

1979

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

Utah Supreme Court

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Robert B. Hansen; Attorneys for Respondent;

James R. Hasenyager; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, in the interest )

of ) CASE NO. 15947

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

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REPLY BRIEF OF APPELLANT

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Appeal from an order of Judge L. Kent  
of the First Judicial District Juvenile Court, Salt Lake  
County, Utah terminating appellant's parental rights to  
her child P.L.L.

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JAMES R. HASENYAGER  
UTAH LEGAL SERVICES, INC.  
Attorney for Appellant  
385 - 24th St., Suite 202  
Ogden, Utah 84401  
Telephone: (801) 394-4400

ROBERT B. HANSEN  
Attorney General

FRANKLYN B. MATHESON  
SHARON PEACOCK  
Attorneys for Respondent  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 533-5261

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, in the interest )

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P.L.L. a person under 18 )  
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REPLY BRIEF OF APPELLANT

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Appeal from an order of Judge L. Kent Bachman  
of the First Judicial District Juvenile Court for Weber  
County, Utah terminating appellant's parental rights to  
her child P.L.L.

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JAMES R. HASENYAGER  
UTAH LEGAL SERVICES, INC.  
Attorney for Appellant  
385 - 24th St., Suite 522  
Ogden, Utah 84401  
Telephone: (801) 394-9431

ROBERT B. HANSEN  
Attorney General

FRANKLYN B. MATHESON  
SHARON PEACOCK  
Attorneys for Respondent  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 533-5261

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## POINT I

### A GENERAL FIFTH AMENDMENT PRIVILEGE AGAINST TESTIFYING APPLIES TO A PARENT IN A TERM- INATION PROCEEDING.

Respondent asserts in its brief (Point I, p. 7-12) that no general Fifth Amendment privilege against compelled testimony by a parent in a termination proceeding can apply because in such an action the Juvenile Court is considered solely and exclusively with the best interest of the child, the parent being a mere witness. This assertion is in error. It misses or chooses to ignore the real thrust of appellant's claim of a general Fifth Amendment privilege against testifying in a termination proceeding which is, in substance, a fanciful name for a forfeiture action of a fundamental constitutional right. If such a privilege exists and has been abridged, appellant's right to basic due process has been denied and no specific showing of prejudice or damage need be made for reversal of the trial court's decision.

A parent, in a termination action, and against whom the proceeding is brought, is far more than a mere witness. Consider for a moment what the parent stands to lose. She will lose forever the companionship and love between mother and daughter. She will lose forever the joy and pride of seeing her daughter grow and develop as an individual. She will lose the opportunity to see her daughter marry and the possibility of her daughter bearing grandchildren for appellant. She loses the care, comfort and security that a daughter

can provide her in her older age. She loses a physical part

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of her being. None of these light losses indeed. To characterize a parent as a mere witness is to casually discard the whole concept of a family. This the Juvenile Court Act does not do.

Section 78-3a-35, Utah Code Annotated 1953, in relevant portion states as follows:

...Parents, guardians, the child's custodian, and the child, if old enough, shall be informed that they have the right to be represented by counsel at every stage of the proceedings. They have the right to employ counsel of their own choice; and if any of them requests an attorney and is found by the court to be without sufficient financial means to employ an attorney, counsel shall be appointed by the court. The court may appoint counsel without such request if it deems representation by counsel necessary to protect the interest of the child or of other parties. If the child and other parties were not represented by counsel, the court shall inform them at the conclusion of the proceeding that they have the right to appeal. (emphasis added)

Obviously, the Juvenile Court is interested in the best welfare of the child. It is equally apparent, however, that the court must concern itself with the interests, legal, social and familial, of the other parties. Who are the other parties? The answer is clear from the statute, they are the parents, guardians or child's custodians. A parent is not a mere witness, rather the parent is a party to the action itself.

Given that a parent is a party to the termination proceeding rather than a mere witness, what is the nature of this other party role in a termination proceeding? It is appellant's position that in a termination proceeding this other party role of the parent is actually that of a defendant, for

of a quasi-criminal nature in that the function of the fact finding process is to scrutinize the conduct or condition of the parent to determine whether or not that conduct or condition is wrongful from a legal or societal standpoint such that the wrongful conduct or condition justifies termination of the fundamental constitutional right to the parent-child relationship. After all, it is the specific wrongful conduct or condition of the parent which triggers the judicial inquiry. Obviously, it is not the conduct or condition of the child which is on trial. That would be ludicrous and no case has ever held that the conduct or condition of the child itself would provide a sole basis for termination. Rather, it is the specific wrongful conduct or condition of the parent, from both a legal and societal standpoint, seriously detrimental to the child, rendering the parent unfit or incompetant to care for the child which is actually on trial as the subject matter of the inquiry. That the best interest of the child will result is of secondary consideration to the initial issue of wrongful conduct or condition of the parent.

An examination of the Juvenile Court Act itself establishes the quasi-criminal nature of the termination proceeding based upon the type of evidence necessary to sustain a decree of termination. The trial court must find that the wrongful conduct or condition ascribed to the parent goes beyond simple neglect or dependency and is such a substantial departure from the norm as to constitute a condition seriously detrimental to the child. State in the Interest of Winger,

558 P.2d 1311 (Utah 1976); State in the Interest of E. v. J.T., 578 P. 2d 831 (Utah 1978). It is precisely the same wrongful conduct or condition on the part of a parent which from an evidentiary standpoint must be established by the state in order to sustain a decree of termination, which is set out in the Juvenile Court Act itself as criminal conduct.

Section 78-3a-19, Utah Code Annotated 1953, (in relevant part) states as follows:

The court shall have jurisdiction to try the following adults for offenses committed against children:

(1) Any person eighteen years of age or over who induces, aids, or encourages a child to violate any federal, state or local law or municipal ordinance, or who tends to cause children to become or remain delinquent, or who aids, contributes to or becomes responsible for the neglect or delinquency of any child;

(2) Any person eighteen years or over, having a child in his legal custody, or in his employment, who wilfully abuses or ill-treats, neglects or abandons such child in any manner likely to cause the child unnecessary suffering or serious injury to his health or morals;...

Any person who commits any act described above in this section, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by a fine not exceeding \$299, or by both. (emphasis added)

A termination proceeding then is a civil statutory remedy available to the state for wrongful conduct or condition of the parent which could otherwise be prosecuted criminally under Section 78-3a-19. This brings the case squarely under the holdings of the United States Supreme Court in Boyd v.



United States, 116 U.S. 616 (1886)<sup>1</sup> and United States v. United States Coin and Currency, 401 U.S. 715 (1971).<sup>2</sup>

The termination proceeding is a civil alternative remedy to criminal prosecution of a parent under Section 78-3a-19, which is instituted in the best interest of the child, by reason of offenses committed by the parent, as described by wrongful conduct or condition of the parent herself. To this extent a termination proceeding is of a quasi-criminal nature for all purposes 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.

It is erroneous to state, as respondent has done, that appellant would have this court believe that children are simply chattels. Appellant puts forth no such position. Rather, appellant asserts that the broader principle enunciated in

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<sup>1</sup>Boyd, *supra*,...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...

<sup>2</sup>United States, *supra*, 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.

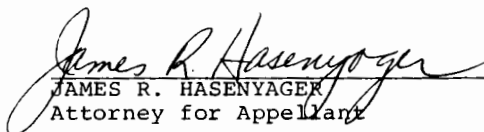
Boyd, supra and United States Coin and Currency, supra is clearly and directly applicable to termination proceedings due to the similarity of the nature of the actions themselves

CONCLUSION

A general Fifth Amendment privilege attaches to a parent in termination actions and appellant therefore asserts it is reversible error for appellant to have been compelled to be a witness against herself in this action.

DATED this 3rd day of April, 1979.

UTAH LEGAL SERVICES, INC.

  
JAMES R. HASENYAGER  
Attorney for Appellant