

1990

## Utah v. Cruz : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. \_\_\_\_\_ IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
In the Interest of:	:	
	:	
J. C., a person under eighteen years of age	:	Case No. 900162-CA
Plaintiff-Appellee	:	
vs.	:	Priority No. 4
Juanita Cruz,	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLEE

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APPEAL FROM THE THIRD DISTRICT JUVENILE COURT,  
SALT LAKE COUNTY,  
HONORABLE OLOF A. JOHANSSON, PRESIDING

-----

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
In the Interest of:	:	
J. C., a person under	:	
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Plaintiff-Appellee	:	
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Juanita Cruz,	:	
Defendant-Appellant.	:	

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this case pursuant to Utah Code Ann. §§ 78-2a-3(2)(c) and 78-3a-51 (1953), as amended.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the Juvenile Court's decision to terminate the parental rights of appellant in her child J.C. on the ground of abandonment was properly supported by clear and convincing evidence. The standard of review for a decision involving termination of parental rights was set forth in State in Interest of J.R.T. v. Timperly: "The decision ... will be disturbed on review only if the findings are clearly erroneous, i.e. if the findings are against the clear weight of the evidence." 750 P.2d

1234, 1236 (Utah App. 1988). See also Utah R. Civ. Pro. 52 (a).

2. Whether, even if the evidence to which appellant objects had been excluded, the record contains sufficient evidence to support the Juvenile Court's Findings and Order.

#### DETERMINATIVE STATUTES AND RULE

1. Utah Code Ann. § 78-3a-48 (1953) provides in relevant part:

(1)The court may decree a termination of all parental rights with respect to one or both parents if the court finds either (a), (b), (c), or (d) as follows:

...

(b) that the parent or parents have abandoned the child. It is prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child.

2. Utah Rule of Civil Procedure 52(a) provides in relevant part:

...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

#### STATEMENT OF THE CASE

On November 15, 1989, the State of Utah filed a petition in the Third District Juvenile Court for Salt Lake City

seeking the termination of the parental rights of Juanita Cruz in her minor child J.C. The matter came before the Honorable Olof A. Johansson in a hearing held January 26, 1990. The Court filed its Findings and Order terminating the mother's parental rights on the grounds of abandonment on February 15, 1990. The mother sought review of the Findings and Order, and filed a notice of appeal on March 16, 1990. A docketing statement was filed April 9, 1990.

#### STATEMENT OF FACTS

This case involves the termination of Juanita Cruz's parental rights in her natural child J.C., who at the time of the termination hearing was 10 years old. J.C. is mentally retarded and has a hearing disability.

At the termination hearing, the State called as a witness Cathy Haderlie, a social worker with the Utah Division of Family Services (DFS), who testified that she had been J.C.'s case worker for nearly two years. Tr. at 14, 15. Since J.C. had been in State custody prior to her involvement with his case, Ms. Haderlie derived some of the information to which she testified from J.C.'s DFS case file. Ms. Cruz's attorney noted a continuing objection to this testimony on the grounds that it was hearsay. The court admitted the testimony under Utah Rule of Evidence 803 (6). The evidence to which Ms. Cruz objected



included testimony that J.C. came into state custody in 1984, and that his mother had visited with J.C. eight times in 1986 and three times in 1987. Tr. at 9,11. In addition she testified as to J.C.'s behavioral problems as documented by his previous case workers. Tr. at 13. She also testified that Juanita Cruz failed to complete three treatment plans ordered by the same juvenile court in 1986-87. Tr. at 14-15. At the request of the State's attorney, the judge took judicial notice of the treatment plans, which appeared in the court file. Tr. at 14-15.

In addition to Ms. Haderlie's testimony, the state submitted as an exhibit a compilation prepared by Ms. Haderlie of relevant information in J.C.'s DFS file. See Exhibit I. Ms. Cruz's attorney objected to the reference in the exhibit to a conversation between a Child Protective Services worker and an informant regarding J.C. and his mother. The reference was stricken from the document, and the judge admitted the exhibit with no further objections from Ms. Cruz's attorney. Tr. at 22-25.

Besides the evidence Ms. Cruz claims was erroneously admitted, Ms. Haderlie offered considerable testimony regarding her personal observations. She told the court that during the time she had been involved in the case, Juanita Cruz had not visited her son or sent him any gifts, cards or other correspondence, that she contributed nothing to his financial

support, that she made no inquiries concerning his health, and that she did not even know how old he was. Tr. at 15, 18, 16. She testified that there was no parent-child bond between J.C. and his mother, and that Ms. Cruz's lack of affirmative involvement with J.C. was very atypical even among parents of children in State custody. Tr. at 22. As to visitation, she testified that Ms. Cruz called her in April 1989 to ask if she could see J.C. Ms. Haderlie said she denied the request because she felt a visit would not be in J.C.'s best interest, inasmuch as he had been placed in a foster home three days previously and was going through a major adjustment period. Tr. at 17. According to Ms. Haderlie, Ms. Cruz called her in May 1989 to ask for the name of a lawyer, and again in November to express anger over having received a summons in connection with the State's petition to terminate her parental rights. Id. Ms. Haderlie testified that at the time of the hearing, J.C. had been in a stable foster home for nine months, that his foster parents had worked professionally with the mentally handicapped and possessed skills necessary to deal with J.C.'s disabilities, and that the family loved him and was anxious to adopt him. Tr. at 28, 18, 19. In addition she stated that according to her observations, J.C.'s speech and behavioral problems had improved dramatically over the previous year. Tr. at 13-14.

Ms. Cruz's own testimony verified that she had not visited with J.C. since 1987. Tr. at 42. She said that DFS workers repeatedly told her that she could not visit J.C. Id. When asked why she had not sent J.C. any gifts or cards, she maintained that DFS prevented her. Tr. at 47-48. She was unable to correctly recall J.C.'s birthdate. Tr. at 47. Although at one point she stated that she had learned some sign language in order to be able to communicate with J.C., she was unable to demonstrate any proficiency. Tr. at 46-47. She also verified that she had not completed the court-ordered treatment plans. Tr. at 45. No other witnesses were called on Ms. Cruz's behalf.

#### SUMMARY OF ARGUMENT

Although Ms. Cruz contends that the trial court had insufficient evidence to support its findings, the record is clear that the elements of abandonment were established by properly admitted testimony. The facts which Ms. Cruz characterizes as hearsay were in fact within the personal knowledge of the witnesses, including Ms. Cruz, or were otherwise properly before the court. The evidence was clear and convincing both to create the statutory presumption of abandonment and to meet the test for abandonment set forth by the Utah Supreme Court.

However, even if the evidence to which Ms. Cruz specifically objects had been erroneously admitted, the juvenile court's decision should nevertheless be upheld under the harmless error rule, since there was no reasonable likelihood that the court's decision to terminate Ms. Cruz's parental rights would have been any different without the challenged evidence.

#### ARGUMENT

##### POINT I

BASED UPON OVERWHELMING, PROPERLY ADMITTED EVIDENCE,  
THE FINDINGS AND ORDER WERE NOT  
CLEARLY ERRONEOUS.

A. Clear and Convincing Admissible Evidence Supported the Trial Court's Finding of Abandonment and Order Terminating Appellant's Parental Rights.

It is undisputed that, as Ms. Cruz points out, the relationship between parent and child is a fundamental right protected by both the United States and Utah Constitutions. See In re J.P., 648 P.2d 1364 (1977). However, that right is not without limits, especially where the conduct of parents is seriously detrimental to children. As the Utah Supreme Court has observed, "[W]e are mindful that deprivation of parental rights is drastic action. Yet at the same time the lives and futures of [children] are in limbo, and their interests, too, must be considered and hopefully some permanency and stability found for

them." In Interest of S.R. and B.R. v. G.R., 735 P.2d 53, 57 (1987).

Utah statutes provide for the termination of parental rights if the juvenile court finds that a parent has abandoned her child. According to Utah Code Ann. § 78-3a-48 (1)(b) :

It is prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following the surrender have not manifested to the child or to the person having the physical custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child.

Under the statute, the party seeking termination--in this case, the State--needs only to establish that a prima facie case exists to create a presumption of abandonment. The burden then shifts to the parent to rebut that presumption. See State in Interest of J.C.O. v. Anderson, 734 P.2d 458 (Utah 1987); State in Interest of J.R.T. v. Timperly, 750 P.2d 1234, 1237 (Ut. App. 1988).

In Interest of J.C.O., the parents had left their children in the custody of other families for approximately two years. Although they visited the children on rare occasions and at one point expressed interest in regaining custody, the trial court nevertheless held that they had abandoned the children. The Utah Supreme Court upheld the decision, noting that "there is no

evidence upon which the trial judge could rely, except the Andersons' assertions that they have not abandoned the children, in holding that the prima facie evidence of abandonment had been rebutted." Id. at 462. Similarly, in Timperly, the father was unable to satisfactorily account for his failure to visit or communicate with his children, whom he had left in state foster care for fifteen months. According to the Utah Court of Appeals, "These facts, under the statute, constitute prima facie evidence of abandonment. In order to rebut the presumption of abandonment, the duty was upon appellant to manifest a firm intention to resume physical custody of, or make arrangements for the care of, J.R.T. within the six month period." Timperly, 750 P.2d at 1237.

As to the instant case, Ms. Cruz's own testimony that she had not visited or otherwise communicated with J.C. since 1987, plus Ms. Haderlie's unchallenged, properly admitted testimony regarding her experiences as J.C.'s case worker, establish clearly the presumption of abandonment. However, the presumption was not rebutted by Ms. Cruz. While it is conceded that Ms. Cruz expressed interest in seeing J.C. in April 1989, she was unable to explain her long period of inaction (which greatly exceeded the six months required under the statute) to the judge's satisfaction. Although Ms. Cruz testified that DFS denied her any opportunity to visit or communicate with her child, the judge's findings indicate that he simply did not find her testimony

credible. See Findings and Order at 3. This was clearly his prerogative as the trier of fact. In In re J. Children, the Utah Supreme Court noted that since the trial court hears the evidence in person, it occupies an advantaged position. Because of this, the court observed, the trial court is in the best position to judge the credibility of witnesses. 664 P.2d 1158, 1161 (1983). See also Robertson v. Hutchison, 560 P.2d 1110, 1112 (Utah 1977). Utah Rule of Civil Procedure 52(a) specifically acknowledges that "due regard shall be given to the trial court to judge the credibility of witnesses."

It is also clear that Ms. Cruz's two requests for visitation in two years hardly constitute a manifestation of firm intent to resume physical custody or make arrangements for a child's care. See, e.g., Interest of J.C.O. In Ms. Cruz's case, the court was also negatively impressed with the fact that, in spite of her testimony, Ms. Cruz had failed to develop sign language skills with which to communicate with J.C. See Findings and Order at 3. Ms. Cruz herself testified as to her failure to complete the treatment plans designed to reunite her with J.C. Tr. at 45. These facts provide clear and convincing evidence that at no time did Ms. Cruz manifest a firm intent to resume physical custody of J.C. or to make arrangements for his care. Although in her brief Ms. Cruz argues at some length that DFS erred in denying her requests for visitation, it is a fact that at any time she

could have sought review of the agency's decision. See, e.g. Utah Code Ann. § 48-3a-47 (1953) (providing that a parent may petition the juvenile court for change or modification of a custody decree upon a change in circumstances). In any case, however, this appeal deals with whether the juvenile court's findings regarding J.C.'s abandonment and order of termination were clearly erroneous. This court is therefore not the place to raise an issue regarding the adequacy or fairness of the agency's action.

In addition to the statutory presumption of abandonment, the Utah Supreme Court has adopted a two-part test to be used in determining whether a parent has abandoned a child. In State in Interest of Summers Children v. Wulffenstein, the Court held that to terminate parental rights, a court must determine (1) whether the parent's conduct has evidenced a conscious disregard for her parental obligations, and (2) whether that disregard has led to the destruction of the parent-child relationship. 560 P.2d 331, 334 (1977). According to the Court, abandonment may be proven objectively from the actions of the parent as well as from the parent's expressions of subjective intent. See Interest of J.C.O., 734 P.2d at 462. The Court has also noted that, "Abandonment can only result from inaction or a course of conduct for which the parent is personally responsible." See In re J. Children, 664 P.2d at 1159.



In Interest of J.C.O., the Court held that the lower court's finding of conscious disregard and subsequent destruction of the parent child relationship was supported by evidence that the parents had never provided financially for their children, and that they had taken only a superficial interest in their children's welfare. Id at 462. See also State in Interest of J.R.T. v. Timperly, 750 P.2d 1234 (Ut. App. 1988). Similarly, in Matter of Adoption of Guzman, 586 P.2d 418 (1978), the Court upheld the termination of a mother's parental rights on evidence that she had visited her children only five or six times in four years, that she had sent no gifts, letters, or communications to her children on Christmas or their birthdays, and had made no phone calls or other attempts to contact them.

In the instant case, even without the evidence appellant claims was inadmissible hearsay, the record contains abundant evidence from which the juvenile court could have found abandonment. Ms. Cruz herself testified that she had not seen J.C. since 1987, and that she had not sent him birthday or Christmas cards. While she maintained that she had made attempts to contact J.C. but had been prevented from doing so, the court found her testimony unpersuasive. See Findings and Order at 3. Ms. Haderlie, testifying from her own observations, stated that Ms. Cruz did not contribute to J.C.'s support, that she never inquired about his health, that there was no parent-child bond

between her and J.C., and that she manifested an unusual lack of affirmative involvement with J.C. These facts provide obvious support for the conclusion that Ms. Cruz consciously disregarded her parental obligations. In short, the record indicates a clear and convincing evidentiary basis for the judge's finding that Ms. Cruz's conduct toward the boy was a substantial departure from normal parental behavior, and that her conduct led to a breakdown of the child-parent relationship. See Findings and Order at 3.

According to the Utah Supreme Court, an additional consideration in the decision to terminate parental rights is the best interest of the child. See In re J.P., 648 P.2d 1364 (1982); Timperly, 750 P.2d at 1238. The Timperly court wrote:

The second prong of the objective abandonment test, whether the parental disregard led to the destruction of the parent-child relationship, satisfies the need separately to consider the best interest of the child. If the parent-child relationship has been destroyed by the parent's conduct, or lack of conduct, it is usually in the best interest of the child to terminate that relationship and allow the child an opportunity to establish a meaningful relationship with loving, responsible parents.

Id. at 1238.

In the instant case, as in Timperly, the child has made considerable progress with his foster family, who love him and wish to adopt him. See id. at 1238-39. Here, the juvenile court judge's determination that J.C.'s best interests required

termination of his natural mother's parental rights was based upon Ms. Haderlie's testimony regarding J.C.'s improvement while in the care of his foster family. These observations were derived from Ms. Haderlie's own experience as J.C.'s case worker, and, again, constitute clear and convincing evidence.

B. Other Findings Challenged by Appellant Were Supported By Competent Evidence.

Appellant contends that certain other findings of the trial court were not supported by properly admitted evidence. First, she claims that there was no competent evidence to establish the chronology of events surrounding J.C.'s placement with DFS. Second, she maintains that there was only hearsay testimony to support the judge's finding that Ms. Cruz failed to comply with the court-ordered treatment plans. Finally, she argues that no competent evidence was admitted regarding J.C.'s flinching and bedwetting following visitation with his mother.

With regard to the evidence dealing with J.C.'s flinching and bedwetting, that information was included in the exhibit prepared by Ms. Haderlie. See Exhibit I. Ms. Cruz's attorney failed to make a specific hearsay objection to that exhibit as a whole although she had ample opportunity to do so. Ms. Cruz did object to one sentence in the exhibit without specifying grounds for the objection, and the judge deleted the

sentence. However, when he specifically asked her whether she had any further objections, she replied that she did not. Tr. at 25. The law is well established that a party must make a timely, specific objection in order to preserve an issue for appeal. See, e.g., Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984).

Ms. Cruz contends that the judge erred in referring to J.C.'s placement with Topham's Tiny Tots in 1982 and his subsequent placement with the State. However, as the court noted, the information was already part of the child's court record. Tr. at 7. J.C. had come before the court previously, and its jurisdiction over him was continuing. See Utah Code Ann. § 78-3a-40 (1953). In addition, a court may take notice of its own records. In Interest of S.J.--also a termination case--the Utah Supreme Court wrote:

The evidence was not hearsay because the witness was testifying as to evidence already part of the record in a prior proceeding in this case, which resulted in the placement of the child in a foster home. The court took judicial notice of the prior proceeding, which he may do under U.C.A. 78-25-1(3) as interpreted in State v. Bates [citation omitted].

576 P.2d at 1283. The introduction of Ms. Haderlie's testimony regarding how J.C. came to be in State foster care was therefore properly admitted.

As to Ms. Cruz's failure to comply with the treatment plans, Ms. Cruz herself acknowledged her failure to complete the plans in the following statement: "I'll do anything that I need to, learn all the--what I wanted, I never denied none of those treatment plans, you know I wanted to do them and stuff, but then ladies come, you know, and then start fading away." Tr. at 46. In light of Ms. Cruz's admission, the court's finding was not clearly erroneous, but was properly supported.

## POINT II

### THE JUVENILE COURT'S ADMISSION OF EVIDENCE CHALLENGED BY APPELLANT WAS AT WORST HARMLESS ERROR.

As the record in this case reveals, ample evidence was presented at the hearing to justify the trial judge's finding that Ms. Cruz abandoned J.C., even if evidence taken from J.C.'s DFS files had been excluded. That being the case, even if an error in admitting the evidence had been made, the judge's decision should be left undisturbed under the harmless error rule.

A statement of the harmless error rule was given by the Utah Court of Appeals in State in Interest of C.Y. v. Yates:

The pivotal question is whether the error resulted in prejudice sufficient to warrant reversal of the termination order. An error is prejudicial "only if a review of the record persuades the [appellate] court that

without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" [citations omitted, emphasis in original] A reasonable likelihood is "a probability sufficient to undermine confidence in the outcome. ... Therefore, we must review the record and determine whether there is a reasonable likelihood that the outcome of the termination hearing would have been more favorable to [the appellant] had the juvenile court not [erred].

765 P.2d 251, 254 (Utah App. 1988). See also State in Interest of S.J., 576 P.2d 1280, 1283 (Utah 1978). In Yates, the court held that the lower court's judgment terminating a father's parental rights would stand if there was other properly admitted evidence establishing the same facts. Yates, 765 P.2d at 254. In the instant case, testimony given by Ms. Cruz demonstrated that she had not visited her child in more than two years and that she had not sent him letters, cards or gifts, and could not remember his birthdate. In addition, her inability to demonstrate simple communications in sign language, combined with her testimony, provided evidence that she had not complied with the treatment plans. The judge's findings with regard to these matters did not depend on the introduction of the allegedly inadmissible evidence, but on Ms. Cruz's own testimony. Hence, any error was harmless.

Under the harmless error rule, admission of the evidence offered by Ms. Haderlie dealing with the exacerbation of J.C's behavioral problems following visits with his mother failed to create unfair prejudice. Given the great weight of

unchallenged testimony supporting the judge's finding of abandonment, it is clear that there was no reasonable likelihood that his decision would have been different in the absence of this evidence. The appellant in Interest of S.J. made a claim of error analogous to Ms. Cruz's, maintaining that the lower court had erred in considering facts outside the record. The Utah Supreme Court responded that "[t]he petitions filed were to terminate parental rights and the evidence admitted reasonably related to appellant's [sic] ability to care for their children. The evidence is overwhelming that the parents cannot adequately support and maintain their minor children and on the facts of this case we feel compelled to sustain the court's order." The clear implication of this holding is that if competent evidence exists to support a court's decision, the decision should stand. The holding in Interest of S.J. has relevance to the instant case, in that the record of Ms. Cruz's termination hearing contains overwhelming evidence that she abandoned her child. On that basis, the trial court's decision should be upheld.

#### CONCLUSION

The record in this case is replete with clear and convincing evidence that Ms. Cruz abandoned her child. While Ms. Cruz asserts that very little competent evidence was presented at

the termination hearing to support the court's findings, the record demonstrates abundantly the propriety of the judge's findings.

Based on the foregoing reasons, the State of Utah respectfully requests that this Court affirm the decision of the Juvenile Court to terminate Appellant's parental rights in her minor child J.C.

DATED this 27<sup>th</sup> day of August, 1990.


R. PAUL VAN DAM  
Utah Attorney General

Linda Luinstra  
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MAILING CERTIFICATE

I hereby certify that on the 27<sup>th</sup> day of August, 1989, I caused to be hand delivered four (4) true and exact copies of the foregoing Brief of Appellee to Kim Rilling, Rilling & Associates, 8 East Broadway, Suite 213, Salt Lake City, Utah 84111; and Ann Wassermann, Littlefield & Peterson, 426 South 500 East, Salt Lake City, Utah 84102.

  
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