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SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

*In re Gladys H.*⁵⁹

(decided January 23, 1997)

Appellant, Stephen H, was denied custody of his children for an extended period of twelve months following a hearing.⁶⁰ The Family Court granted the Department of Social Services applications pursuant to Social Services Law § 384-b⁶¹ to adjudicate the children to be “permanently neglected” which ultimately terminated the father’s parental rights.⁶² The father appealed from this ruling contending that his Fifth Amendment⁶³ privilege against self-incrimination was violated during the hearing.⁶⁴

⁵⁹ 235 A.D.2d 841, 653 N.Y.S.2d 392 (3d Dep’t 1997).

⁶⁰ *Id.* at 841, 653 N.Y.S.2d at 392

⁶¹ See N.Y. SOC. SERV. LAW § 384-b (McKinney 1992) which states in pertinent part:

- (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;
- (ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child’s need for a normal family life will usually best be met in the natural home, and parents are entitled to bring up their own children unless the interests of the child would be thereby endangered;

. . .

- (iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

Id.

⁶² *Id.*

⁶³ U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: “No person shall be compelled . . . to be a witness against himself.” *Id.*

⁶⁴ *In re Gladys H.*, 235 A.D.2d at 842, 653 N.Y.S.2d at 394.

The children were in the custody of Social Services since August 26, 1990 subsequent to their mother's death from a terminal illness.⁶⁵ The Family Court provided for continuing custody with Social Services and provided for appellant's visitation rights.⁶⁶ The father was ordered by the Family Court to "attend parenting classes, receive assistance from a parent aide, participate in mental health counseling and obtain suitable housing for himself and his daughters."⁶⁷ In 1992, Family Court determined that the children were abused and extended custody to Social Services from March 1993 to March 1994.⁶⁸ It was found that the father sexually abused his daughters.⁶⁹ Petitions were filed on June 15, 1994 alleging that the father refused to participate in parenting classes and counseling and did not obtain suitable housing.⁷⁰ A fact finding hearing was held in November 1994 where the appellant objected to giving testimony utilizing his Fifth Amendment privilege.⁷¹ The court overruled the objection and found the children to be permanently neglected.⁷² The Family Court ruled that Social Services should maintain permanent custody of the children.⁷³ Stephen "H" appealed from the court's decision to terminate his parental rights.⁷⁴

On appeal, the Appellate Division, Third Department, affirmed the Family Court's termination of the father's parental rights.⁷⁵ The appellate court held that the father's Fifth Amendment rights were not violated⁷⁶ and if there was error, it was harmless in view

⁶⁵ *Id.* at 841, 653 N.Y.S.2d at 393.

⁶⁶ *Id.* at 842, 653 N.Y.S.2d at 393.

⁶⁷ *Id.* The Family Court would allow the father visitation rights provided that he demonstrate his willingness to improve his parenting skills. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 843, 653 N.Y.S.2d at 394.

⁷⁰ *Id.* at 842, 653 N.Y.S.2d at 394.

⁷¹ *Id.* at 843, 653 N.Y.S.2d at 394. The father feared that if he was forced to testify against himself, he would risk losing custody of his children. *Id.*

⁷² *Id.* at 842, 653 N.Y.S.2d at 394.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 843, 653 N.Y.S.2d at 394.

of the evidence that the father neglected his children.⁷⁷ The court explained that the father failed to comply with the order to attend parenting classes and to obtain appropriate housing which would set a foundation for the children's future.⁷⁸

At the fact finding hearing, the father was asked, "Do you continue to deny the finding of sexual abuse made by Family Court last year?" In response, he asserted his Fifth Amendment privilege.⁷⁹ When the Family Court overruled the objection the father replied, "Yes, I do."⁸⁰ The father was later asked whether he had sexual contact with the children between June 1992 and June 1993.⁸¹ Again, his objection was overruled and the father responded, "there was supposedly sexual abuse against me. And I don't believe it."⁸² Appellant argued on appeal that an admission to sexual abuse would subject him to criminal penalties.⁸³ However, the father never offered evidence that he was subjected to criminal prosecution regarding abuse of his daughters.⁸⁴ Furthermore, the court stated that the Family Court could compel the father to answer the question and face criminal prosecution or remain silent and risk the loss of custody of his children.⁸⁵ Moreover, "the dilemma [did not] deprive the father from offering evidence or cross-examining witnesses."⁸⁶

⁷⁷ *Id.*

⁷⁸ *Id.* at 844, 653 N.Y.S.2d at 395. Without demonstrating a genuine interest in the general welfare of the children, the court could not find that the father was capable of raising his daughters. *Id.*

⁷⁹ *In re Gladys H*, 235 A.D.2d at 844, 653 N.Y.S.2d at 394.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The appellate court explained that "[r]espondent's testimony that he did not agree with the adjudication of abuse did not violate his 5th Amendment rights." *Id.*

⁸³ *In re Gladys H*, 235 A.D.2d at 844, 653 N.Y.S.2d at 394. The Appellate Division found defendant's argument to be without merit because the father has not been denied the opportunity to prove his innocence. *Id.* Since the questions were relevant to the Family Court's decision to terminate his parental rights, the inquiry was proper. *Id.*

⁸⁴ *In re Gladys H*, 235 A.D.2d at 844, 653 N.Y.S.2d at 394.

⁸⁵ *Id.*

⁸⁶ *Id.*

In *Chase Manhattan Bank, National Association v. Federal Chandros, Inc.*,⁸⁷ plaintiff served information subpoenas on the defendants to enforce a judgment of nearly \$1,000,000.⁸⁸ Defendant, Federal Chandros, failed to respond to the subpoenas forcing the plaintiff to commence a proceeding for contempt.⁸⁹ Defendant invoked its Fifth Amendment privilege against self-incrimination.⁹⁰ The Appellate Division, Second Department, found the defendants guilty of contempt by stating that the failure to assert the privilege in a timely manner subjected them to liability.⁹¹ The court indicated that “[i]t is well settled that a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances.”⁹² The Fifth Amendment protection, as construed in New York cases cited to by the *Gladys “H”* court, held that unique circumstances must exist for the court to allow a blanket refusal to answer questions.⁹³ Absent such a showing a violation of the Fifth Amendment is not proven.⁹⁴

In *Agnello v. Corbisiero, Jr.*,⁹⁵ plaintiff contended that he “was penalized for having exercised his Fifth Amendment privilege against self-incrimination by not being allowed to testify on his

⁸⁷ 148 A.D.2d 567, 539 N.Y.S.2d 36 (2d Dep’t 1989). The Appellate Division stated that a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination may not be sustained without unique circumstances. *In re Gladys H*, 235 A.D.2d at 842, 653 N.Y.S.2d at 394. Since the father in *Gladys H* could not establish a sufficient reason to allow the court to sustain his objection, he was forced to answer incriminating questions posed by adverse counsel. *Id.*

⁸⁸ See *Chase Manhattan Bank, National Association v. Federal Chandros, Inc.*, 148 A.D.2d 567, 568, 539 N.Y.S.2d 36, 37 (2d Dep’t 1989).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *In re Gladys H*, 235 A.D.2d at 842, 653 N.Y.S.2d at 394 (1997).

⁹⁴ *Id.*

⁹⁵ 177 A.D.2d 445, 576 N.Y.S.2d 541 (1st Dep’t 1991).

own behalf.”⁹⁶ Similar to plaintiff in *Chase Manhattan Bank*, the petitioner did not properly invoke his Fifth Amendment privilege.⁹⁷ The *Agnello* petitioner refused to answer any questions regarding false statements on harness racing license application regarding a record of arrests and ejections from various race tracks.⁹⁸ The court indicated that the petitioner’s actions were unjustified and the petitioner could be precluded from testifying later.⁹⁹

In the case of *In re Gladys H*, the court dealt with the question of whether the Family Court erred by overruling the father’s objection to answer questions relating to his alleged sexual abuse of his daughters.¹⁰⁰ The Appellate Division refused to hold that the father’s testimony indicating his disagreement with the Family Court’s adjudication of abuse violated his Fifth Amendment rights.¹⁰¹ The court noted that if the questions did in fact violate the father’s constitutional right, the error was harmless.¹⁰² The alternative argument accepted by the Family Court was that the father failed to abide by the court’s requests.¹⁰³ The Appellate Division found that the father failed to attend and participate in mental health counseling and parenting classes and he failed to find appropriate housing for himself and his daughters.¹⁰⁴ Following the earlier decisions which discussed the issue of Fifth Amendment protection, it is noted that the privilege is not absolute.¹⁰⁵ Since the father chose not to offer evidence or cross-

⁹⁶ *Id.* at 446, 576 N.Y.S.2d at 542. Petitioner was denied a harness owner’s license for false statements made to the State Racing and Wagering Board. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *In re Gladys H*, 235 A.D.2d at 843, 653 N.Y.S.2d at 394.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 844, 653 N.Y.S.2d at 395. “The respondent continually failed to participate in parenting classes and counseling and to obtain appropriate housing.” *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Chase Manhattan Bank, National Association v. Federal Chandros*, 148 A.D.2d 567, 568, 539 N.Y.S.2d 36, 37 (1st Dep’t 1991). See also

examining witnesses, he would be deemed guilty of sexual abuse and he could not shield himself under Fifth Amendment protection.¹⁰⁵ Hence, unique circumstances did not exist to allow the father to remain silent on the issue of sexual abuse, because he was afforded the opportunity to present evidence to show his innocence.¹⁰⁷

An analysis of the Fifth Amendment under both the United States Constitution and the New York State Constitution¹⁰³ indicate no difference regarding compelling a defendant to testify against himself in a civil action.¹⁰⁹ It may be argued that during a criminal investigation under the New York State Constitution protection exists for the criminal defendant. Yet, the Fifth Amendment is applicable to civil and criminal proceedings which denotes that its protection is sufficiently broader in scope than its New York legislation. The defendant in *Gladys H* did not act affirmatively to demonstrate that he was fit to maintain the health and welfare of his children nor did he exhaust his use of evidentiary devices to demonstrate his good character.¹¹⁰ If unique circumstances are shown by any defendant to justify a blanket refusal to answer questions then protection under the Fifth Amendment and New York's constitutional provision will be afforded.

Agnello v. Corbisiero, 177 A.D.2d 445, 446, 576 N.Y.S.2d 541, 542 (1st Dep't 1991).

¹⁰⁵ *In re Gladys H*, 235 A.D.2d at 843, 653 N.Y.S.2d at 394. "This dilemma does not deprive respondent of due process as he has not been prevented from offering evidence or cross-examining witnesses." *Id.*

¹⁰⁷ *Id.*

¹⁰³ N.Y. CONST. art. I, § 6. Article I, § 6 of the New York State Constitution provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." *Id.*

¹⁰⁹ *In re Gladys H*, 235 A.D.2d at 842, 653 N.Y.S.2d at 394. "[T]he [Fifth] Amendment privilege against self-incrimination applies to civil proceedings, including Family Court proceedings. . . ." *Id.*

¹¹⁰ *Id.* at 843, 653 N.Y.S.2d at 394. "[Respondent] clearly failed to work toward correcting the conditions which led to petitioner retaining custody of the two children." *Id.* at 844, 653 N.Y.S.2d at 395.