

1979

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

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.

Case No. 15947

a person under 18 years of
age. :

BRIEF OF RESPONDENT

Appeal from an order of the Honorable
L. Kent Bachman of the First Judicial
District Juvenile Court for Weber
County.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the :
interest of :
P.L.L. : Case No. 15947
a person under 18 years :
of age. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal by the natural mother from an Order of the First District Juvenile Court for Weber County, Utah, Judge L. Kent Bachman presiding, entered on June 22, 1978, permanently terminating all parental rights of appellant in connection with her child, P.L.L.

DISPOSITION IN LOWER COURT

On June 22, 1978, the juvenile court found appellant to be incompetent by reason of conduct or condition seriously detrimental to her child, and ordered that the parental rights of Mary Ellen Lavine, the appellant herein, be permanently terminated. (R.81). The court further ordered that the child be placed in the custody of the Utah State Division of Family Services.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the juvenile court's order terminating parental rights.

STATEMENT OF FACTS

Respondent agrees with appellant's Statement of Facts with the following exceptions and additions:

1. The child, P.L.L., was placed in the custody of the Division of Family Services at birth by order of the juvenile court dated July 18, 1973. (R.2). The child's physical condition, coupled with the doctor's conviction that the mother was incapable of providing proper care resulted in Division of Family Service custody from the time of the child's birth. (TR. 118). It was not the child's condition alone as appellant asserts. (Appellant's Brief, p.2).

2. The visitations which were arranged by Mr. Mullens (Appellant's Brief, p.2) took place at the Division of Family Services office, because Mr. Mullens did not consider appellant's living quarters appropriate for a child. (TR. 71-72).

3. Appellant's statement on page 3 of her brief regarding visitations arranged by Ms. Rowe is noticeably undetailed. The record reflects, in detail, all of the visits arranged by Ms. Rowe. In actuality, only the

first three-hour visit on August 1, 1974, was recorded without problems (TR. 86). Afterward, when Ms. Rowe allowed visits for longer periods of time, the record is replete with resulting problems.

The first overnight visit took place on August 6-7, 1974. When Ms. Rowe delivered the baby to the mother, she instructed her on the proper way to feed the baby, emphasizing the special problems created by the cleft pallat, how to bathe and clothe her, and what time the child should be put to bed. (TR. 89). When Ms. Rowe picked up the child the next day, the baby had a hard sucker in her mouth, had not been bathed, had not been cleaned after diaper changes, and had not been put to bed until 3:00 a.m. (TR. 88-90).

A second overnight visit was arranged on August 27-28, 1974. When Ms. Rowe returned to pick up the child, the baby was very tired, her hair was matted together with a stickly substance, her nose had run and dried all over her face, and she appeared not to have been bathed. (TR.91). Upon return to the foster home, the child was wheezing and coughing, and her nightgown in her suitcase was found to be soaking wet and filthy. (TR. 92). Again, the mother had been instructed on how to care for the child. (TR. 91).

After the third visit, the child had on dirty underclothes and was tired. (TR. 93).

When Ms. Rowe next went to the appellant's house, she found it in a state of complete filth, as described in the transcript at pages 94-95.

After instruction and prodding by Ms. Rowe, the appellant managed to clean up the house (TR. 96), and Ms. Rowe agreed to allow a week long visit which commenced on October 22, 1974. Two days later Ms. Rowe returned to find the baby very dirty and the house malodorous, with spilled garbage all over. (TR. 97-98).

After a four-day visit in November, 1974, Ms. Rowe did not find the baby at the appellant's house when she went to pick her up. (TR. 101). She located her at her maternal grandmother's, and found her to be subdued and somewhat melancholy. (TR. 102).

From the record detailing the visits arranged by Ms. Rowe, it appears that almost all were "less than successful," as stated by appellant at page 3 of her brief.

4. Appellant's conclusion that the quality of care provided by the mother improved considerably subsequent to her attendance at parenting classes is not supported by the record. The child was dirty after a visit on January 13, 1975 (TR. 103), and was tired and dirty

after an overnight visit on March 29-31, 1975. (TR. 104).

5. Appellant's assertion on page 5 that by December 9, 1975, active steps were being taken by Ms. Gearhart to terminate parental rights is a misstatement of the facts. At that point, Ms. Gearhart had only decided to explore termination as a possible alternative in this case. (TR. 155).

6. The appellant refrains from giving the reason that Ms. Gearhart stopped the child's visits with her grandparents. (Appellant's Brief, p.7). After the child had undergone surgery for the cleft pallat, Ms. Gearhart attempted to take the child for a visit with the grandparents. When they pulled up in front of the grandparents' house, the child became extremely upset and threw a tantrum, crying and screaming very loudly. (TR. 145). Ms. Gearhart felt that such emotional and physical exertion was harmful to the child after having recently had surgery, so cancelled the visit. The grandparents were informed of this and the reasons for it by telephone. (TR. 145).

7. The appellant's right to visitation was not affected in any way by Ms. Gearhart's actions regarding the grandparents' visits. Appellant could have requested visits at any time. (TR. 147).

8. Appellant's Statement of Facts omits any mention of the facts attested to by the psychologists who were called as expert witnesses. Appellant's intelligence level and capacity would classify her as borderline mentally retarded. (TR. 29). Appellant was diagnosed as having a passive dependent personality, which means that she takes a passive stance in life, depending on others to provide her with the basic necessities of life. Dr. Paul T. Furlong testified that with her intellectual capacities and personality traits, the appellant may be able to provide basic survival care to a child, that the child would likely survive but would not necessarily thrive or be stimulated. (TR. 42). Dr. Richard Grow testified that with training, the appellant may be able to learn basic survival skills, but no other more advanced parenting skills. (TR. 66). Dr. Furlong also testified that the appellant lacks the sophistication and ability to train a child to fit into society in a reasonably adequate fashion. (TR. 44).

After a lengthy trial at which the Juvenile Court judge had the opportunity to hear and weigh all of these facts, the court found that the appellant "is incompetent by reason of her condition and conduct which is seriously detrimental to the child," and ordered that all parental rights be terminated. (R. 291-292).

ARGUMENT

POINT I

ALLOWING THE APPELLANT TO TESTIFY AS A WITNESS
IN THIS CASE DID NOT VIOLATE HER FIFTH AMENDMENT
RIGHTS AND DOES NOT CONSTITUTE REVERSIBLE ERROR.

Appellant characterizes the juvenile court proceeding in a termination case as "an adult case, and a forfeiture proceeding of a quasi-criminal nature to which the Fifth Amendment privilege against self-incrimination must apply." (Appellant's Brief, p.7). However, the denomination of the proceeding as civil, criminal, adult, or juvenile is inconsequential for Fifth-Amendment purposes. It is well established that the Fifth Amendment privilege against self-incrimination applies to juvenile court proceedings, Application of Gault, 387 U.S. 1 (1967). Further, it is not important whether the proceedings are denominated civil or criminal because the Fifth Amendment privilege generally applies in either case. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977), citing Malloy v. Hogan, 387 U.S. 1, 11 (1964), Justice White concurring, in Murphy v. Waterfront Commission, 387 U.S. 52, 94 (1964). Therefore appellant's belabored efforts to categorize action as an adult proceeding in order to invoke application of the Fifth Amendment is unnecessary and moot.

Respondent has some problem with appellant's characterization of a juvenile court termination proceeding as a forfeiture proceeding, although it is an unnecessary argument for analysis of the Fifth Amendment privilege. Respondent points out that a parent does not have the same kind of property interest in a child as she would in a chattel. As was discussed by a federal district court in Organization of Foster Families v. Dumpton, 418 F.Supp. 277, 282 (S.D.N.Y. 1976), "The time has long since passed when children were considered mere chattels of the adults with whom they lived." To treat the parent-child relationship as one would that of a property owner to his chattel is to totally overlook the rights of a child as a person. (See Point V , infra.) There are at least two individuals with protected rights involved in a termination proceeding, so it is very unlike a forfeiture proceeding in nature or purpose.

With the fundamental principle that the Fifth-Amendment privilege applies in juvenile court proceedings agreed upon, it is necessary to evaluate appellant's argument in terms of whether any error, reversible or otherwise, was committed in allowing appellant to testify as a witness in the court below.

The appellant was represented by counsel at all relevant stages of the proceedings which this court now reviews. Appellant's counsel, Mr. Hasenyager, generally objected to the calling of the appellant, Mary Ellen Clark Lavine, to testify as a witness. (TR. 195). However, Ms. Lavine was only a witness, not a defendant. A termination action in juvenile court is a proceeding in regard to the child, not the parent. The parent is not a defendant as in a criminal case. It is only in appellant's brief that there is any assertion that the purpose of a termination hearing is to place guilt or find "wrongful" conduct. The question of a parent's conduct or condition in a termination proceeding is not to be measured in terms of "right or wrong", but rather by the effect of that conduct on a child. The Fifth Amendment privilege against self-incrimination does not allow a witness to refuse to testify altogether. The general objection by appellant's counsel as to allowing appellant to testify was properly denied. (TR.199).

At the stage of the proceedings when the general objection was entered, no questions had been put to Mary Ellen Lavine. It is well-accepted that the Fifth Amendment privilege does not come into operation until specific questions are asked, U.S. v. Roundtree, 420 F.2d 845

(5th Cir. 1969), General Dynamics Corp. v. Selb Mfg. Co.,
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481 F.2d 1204 (1973) cert. den. 414 U.S. 1162 (1974),
U.S. v. Malnik, 489 F.2d 682 (5th Cir. 1974), the answers
to which might later subject the witness to criminal
prosecution. Lefkowitz v. Cunningham, 431 U.S. 801,
805 (1977).

The testimony which appellant gave at the hearing
below produced no evidence which might subject her to
future criminal prosecution. The attorney for the state,
Mr. Daines, attempted to follow a line of questioning
regarding prostitution. Counsel for appellant made a
Fifth Amendment objection. To the extent that the
Juvenile Court allowed this line of questioning, no
evidence came forth which could incriminate or support
future criminal prosecutions of appellant. (TR. 222-230).

Reference was made to taxes not filed by Mrs. Lavine,
which information might possibly subject her to criminal
liability. However, no claim of privilege was made to
these questions by either the appellant or her counsel.
It is necessary that a claim of privilege be made since
witnesses may waive their privilege against self-incrim-
ination if it is not asserted. U.S. v. Monia, 317 U.S.
424, 427 (1943).

There was no valid claim of privilege in this case.
This court stated in State v. Anderson, 495 P.2d 804,

(Utah, 1972) that:

An attorney for a witness cannot claim a privilege against self-incrimination; he can only advise the witness. In order for the claim to be honored by the court, it must be made by the witness.

Counsel for appellant tried several times to raise a Fifth Amendment claim of privilege, but appellant never made such a claim herself. Although the court allowed the appellant to testify, there was no evidence adduced which could subject appellant to criminal prosecution, so appellant was not unlawfully required to testify "against" herself within the meaning of those words.

It is interesting that although appellant makes such an extensive Fifth Amendment argument in her brief, there is absolutely no claim that her testimony produced any evidence which was influential in the court's decision. The court will note that of the important facts contained in the Statement of Facts in the briefs of both parties, no facts adduced from Mrs. Lavine's testimony are included. The findings and conclusions of the Juvenile Court, as articulated by Judge Bachman, are not based upon any information gained from the appellant's testimony. (R. 81).

Appellant testified only as a witness in the hearing below. There was no evidence obtained from her testimony which might incriminate her for future criminal proceedings,

and there is not even any indication that her testimony damaged her in this proceeding. The court below committed no reversible error in allowing appellant to testify.

POINT II

APPELLANT WAS GIVEN REASONABLE OPPORTUNITY TO CORRECT THE INADEQUACIES IN HER ABILITY TO CARE FOR HER CHILD.

P.L.L., the minor child involved in this case, is now over five years old. She has been in a foster home, under the custody and supervision of the Division of Family Services, since her birth. For over four years the Division of Family Services worked with the mother to provide opportunity for her to learn how to care and provide for her child. Numerous home visits were arranged between mother and child, and the mother was instructed on the very basic necessities of how to care for the child. Appellant's claims in Point II of her brief that she did not have the opportunity to improve herself and adequately prepare herself to receive custody of her child are unfounded. Only after four years of trying to maintain the natural parent-child relationship did the Division of Family Services determine that the child's best interests required a termination of parental rights. The appellant simply cannot claim that she had insufficient time or

opportunities to correct the inadequacies in her capacity to care for P.L.L.

The record shows that there was an extended period of trial and error during which time the appellant was given instruction in how to provide basic survival care for her child. Most of these incidents are detailed in Respondent's Statement of Facts. A brief summary follows:

1. During the period from July to November, 1973, the child received medical treatment in the hospital and then efforts were concentrated on placing her in an appropriate foster home. (TR. 69).

2. When the case was assigned to Mr. Mullens, a social worker, in November, 1973, he arranged for and secured psychological evaluations on the appellant to determine her needs, strengths, and deficiencies. (TR. 70).

3. Between November, 1973, and May, 1974, Mr. Mullens arranged visits between mother and child, which took place in the offices of the Division of Family Services because the worker felt uncomfortable about taking a baby into appellant's current living quarters. (TR. 71). Although several visits were cancelled either because the baby, the appellant or her husband was ill, at least four visits did take place. (TR. 78). During at least one of these visits, the social worker instructed

the appellant on how to feed the baby, pointing out the special problems caused by the cleft pallet. He also demonstrated the feeding method, as he had been instructed by the doctor. (TR. 73). Appellant seemed able to feed the baby correctly at that time. Mr. Mullens testified that the Division's major objective during the first year of the child's life was to make sure the child's medical needs were met.

4. The worker assigned to the case between May and July, 1974, was not called to testify, but the record does indicate that several visits were arranged during that time. (TR.107-108).

5. On August 6, 1974, the child was delivered to the mother with specific instructions on feeding, bathing and bedtime with emphasis regarding the child's cleft pallet and special feeding needs. (TR.89). On August 7, when the child was picked up by the social worker, she has a hard Sugar Daddy sucker in her mouth, was dirty, and had not been put to bed until 3:00 a.m. (TR. 88-90). The child was just one year old.

6. On August 27, 1974, the child was delivered to the mother, again with specific instructions regarding the simple necessities of bathing, feeding, and bedtime. The child was returned very dirty, tired, and improperly clothed. (TR. 91).

7. During a week long visit in October, 1974, the social worker had to keep almost a constant surveillance to insure that the child was cleaned and the house didn't fall into a state of filth. (TR. 97-98). Again, the social worker, Ms. Rowe, testified that she gave the same basic instructions to appellant at the beginning of each visit. (TR. 109), and asked appellant if she understood or to repeat the instructions. (TR. 110). Nonetheless, appellant continued to perform inadequately and the child was returned in unsatisfactory condition.

In the fall of 1974, the Division of Family Services referred the appellant to the Skills Center of Weber County Mental Health for the purpose of attending parenting classes and receiving specialized instruction in parenting skills. (TR. 113). Such classes are provided at no cost to participants. Even after appellant had reportedly attended such parenting classes for several months (TR. 113), she still failed to adequately perform the basic function of bathing and keeping the baby clean. (TR. 103, 104).

When Vickie Rowe, the social worker during much of 1974-75, was asked why she kept trying, she replied that she kept hoping that with teaching, the mother's parenting would improve. (TR. 93). It can hardly be said that no efforts were made to train the mother, and it was certainly not unreasonable for the Juvenile Court judge, after hearing

all the testimony, to conclude that the Division had afforded the appellant sufficient training and opportunities to learn basic mothering skills. (TR. 290). These efforts largely failed, and for almost a year and a half, the appellant didn't even request any more home visits. (TR. 136) She made no efforts then, but takes the position now that the Division of Family Services must continue for an indefinite period of time to assist her. The appellant has limited learning capacities. She has not responded well even to basic training in survival care. It would be unfair to the child to keep her in a temporary foster care situation for years while interminable efforts are being made to train her mother, especially when the prognosis is doubtful.

Appellant claims on page 13 of her brief that the most significant failure of the Division of Family Services was a failure to extend reasonable efforts of assistance to appellant to correct her deficiencies prior to filing a petition for termination of parental rights. On the contrary, the Division had kept P.L.L. in foster care for over four years before filing for termination. All of the training and in-home visitations previously discussed took place before the petition was filed. During the last year and a half of the period, appellant did not even request additional in-home visits.

The duty of the Division of Family Services to assist a parent in overcoming her parenting deficiencies, as articulated by this court in State v. Lance, 464 P.2d 395 (Utah 1970) and State in the Interest of Walter B., 577 P.2d 119 (Utah 1978), only goes so far.

In State in Interest of Mario A., 514 P.2d 797 (Utah 1973), this court said that:

"We do not think caseworkers are obligated to go to the extremes which appellant claims they should have done in order to kindle and increase a small flame of desire to be reunited with her children." 514 P.2d at 799.

In the present case, the Division of Family Services did make reasonable efforts over an extended period of time to aid the appellant and provide her with opportunities to maintain her parent-child relationship. However, at some point the Division's duty to protect the best interests of the child must take over, and the Division must take appropriate steps to provide the child with a stable, stimulating family environment.

Appellant submits that "the capacity to provide basic survival care is in itself sufficient to defeat a termination petition." (Appellant's Brief, p.14). First of all, the record indicates that appellant did not demonstrate a significant capacity to provide even basic survival care. Even if she had such capacity, it would

not be sufficient in and of itself to defeat the termination petition.

In the most recent case decided by this court regarding termination of parental rights, State in the Interest of R.J., H.J., and D.J., (Dec. 15, 1978, No. 15386), the mother was found to be "unable to provide an environment which would stimulate intellectual or emotional growth in her children." (Dec. 15, 1978, p.2). It was also found that "neither parent has been able to respond to or cooperate in assistance offered by Social Services over a period of several years." Id. This court affirmed the Juvenile Court's judgment that:

...[T]he natural parents are socially and emotionally retarded and unable or unwilling to psychologically, emotionally, and/or socially stimulate the above children to the degree that they are failing to develop properly and said failure is seriously detrimental to the welfare of said children. Id.

Thus, this court has recognized that children require more than basic survival care. They also require and deserve at least some degree of intellectual, emotional, and social stimulation.

A recent case in the Virgin Islands, In re Maria, Elisa, and Norma C., 5 FLR 2089 (Terr. Ct. USVI, Nov. 16, 1978) discusses a situation remarkably similar in facts to the present case. In doing so, the Territorial Court cited the Utah statute and practice regarding

termination of parental rights. The mother in that case was also slightly mentally retarded. The father was 69 and had just suffered an incapacitating massive heart attack. The court held:

"The facts before the court clearly and convincingly establish that Mr. Gabino C. and Mrs. Luz C. are not capable of adequately parenting their minor children.... Without doubt, Mr. and Mrs. C. are incapable of meeting the psychological, emotional, and intellectual needs of their children. At best, the C's can provide their three daughters with no more than the basic physical necessities of life." 5 FLR 2090. (Emphasis added.)

The court concluded that the conduct and condition of the patents were seriously detrimental to the children, and parental rights were terminated. 5 FLR at 2090.

The courts are recognizing that adequate parenting involves more than simply providing basic survival care. Appellant asserts that she had the capability to provide basic survival care, without training, (Appellant's Brief, p.14) but the record does not support such an assertion. Neither psychologist testified that appellant could provide survival care without training, only that she probably had the capacity to provide such care with training. (TR. 42,65). When given instruction in basic skills such as bathing, feeding, and bedtime, the appellant did not respond with a convincing demonstration of her ability to learn survival care. But even if we assume

that she can eventually learn the skills necessary to keep a child alive, there has been little or no hope offered that appellant would ever be able to provide her child with anything more than basic survival care. Dr. Furlong testified that appellant did not have the ability to provide the stimulation or training necessary for a child to fit into society in a reasonably adequate fashion. (TR. 44). Dr. Grow testified that the appellant was not capable of learning more than basic survival skills. (TR. 66). With this type of prognosis, one wonders how much training the Division of Family Services was expected to provide, and for how many years, before coming to the same conclusion -- that the appellant lacks the capacity to provide adequate parenting to her daughter.

The Juvenile Court judge heard all the testimony, considered all the facts presented, found that there had been adequate attempts at instruction and training, and that appellant has made "no significant progress". (TR. 290). The trial court is in the best position to analyze and find the facts, and as this court said in R.J., H.J., D.J., supra, "[t]he general rule that we will usually defer to the trial court's factual findings, applies to juvenile proceedings." Dec. 15, 1978, p.2, fn. 6, citing State v. Dade, 376 P.2d 948 (Utah 1962). As Justice

Crockett said in his dissenting opinion in State in the

Interest of Walter B., supra:

[I]f this entire record is surveyed in the light of the established rules of review, allowing the Juvenile Court its prerogative of finding the facts, and of exercising its judgment as to the best interest and welfare of this child, there is no basis shown which should persuade this Court to disturb the findings and order made. 577 P.2d at 126.

In the present case, the record fully supports the findings of the lower court that the Division of Family Services attempted to allow the appellant to care for her child and to train her to provide adequate parenting; and that the appellant's unsatisfactory performance and inability to learn, together with the child's best interests, now require termination of parental rights.

POINT III

APPELLANT'S CONDUCT AND CONDITION MUST BE ANALYZED IN CONNECTION WITH HER INDIVIDUAL RELATIONSHIP WITH HER CHILD, AND NOT IN TERMS OF A NATIONAL STATISTICAL CATEGORY.

Point III of appellant's brief sounds rather like the age-old excuse a child gives his parent to justify some wrongdoing. "But Mom, everybody else does it!"

Appellant's argument seems to be that there are statistically quite a number of people in the United States who are at the same or lower intelligence level as the appellant. Many of those people may have children. Many may not be providing their children with the care

and stimulation that would allow them to thrive. (Appellant's Brief, p. 17). However, appellant is an individual with unique problems. Her child is also an individual, and the child also has some unique problems. The task of the Juvenile Court is to determine whether this mother's conduct or condition is seriously detrimental to this child. The fact that the court cannot solve all the problems which may exist in homes around the country should not prevent it from doing its best in this particular case.

As Dr. Grow testified, the appellant's condition may not be as common as her statistics indicate. (Appellant's full scale IQ is approximately at the 6th percentile nationally, TR. 30). Dr. Grow indicated that in judging a person's parenting abilities, one must consider more than her intellectual capacity alone. The person may have strengths separate and apart from her intelligence level which could enable her to be quite a satisfactory parent. (TR. 65). Many of the people in appellant's statistical group who have approximately the same intellectual capabilities may have many compensating traits which allow them to care adequately for their children. These people have to be judged as individuals, not simply as a member of some statistical group.

However, Dr. Grow testified that he looked for positive traits and strengths in Mary Ellen Lavine's personality, and found them lacking. (TR. 65,67).

Appellant not only suffers from slight mental retardation and very limited learning capacity, she also lacks compensating traits on the positive side of the ledger. In this way she may differ from many others in the country with her same mental condition who are raising children. In examining the particulars of this case, the Juvenile Court was justified in finding that this mother could not adequately care for this child.

There may well be other failing families around the country. But when the courts of this state are presented with an appropriate case for remedial action, they should not hesitate merely because they are unable to remedy all similar households. An analogy might be made to child abuse. Child abuse is certainly not uncommon in this country. The courts are not able to convict all child abusers. However, when there is sufficient evidence to convict one child abuser, the court does not hesitate to do so.

In this case, the Juvenile Court was presented with sufficient evidence to support termination of parental rights as between this parent and this child. The lower court's decision should not be overturned on the grounds

that similar problems may exist in other families.

POINT IV

THE DIVISION OF FAMILY SERVICES WORKED ACTIVELY TO BUILD AND IMPROVE APPELLANT'S PARENT-CHILD RELATIONSHIP BEFORE DECIDING TO PETITION FOR TERMINATION OF PARENTAL RIGHTS.

The Division of Family Services worked with appellant and her child for over four years. Numerous visits were arranged, and instruction was given on how to care for the child. (See Point II, supra). Nonetheless, appellant asserts in Point IV of her brief that the Division engaged in a deliberate and calculated plan to destroy her relationship with her child. There is absolutely no evidence in the record of any deliberate, calculated plan, either individually or as a conspiratorial scheme, to alienate the child from the parent or the parent from the child. This assertion rests solely on the fact that when Mr. Gearhart was assigned to the case as a social worker, she did not take active steps to arrange visits between appellant and the child. Visits were never denied to the appellant, she just never asked for them. (TR. 146, 147) Appellant is an adult claiming to have sufficient understanding, capacity, and desire to have full custody of her child. If such is the case, and if in fact she did want to maintain relationship with the child and eventually regain custody, she certainly should have requested

visitation on her own, which she never did.

Ms. Gearhart did terminate the visits with the grandparents. The circumstances surrounding this matter have already been discussed. (See page 5 , supra). Whether Ms. Gearhart's actions regarding the grandparents' visits were proper is irrelevant for purposes of this action. Appellant's visitations were not contingent upon the grandparents' visits. So by terminating the grandparents' visitation, Ms. Gearhart did nothing to deny appellant the right to see her child.

Appellant puts too much emphasis on the fact that she did not see her daughter for a year and a half. (Appellant's Brief, p. 18). Appellant's parental rights were not terminated solely because she did not request visits. There were several factors which combined to make her conduct and condition seriously detrimental to the child. (See Juvenile Court Order, TR. 289-292).

There is an underlying fallacy in much of appellant's argument. If at some point the Division of Family Services did not make the decision that steps should be initiated to terminate parental rights, no petition would ever get filed. It doesn't all happen on its own. When Mrs. Gearhart took over the case, she reviewed the record and saw that no significant progress had been made by appellant in caring for the child. She was aware of

appellant's mental condition and intelligence level which indicated that it was unlikely that she would ever learn adequate parenting skills. She could see that appellant had not responded well to instruction on basic survival skills. The child had never lived with appellant, had been in the foster care program for several years, and really had little to look forward to except more years in foster care. At that point Ms. Gearhart decided that the interests of the child would best be served by initiating some steps toward termination of parental rights.

In cases such as this, the Division of Family Services must be concerned with two sets of interests--those of the parent and those of the child. The interests of the parent should not be allowed to subvert those of the child.

In its most recent pronouncement on this subject, this court acknowledged that the interests of the child should be paramount. "Although courts are reluctant to perform social surgery in permanently terminating the natural parent-child relationship, the welfare of the child is the paramount consideration." State in Interest of R.J., H.J., D.J., supra, Dec. 15, 1978, p.2. (emphasis added.)

This court has stated on many other occasions that the ultimate and most important test in a termination case must be the interest and the welfare of the child, which concern

must outweigh any right or privilege of the natural parent. In the case of State v. Dade, 376 P.2d 948, 949, (Utah, 1962), the court said:

"Quite beyond and more important than the rights and privileges of the parents is the welfare of these children and their prospects for becoming well-adjusted, self-sustaining individuals. This is the consideration of paramount importance."

In the termination case of State in the Interest of Jennings, 432 P.2d 879, 880 (Utah, 1967), this court stated:

"While ordinarily the parents have a right to the custody of their children, the State also has an interest in the welfare of children, which is paramount thereto."

In the termination case of State in the Interest of A, supra, 514 P.2d at 797, 799 (Utah, 1973), this court stated:

"While one feels deeply for a parent who is deprived of a child that feeling must not overcome the duty placed upon the court to act in the best interest of the child."

In the termination case of In re Interest of Winger, 558 P.2d 1311, 1313 (Utah, 1976) this court stated:

"There is a presumption of great strength, that it is in the best interests of the child to be reared by its natural parents. This presumption is only overcome when the trier of facts is convinced by a preponderance of the evidence the welfare of the child requires termination."

Finally, in the termination case of In re the Interest of S.J., H.J. and S.J., 576 P.2d 1280, 1283 (Utah, 1978), this court stated:

"It was also fair and reasonable to further conclude that the rights of the parents were secondary in importance since they were in direct conflict with and contrary to the best interest of the children."

In the present case, the decision to petition for termination of parental rights was made in consideration of the best interests of the child after long term efforts had been made to aid the natural mother. There was nothing irresponsible or inappropriate in the actions taken by the Division of Family Services, which must protect the child's interests as well as those of a parent.

POINT V

THE MINOR CHILD, P.L.L., HAS A CONSTITUTIONALLY PROTECTED RIGHT TO THE PRESERVATION OF IT'S BEST INTEREST.

Minor child P.L.L. was born out of wedlock on July 10, 1973. (R.5). It was born with a hole in its throat, a cleft pallat, a possible hearing loss, a turned out right foot, and an anticipated susceptibility to respiratory disease. (TR. 46,70,118). The child was kept in the hospital where delivered for approximately two weeks for tests. (TR. 118). The attending physician refused to release the child to its natural mother because she was not able to care for the baby. (TR. 118). Before the mother was released from the hospital a tubelegation was performed (TR. 208). The child was placed temporarily in an emergency shelter facility by the Division of Family Serves and subsequently on order of the Juvenile Court placed in a

foster home. (TR. 195). The child has been in the same foster home ever since for a period of over five years. (TR. 195). The child is in an adoptable status and it would be possible for the foster parents to adopt it. (TR. 194,195). The child has been under the continuous legal custody and guardianship of the Division of Family Services. The physical problems have been repaired in a series of surgical operations and at the present time the child appears both physically and mentally active and normal with only some speech difficulty. (TR. 163). There was no evidence that the child's parents have contributed anything to the support or care of the child. The Juvenile Court has continued custody in the Division of Family Services on findings that the mother is unable to care for the child. (See orders of January 21, 1975, R. 18; January 20, 1976, R. 19; March 22, 1977, R. 36). The mother is not asking for restoration of custody in this proceeding. (TR. 239). There have been prolonged periods of time during which the mother has neither requested nor had contact with the child. (TR. 132,150,156,163,210). The mother has changed residences frequently and for a time was unlocatable. (TR. 163,176). She has had several places of employment. (TR. 165,247) and is uncertain as to the sources of her income. (TR. 229). She was on welfare until eligible for social security income from a deceased

husband. (TR. 235). She has an older child (age 6) living with her parents in Nebraska, city or address unknown. (TR. 200,242). This child has lived with her parents and been in their continuous care since 10 months of age. (TR. 242). She has never, during that time, attempted care or physical custody of said child. (TR. 242). Said child prefers to live with the grandparents. (TR. 247). Professional testimony was introduced that the mother is mentally retarded with a very inadequate personality (TR. 55), that she lacks mental capacity to improve her parenting ability (TR. 57), and that although she might be able to provide basic survival care for the child P.L.L. the child would not thrive or be adequately stimulated. (TR. 35,36, 42,49). There was testimony regarding her neglect and inability to care for the child P.L.L. during periods of visitation. (TR. 87). The guardian ad litem appointed by the Juvenile Court to protect the interest of the child recommended termination of the mother's parental rights. (R. 37).

Under these circumstances it seems obvious that continuation of appellant's parental ties, thus preventing a permanent placement and adoption of P.L.L., would not be in the child's best interest. The evidence demonstrates that both the past conduct and the condition (circumstance

of the appellant have been and are seriously detrimental to the child P.L.L. and render the appellant unfit and incompetent as a parent to said child. (Section 78-32-48(a), Utah Code Annotated 1953, Replacement Volume 9A). It is respondent's position that not only have the statutory requisites been met for termination, but further, under these circumstances, the child P.L.L. has a constitutional right to be cut adrift from the appellant's parental ties.

It should be noted that a proceeding in the Juvenile Court is in the interest of the juvenile - not the parent, nor the state, nor some other party. The petition and all subsequent court documents shall be entitled: "State of Utah, in the interest of ___, a person under eighteen years of age." (Section 78-3a-23, U.C.A. 1953, Replacement Volume 9A). It is the duty of the trial court, and the appellant court, to act in the best interest of the child, not the adult parent. (State in the Interest of A, supra, at page 799). Admittedly, there is a presumption that it is in the best interest of the child to be reared by its natural parents - but this is a rebuttable presumption and can be overcome when the trier of the fact is convinced by a preponderance of the evidence that the welfare of the child requires termination. In re Winger, supra.

There is seldom reluctance to terminate parental ties in order to protect a child's physical well being. There is little hesitation to sever biological bonds if there is neglect or abuse, and it is not difficult to affirm the unfitness of a parent guilty of such conduct. But equally inimical to a child may be the trauma and emotional injury triggered by the termination of non-biological parental ties formed in early years. Such an interruption, especially where no reassertion of custody by the natural parent is possible, should likewise justify a termination of the biological tie. Unlike adults, children have no sophisticated concept of blood-tie relationships until quite late in their development. A blood-tie legal preference is rather obscure and means nothing to a child who has formed bonds with another parent figure who is providing love and care. It is a mistake to subordinate the psychological well being of the child to an adult's non possessory assertion of biological preference. For young children under age of 5 every disruption of continuity affects any achievements attained and may completely reverse the child's successful pattern. (See Drs. Goldstein, Freud and Solint, Beyond the Best Interest of the Child, Macmillan Publishing Co., Inc., 1973). In light of P.L.L.'s fragile beginning it would seem tragic to either transfer

the child from a successful placement to a rather marginal environment and frightening prospect in the custody of appellant, or to shut the door to any permanent adoptive circumstance in a stable surrounding.

Many courts have raised the psychological-parent concept to a constitutional base and dictated that a child whose placement is in question is entitled to the least detrimental available alternative for safeguarding his growth and development. In the case of In re Roy, N.Y. Fam. Ct. N.Y. Cty., 4/5/77, 3 FLR 2380, 393 N.Y.S.2d 515, the court held a natural mother's possessory claim to a 16 year old son who has lived with foster parents since one year old, is severed by such an "extraordinary circumstance", which circumstance triggers the best interest rule and authorizes the boys adoption by foster parent. Of particular interest in relation to instant case is following language of the court:

"His biological mother is not seeking his return to her; her claim is that she can maintain her title to him -- that she can prevent his adoption and the termination of her right to call herself a parent..."

"For this court to refuse to consider the child's best interest because of an adult's title to him, albeit a biological parent's, seemingly would be unconstitutional. To preclude a person by virtue of his birth

from a benefit -- from a measure promoting his interests -- would be anomaly in constitutional law. ...the minor has an unequivocal and unquestionable interest in termination of his parent's title to him, and therefore he seemingly has a constitutional right to freedom from the parental possessory claim"

In re J.S.R., D.C. Ct. App., 5/26/77, 3 FLR 2500, it held that in a termination proceeding the "best interest of the child" test was not unconstitutionally vague and that the standard requires the trial court to find the "least detrimental alternative available for the child."

"We think it plain that the standard 'best interest of the child' requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental or the available alternatives."

The integration of a child into a viable family unit is more important to the child than maintaining a non-custodial natural parent-child relationship. In the case of State v. Blum, (Or. App. 1970), 463 P.2d 367, which was cited with approval by this court in the case of In re Winger, supra, the Oregon Appeals Court, under a deprivation statute identical to ours, affirmed an order that parental rights of a mentally ill mother could be terminated upon finding that she was unfit by reason of conditions seriously detrimental to the child. The court stated:

"It is important that the child have a sense of belonging to a family. This is one of the things we look for after we say that our prime consideration is the best interests of the child. It is not in the best interest of the child to keep him forever in a limbo--a limbo that is terminated, if at all, when on some uncertain date his mentally ill mother recovers and gives him a normal mother's care. For this child it may well be that at his present age of seven and one-half years it is already too late to successfully integrate him into a family. If it is not too late, it is important to get it done soon." (463 P.2d, p. 370).

In the case of Organization of Foster Families v. Dumpson, 418 F.Supp. 277 (1976), certain foster parents attempted to restrain the New York City Human Resources Administration from transferring foster children without affording a constitutionally appropriate fair hearing, claiming that both the foster children and the foster parents enjoyed a familial right to privacy similar to that recognized in a biological family relationship because of the psychological ties which had been formed, which was protected under both the Equal Protection and Due Process clauses of the Fourteenth Amendment. The Federal District Court agreed with the foster parents recognizing that the minor children had a constitutionally protected "liberty interest to familial privacy"; viz., a constitutional right to the preservation of the least restrictive familial relationship which can not be deprived

without due process. On appeal to the United States Supreme Court (Smith v. Organization of Foster Families, 431 U.S. 816, 87 S.Ct. 2094, 53 L.Ed.2d 14 (1977)), the Supreme Court recognized that "the importance of the familial relationship to the individuals involved stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children, as well as from the fact of blood relationship." (97 S.Ct. at page 2110). Further the court recognized that "...emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." (97 S.Ct., footnote 52 at page 2110).

The following language of the Dumpson court is relevant and significant:

"The time has long since passed when children were considered mere chattels of the adults with whom they lived. ...it is by now well-settled that children are 'persons; within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. (Authorities omitted)
Foremost among those rights, as the Supreme Court has repeatedly held, is the right to be heard before being 'condemned to suffer grievous loss'". (Authorities omitted) 418 F.Supp. 282 (Emphasis added).

Of special interest in regard protection of the child in termination cases are two recent cases, one from the

State of New Mexico and one from the State of California. In the case of New Mexico Health and Social Services Dept. v. Smith, N.M. Ct.App., 1/9/79, 5 FLR 2346, the New Mexico appeals court affirmed a judgment terminating parental rights of child who had been in foster care for 2 of its 2 1/2 year life on the grounds that she was "unable to discharge her natural responsibilities as a parent due to mental incapacity, hospitalization, incarceration periods and the use of alcohol." A termination statute, similar to ours, was involved which required a finding that the parent was unfit resulting in serious harm to the child. The trial court did not rule that the child suffered physical harm but found that there was mental and emotional harm as a result of the failure of the mother to perform the natural obligation of care and support. The consequence of the mother's failure was the absence of a parent-child relationship. In other words, absence of a parent-child relationship constitutes serious harm sufficient to justify termination of parental rights. So in our instant case, absence of a parent-child relationship between the appellant and P.L.L. as a result of appellant's inability or lack of interest in providing care and support of the child renders the mother unfit and justifies termination of her parental rights. In the case of In re Heidi T., Cal. Ct. App.

1st Dist., 12/27/78, 5 FLR 2350, it was held that the mother's continuing mental illness which rendered her incapable of providing support justified termination of parental rights regarding two children, 12 and 11, who had been in foster care for ten years.

1979 is the "International Year of the Child" as designated by the General Assembly of the United Nations. This year commemorates the 20th Anniversary of the United Nations Declaration of the Rights of the Child. Privilege 2 of said Declaration provides as follows:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interest of the child shall be the paramount consideration.

It is not argued that a United Nations Declaration of Principle establishes a constitutional right. It is suggested, however, that to deny the least restrictive alternative for P.L.L. to develop in a manner described in said principle shall deprive P.L.L. of the liberty vouchsafed under the Fifth and Fourteenth Amendments.

CONCLUSION

It is acknowledged that termination of parental rights is an extreme action to be very carefully considered. The seriousness of the circumstance should not, however, becloud the essentiality of the procedure when appropriate. The Legislature has recognized that termination may well be the proper action by authorizing such procedure.

In view of the importance of the matter this court has in a series of recent cases spelled out certain tests that should be followed in applying the statutory language. The tests are as follows:

1. The termination order must be supported by a preponderance of the evidence. (In re the Interest of Winger, supra, 1975).
2. The natural parent is unable to supply physical and emotional care for the child. (Ibid.)
3. This circumstance will continue beyond a time in which the child could otherwise be integrated into a suitable substitute home. (Ibid.)
4. The conduct and condition of the natural parent is a substantial departure from normal parental relationships. (State in the Interest of Walter B., supra, 1978).
5. The parent must be advised of appropriate remedial action. (Ibid.)

6. The social agency must render reasonable efforts of assistance. (Ibid.)

7. It must be clearly manifest that the parent cannot or will not correct the deficiencies which exist. (State in the Interest of E.B., 578 P.2d 831, (Utah, 1978)).

8. The termination must be in the best interest of the child. (State in the Interest of R.J., H.J. D.J., supra, 1978).

Without belaboring further argument it appears obvious that the preponderance of the evidence supports all of these tests. It would seem to be an effort in futility, and certainly not in the interest of the child to return the child to appellant for some sort of trial period. The die has been cast. The essential thing now is to conclude a permanent placement that will continue to afford P.L.L. prospect for becoming a well-adjusted, self-sustaining individual. This should now be the consideration of paramount importance. The order of the Juvenile Court should be affirmed.

Dated this 9th day of March, 1979.

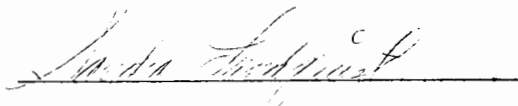
Respectfully submitted,

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MAILING CERTIFICATE

This is to certify that mailed two copies of the foregoing Brief of Respondent, postage prepaid, to James R. Hasenyager, Attorney for Appellant, at 453 - 24th Street, Ogden, Utah, 84401, on this the 9th day of March, 1979.

A handwritten signature in cursive script, appearing to read "Linda Lindquist", is written over a horizontal line.