

1975

# Utah v. Erika R. Pitts and Vallarey L. Pitts: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

DEC 17 1975

STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

STATE OF UTAH, :

In the Interest of: :

PITTS, Erika R. and : ~~Case Nos. 241839 and~~

PITTS, Vallarey L., : ~~241841~~

Persons under 18 years : *CASE No. 13882*  
of age. :

BRIEF OF APPELLANT-MOTHER

AN APPEAL FROM THE JUDGMENT OF THE SECOND  
DISTRICT JUVENILE COURT OF SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE JUDITH F.  
WHITMER, PRESIDING.

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*Clerk, Supreme Court, Utah*

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IN THE SUPREME COURT

STATE OF UTAH

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PITTS, Vallarey L., :

Persons under 18 years :  
of age.

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BRIEF OF APPELLANT-MOTHER

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NATURE OF THE CASE

Whether the State of Utah exercised diligent inquiry when attempting to serve appellant personal and whether the State of Utah determined appellant was outside of Utah before obtaining service by publication in an action to permanently deprive appellant-mother of her children as required by §55-10-88(4)(b) Utah Code Annotated (1953, as amended)

STATEMENT OF FACTS

Respondent petitioned the Second District Juvenile Court for Salt Lake County, State of Utah, to

permanently deprive appellant of her above-named children.

In sworn testimony Victor Irl Carlson, an employee of the Utah Department of Family Services, testified that on behalf of the State of Utah the only inquiry he made to locate appellant was to: 1) check with the Post Office; 2) check with the Baywood Hotel; 3) check with Utah Power and Light Company. After making the above inquiry Mr. Carlson testified that he then filed an affidavit to obtain service by publication. (See page 17, line 29 - page 18, line 8 from the transcript of the October 17, 1974 hearing held in the Second District Juvenile Court.) Darrell Meyers, also an employee of the Utah Department of Family Services, testified that he in addition asked Hattie Pitts one time if she knew appellant's address and looked through the Gandys listed in the telephone book. (See page 18, line 2 page 19, line 6 of the October 17, 1974 Juvenile Court hearing transcript.) Appellant was served by a notice printed for four (4) consecutive weeks in

The Salt Lake Times. Appellant was not personally served.

On July 16, 1974, the Second District Juvenile Court entered its Order permanently depriving appellant of her children.

#### DISPOSITION IN THE LOWER COURT

On September 18, 1974, appellant appeared for the first time seeking to set aside the July 16, 1974 Order of termination because she was not personally served with Summons as required by Rule 4 of the Utah Rules of Civil Procedure and that appellant had not appeared in the action. On October 17, 1974 appellant's motion to set aside was heard and denied by the Honorable Judith F. Whitmer, Judge of the Second District Juvenile Court. Appellant hereby appeals Judge Whitmer's October 17, 1974 denial of her motion to set aside the July 16, 1974 Order terminating appellant's parental rights because of improper service.

#### ARGUMENT

##### POINT I

THE TERMINATION OF PARENTAL RIGHTS BY JUDICIAL

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ORDER IS: A) A DRASTIC ACTION; B) AN ACTION IN PERSONAM.

This Court said in State in Interest of Bennett 77 Utah 247, 254, 293 P. 963, 966:

It has always been the policy of both the Legislature and the courts of the various states not to deprive or interfere with the important and sacred relation of parent and child unless absolutely necessary for the welfare of the child or for the protection of society.

And more recently in the Case State v. Lance, 23 Utah 2d 407; 464 P.2d 395, 397 (1970):

Deprivation of the parents' custody of their children is a drastic remedy which should be resorted to only in extreme cases and when it is manifest that the home itself cannot or will not correct the evils which exist. The cutting of family ties is a step of utmost gravity and is undesirable both socially and economically and should be avoided unless that is the only alternative to be found consistent with the best interest of the children. There is a presumption that it is generally for the best interest and welfare of children to be reared under the care of their natural parents.

Also see §55-10-100(18) U.C.A. (1953, as amended 19 State in Interest of F. V. Dade, 14 Utah 2d 47, 376 2d 948 (1962).

Besides this Court's unequivocal statement, our  
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regarded and vigorously protected by the law.

Common law jurisdiction is colored with the terms "in personam" and "in rem". Black's Law Dictionary 899 (4th ed. 1968) states:

In the Roman Law, from which they are taken, the expressions "in rem" and "in personam" were always opposed to one another, an act or proceeding in personam being one done or directed against or with reference to a specific person, while an act or proceeding in rem was one done or directed with reference to no specific person, and consequently against or with reference to all whom it might concern, or "all the world".

Also see Freeman v. Alderson 119 U.S.185, 7 S.Ct. 1130 L.Ed. 372.

In the instant case the Legislature has provided for service of process to obtain jurisdiction without reference to the ancient concepts of "in rem" or "in personam". To understand the importance of the instant case it is helpful to realize that we are dealing with a personal relationship not created by the State. Therefore, this is an action in personam which traditionally requires personal service instead of a proceeding in rem where the mere presence of the thing within a Court's jurisdiction empowers the Court.

## POINT II

FOR A DRASTIC IN PERSONAM ACTION THE CONSTITUTION OF THE UNITED STATES AS DOES THE CONSTITUTION AND LAWS OF UTAH REQUIRE A DILIGENT EFFORT TO PERSONALLY SERVE THE PARTY AFFECTED.

Due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 7 of the Constitution of the State of Utah is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise the defendant of the pendency of an action. Riverside & Dan River Cotton Mills v Menefee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910. And the violation is not cured by granting the aggrieved party a hearing on its motion to set aside the unfair judgment. The burden of affording proper notice rests on the plaintiff. It cannot be avoided by the perfunctory judicial approval of an unsupported conclusion of due diligence. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62.

Since 1864 it has been recognized that "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right

they must first be notified." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1864). Also see Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). The landmark case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), required "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Thus, "at a minimum" the due process clause of the Fourteenth Amendment demands that a deprivation of life, liberty or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." Mullane, at 313, 70 S.Ct. at 657. Moreover, this opportunity "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

Synthesizing decisions "representing over a hundred years of effort," the United States Supreme Court recently refined these fundamental requirements of procedural due process into the following stand:

[D]ue process requires, at a minimum, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

From reading the opinions rendered by the United States Supreme Court it is obvious that they allow flexibility in the manner in which the process is served upon a party to a lawsuit. But, this flexibility means that "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." Bell v. Burson, 402 U.S. 535, 540, 91 S.Ct. 586, 1590, 29 L. Ed.2d 90 (1971). The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them. See Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In determining the specific procedure required by due process under given set of circumstances we must consider:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for

doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, [and] the balance of hurt complained of and good accomplished . . . Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 163, 71 S.Ct. 624, 644, 95 L.Ed. 817 (1951). (Frankfurter, J., concurring.)

As stated in Point I of appellant's brief, the interest adversely affected is one which the law a all men consider to be of utmost importance. Therefore, basic fairness as demonstrated in the above cited authorities under the rubric of due process requires that respondent conduct an exhaustive inc to locate appellant before jurisdiction may be obt over her by publication. The U.S. Supreme Court correctly noted in Walker v. Hutchinson City, 352 112, 77 S.Ct. 200, 1 L.Ed.2d 78 at 116:

It is common knowledge that mere newspaper publication rarely informs the landowner of proceedings against his property.

And at 117:

At too many instances notice by publi- cation is no notice at all.

The specific Utah law which requires a dilige effort to personally serve the affected party is

Section 55-10-88(4)(b) Utah Code Annotated (1953, as amended) which states that:

if the address or whereabouts of the parents or guardian outside the state cannot after diligent inquiry be ascertained, by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending (Emphasis added.)

The statutory command coincides with the constitutional principles of jurisdiction in that responde is clearly required to conduct a "diligent inquiry and cannot get by with anything less.

### POINT III

RESPONDENT FELL FAR SHORT OF HIS LEGAL DUTY TO CONDUCT A DILIGENT INQUIRY TO PERSONALLY SERVE APPELLANT.

Assuming that the respondent made the five inquiries asserted, checking at the post office and the power company were the only efforts which could be considered primary sources to garner information as to appellant's whereabouts. Unfortunately the sources were only partially exhausted for there was no effort to use them to contact appellant's relatives living in Salt Lake who, according to appellant's affidavit, knew her address.

Checking at the Baywood Hotel is admirable but could hardly be considered a primary source for finding appellant since the only testimony was that appellant left her child there. There is not testimony that she ever lived there, that she ever received mail there, etc.

The mother of appellant's boyfriend's, Hattie Pitts', ignorance of appellant's whereabouts was on hearsay evidence which is countered by appellant's affidavit that appellant was staying at Hattie Pitts' family home in which Hattie Pitts lived for a number of years.

Mr. Meyers' looking through the phone book hardly deserves comment since there is no testimony that he called any of the Gandys listed. Obviously a telephone could be listed under an initial or first name which was unfamiliar to Mr. Meyers. All of the Gandys listed could very well be relatives who knew appellant's address for he was not dealing with a common surname such as Smith or Jones. Unfortunately no phone calls were made.



little chance of notifying anyone, in effect, appellant's parental rights were terminated by a telephone call to the post office and the power company, bolstered by a perusal of the phone book, a questionnaire conversation with a friend's mother, and a check at a hotel where appellant was seen. This inquiry could have been accomplished in fifteen (15) minutes.

There was absolutely no effort to contact appellant's mother or siblings who live in Salt Lake, attend Salt Lake schools, have been on Salt Lake welfare rolls, etc. Logically, relatives would be the primary source of locating a person.

The Utah Department of Family Services had the children and obviously from the petition knew the names. Therefore, a call to the Department of Vital Statistics could turn up birth certificates which would give addresses and names. This research could easily extend back another generation to find more names and addresses. From the birth certificates the hospital where the children were born could be ascertained. From the hospital records may be found a doctor who may have a continuing relationship with

the family. Though this information may have been a few years old at least some information would have been discovered.

Respondent's cursory efforts did not extend to such primary sources as tax rolls, automobile registrations, driver's license rolls, judicial records, city records, etc., etc., etc. This partial list of available primary sources of information to locate parents is designed to demonstrate how shallow and perfunctory the Utah Department of Family Services inquiry was. Appellant lived in Salt Lake City for almost two (2) decades yet respondent was unable to find one relative or one address. Their results speak for themselves. The State of Utah did not conduct a diligent inquiry.

#### POINT IV

BEFORE THE STATE OF UTAH PROCEEDED WITH SERVICE BY PUBLICATION THEY DID NOT KNOW WHETHER APPELLANT WAS OUTSIDE THE STATE OF UTAH.

Section 55-10-88(4)(b) Utah Code Annotated (1953, as amended) states that:

if the address or whereabouts of the parents or guardian outside the State cannot after diligent inquiry be ascertained, by publishing summons in a

newspaper having general circulation in the county in which the proceeding is pending. (Emphasis added.)

The statute is clear that the parent must be outside of the State. The case law is adamant that there must be strict compliance with the statutory command for a prior determination that the party to be served is out of state. See Arnow v. Bishop, 120 P.2d 423, 112 Mont. 611; Evans v. Hallas, 167 P.2d 94, 64 Ariz. 142; Crummer v. Fourth Judicial Dist. Court In and Elko County, 238 P.2d 1125, 68 Nev. 527; and Sine v. Stout, 203 P.2d 495, 119 Colo. 254. There was no evidence that the State knew appellant was outside the State of Utah when service by publication was sought in direct contravention of statutory command.

### CONCLUSION

The drastic in personam action terminating parental rights according to United States Constitutional and Utah Law requires a diligent inquiry to personally serve the parent to be deprived which diligent inquiry was not met in the instant case.

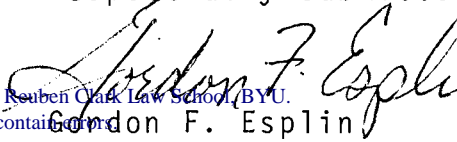
To secure jurisdiction over unknown parties by constructive service through publication is a concession of the law to the hard cir-

steps. The phrases "due inquiry" and "diligent inquiry" in that statute are not intended as useless phrases, but are put there for a purpose. Those two phrases have a well-understood meaning that cannot be reconciled with the taking of a chance or guessing that the names and addresses of unknown parties cannot be ascertained. A perfunctory inquiry does not comply with the provisions of the statute. An honest and well-directed effort must be made to ascertain the names and addresses of unknown parties. The inquiry must be as full as the circumstances of the particular situation will permit. Graham v. O'Connor, 182 N.E. 764, 766, 350 Ill. 36.

Furthermore respondent failed to meet the specific requirements of Section 55-10-88(4)(b) Utah Code Annotated (1953) in ascertaining that appellant was outside the State of Utah before proceeding with service by publication.

Service was improperly made upon appellant. Appellant hereby requests this Court to reverse Judge Whitmer's October 17, 1974 decision denying appellant's motion to set aside the July 16, 1974 order permanently depriving her of her children.

Respectfully submitted

  
Gordon F. Esplin

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