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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, in the interest of		)	
Rae Lynn Jones	(12/28/71)	)	
Robert William Jones	(07/27/74)		
James Robert Jones	(02/07/76)	)	Case No. 18189
Persons Under 18 Years of Age		)	

APPELLANT'S BRIEF ON APPEAL

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FILED

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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)

Rae Lynn Jones (12/28/71)) APPELLANT'S BRIEF ON APPEAL
Robert William Jones (07/27/74)
James Robert Jones (02/07/76)) Case No. 18189

Persons Under 18 Years of Age)

NATURE OF THE CASE

This is an appeal from the Judgment of the Second District Juvenile Court in and for Salt Lake County, State of Utah, the Honorable Judith F. Whitmer, presiding, on Respondent's petition for termination of parental rights of Appellant. All parental rights of the above-named children's natural mother, Vina Rae (Jones) Patereau, Appellant, were terminated pursuant to the provisions of UCA Section 78-3A-48(1)(b). Legal custody and guardianship of the children were vested in the L.D.S. Social Services for placement in a suitable adoptive home. The Court found that the mother had abandoned the children in that her conduct evidenced a conscious disregard for her parental obligations and that this disregard led to the destruction of the parent-child relationship.

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DISPOSTION OF THE LOWER COURT

The Second District Juvenile Court, after trial, entered an Order permanently terminating all parental rights of the natural mother, Vina Rae (Jones) Patereau, Appellant, because her conduct indicated that she had abandoned the children.

NATURE OF RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the Juvenile Court decision.

STATEMENT OF THE FACTS

The Appellant, Vina Rae (Jones) Patereau, is the natural mother of Rae Lynn Jones, born December 28, 1971; Robert William Jones, born July 27, 1974; and James Robert Jones, born February 7, 1976 (hereinafter "children").

The Respondent, James Robert Jones, hereinafter "Mr. Jones", is the father of the children. The Appellant and Mr. Jones were married, but became separated in April of 1977. (R. 2.). The

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Appellant took the children with her upon her separation from Mr. Jones, but, due to her graveyard work schedule, was unable to arrange for care of the children. She returned the children to Mr. Jones for his care until she could care for the children. (R. 17.).

On April 30th, 1978, Appellant and Mr. Jones were divorced. (R. 29.) In the Decree of Divorce Mr. Jones was awarded legal custody of the children, and Appellant was ordered to pay $15 per month per child for the support of the children. (R. 5.). The children have been in the physical custody of Mr. Jones since April, 1977, until he relinquished custody of the children to the Respondent L.D.S. Social Services in December, 1980. (R. 8. - 9.).

While the children were in the custody of Mr. Jones, the Appellant paid no child support for the children. (R. 5.). During this time, however, Appellant was either unemployed and receiving public assistance or church aid, or was earning minimal wages for part-time work and could not contribute to the support of the children. (R. 27., 36.). Nevertheless, Appellant purchased toys and clothing for the children (R. 27.). She sought visitation with the children through Mr. Jones or his contacts each month, but was refused most requests for visitation until she paid child support (R. 18., 19., 25. - 26., 31., 40., 43.). Appellant was allowed visitation only four or five times since her separation from Mr. Jones, the most recent occasion being in February of 1980, for the weekend. (R. 9 - 10.). Appellant's contact with the children was further frustrated by Mr. Jones' change of residences and his failure to attempt to inform Appellant of such changes. (R. 3. -

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4., 11.). Appellant had told Mr. Jones where she could be reached, and she is listed in the Salt Lake Area telephone book. (R. 19., 23. - 24.).

In June, 1981, Mr. Jones met with Appellant at Appellant's suggestion, to discuss foster care for the children, but Mr. Jones did not inform Appellant of his plans to place the children in foster care for later adoption. (R. 12. - 15., 20. - 22., 39., 42.). Appellant learned of this subsequent placement through the newspaper, and immediately contacted Respondent L.D.S. Social Services. (R. 54.). Mr. Jones filed a Petition for Termination of Parental Rights of the Appellant with the Juvenile Court, which court ordered Appellant's parental rights in the children terminated due to her abandonment of the children.

ARGUMENT

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING THAT APPELLANT HAS ABANDONED HER CHILDREN AND THE CONCLUSION THAT HER PARENTAL RIGHTS SHOULD BE TERMINATED PURSUANT TO THE PROVISIONS OF 78-3A-48(1)(B), UTAH CODE ANNOTATED.

This Court has made clear that a strong presumption exists against the termination of parental rights. Perhaps the most cogent

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statement of the Court's position in this regard was made in the recent case of In Re Castillo, 632 P.2d 855 (Utah 1981) where the court stated:

> . . . we have no reservation in agreeing that a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the courts, may believe to be in a child's best interest, without giving serious consideration to the rights of the natural parent in his child. High among the ideals of individual liberty which we consider essential in our free society are those which protect the sanctity of one's home and family.
>
> . . . . .
>
> . . . we are not aware that this court has ever espoused the view and it is not our view, that the termination of parental rights can be decreed without giving serious consideration to the prior and fundamental right of a parent to rear his child; and concomitantly, of the right of the child to be reared by his natural parent. It is a matter of such common knowledge as to hardly require expression that it is in accordance with the natural customs and instincts of mankind that in most instances the interests of a child are best served by being in the custody of natural parents. At 856.

It is within these parameters and upon this presumption that consideration for Appellant's parental rights must be given great weight, for termination of parental rights is viewed as a "drastic" remedy which should be resorted to only when absolutely necessary and in the interest of a child. As the Court stated in State in the Interest of Walter B., 557 P.2d 119 (Utah 1978), "The severing of family ties is a step of utmost gravity both socially and economically." See also: State in Interest of Winger, 558 P.2d 1311 (Utah 1976);

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State v. Lance, 23 Utah 2d 407, 464 P.2d 395 (1970); State in Interest of E. and B. v. J.T. 578 P.2d 831 (Utah 1978).

It has been consistently held by this Court that to sustain an order of the Juvenile Court terminating the parent-child relationship, the Court must be convinced by the evidence that the conduct of the parent is seriously detrimental in its effect on the child. See State in the Interest of Mullen, 29 Utah 2d 376, 510 P.2d 531 (1973). The Court has held that inasmuch as the presumption against termination of parental rights is one based in logic, the presumption has "evidentiary value which must be considered by the trier of fact in determining the question of termination." State in Interest of Winger, 558 P.2d 1311, 1313 (Utah 1976). Unquestionably, the Juvenile Court is the finder of fact in cases involving termination of parental rights, but the Supreme Court has made clear that where there is a definite showing of abuse of discretion the findings of the Juvenile Court will be overturned. State in Interest of S   J   , et. al., 576 P.2d 1280 (Utah 1978).

In the case at Bar, Appellant's parental rights were terminated pursuant to the provisions of Section 78-3A-48(1)(b) Utah Code Annotated, 1953 as amended, which provides that:

> 1. The court may decree a termination of all parental rights with respect to one or both parents if the court finds that the parent or parents have abandoned the child. It shall be 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 such surrender have not manifested to the child or to the person having physical

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> custody of the child a firm intention to resume physical custody or to make arrangements for the care of the child.

Where a parent does not have legal custody of a child, however, the determination of abandonment must be made solely on the facts of the particular case, and no prima facie presumptions apply.

In <u>Robertson v. Hutchison</u>, 560 P.2d 1110 (Utah 1977), a mother opposed the adoption of her children by her former husband and his new spouse, and as a result the husband brought an action to terminate the parental rights of the mother. This Court upheld the decision of the lower court which denied the termination, despite the fact that the mother had had no contact with the children for approximately five years. Because the mother had never expressed any sentiment or conducted herself in any way indicative of a desire to abandon the children, the Court held that her rights could not be terminated. Specifically, the Court pointed out that the mother lacked resources to visit the children. Nonetheless, she <u>did</u> attempt to contact the children. Despite a five year lack of communication between mother and children, a span of time not even closely approximated in Appellant's case, this Court refused to terminate the mother's parental rights and stated that:

> Arising out of the natural bonds of affection and concern which natural parents usually have for their children, it is and should be the policy of the law to support and give strength to the family by encouraging the preservation of the parent-child relationship and by being reluctant to interfere with or destroy it. Accordingly, the Court does not easily find such abandonment, but will do so only when the evidence is clear and convincing that the parent has either expressed an intention, or so conducted himself as to clearly indicate an intention to relinquish parental rights and reject parental responsibilities to his child. At 1112.

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The facts of the <u>Robertson</u> case are analogous to Appellant's situation where, due to Respondent's failure to inform Appellant of his residences and his inaccessibility to Appellant, Appellant was unable to maintain continuous contact with her children. (R. 3. - 4., 11., 18., 25. - 26., 31., 40., 43.).

Similarly, in <u>Hall v. Anderson</u>, 562 P.2d 1250 (Utah 1977), this Court upheld a decision of the lower court whereby a termination of parental rights was denied. In that case the father opposed adoption of his children by his former wife and her new spouse. He argued that he had not abandoned the children in that he had sent numerous letters to them, and had attempted to correspond with his ex-wife, but had gotten no response. Though he suffered a back injury and was out of work, the father sent some support money for the benefit of the children and sent gifts to the children. The Court held that though it is not necessary to show any affirmative declaration of abandonment of a child in order to uphold a termination of parental rights, "it is nevertheless necessary that it be shown that there was an intent, coupled with acts or conduct constituting a desertion or an abandonment." At 125.

The <u>Robertson</u> and <u>Hall</u> cases, taken together, stand for the proposition that <u>some</u> act which evidences an intent to abandon children on the part of the parent is necessary to uphold a finding of abandonment. Further, these decisions show that in cases where, due to various exigencies, parents have failed to either meet

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support obligations or to regularly communicate with children from whom they are separated, the Court will take such exigencies into account along with the presumption against termination of parental rights, and will preserve those rights wherever possible. It is these two principles which the lower court should have applied in Appellant's case. Had this been done, the contacts which Appellant initiated and continued with her ex-husband; her financial inability to pay support; her continued expressions of interest in and desire to see the children; the fact that she remained in close geographic proximity to the children; and the fact that she did on several occasions make the effort required to see and spend time with the children, despite her ex-husband's opposition, would have precluded termination of her rights as a parent, inasmuch as all of these factors demonstrate the absence of any conscious disregard for parental obligations on the part of Appellant. This evidence, however, was unfortunately and improperly not given proper weight by the Juvenile Court.

Although it has been held that an order terminating parental rights in a child must be supported by a preponderance of the evidence, State v. In the Interest of Winger, 558 P.2d 1311 (Utah 1976); State in the Interest of Walker B., 577 P.2d 119 (Utah 1978); State in the Interest of E. and B. v. J.T., 578 P.2d 831 (Utah 1978), recent decisions more properly state that "the Court does not easily find . . . abandonment, but will do so only when the evidence is clear and convincing . . ." Robertson v. Hutchinson,

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560 P.2d 1110 (Utah 1977). This standard was recently affirmed by the United States Supreme Court, which held that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least the standard of clear and convincing evidence. Santosky v. Kramer, 50 U.S.L.W. 4333 (1982). There, an order terminating parental rights to a child was reversed because the trial court's finding of neglect was based on only a preponderance of the evidence.

In the Juvenile Court's conclusions in Appellant's case, the trial court cites the case of State in the Interest of Summers Children v. Wulffenstein, 560 P.2d 331 (Utah 1977), as setting forth the standard for determining whether abandonment has occurred. In this case the Utah Supreme Court departed from the subjective examination of abandonment cases and stated:

> Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents, but their conduct as parents as well. The subjective intent often focuses too much attention on the parent's wishful thoughts and hopes . . . and too little on the more important element of how well the parents have discharged their parental responsibility. At 334.

The Court went on to say, however, that:

> A better definition of abandonment . . . is that abandonment consists of conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship. Id.

In Appellant's case, the trial court failed to follow the dictates of the Summers case. If the question is in fact "how well the parents have discharged their parental responsibility", the facts

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of Appellant's situation shed no unfavorable light on her conduct. It can hardly be said that she exhibited a "conscious disregard" for the children, since as she continually tried to contact them, remained in contact with their father as much as was possible, and did in fact see the children approximately five times in the three years following her divorce. Because of her many attempted but infrequent actual contacts with Mr. Jones, and her intermittent contacts with the children themselves, no "conscious disregard" for the children exists. The conclusion of the trial court that until James Robert Jones initiated the action to terminate Appellant's parental rights she showed little interest in the children is not supported by the facts, and the facts do not clearly and convincingly evidence conscious disregard for the children on Appellant's part.

This Court has both a right and a duty to review the findings of the Juvenile Court upon appeal. As the Court stated in State in Interest of E. and B. v. J.T., 578 P.2d 831 (Utah 1978),

> As hearings in the Juvenile Court are equitable in nature this Court has the responsibility to review both the facts and the law and to make its own findings and substitute its judgment for that of the lower court, if the evidence clearly preponderates against the findings as made, or if the Court has abused its discretion. At 834.

As the analysis above indicates, the Utah Courts have applied both the presumption against termination of parental rights and its power to review Juvenile Court findings to determine that a termination of parental rights cannot be upheld based upon an abandonment theory in circumstances similar to those of Appellant. A careful reading of these cases supports the

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conclusions that the parental rights of Appellant cannot be legally terminated based on an argument that she has "abandoned" her children.

In the case of State in Interest of A., 30 Utah 2d 131, 514 P.2d 797 (1973), this Court upheld the termination of a mother's parental rights. In that case the children had spent much of their lives away from their mother, and she had frequently lived significant distances from them. The Court specifically noted that, unlike the Appellant herein, the effort put forth by the mother to visit the children in that case was "practically nil". Similarly, in Adoption of McKinstray v. McKinstray, 628 P.2d 1286 (Utah 1981), the Supreme Court upheld an order of the Juvenile Court which terminated the rights of a father, thereby allowing the children's stepfather to adopt them. In that case, the parent failed to pay child support for a period of six years, despite his financial ability to do to. There the father moved away from where the children were living, and unlike the Appellant herein, did not attempt to learn of the whereabouts of the children through contact with knowledgeable parties.

Clearly, both the A. case the McKinstray case can be distinguished from Appellant's situation. Appellant has maintained knowledge of the children's whereabouts as much as was possible, has lived near to them, and has made several attempts to contact them which were thwarted by her former spouse. Appellant's failure to pay child support was for a much shorter period than that involved in McKinstray, and was due to her financial inability as opposed to mere unwillingness to expend money to support the children.

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POINT II

A GUARDIAN AD LITEM SHOULD HAVE BEEN APPOINTED FOR AND ON BEHALF OF THE CHILDREN IN ADVANCE OF TERMINATION OF THEIR MOTHER'S PARENTAL RIGHTS.

As previously stated, serious consideration must be given to the right of a child to be reared by his natural parents. In Re Castillo, 632 P.2d 855 (Utah 1978) at 856. Unquestionably, the rights of the children were seriously affected in the trial court's termination of Appellant's parental rights, yet the children's interests were unrepresented despite the fact that the age of the children ranges from ten years to five years, and their last contact with Appellant was a happy one. (R. 28.) In Utah, a guardian ad litem may be appointed in any cases "where it is deemed by the Court in which the action or proceeding is prosecuted, expedient to represent the infant." U.R.C.P. 17(b). In Appellant's case, the feelings and desires of the children were explored neither on the record nor by informal consultation with the trial judge. Their particular interest was therefore given little weight, much less given serious consideration, prior to the Juvenile Court's order irrevocably severing their relationship with their natural mother. Such a drastic effect of the termination order on the rights of the children should have been made only after adequate assurance that the rights of the children were protected.

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CONCLUSION

A strong presumption against the termination of parental rights exists in the law. A finding in favor of termination of parental rights must be supported by clear and convincing evidence indicative of conscious disregard of parental obligations by the party whose rights are terminated. In this case, the evidence did not support the findings of the trial Court, and the parental rights of Appellant should not have been terminated.

Under Utah law, a guardian ad litem may be appointed in any case where "it is deemed by the Court in which the action or proceeding is prosecuted, expedient to represent (the) infant." U.R.C.P. 17(b) The interest of the children of Appellant in preventing the termination of their rights to be reared by their natural parent should have been represented by a guardian ad litem. The trial Court abused its discretion by failing to appoint a guardian ad litem to act on behalf of the children, or otherwise giving serious consideration to the rights of the children.

DATED this 19th day of April, 1982.

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CERTIFICATE OF MAILING

On this 19th day of April, 1982, I certify that I mailed a copy of the foregoing Appellant's Brief on Appeal to:

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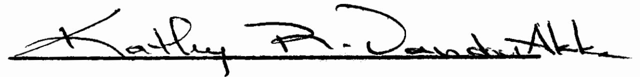

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