

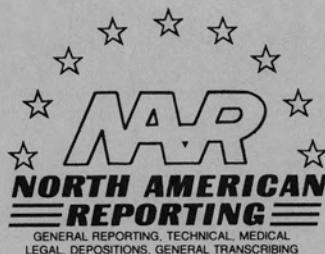
In the

Supreme Court of the United States

JOHN DOE AND JANE ROE,)	
)	
Appellants,)	
)	
v.)	No. 79-5932
)	
STATE OF DELAWARE,)	
)	
Appellee.)	

Washington, D.C.
January 12, 1981

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JOHN DOE AND JANE ROE, :
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Appellants, :
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v. : No. 79-5932
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STATE OF DELAWARE, :
:
Appellee. :
-----:

Wasington, D. C.
Monday, January 12, 1981

The above-entitled matter came on for oral ar-
gument before the Supreme Court of the United States
at 10:06 o'clock a.m.

APPEARANCES:

GARY A. MYERS, ESQ., Community Legal Aid Society, Inc.,
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on behalf of the Appellants.
MRS. REGINA M. SMALL, State Solicitor, State of Delaware,
820 North French Street, Wilmington, Delaware 19801;
on behalf of the Appellee.

C O N T E N T S

ORAL ARGUMENT OF

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GARY A. MYERS, ESQ.,
on behalf of the Appellants

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MRS. REGINA M. SMALL, ESQ.,
on behalf of the Appellee

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GARY A. MYERS, ESQ.,
on behalf of the Appellants -- Rebuttal

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Doe vs. Delaware, No. 79-5932.

Mr. Myers, you may proceed whenever you are ready.

ORAL ARGUMENT OF GARY A. MYERS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. MYERS: Mr. Chief Justice, and may it please the Court:

This is an appeal by two parents, John Doe and Jane Roe, from a final decision of the Delaware Supreme Court. By this appeal they seek to overturn lower court orders which permanently and irrevocably terminated all of their relationships with their five children.

QUESTION: Do they want the children back, Mr. Myers?

MR. MYERS: The parents -- if this order was vacated at this time, custody would still remain within the State. Hopefully we could meet with representatives of the State, establish visitation with these children, with the eventual goal of the mother regaining them in her custody.

QUESTION: Say that again. With the essential goal of what?

MR. MYERS: The mother regaining them in her custody.

QUESTION: In her custody.

MR. MYERS: Yes.

QUESTION: So he doesn't want them back?

1 MR. MYERS: Well, he is more than willing to allow
2 the mother to have custody and allow him to have reasonable
3 visitation rights so he can maintain his fatherly role with
4 the children.

5 QUESTION: Well, am I correct that neither mother
6 nor father has seen these children in several years?

7 MR. MYERS: State has resisted efforts for the --

8 QUESTION: No, no; but they have not seen the
9 children in several years, have they?

10 MR. MYERS: Since 1975.

11 QUESTION: They are now separated, are they not?

12 MR. MYERS: The father lives and works in Atlanta
13 and the mother lives with her stepson and her husband, and
14 remains in Delaware.

15 QUESTION: She is now married?

16 MR. MYERS: Yes.

17 QUESTION: But all they want, really, is access to
18 these children, just want to know where they are, is that it?

19 MR. MYERS: No, I think they want to regain their
20 children back into their own family, into their own family.

21 QUESTION: They -- when you speak, "they," they
22 are not --

23 MR. MYERS: The mother wants to --

24 QUESTION: They are not a family unit anymore, are
25 they?

1 MR. MYERS: Well, I think the mother had a family
2 relationship with her children before the State intervened in
3 this family and she is more than willing to again create those
4 day-to-day attachments.

5 QUESTION: There are five children?

6 MR. MYERS: That's correct.

7 QUESTION: And she wants all five? And how old are
8 the children now?

9 MR. MYERS: They range in ages from six through nine.

10 QUESTION: Six through nine? Five of them?

11 MR. MYERS: Yes. There is a -- their ages are -- the
12 oldest one is nine, and the two youngest ones who are twins are
13 six now.

14 QUESTION: I see.

15 MR. MYERS: The nature of the proceeding below was
16 a termination of parental rights proceeding, or a TPR. That
17 proceeding is unique in Delaware. It seeks not only just to
18 remove children from the custody of their parents; rather it
19 seeks to forever break the parent-child relationship. It is
20 not a temporary removal of a child. In the words of the Dela-
21 ware statute, its sole purpose is "to make parents and the
22 children as if they were and have always been strangers."
23 It's in effect a death penalty for the family.

24 This appeal raises three questions against the TPR
25 outlined above.

1 QUESTION: When it ends the relationship with the
2 parents I gather it has the same effect as an adoption,
3 doesn't it?

4 MR. MYERS: Well, a TPR does not necessarily lead to
5 an adoption.

6 QUESTION: No, but in terms of termination of any
7 relationship of parent and child, doesn't it have the same
8 effect as an adoption?

9 MR. MYERS: As to the parent, it makes him a stran-
10 ger. It doesn't necessarily guarantee to the child that
11 there's going to be a replacement. As I said, this appeal
12 raises three questions against the termination order below.
13 The first question is whether the statutory standards used to
14 break up this family were unconstitutionally vague. The second
15 standard is whether the State could proceed to break up this
16 family in a judicial proceeding using a mere preponderance of
17 the evidence standard. The third standard is whether the
18 State could break up this family without demonstrating that
19 any of the conduct alleged against these parents had caused
20 any actual, substantial harm to the children.

21 Briefly stated, the facts of the case were these.
22 John Doe and Jane Roe were half-brother and sister, and begin-
23 ning in the 1970s they lived together and had five children.
24 The Delaware State Welfare Agency, the Division of Social Ser-
25 vices, knew about Mr. and Mrs. Doe's relationship since 1972,

1 and had previously indicated to them that that relationship
2 would not be a factor that the Division would consider about
3 them raising their children. However, in early 1975 workers
4 from the Division went to the local Attorney General, the
5 attorney that advised them. He told them at that meeting that
6 so long as there were children in the Doe home, they would
7 not be able to prove the Does were unfit parents and would not
8 be able to get a termination of parental rights. At that
9 meeting, then, it was decided that in order to remove the chil-
10 dren from the home the parents would be charged with the
11 criminal charge of incest. Once they were charged with that,
12 the Division would then proceed to obtain custody of the chil-
13 dren and then file a termination of parental rights as to all
14 of their children. That plan of action by the Division was
15 followed through. Within a week after the meeting the Attorney
16 General brought a criminal charge of incest against the
17 parents. The parents were incarcerated in default of a \$1,000
18 bond for 19 days. Given their absence, the Division of Social
19 Service was in effect given temporary custody of the children.
20 Subsequently, the parents were convicted of the criminal
21 charge of incest, a misdemeanor in Delaware, and permanent
22 custody of the children was given to the Division.

23 What's important to note about the incest conviction
24 is that, as the parents testified, after the conviction of the
25 misdemeanor they were told by the presiding judge that

1 presided at that trial that if they underwent sterilization
2 that would be a substantial factor in them regaining their
3 children.

4 QUESTION: And did they?

5 MR. MYERS: Yes, they did. Anxious to get their
6 children back, and relying on that advice, they underwent
7 sterilization. Within a week after undergoing that steriliza-
8 tion the Division told them that they were going to terminate
9 all their parental rights. The Division --

10 QUESTION: It's totally irrelevant. Did the judge
11 pay for the sterilization procedures?

12 MR. MYERS: Yes, he did.

13 QUESTION: Has he ever been reimbursed?

14 MR. MYERS: I don't believe so. The record doesn't
15 reflect that, but to my knowledge he wasn't.

16 The Division then filed the termination of parental
17 rights proceeding. The statute under which they based that
18 provision was a former Delaware provision which allowed the
19 termination if the parents were not fitted to continue to exer-
20 cise parental rights. That short phrase was the sum extent
21 of the statutory definition of when a termination could go
22 forward.

23 In its original petition the Division alleged that
24 the not-fitted conduct sufficient to trigger the statute was
25 their half-brother and half-sister relationship. It's this

1 conduct that the Division had known about for almost three
2 years and had in fact told them in the past that it wasn't
3 going to be used against them.

4 QUESTION: Well, Mr. Myers, in reading the opinion
5 of the Delaware Supreme Court at page 199 of Atlantic, 2d,
6 the Court says that "under our statute there must also be a
7 finding that the termination of parental rights is in the
8 best interest of the child," indicating that parental unfitness
9 is not by itself sufficient.

10 MR. MYERS: Well, we contend also that "best inter-
11 est" is just as vague as "not fitted" language. The trigger-
12 ing criteria to get to "best interest" is in effect the
13 "not fitted" standard. Unless you can go forward on "not
14 fitted," I don't think that "best interest" as a matter of
15 State law comes into play. And both the Superior Court and
16 the Supreme Court emphatically stated that the half-brother -
17 half-sister relationship was the disqualifying, triggering
18 criterion of "not fitted."

19 QUESTION: Well, but, it wouldn't have been suffi-
20 cient, as I read the Delaware Supreme Court opinion.

21 MR. MYERS: It's a precondition. If in effect the
22 precondition has been met, then it would have to go into
23 "best interest." I think this opinion points out exactly
24 the limited scope the Delaware Supreme Court has read into the
25 term "best interest." I think that the phrase itself is a

1 comparative phrase and it requires looking at all the elements
2 concerning the child. How the trial court and -- both -- the
3 Supreme Court construed it was that they were again merely
4 looking not to any harm to the children that had occurred but
5 rather to some sort of conduct of the parents in the
6 abstract.

7 QUESTION: Mr. Myers, do you agree or what is your
8 view on whether the issues are the same for the mother and the
9 father? Now, the reason I ask that, there's the evidence of
10 the offensive touching as to the father and the alcoholism
11 -- at least at some time in the past -- as to the father, and
12 one thing and another. But now the parents are in different
13 places and presumably it would make a difference as to which
14 parent had the contact with the child. Do you concede that
15 if the order is proper as to one parent, it's proper as to
16 both?

17 MR. MYERS: I don't think the order is proper as to
18 either parent.

19 QUESTION: I understand that, but is it the same
20 issue as to both?

21 MR. MYERS: Yes, I think -- again, there's no con-
22 duct on behalf of either parent, particularly the mother, but
23 even to the father's conduct, there's no conduct on his part
24 which was shown that any of that conduct caused harm to his
25 children.

1 QUESTION: I understand on your harm argument, but
2 on the best interests of the child argument, perhaps now that
3 they're separated there's at least an arguable basis for
4 drawing a distinction between the two?

5 MR. MYERS: Well, I think the best interests --

6 QUESTION: In fact, are their interests entirely
7 parallel? Are they the same? I know you represent them both,
8 but it seems to me if one were representing the mother sepa-
9 rately perhaps the mother could make some arguments the father
10 can't make.

11 MR. MYERS: Well, I think once the order terminating
12 both of their parental rights, in effect giving their children
13 to strangers, is vacated, then in effect those interests, the
14 State courts may have to adjudicate those interests if they
15 decide they conflict. My discussions with the parents at this
16 point is that they don't seem to conflict. She is more than
17 willing to have custody and he is willing to have that. She
18 is more than willing to allow him to have visitation, given
19 the distance he is away, and she's more than willing to allow
20 that. That's the discussions we've had.

21 QUESTION: Well, when did the change of circumstance
22 take place in these proceedings?

23 MR. MYERS: When did they separate?

24 QUESTION: Yes, when did they separate -- ?

25 MR. MYERS: The record below does not reflect that.

1 She was married in July of 1977.

2 QUESTION: Well, was it before or after the case
3 went through the Delaware courts?

4 MR. MYERS: They had separated prior to the final
5 opinion of the Delaware Supreme Court.

6 QUESTION: Did the Delaware Supreme Court know these
7 facts?

8 MR. MYERS: They knew they were separated. In the
9 Delaware Supreme Court opinion -- appendix.

10 QUESTION: Well, do you suppose the same thing would
11 have happened -- do you think the same termination of parental
12 rights would have occurred if the facts that now exist had
13 existed at the time of the petition to terminate parental
14 rights?

15 MR. MYERS: You mean the parties' separation?

16 QUESTION: Yes. And the marriage of the mother?

17 MR. MYERS: I can only speculate that that informa-
18 tion was given to the Delaware Supreme Court and was --

19 QUESTION: It was never given to the trial court,
20 though?

21 MR. MYERS: No. But it was given to the Delaware
22 Supreme Court and they didn't think a remand with those new
23 facts was appropriate.

24 QUESTION: Did you ask them to?

25 MR. MYERS: No, because we believe that even though

1 those facts existed in '75 --

2 QUESTION: Well, I know, that's why I'm asking you,
3 you never --

4 MR. MYERS: There was no specific request of the
5 Delaware Supreme Court to remand with those factual situations
6 changed.

7 QUESTION: Well, I would have supposed you might
8 have had an easier time in the trial court on these facts,
9 wouldn't you? Just on parental termination, because you're
10 not asking, you're not objecting right now to the change of
11 custody.

12 MR. MYERS: The parents aren't seeking if this order
13 would be overturned to get their children back, given the pas-
14 sage of time, the next day.

15 QUESTION: No.

16 MR. MYERS: They want to regain contact with the
17 children and work towards eventually having them reintegrated
18 into their home.

19 QUESTION: You're interested in having the termina-
20 tion of parental rights overturned?

21 MR. MYERS: That's correct; as a starting point.

22 QUESTION: But you've never asked anybody -- this
23 judgment isn't final yet, is it?

24 MR. MYERS: Yes, I believe it is, if it -- well --

25 QUESTION: No, it isn't --

1 MR. MYERS: Not by direct appeal, it's not.

2 QUESTION: It isn't final.

3 MR. MYERS: Until you rule it's not final.

4 QUESTION: But you've never asked a Delaware court
5 to reconsider in the light of new facts, have you?

6 MR. MYERS: No. Those facts have been told to the
7 Delaware Supreme Court.

8 As I indicated, originally, the trial court agreed
9 with the Division that the half-brother - half-sister relation-
10 ship of the parents wasn't sufficient to be the "not-fitted"
11 conduct. An appeal was then taken to the Delaware Supreme
12 Court. The Delaware Supreme Court did not reach any of the
13 legal issues but remanded it back to the trial court to have
14 a separate findings made on the second statutory standard of
15 "best interests." A five-day trial was held in the trial
16 court and as I indicated, although the term "best interests"
17 seems to mandate some sort of comparative analysis, the trial
18 court and the State resisted any efforts by the parents to
19 show what type of care the children were receiving while they
20 were in the State's custody. What information did leak
21 through is that the oldest child had been, during her period,
22 while she was in the State's custody, had been shuffled back
23 and forth between nine different foster care placements.
24 At the end of that the trial court entered a final judgment
25 indicating that it found it was in the best interests of the

1 children to terminate their parental rights, based on several
2 factors. One was frequent moves of the parents, as Mr. Doe
3 frequently changed jobs. The second was the half-brother and
4 half-sister relationship of the parents. And the third was
5 the prior conviction Mr. Doe had suffered for a misdemeanor of
6 offensive touching. That last factor was a hotly contested
7 issue. It arose in 1973 when the Division charged Mr. Doe
8 with sexually assaulting one of his daughters. After a trial
9 on that matter he was acquitted of any sexual offense. He did
10 suffer an offensive touching conviction and was placed on
11 probation. He described the conduct which formed the basis
12 of the conviction. It was playfully placing his tongue on
13 his 2-1/2-year-old daughter's nose and mouth. Again, the case
14 was returned to the Delaware Supreme Court. They rejected
15 the parents' vagueness challenge to the statutory standards,
16 they upheld the trial court's use of the preponderance of the
17 evidence, and they found specifically that the half-brother -
18 half-sister relationship was the triggering criterion, not-
19 fitted criterion.

20 QUESTION: Mr. Myers, is it part of your position
21 that a state may not ever terminate parental rights?

22 MR. MYERS: We think that the only interest that the
23 State can assert in a termination of parental rights that's so
24 compelling is prevention of actual substantial or imminent
25 harm to the children. Any less intrusion without proving

1 that is not permissible.

2 QUESTION: Physical or mental harm?

3 MR. MYERS: Pardon me, Justice Marshall?

4 QUESTION: Physical or mental harm?

5 MR. MYERS: Physical harm, surely, and mental harm
6 when it's characterized by some overt symptoms, not merely
7 speculation, but symptoms such as aggressiveness withdrawal
8 and so forth.

9 QUESTION: I just wanted to know, do I have to get a
10 degree in psychiatry to decide the case?

11 MR. MYERS: Well, I think the trial courts decide
12 these types of issues every day and it's not difficult to
13 show those types of actual harm.

14 QUESTION: Then you think also that the criteria for
15 termination have to be spelled out in some detail, I take it?

16 MR. MYERS: I think that the appropriate way for
17 state legislatures to go in this field is, in effect, to spell
18 out the criteria of harm.

19 QUESTION: Well, appropriate isn't really what I had
20 in mind, because we are dealing with a constitutional question.
21 You think the states are required to list factors?

22 MR. MYERS: I think that's required so that individ-
23 ual social workers or judges don't in effect define within
24 vague statutes what their own ideas of good parenting or bad
25 parenting are. It's a legislative choice and the legislature

1 should set those criteria.

2 QUESTION: Well, is the issue the welfare of the
3 children, the interests of the children, not good parenting
4 or bad parenting?

5 MR. MYERS: I think that's why the legislature should
6 look to harm to the children rather than trying to detail any
7 right or wrong parent. If there's any harm to children
8 they're in effect looking to the welfare of the children.

9 QUESTION: So you don't really -- you don't really
10 say that the welfare of the children is necessarily an insuffi-
11 cient standard. If a state happened to construe that standard
12 as requiring some showing of injury to the children, you
13 wouldn't have any objection to it.

14 MR. MYERS: If the legislature defined the welfare --

15 QUESTION: No, I'm not saying legislature. I said
16 the state court construed it that way.

17 MR. MYERS: A construction that would limit welfare
18 to harm, I think, would be constitutional.

19 QUESTION: Or in any specific case, if in applying
20 the welfare of the children standard as a matter of fact they
21 found that there was harm to the children? I don't know how
22 you'd --

23 MR. MYERS: If the harm was in effect actual harm or
24 imminent threat of actual harm, whether that be psychological
25 or physical. The problem with dealing with it on a case-to-case

1 basis without any criteria of what the legislature has de-
2 nominated as harmful is that that's an easy way for judges in
3 effect to impose their own values.

4 QUESTION: You wouldn't require the same standard
5 for termination of custody, would you?

6 MR. MYERS: Well, that case is not before you today.
7 I think the State can by imposing --

8 QUESTION: It is in a sense because I take it that
9 you would say, if the State had custody of the children, and
10 validly so, that there could never be an adoption, unless your
11 standard is satisfied?

12 MR. MYERS: Unless returning these children to
13 their parents would cause them actual harm.

14 QUESTION: So unless the State could prove that,
15 the State would always just have to retain custody?

16 MR. MYERS: When the State is trying to take chil-
17 dren from both of their parents and give them to someone --

18 QUESTION: And you would be required not to put these
19 children in any kind of a permanent family -- ?

20 MR. MYERS: Well, I think they can return to their
21 natural family, if the State in effect can't show that it's
22 going to cause harm that the --

23 QUESTION: So are you saying custody then rests on
24 the same standard or not?

25 MR. MYERS: Well, I think that any time the State

1 seeks to intrude in a family, that in effect the State surely
2 has to show some possibility of harm at the custody stage and
3 much more at the termination state where in effect it's
4 permanent.

5 QUESTION: In taking this record as a whole, are
6 you telling us that this record would not support a conclusion,
7 a finding and conclusion that there was emotional harm to these
8 children?

9 MR. MYERS: Well, there's been no finding below and
10 I think that that's the responsibility of the state court.

11 QUESTION: I've asked you a hypothetical question:
12 that it would not support? Are you saying that it would not
13 support such a finding?

14 MR. MYERS: Well, I think that any of the criteria
15 that the trial court lists, frequent moves of the family,
16 the half-brother and half-sister relationship, would not sup-
17 port a finding of sufficient harm for them to in effect per-
18 manently break up this family. The moving of a family as
19 the father changed jobs is something that occurs to millions
20 of American families, I believe. There's not a scintilla
21 of evidence in this record concerning the half-brother - half-
22 sister relationship which showed that that caused any harm to
23 these children who were already in existence. The experts
24 brought forth by the State who generally had never seen the
25 parents nor the children even in that situation disclaimed any

1 reliance upon the half-brother - half-sister relationship as
2 causing any harm to the children.

3 QUESTION: The problem I have is that you admit that
4 they're living in incest; they were.

5 MR. MYERS: They were half-brother and half-sister
6 and had five children and they were convicted of the crime.
7 Yes, sir.

8 QUESTION: And you don't think that a child brought
9 up in the home of two criminals continuing to practice their
10 criminality is not a good home?

11 MR. MYERS: Well, that's a decision that the Dela-
12 ware Legislature has not made and that's a problem with the
13 "not-fitted" conduct. There's no explicit grounds in Delaware
14 that says conviction of a misdemeanor means the forfeiture of
15 your children.

16 QUESTION: That wasn't my question. My question was
17 what you think about it.

18 MR. MYERS: My personal opinion?

19 QUESTION: Yes.

20 MR. MYERS: In the absence of showing any of the
21 types of harm I've outlined before, I'm not sure that the
22 State had any reason to take children from both of these
23 parents.

24 QUESTION: Well, suppose a state has murder as a
25 misdemeanor, would a home of husband, mother and father

1 convicted murderers, making murder their pastime, be a
2 decent home, in your opinion?

3 MR. MYERS: Absent the showing that the conviction
4 and the conduct that caused the conviction harmed the child,
5 there should be no reason for the state to intervene.

6 QUESTION: So it's perfectly all right to live in the
7 home of murderers? What's your position?

8 MR. MYERS: I think, in the absence of harm, I
9 think it has --

10 QUESTION: I'm just trying to get your position.

11 QUESTION: Well, haven't courts run into problems
12 before when they have attempted to lay down very definite
13 criteria such as Justice Holmes in the earlier days of rail-
14 roads, when he said, we declare it to be negligent as a matter
15 of law when you come to a railway crossing and fail to obey
16 the "stop, look, and listen" sign, or when in the McGautha
17 opinion Justice Harlan referred to the Royal Commission
18 Report saying that it had just proved impossible, virtually,
19 to define the standards that made one subject to capital
20 punishment, that there's necessarily an element of vagueness
21 there. Negligence embraces so many situations in the tort
22 field that I don't think any court today says that it's vague
23 because all we require is negligence and the jury deliberates
24 as to what is negligent and what is not.

25 MR. MYERS: Well, I think my response would be

1 twofold. Initially, in effect stating standards of conduct
2 as to how you drive an automobile, how you run a commercial
3 business, where there may be accepted standards outside the
4 law, is a lot different than when a state tries to interfere
5 in a family, something this Court has recognized as a funda-
6 mental interest to both the parents and the children.
7 Secondly, I would point out that while we're not asking for
8 absolute certainty, the Delaware statute used against these
9 parents without any statutory definition, without any narrow
10 construction, is surely vague. It doesn't give any guidance
11 to anyone either under the "not-fitted" standard or the "best-
12 interest" standard.

13 QUESTION: Well, how about capital punishment in
14 the McGautha case?

15 MR. MYERS: Well, I think this Court has now in
16 effect required the states to in effect take into those --
17 to legislate and make law the types of factors the jury would
18 consider. That's what basically, as we've pointed out the
19 examples in the appendix to our brief, and some of the amici
20 point out, that that would be the proper way for the courts to
21 go about this procedure, not try to detail and outline every
22 type of conduct a parent can or cannot do, but in effect
23 delineate the types of harm that will be sufficient and will
24 allow judges to decide whether in effect parental rights
25 should be forever forfeit.

1 QUESTION: Well, if the Delaware Legislature should
2 say that a mother and father who were living in an incestuous
3 relationship are unfitted as parents and that that alone is
4 ground for termination of the parental rights, that would cer-
5 tainly eliminate the vagueness problem.

6 MR. MYERS: That's correct.

7 QUESTION: But as I understand your answers to ques-
8 tions propounded to you by my colleagues, that would not elimi-
9 nate either of the other two problems in this case.

10 MR. MYERS: Well, I think --

11 QUESTION: Is that correct?

12 MR. MYERS: That's a difficult issue.

13 QUESTION: And is my understanding correct?

14 MR. MYERS: And it should be decided on that case
15 if the legislature makes that choice. The Delaware Legisla-
16 ture has not made that choice.

17 QUESTION: But the court has. The court has con-
18 strued this statute to mean that.

19 MR. MYERS: To say that conviction of a misdemeanor
20 of incest was the triggering criterion.

21 QUESTION: Right. Correct.

22 MR. MYERS: As I responded to Mr. Justice Marshall,
23 my feeling is, in the absence of a final determination that
24 that conduct caused harm to the children --

25 QUESTION: So, in other words, it would not eliminate

1 your other two challenges to the legislation? Is that correct?

2 MR. MYERS: No, no.

3 QUESTION: Is my understanding correct? That's my
4 only question.

5 MR. MYERS: As to my personal belief whether that
6 would be --

7 QUESTION: Well, not your personal belief. Your be-
8 lief as an advocate here, before this Court.

9 MR. MYERS: No.

10 QUESTION: It would not. It would eliminate the
11 vagueness problem, clearly.

12 MR. MYERS: Surely it would eliminate the vagueness
13 problem, but not the substantive due process problem.

14 QUESTION: Right.

15 MR. MYERS: I'll just briefly point out that the
16 third issue presented to this Court is the proper standards of
17 proof. Recently in Addington v. Texas this Court has outlined
18 those factors where the Constitution compels states to require
19 in its judicial proceeding something beyond a mere preponder-
20 ance of evidence, and to apply the Addington criteria of loss
21 of liberty, stigmatization, and the possibility of decisions
22 based on unauthorized conduct. Those factors clearly are pre-
23 sent in a TPR. There is an additional criterion, as I pointed
24 out, in a TPR that wasn't present in Addington. In Addington
25 an original commitment could in effect be changed, an erroneous

1 original commitment could be changed. In a TPR an original
2 erroneous termination is forever. It cannot be changed.
3 And despite the State's protest I don't think a higher stan-
4 dard of proof as we asked for causes any problems. As we
5 point out in the brief, numerous states have adopted the clear
6 and convincing evidence, and when Congress has spoken on the
7 issue it has required a showing of harm, and has required a
8 showing of harm beyond a reasonable doubt. It did so analo-
9 gizing that TPR was in effect a greater punishment than a crimi-
10 nal conviction.

11 In sum, unless the lower courts are reversed, the
12 State of Delaware will have taken these children from their
13 parents under an ill-defined standard by proving its case by
14 a mere preponderance of evidence, and without any demonstra-
15 tion that any of the children had been harmed by the parents'
16 conduct. In so doing, because of the sterilization, the State
17 will have taken the only children these parents will ever
18 have.

19 MR. CHIEF JUSTICE BURGER: Mrs. Small.

20 ORAL ARGUMENT OF MRS. REGINA M. SMALL, ESQ.,

21 ON BEHALF OF THE APPELLEE

22 MS. SMALL: Mr. Chief Justice, and may it please
23 the Court:

24 This case involves abstruse academic and abstract
25 principles of constitutional law but as the Justices' questions:

1 have demonstrated, cases that come to this Court are neither
2 abstruse, abstract, or academic. This case involves five
3 children and their biologic parents, and the right of those
4 parents now separated, and the mother remarried and raising
5 the child of her present husband, to regain parental rights --
6 if this order is final except in the sense that it's not
7 finally final because it's before the Court -- to regain the
8 right to some form of contact with these children and perhaps
9 some custody at some future time after planning, according to
10 counsel.

11 Ms. Roe testified at the TPR hearing that what she
12 wanted was to keep a good home for them, the children, to keep
13 them clothed and fed good. That was her concept of parenting
14 duties. The testimony in the record -- and there is the
15 transcript of a five-day trial on remand to the Delaware
16 Superior Court which conducted the termination hearing, the
17 record before that court indicates that in visitation and the
18 time between the removal on custody grounds of these children
19 and the termination hearing, Ms. Roe was not particularly
20 interested in the children, unable to relate to them. The
21 social worker who participated in the visitations testified
22 at one point that the young child, a baby at that time, Charles,
23 was brought in, cried. The mother was unable to comfort him,
24 unable to bring any emotional succor to him, and the foster
25 mother who was in the building at the time of this visitation

1 had to be brought in to calm the child down so that the visi-
2 tation could continue for but a short time. The mother made
3 no emotional responses when the children left, no --

4 QUESTION: How old was the child then?

5 MS. SMALL: My recollection is that he was an
6 infant, Justice Stevens. He would have been --

7 QUESTION: There are all sorts of reasons why a
8 child may continue to cry.

9 MS. SMALL: But the foster mother was able to calm
10 him very quickly.

11 QUESTION: I suspect something like that happens to
12 every parent, though, doesn't it, Mrs. Small?

13 MS. SMALL: I have no doubt that it does, and more
14 often than once, but this is the reaction that happened
15 in a specific visitation session. And the testimony was that
16 beyond this particular visitation session -- in fact, when
17 the children were in voluntary custody of the Division, the
18 eldest two, Amy and Bill, Ms. Roe indicated no particular
19 interest in where the children were or how --

20 QUESTION: Mrs. Small, why do you suppose they're
21 still litigating this case?

22 MS. SMALL: That's a question I ask myself without
23 a good answer, Justice Stevens. The children in this case
24 have not seen their parents since --

25 QUESTION: But is it not true that they did make

1 efforts to and they were denied access to the children?

2 MS. SMALL: They made some efforts through the
3 Division and through counsel to --

4 QUESTION: And they were denied.

5 MS. SMALL: And they were denied. They also --

6 QUESTION: Well, what were they supposed to do after
7 that? Other than fight this lawsuit?

8 MS. SMALL: They made an attempt in 1977, December
9 of 1977, more than a year and four months after the first
10 termination hearing, to obtain a stay of the termination
11 hearing for the purposes of obtaining visitation rights.
12 That application was made to the trial court as Delaware
13 procedure requires. It was denied, the application was not
14 renewed in the Delaware Supreme Court. And so a full year
15 and eight months after the last of the children were removed
16 from their custody, much less their parental control, was
17 the first time they made an application to the court to stay
18 the order so that they could --

19 QUESTION: Had they made informal requests to the
20 agency?

21 MS. SMALL: Yes, they had, and they continued --

22 QUESTION: Made and denied. Had they regularly
23 been denied?

24 MS. SMALL: That's correct.

25 QUESTION: Maybe they got a little discouraged.

1 And then they tried in court, and they were denied in court.

2 MS. SMALL: And they had the opportunity to make
3 the application to the Delaware Supreme Court and did not do
4 so.

5 QUESTION: Well, Mrs. Small, has there ever been a
6 request to reconsider this case in light of the current facts?

7 MS. SMALL: No, Justice White, there has not been
8 and in fact, at the time of oral argument before the Delaware
9 Supreme Court, as the full opinion of the Delaware Supreme
10 Court which appears in the appendix to the jurisdictional
11 statement discloses, the Delaware Supreme Court was aware of
12 the fact that Mr. Doe was living in Georgia.

13 QUESTION: Do you think this represents a judgment
14 by the Delaware Supreme Court that these changed circumstances
15 wouldn't make any difference in the -- ?

16 MS. SMALL: I think it undoubtedly does because not
17 only was Mr. Doe's parental rights terminated but Ms. Roe's
18 parental rights were terminated also. And there was evidence
19 with respect to each of the parents put forward in the termi-
20 nation trial. And on the basis that --

21 QUESTION: Yes, but some of the problems that existed
22 at the time of the proceeding in the trial court didn't exist
23 anymore, did they? They weren't living together incestuously,
24 the lady was married. Now --

25 MS. SMALL: That's correct. However, no application

1 was made to the Delaware Supreme Court, although it was upon
2 question --

3 QUESTION: So you really can't say that the Delaware
4 Supreme Court has acted on a request to remand for further
5 proceedings in light of the changed circumstances?

6 MS. SMALL: Undoubtedly they have not acted because
7 they have not been requested to act, although it was a question
8 of the Chief Justice of the Delaware Supreme Court which eli-
9 cited the information on the present condition, then-present
10 condition, 1978, of the parents of these children. So that
11 fact was clearly before them, that Ms. Roe was married to
12 another man and raising his child --

13 QUESTION: In Delaware, does this same statute
14 govern removing children from the custody of the parents?

15 MS. SMALL: No, it does not, Justice White. The
16 first point I should make is that this statute is now repealed
17 and we're only talking about nine children who would be af-
18 fected by the decision of this Court, the five children here
19 and the four children in Able v. Delaware case where the appeal
20 has not --

21 QUESTION: Well, what if this case were pending now
22 in the Delaware Supreme Court? Suppose it had just been filed.
23 Suppose it was filed in the Delaware Supreme Court the day
24 after the new statute was passed. Under what law would the
25 Delaware court review the case?

1 MS. SMALL: If the appeal were pending on -- if the
2 appeals were filed the day after the new statute was enacted,
3 as I understand your question --

4 QUESTION: Yes?

5 MS. SMALL: -- the Delaware Supreme Court would re-
6 view the case under the statute existing at the time of the
7 termination of parental rights.

8 QUESTION: It wouldn't review it in the light of the
9 new statute?

10 MS. SMALL: With the --

11 QUESTION: That's a little odd, isn't it?

12 MS. SMALL: With the attack made on appeal, I can't
13 see how the court could review it in light of the new statute
14 except to say --

15 QUESTION: Well, it could remand to see if the trial
16 court -- for reconsideration in light of the new statute.
17 Wouldn't that be the thing to do?

18 MS. SMALL: You anticipated my exception: except to
19 say that it could take cognizance of the record and make a
20 determination on its own from the record, or more likely, to
21 remand to the trial court. But at the time of the termination
22 the now-repealed statute was the one that governed.

23 QUESTION: But our rule here normally is in civil
24 cases to adjudge a case in the light of the current law, the
25 current statute. Why shouldn't we remand for reconsideration

1 to see if the new statute makes any difference to the Delaware
2 courts?

3 MS. SMALL: I can only give a practical answer to
4 that question, Justice White. That is --

5 QUESTION: Well, I'm really wanting a legal answer.

6 MS. SMALL: Then I shall attempt to give a legal
7 answer.

8 QUESTION: Which will probably be the same thing, so
9 go ahead.

10 MS. SMALL: A remand of this case for application of
11 the present Delaware statute by the Delaware courts would be
12 no more and no less than a tacit recognition that the former
13 statute was vague and likely --

14 QUESTION: Why is that? Delaware has replaced its
15 statute.

16 MS. SMALL: As part of a more comprehensive statu-
17 tory --

18 QUESTION: Well, but it's nevertheless replaced the
19 statute. It isn't the same standard, is it?

20 MS. SMALL: No, it's -- the language of the statute
21 is different, although in the generic terms both unfit-
22 ness and best interests are still required. In fact, the new
23 statute is remarkably similar in its language to the statutes
24 to which the appellants point the Court in the appendices to
25 their brief as being models of the kind of flexibility that

1 is required.

2 QUESTION: Well, then, why shouldn't -- in a case
3 that's not final, why shouldn't these parents now have their
4 case judged in the light of the current State standards?
5 And why should we pass on the constitutionality of a statute
6 that's been replaced?

7 MS. SMALL: That leads me only to my practical
8 answer that it will be several more years before there can
9 be permanent placement for these children. The State thinks
10 that that would be travesty.

11 Delaware's termination of parental rights statute,
12 the TPR statute, is not, as counsel suggests, unique. We know
13 of no state which doesn't have a similar statutory provision.
14 In fact, in appellants' brief at page 32, notes 52 and 53, in
15 making their standard of proof argument, the appellants list a
16 number of states that use the clear and convincing evidence
17 standard of proof in termination of parental rights standards,
18 parental rights acts. So I would assume that they will con-
19 cede that there are other TPR statutes. In fact, Delaware was
20 in the forefront of having statutes which require both the
21 best interest and the fitness of the parents to be considered
22 with the Cline case in 1967, the very standards which this
23 Court has alluded to in both Offer and in Kilwarren.

24 Counsel in his brief recitation of the facts seems
25 to pass over the years intervening between the first contact

1 between Doe and Roe and the Division of Social Services, and
2 the time at which the termination of parental rights action was
3 filed. In those three years there was continued contact be-
4 tween the agency and the family. The children were first
5 placed voluntarily, because Mr. Doe came to the agency and
6 said that he was not able at that time to provide support for
7 his family. After helping him obtain employment and helping
8 the family find a nice home, the younger of the two children
9 at that time, Bill, was replaced in the home. The Division
10 observed the family life, was satisfied that at that point in
11 1973 the family was coping, providing stability for the one
12 child replaced, the elder child, Amy, shortly thereafter.
13 The reaction to that was that Mr. Doe quit his job very prompt-
14 ly; he went out and found another, was fired. The family moved
15 in the middle of the night, the night before a worker was to
16 make a regular visit, leaving no forwarding address.

17 From that time on the relationships between the
18 Division and the family continued to increase. The Division's
19 policy is to maintain the family unit whenever possible, and
20 when it becomes impossible by reason of incapability or failure
21 of the parents to be able to provide the nurturing stable en-
22 vironment that the child has a right to, and family integrity,
23 then the Division believes that a permanent placement alterna-
24 tive as close to the family situation that is a new adoptive
25 family is the preferable one. And in fact the record discloses

1 that it was not until the Division made the determination that
2 these children should be put in adoptive care where they could
3 be received into a new family, albeit not a biologic one, but
4 a new family, that the TPR was filed.

5 QUESTION: Ms. Small, does the record tell us whe-
6 ther all the children are in the same family. Are they per-
7 haps in five separate families?

8 MS. SMALL: The record does not disclose that. They
9 are in four families. The twins are in the same placement,
10 the youngsters.

11 QUESTION: The record does show that one was in nine
12 families in one year.

13 MS. SMALL: The record does not disclose that,
14 Justice Marshall. A reference to Miss Kinkaid's testimony at
15 the trial, termination trial, is where that information comes
16 from. Miss Kinkaid, who was a psychologist employed by
17 the Division to test and observe these children, testified --
18 and her testimony can be found at page 241 of the record --
19 that she thought from some information she saw that was provid-
20 ed by either the Division or Children's Bureau, that Amy had
21 been in nine placements. On our cross-examination she was
22 asked, "Nine placements, foster placements?" And she said,
23 "No, I think it's nine. Well" -- and I'm paraphrasing -- I'd
24 have to go back and check I'm not sure.

25 The next piece of evidence that was put before her

1 was the records of the State Hospital, the Child Psychiatric
2 Center where Amy was tested several years before. And at that
3 point there was a showing that she had been in three foster
4 placements. Her placement worker testified --

5 QUESTION: But didn't you have a record of your own
6 where the child was?

7 MS. SMALL: Yes. And --

8 QUESTION: Didn't the agency have a record?

9 MS. SMALL: Yes, the agency --

10 QUESTION: Well, didn't the agency put the record in
11 to contradict that?

12 MS. SMALL: There was no affirmative showing to con-
13 tradict that rather questionable recollection on Miss Kinkaid's
14 part.

15 QUESTION: But you could have done it, couldn't you?

16 MS. SMALL: It could have been done. I can repre-
17 sent to the Court that the child has been in a total of six
18 placements, including with her own family, in her entire life
19 till today. But that's not on the record. The evidence,
20 though, that is on the record that is alluded to to support
21 nine placements does not support nine placements.

22 QUESTION: Is there anything in the record that shows
23 that the present husband will take the five children?

24 MS. SMALL: There is nothing in the record, to my
25 knowledge.

1 QUESTION: I'm getting back to what Justice White
2 was talking about. I don't know what we've got here. The
3 one side --

4 MS. SMALL: Neither do I, Justice Marshall.

5 QUESTION: One side argues that this lady is dying
6 to get these children back, and the record shows she is mar-
7 ried to another man whom nobody vouches for. Now, what con-
8 clusion can I draw?

9 MS. SMALL: I think you can draw no conclusion from
10 that, Justice Marshall. I think that you have to look back
11 to the time of the termination proceeding and Ms. Roe's inter-
12 est in regaining custody of her children I think is belied by
13 the facts of the case. For example, when the sexual miscon-
14 duct charge was filed against Mr. Doe, custody of their then-
15 three children was in the State, actual physical custody, as
16 well as legal custody; and then when Roe disappeared for a
17 period of four months after the charge was filed, leaving the
18 State, making no attempts to have any contact with her chil-
19 dren at that point.

20 The record does disclose history of instability in
21 the family that relates both to Mr. Doe and Ms. Roe, and a lack
22 on her part of any strong emotional attachment to any of the
23 children. The youngest have been out of the home since under
24 the age of six months.

25 QUESTION: Well, do you deny that she wants these

1 children?

2 MS. SMALL: The only thing in the record that I can
3 point to as her positive assertions are the testimony which I
4 quoted --

5 QUESTION: Well, isn't this suit one example of
6 positive assertion?

7 MS. SMALL: She now seeks, as I understand it from
8 her affidavit in forma pauperis contact, I understand from
9 counsel's argument this morning, that they would seek to re-
10 unite the family. I understand from a quotation in the local
11 newspaper yesterday that he didn't know what they wanted to do
12 with the children. This is a perplexing point for the Divi-
13 sion as well as it clearly is for the Court.

14 QUESTION: Well, do you have any evidence that she
15 does not want them, and if so why haven't they given it to her?

16 MS. SMALL: There is no direct evidence that she
17 has abandoned the children, which is a separate basis for
18 termination. Her parental rights were terminated on the basis
19 of her individual unfitness without regard to Mr. Doe, except
20 that one of the reasons was they lived in an incestuous
21 relationship.

22 QUESTION: Well, my question is, fit or unfit, it is
23 true that she wants the children?

24 MS. SMALL: I have only counsel's representation to
25 rely upon and --

1 QUESTION: Well, do you have anything to the con-
2 trary?

3 MS. SMALL: The record's been closed in this case
4 since December, 1976, Justice Marshall.

5 QUESTION: Do you have anything to the contrary?
6 The answer is, no. Right? So, we'll just take that point.
7 I'm not saying how important it is.

8 QUESTION: Doe and Roe are no longer living together?

9 MS. SMALL: That's correct.

10 QUESTION: And so they obviously, if they -- they
11 couldn't both want the children as parents of the children
12 and as co-homemakers for the children because they're not
13 co-homemakers anymore for even themselves, are they?

14 MS. SMALL: No, and that's what counsel admitted in
15 his opening statement, that --

16 QUESTION: He also said that she wanted them. He
17 said positively that she wanted the children.

18 QUESTION: What becomes of John Doe then?

19 QUESTION: But the question is, did he say that or
20 not?

21 MS. SMALL: He did say that, Your Honor.

22 QUESTION: Well, thank you. Now, do you have any-
23 thing to contradict that, any fact?

24 MS. SMALL: No, Your Honor, we have not conducted
25 discovery in this case while it was before the Court, didn't

1 think it appropriate.

2 QUESTION: Ms. Small, I'd be interested in your
3 discussion of the constitutional issues that I thought we took
4 this case to consider.

5 MS. SMALL: There is, we believe, before the Court
6 one properly raised constitutional issue and that's the attack
7 on the former Delaware statute for vagueness. The standard
8 and the rationale for a vagueness standard is that the State
9 in enacting legislation which affects individuals should put
10 the reasonable man on notice as to what conduct is prohibited
11 so that he may act accordingly and so that in applying such
12 standards the courts may determine without a discriminatory
13 or standardless application whether the statute is in force.
14 We think that the former Delaware statute survives an attack
15 as void-for-vague. It is not a question of what's pre-
16 ferable draftsmanship. The question is whether it meets the
17 threshold requirements, either on its face or assuming, not
18 on its face, through narrowing interpretations of the Delaware
19 courts. The statute says that parental rights may be termi-
20 nated when one is considered not fitted to exercise parental
21 duties.

22 That seems to me to be -- and to the Delaware courts
23 -- to be a standard that is comprehensible by the ordinary
24 person: care, feeding, clothing, providing for the emotional
25 needs, and the need to stay in out of the rain. Plaintiffs

1 submit that there are no slide rule calculations for deter-
2 mining what's a statute which would survive the void-for-
3 vagueness attack, and as the amici agree, there should be
4 in the case of child custody some flexibility for determining
5 the statutes. As I say, I think the Delaware Supreme Court
6 in referring to the dictionary definition has suggested that
7 the statute is on its face sufficient to give standards. Even
8 if it's not the Delaware courts have over the years inter-
9 preted the statute so that any reasonable person ought to know
10 what conduct is proscribed.

11 QUESTION: Now, Mrs. Small, you said that you thought
12 that only one constitutional issue is properly here. Counsel
13 for the appellants says that three constitutional issues are
14 properly here. Why do you think the others are not properly
15 here?

16 MS. SMALL: The question --

17 QUESTION: I.e., the burden of proof, and the sub-
18 stantive due process standard, as he calls it, that any state
19 need establish that there be harm to the children before it
20 can terminate the parents' relationship.

21 MS. SMALL: As to the latter, Justice Stewart, it
22 was not raised in the Delaware Supreme Court until --

23 QUESTION: How about the second one?

24 MS. SMALL: -- until motion for reargument. As to
25 the former, the argument in the Delaware Supreme Court was

1 that the standard of proof was to be beyond a reasonable doubt.
2 Appellants correctly point out in their reply brief that they
3 make reference to the Addington case in their reply brief in
4 the Delaware Supreme Court and in their motion for reargument.
5 But they do not discuss the context in which that reference
6 was made.

7 With respect to the burden of proof issue, Addington
8 is cited in their reply brief in the Delaware Supreme Court
9 directly after the positive statement that the standard of
10 proof in this case must be beyond a reasonable doubt.

11 QUESTION: Well, in any event, you concede that --

12 MS. SMALL: The case was cited.

13 QUESTION: The argument was clearly made that a
14 standard of proof by preponderance of the evidence was consti-
15 tutionally impermissible and insufficient.

16 MS. SMALL: That is correct. The standard which was
17 urged was not the standard which is now urged in this Court.

18 QUESTION: Mrs. Small, may I ask you this? This has
19 reference to Delaware's new statute. I've just looked at it
20 and it certainly seems to me that the standard under the new
21 statute, which is best interests of the children, is surely
22 quite different from the standard under the old statute of
23 not fitted. And my question to you is this, in Bell and
24 Maryland, where we vacated a state Court of Appeals of Mary-
25 land judgment and remanded for reconsideration in light of new

1 law in the State of Maryland, we relied on Patterson and
2 Alabama in 294 United States 600, where Mr. Chief Justice
3 Hughes stated the following, and my question to you is, why
4 isn't this statement applicable in this case?

5 Chief Justice Hughes said, "We have frequently held
6 that in the exercise of our appellate jurisdiction we have
7 power not only to correct error in the judgment under review
8 but to make such disposition of the case as justice requires.
9 And in determining what justice does require, the Court is
10 bound to consider any change either in fact or in law which
11 has supervened since the judgment was entered. We may recog-
12 nize such a change, which may affect the result, by setting
13 aside the judgment and remanding the case so that the state
14 court may be free to act. We have said that to do this is not
15 to review in any proper sense of the term the decision of the
16 state court upon a non-federal question but only to deal ap-
17 propriately with a matter arising since its judgment and
18 having a bearing upon the right disposition of the case."

19 MS. SMALL: Well, my answer suggests two things,
20 Justice Brennan. First, the change in the statute enacted
21 this summer does not add the best interests standard. That
22 has been a standard by statute or by court decisions since
23 before 1967. The change was in the phraseology respecting
24 fitted or not fitted.

25 To answer, I think, the thrust of your real question,

1 now, I can only suggest that the new statute is presently
2 under constitutional attack for the same reasons in the
3 Delaware state courts and it's likely that --

4 QUESTION: Yes, but neither you nor we, I gather,
5 really know what the Delaware state courts would do if we
6 sent this back for reconsideration in light of that statute.

7 MS. SMALL: In light of the new statute?

8 QUESTION: How they would interpret it, how they
9 would deal with any constitutional challenge to it,
10 we don't know, do we?

11 MS. SMALL: No, we do not know, although --

12 QUESTION: But surely we ought not decide the con-
13 stitutional questions tendered if the Delaware courts would on
14 reconsideration apply that new statute, should we?

15 MS. SMALL: Well, I think it's fair to say that even
16 the appellants would agree that the new statute, although
17 they won't concede it's constitutionally acceptable, is better
18 than the old statute and that the Delaware Supreme Court did
19 not find the old statute vague, and for a determination of
20 parental rights under that statute they would likely affirm
21 that as precedent.

22 QUESTION: Your practical, your so-called practical
23 answer to my brother White earlier, however, would still be
24 applicable here, that any delay would delay the potential
25 adoption of these children.

1
2 MS. SMALL: That's correct. Because in Delaware
3 termination of parental rights is a prerequisite for the
4 adoption --

5 QUESTION: Of course it is. It is anywhere.

6 MS. SMALL: In some states --

7 QUESTION: A child can't have two mothers and two
8 fathers.

9 MS. SMALL: That's correct.

10 QUESTION: I suppose you would rather have a remand,
11 though, than a declaration of unconstitutionality, wouldn't
12 you?

13 MS. SMALL: Certainly, Justice White.

14 MR. CHIEF JUSTICE BURGER: Mr. Myers, you have two
15 minutes remaining.

16 ORAL ARGUMENT OF GARY A. MYERS, ESQ.,

17 ON BEHALF OF THE APPELLANTS -- REBUTTAL

18 MR. MYERS: Well, at this point, concerning the
19 remand question, I think the remand question and the questions
20 we've been posed concerning the vagueness issues, regardless
21 of the change in the statutory language of the new section,
22 I think the other two constitutional issues which we raised
23 are properly before the Court and would have to be decided
24 regardless of any remand.

25 QUESTION: Well, the whole point, I gather, of Chief
Justice Hughes' statement in the Patterson case, and it's been

1 followed in a great many others, including Bell and Maryland
2 where it was quoted, is that this Court ought not determine
3 constitutional questions if perhaps they will disappear on
4 reconsideration under the new law.

5 MR. MYERS: Well, I think that the standard of proof
6 argument is not going to disappear, and a remand may entail
7 another evidentiary hearing and to allow it to go forward
8 under what we contend is an impermissible standard of proof
9 should not be --

10 QUESTION: Well, that may be so, but you may win.

11 MR. MYERS: Well, I think the lower courts need
12 some instructions.

13 QUESTION: You may win, and then we may never have
14 to decide the question.

15 MR. MYERS: And again, I would point out as to the
16 substantive due process, I think it's before this Court be-
17 cause I think the Delaware court in this case and other cases,
18 what few there are, has indicated that it's not going to re-
19 quire harm and we think that's the constitutional requirement.

20 QUESTION: Mr. Myers, under your view of the law,
21 if there were a remand and a new hearing, what would the issue
22 be at the hearing, whether the parents are presently unfit or
23 whether they were unfit in 1976?

24 MR. MYERS: I think in fairness to the parents it
25 would be whether they presently meet whatever statutory

1 requirements the state courts would apply.

2 QUESTION: And under the present law.

3 QUESTION: Under the present law. The facts are
4 quite different than they were five years ago.

5 MR. MYERS: I would respectfully beg off on that
6 because I'm not sure whether Delaware would apply the present
7 law.

8 QUESTION: I know it. I understand you would like
9 to have a decision here; yes.

10 MR. MYERS: Thank you.

11 MR. CHIEF JUSTICE BURGER: Thank you, counsel. The
12 case is submitted.

13 (Whereupon, at 11:08 o'clock a.m., the case in the
14 above-entitled matter was submitted.)
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CERTIFICATE

North American Reporting hereby certifies that the
attached pages represent an accurate transcript of electronic
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No. 69-5932

JOHN DOE AND JANE ROE

V.

STATE OF DELAWARE

and that these pages constitute the original transcript of the
proceedings for the records of the Court.

BY: 

William J. Wilson

Received

1/19/81