no legitimate steps were ever undertaken to diagnose appellant's strengths or alleged inadequacies in providing adequate care for her child, nor was any such information properly made known to appellant. Secondly, no legitimate efforts, which failed, were ever made to extend reasonable assistance to appellant to overcome her weaknesses and build upon her strengths in caring for her child as a condition precedent to termination.

Testimony at trial revealed that only DFS caseworker Vickie Rowe gave appellant some basic types of positive instructions on how to care for the child in terms of feeding, clothing and bathing the child. It was these brief instructional sessions, as Ms. Rowe dropped the child off with appellant for visitation, that the juvenile court relied upon in finding, as a condition precedent to termination, that appellant had

been informed of inadequacies in the environment she was providing for the child. Also, that these instructional

sessions constituted reasonable efforts of assistance to appellant to correct the alleged seriously detrimental conduct or conditions. (TR. 290) In reaching this finding, the court discounted entirely the very significant factor that Ms. Rowe had absolutely no training or past experience at all that would have qualified her to be able to adequately convey to and instruct appellant about alleged inadequacies in appellant's ability to care for her child. (TR. 109-10) This of course, is significant because with a parent of limited intellectual abilities a legitimate question arises as to whether or not brief and hastily given instructions on child care would be adequately comprehended. To have assured that appellant was fully informed about and actually understood DFS complaints about alleged inadequacies in her abilities to care for her child qualified professional help should have been brought into the case to assure that appellant did fully understand her alleged inadequacies and would thereby receive a bona fide chance to correct the inadequacies.

The far more important failure in this case however, was the failure of DFS to extend reasonable efforts of assistance to appellant to correct the alleged conduct or condition seriously detrimental to the child prior to seeking an order of termination of parental rights. Again, the juvenile court relied solely upon the brief instructional sessions by Vickie Rowe as constituting the reasonable assistance required under the circumstances. The question then becomes was this in fact

reasonable assistance under the circumstances?

Both psychologists who testified at trial agreed that appellant has the ability to provide her child with basic survival care. (Dr. Furlong-TR.42; Dr. Grow-TR.65-66) If a parent possesses the capability, without training, to provide basic survival care enabling the child to survive but not necessarily thrive or be adequately stimulated, reasonable assistance as a pre-condition to seeking termination would require that some additional steps be undertaken in terms of supplemental training to determine if the parent can be trained sufficiently to provide an even better level of care for her child.

It is submitted that the capacity to provide basic survival care is in itself sufficient to defeat a termination petition because, as acknowledged by Dr. Furlong in his testimony to the court, the situation of a parent raising a child in basic survival conditions is not that uncommon. (TR. 43) Therefore, that factor is not such a departure from the norm as to fall within the legislative meaning of seriously detrimental to the child. However, separate and apart from the ability to provide basic survival skills no efforts at all were made to increase the appellant's ability to provide a better quality level of care for her child. Indeed, no one was able to render a realistic opinion as to whether or not appellant could or could not be helped to raise the level of her ability to care for her child because no such efforts

had been made. When Dr. Furlong was asked the direct question, his response was "Well, I don't know, I honestly don't know." (TR. 45) Far too much uncertainty exists on such an important question.

As a condition precedent to termination basic fairness requires that appellant be given a reasonable opportunity to have the child in her home, absent wilful neglect or abuse, with qualified professional supervision and training before she be deemed to be unable to correct conduct or conditions which might otherwise preclude her from having custody or maintaining parental rights to her child. The petition to terminate parental rights was for this reason premature under these particular circumstances. The juvenile court's order should be vacated and the case remanded to the juvenile court with instructions that bona fide efforts be made to assist appellant in caring for her child as a condition precedent to seeking a termination in this case.

POINT III

THE INADEQUACIES OF CONDUCT OR CONDITION ALLEGED TO BE SERIOUSLY DETRIMENTAL TO THE CHILD ARE NOT SUCH SUBSTANTIAL DEPARTURES FROM THE NORM AS TO SUSTAIN A DECREE OF TERMINATION.

In In the interest of Winger, 558 P.2d 1311, 1316 (1976) quoting State v. McMaster, 468 P.2d 567 (1971) the Utah Supreme Court adopted the position that in order for a termination of parental rights to be sustained the conduct or condition ascribed to the parent must be such a substantial

departure from the norm as to constitute a condition seriously detrimental to the child. The evidence in the present case failed to establish conduct or condition on the part of the appellant which was such a substantial departure from the norm that a termination can be sustained.

Viewing the evidence presented at trial in a light most favorable to the state, it showed only that the appellant is borderline mentally retarded thereby limiting her ability to care for her child. There was no evidence at all that the appellant had ever willfully neglected or abused her child at any time.

On the question of the conduct or condition of the appellant being a substantial departure from the norm the testimony of Dr. Furlong, who testified on behalf of the state, is of particular importance. This testimony is contained generally in pages 40-43 of the trial transcript. In particular Dr. Furlong testified: (TR. 42-42)

Q: And at that time do you recall telling me that it was your opinion that Mary Lavine could provide P___, the Child, with basic survival care?

A: Yes.

Q: And is it your opinion from testing her that she could provide basic survival care for the child?

A: Yes.

Q: What's that mean?

A: Well, it means that the child likely would

stimulated, but would survive.

Q: Now, is that type of situation an uncommon circumstance around the country as far as you know?

A: I would think it's not uncommon. (emphasis added)
If it is not uncommon that throughout the country there are many parents of skills and abilities comparable to appellant who, although capable of providing only basic survival care, are raising their children under similar conduct and conditions this, while unfortunate, does not establish such a substantial departure from the norm justifying a termination of parental rights.

POINT IV

THE DIVISION OF FAMILY SERVICES IS ESTOPPED FROM SEEKING A TERMINATION OF PARENTAL RIGHTS HEREIN BECAUSE DFS ACTIVELY ENGAGED IN A DE-LIBERATE PLAN CALCULATED TO DESTROY APPELLANT'S PARENT-CHILD RELATIONSHIP.

Through the summer of 1975, appellant regularly maintained contact and visitation with her daughter. At this point in time Ms. Deola Gearhart was given management of the case. Ms. Gearhart acknowledged on cross-examination that she initiated no steps whatever to attempt to build or maintain the parent-child relationship between appellant and her daughter. (TR. 144) It was her view that responsibility for arranging visitation between appellant and her child, rested solely on the appellant. Further, even after the juvenile court had ordered in March, 1977, that visitation between grandparents and P.L.L. and appellant and her daughter take place Ms. Gearhart deliberately and unilaterally terminated the visitation because in her sole judgment the visits

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were upsetting the child. (TR. 145) These visitations were terminated even though Ms. Gearhart knew that appellant was seeing her child when the child would be taken to the home of the respective grandparents. (TR.146) The visitations, after being unilaterally terminated in late summer, 1977, were not resumed.

The deliberate policy of DFS, specifically Ms. Gearhart, in trying to build a favorable record sufficient to support a decree of termination is clearly demonstrated by Ms. Gearhart's answers to cross-examination on pages 155 and 156 of the trial transcript. In June, 1976, Ms. Gearhart filled out a Social Services Contract which detailed her plan for handling this case. The document said "Mother's visits will be limited and closely supervised." This work plan was entered with the knowledge that it takes continuous and active interaction between a mother and daughter under these circumstances to foster any sort of parent-child relationship.

The chronicled actions of Ms. Gearhart permitted DFS to place appellant in a catch-22 type situation. The reasoning goes - parental rights can be terminated because appellant has not visited her child and therefore, has no interest in the child - because the child isn't visited by appellant this is seriously detrimental to the child permitting termination - however, the appellant can't see her child because DFS won't let her see her child, or refuses to initiate

any steps to maintain the relationship. By failing to attempt to maintain or build appellant's relationship with her child, DFS clearly violated appellant's fundamental right to maintenance of a family relationship. In this circumstance DFS must not be permitted to profit by its intentional and wrongful inaction.

CONCLUSION

As has been pointed out many times, termination of parental rights is a very drastic and extreme action to be taken against a parent and then only in the most serious cases. It is a step which should not be taken at all until it can be conclusively shown that a parent cannot or will not correct the conduct or conditions alleged seriously detrimental to the child. It is not an action which should be based upon conjecture and supposition as has been done in this instance. The mother must, as a precondition to termination, be given a bona fide chance to have the child in her custody, with proper and adequate supervision in order to determine whether or not conduct or conditions alleged seriously detrimental to the child can be corrected. This not having been done in this case, the termination proceeding was premature and cannot be sustained.

DATED this 18th day of December, 1978.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.



Attorney For Appellant