

1977

State of Utah, In The Interest of Douglas Rex Izatt, A Person Under Eighteen Years of Age : Brief of Ben And Janet Stowell, Petitioners And Appellants

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH, in the :
interest of DOUGLAS :
REX IZATT, a person under : Case No. 14576
eighteen years of age :

BRIEF OF BEN AND JANET STOWELL,
PETITIONERS AND APPELLANTS

Appeal from the District Juvenile Court in and for
Salt Lake County, State of Utah
The Honorable John Farr Larson

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FILED

MAR - 1 1977

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NATURE OF THE CASE

Petitioners prayed for a determination that it would be in the best interest of the minor child, Douglas Rex Izatt, that his care, custody and control be vested in them. The natural father of the child obtained a Writ of Habeas Corpus out of the Third Judicial District Court and in a hearing on that matter, the District Court certified the matter back to the Juvenile Court for findings and an order with regard to custody. The District Court also ordered that after the recommendation of the Juvenile Court the case would then be returned to the District Court for a final hearing on the issue of custody, pursuant to the Writ of Habeas Corpus.

DISPOSITION IN LOWER COURT

The Juvenile Court made an order, prior to the close of petitioner's case, dismissing part of the petition, and later, and also prior to the close of petitioner's case, made a final order of dismissal. The final order of dismissal did not refer the matter back to the District Court.

RELIEF SOUGHT ON APPEAL

Appellants seek a judgment reversing the lower court's order of partial dismissal and the final order of dismissal, with directions to permit petitioners to complete their case in chief in the Juvenile Court and thereafter, following

the entry of findings and a recommendation in the Juvenile Court, for an order that the matter be referred back to the District Court for final determination of custody pursuant to the Writ of Habeas Corpus.

STATEMENT OF FACTS

Viewing the record in a light favoring the successful party below, the evidence demonstrates the following:

1. On January 27, 1975 a Decree of Divorce awarding custody to the natural mother of the minor child, Judith H. Izatt, was entered granting reasonable rights of visitation in the child's natural father, Sheldon J. Izatt.

This order was entered following a disputed custody struggle in the divorce action which was resolved on stipulation of the parties after the parties had submitted to and received a custody evaluation.

2. On February 25, 1975, Judith H. Izatt, the natural mother of the child, Douglas Rex Izatt, was killed in an auto-pedestrian accident.

3. On February 28, 1975, the District Juvenile Court in and for Salt Lake County, entered an order placing the temporary custody of the aforesaid minor child in his maternal grandmother, Ina Hellstrom, with whom the child and his mother had been living for more than one year prior thereto. This order of temporary custody was based on the

petition of the maternal grandmother and the maternal aunt and uncle, appellants herein.

4. The initial petition for temporary custody alleged, among other things:

(a) The child's mother had recently been killed in an auto-pedestrian accident.

(b) That said 3 year old minor child had lived continuously with his mother and maternal grandmother in the maternal grandmother's home for more than one year immediately prior to the filing of the petition.

(c) That custody of the child had been awarded to his mother in a disputed divorce action.

(d) That the child's father was living with a woman he was not married to, had no residence of his own, and had failed to support the minor child for six months prior to the death of his mother.

(e) That when the child returned from visits with his father, the child came home bruised and disturbed and had picked up using foul language. (T.220 Pictures)

(f) That a home evaluation should be made to determine the most suitable home for the child.

5. On March 10, 1975 a Writ of Habeas Corpus was issued directing that the minor child be brought before the Third Judicial Court and dealt with according to law and a hearing was set for March 21, 1975.

6. On March 13, 1975 a pre-trial conference was held in the Juvenile Court on the petition of the maternal grandmother and maternal aunt and uncle, the appellants herein. At that time the court appointed Michael Stead, Deputy County Attorney, as guardian ad litem for the child and also as attorney for the child.

The Juvenile Court continued custody in the maternal grandmother pursuant to the order of February 28, 1975, and continued the pre-trial to March 24, 1975, pending a determination in the District Court on the Writ of Habeas Corpus.

7. On March 21, 1975 a hearing on the Writ of Habeas Corpus was held resulting in an order as follows:

1. The question of the custody of the minor child, Douglas Rex Izatt, is certified to the District Juvenile Court in and for Salt Lake County for determination pursuant to 55-10-78 U.C.A. as amended.
2. That the Writ of Habeas Corpus herein is continued without date.
3. That following the hearing in Juvenile Court, the Juvenile Court shall make findings and an order with regard to custody and refer the matter back to the District Court for final hearing on the Writ of Habeas Corpus.
4. The petitioner's motion that the temporary order of the Juvenile Court vesting custody in respondents be vacated is denied.
5. That there is no continuing jurisdiction in the divorce action, Civil No. D-13106, with regard to the question of custody, as referred to in 55-10-78 U.C.A., as amended in 1971, due to the death of one of the parties thereto, Judith H. Izatt, defendant therein.

8. On March 24, 1975 the pre-trial was held in the Juvenile Court and Judge Larson observed with regard thereto,

"Now if we are riding the District Court horse that doesn't become critical, I suppose, but I just evaluate what information is available and make a recommendation to the District Court. That doesn't turn on the question of neglect, it seems to me. It turns on what appears at this point. I suppose it would be in the best interest of the child, wouldn't it? (T.13 P.12-19)

At this hearing the State of Utah asked leave to withdraw and the same was permitted by Judge Larson. The minor child was three years old at the time.

9. Following the hearing on the Writ of Habeas Corpus in the District Court, at which time the maternal grandmother had temporary custody of the minor child by virtue of the Order of Temporary Placement of the Juvenile Court, dated February 28, 1975, the natural father was permitted to visit with the child once a week, and custody was continued in the maternal grandmother.

10. On May 20, 1975, a hearing was held on Petitioners' Motion For A Psychological Examination of the minor child and the natural father. The petition was joined in by the attorney for the child, Michael Stead, and the court granted the motion. The Court ordered the maternal aunt and uncle, appellants herein, to pay for the psychological examinations.

11. On March 28, 1975 the maternal grandmother of the child died of a heart attack.

12. On April 1, 1975, the Court placed the temporary custody and guardianship of the minor child with the

natural father, subject to the protective supervision of the Division of Family Services and advised the maternal aunt and uncle to turn the child over to the father. The Court further advised the father of the child to permit the maternal aunt and uncle to visit with the child and that request was frustrated and specifically thwarted by the father's counsel who stated that he had directed his client not to let them visit with the child. (T. 208)

13. On August 8, 1975 a motion to amend the petition and for a psychological examination of the natural father's present wife came on for hearing. Michael Stead, the attorney and guardian for the child joined in the petition and Dr. H. Max Cutler testified with regard to the advisability thereof. The court granted the motion and ordered petitioners to pay the expenses of the psychological examination as well as the psychological examinations on the father of the child.

The amended petition alleged new information received as a result of the psychological examinations of the minor child and his father. The new matter alleged is as follows:

The said Sheldon J. Izatt is unfit and/or incompetent by reason of conduct or condition seriously detrimental to the child as follows:

CONDUCT

- (a) The father has neglected and/or abused the child physically on more than one occasion.
- (b) The father's conduct is both amoral and asocial.
- (c) The father has set an example of prevarication, immorality and vulgarity, which is seriously detrimental to the welfare of the child.
- (d) The wife of the natural father of said child, who has the actual care, custody and control of the child for most of his waking hours, has threatened the boy with castration. This extremely negative approach to discipline can have serious psychological consequences in terms of severe sexual and emotional conflicts for years to come.

CONDITION

- (a) The father has massive hostility, expressed both in acting out and projecting the same in others. The child becomes the victim of direct hostility as well as being the object of projected hostility.
- (b) The father is of significantly lower intelligence than the child, and it is more probable than not that the child will not develop to his potential, if custody remains with his father.
- (c) The father's present wife, and her five children, from two previous marriages, are of significantly lower intelligence than said child and it is more probable than not, that the child will not develop to his potential if he continues to reside with said persons.

14. On October 17, 1975 the matter came on for trial and petitioners called as their first witness the natural father of the child at which time the court ruled that the petitioners would have to subpoena the natural father in order to make him a witness. The natural father did not

appear on the first day of trial nor at any other time nor at any of the motions in the Juvenile Court.

15. On the first day of the trial and before the close of evidence, the natural father, by and through his attorney, made a motion to dismiss which was granted as to paragraphs 1a - 1c under conduct of petitioners' amended petition. The motion was taken under advisement and at the time of the hearing Judge Larson observed as follows:

"One thing that bothers me is that Mr. Goodwill had not rested. If he's got his evidence in on these points, then I could make a ruling."
(T. 179, L. 7-9)

Opposing counsel then gave as his reason for a prohibition against calling the father of the child as petitioners' witness that the court should assume what he would say before he said it, when counsel for the father states as follows:

Your Honor, as a matter of common sense, the defendant assuming whether he is guilty or not guilty, whether he is a liar or not, Mr. Goodwill is never going to be able to prove that he is a liar and assuming that he is telling the truth, he is certainly going to deny neglecting, beating, and living with a woman. If that's the rest of his case it's no case. (T. 181, L. 7-13.)

16. On December 1, 1975, the Court entered an order of partial dismissal, based on counsel for the father's motion, as the paragraph 1a through 1c under conduct, of petitioners'

amended petition, without first giving petitioner a chance to examine the natural father as a witness and continued the matter for a trial as to paragraph 1d conditions and 1a through 1c under conduct to December 15, 1975. That date was stricken and the matter was reset for trial to the date of April 15, 1976.

17. On April 15, 1976, counsel for petitioner appeared in Juvenile Court with the intent of completing his case in chief, but instead, the court permitted counsel for the natural father to put on a witness in support of his renewed motion to dismiss the remaining portions of the petition.

18. During the hearing of April 15, 1976, the Court, without notice or hearing, stated that a Mr. John Soltis had been appointed as guardian for the child and Mr. Soltis, it was determined had theretofore met with the attorney for the natural father and based on the information given to him by the attorney for the natural father joined in a motion to dismiss. This motion was made, once again, prior to the close of petitioners' case.

Petitioner had been unable at this time to put on the expert witness, Dr. Victor B. Cline, who had examined the child at the expense of petitioner, and had also been unable to examine either the father or the

father's new wife.

The Court permitted the natural father to examine a social worker in support of his motion to dismiss. The social worker had visited the home of the natural father. The social worker made many recommendations and statements which would require her to have been established as an expert witness. The Court then granted petitioners' motion to strike all of the social worker's testimony, except that testimony that related to her actual observations of the child or of the home of the father and the conditions therein.

Counsel for petitioner objected to the appointment of Mr. John Soltis, as attorney for the child, on the basis that said attorney had met with opposing counsel prior to his official appointment, there had been no notice of his appointment, and he had not spoken with counsel for petitioner nor investigated any of the facts from the standpoint of petitioners' theory, nor had he been present at any of the prior hearings, and on the basis that he was not acting in the best interests of the child. Over objection, the Court appointed Mr. Soltis guardian for the child and further granted the motion to dismiss petitioners' entire petition.

POINT I

THE GRANTING OF A SECOND MID-TRIAL MOTION TO DISMISS PETITIONERS' AMENDED PETITION BEFORE THE CLOSE OF PETITIONERS' CASE IN CHIEF IS REVERSIBLE ERROR.

The attorney for the child, Michael Stead, was a joint signator with counsel for petitioner in his Motion to Amend the petition to include conduct or condition seriously detrimental to the child based on subsequent psychological examinations of the natural father and the minor child and a threatened castration of the minor child by the child's stepmother.

During the trial and before petitioner had completed its case in chief, counsel for the natural father made a motion to dismiss petitioners' amended petition. Judge Larson questioned the propriety of granting a motion to dismiss before petitioners had rested their case and he observed as follows:

"One thing that bothers me is that Mr. Goodwill had not rested. If he's got his evidence in on these points then I could make a ruling." (T. 179, L. 7 to 9)

At the time of the motion to dismiss the amended petition, Michael Stead, the court appointed attorney for the minor child opposed the motion to dismiss with regard to the portions of the amended petition which related to the psychological examinations of the father and the child as follows:

" . . . (H)owever, I am concerned about the emotional and mental ability of this father to adequately take care of the child and would like more information as to that . . . "

On the 1st day of December, 1975, the court entered an order partially dismissing petitioners' amended petition and denied the same with regard to the condition which related to the psychological examinations performed on the father, the child and the step-mother and with regard to the alleged conduct of the child's stepmother as to a threat to castrate the child.

The case had been continued for trial to December 15th, 1975 but was re-set for trial for April 15th, 1976. On April 15, 1976 Mr. John Soltis, a Deputy County Attorney, was appointed guardian ad litem for the child. Mr. Soltis had met with counsel for the father prior to the hearing but had not been officially appointed by the court, nor had there been notice or hearing as to his appointment. It was admitted that he had not been present at the prior hearings nor during the trial itself. Mr. Soltis admitted that he had spoken with counsel for the father, with the child and a case worker, but that he had not spoken with the natural father, had not spoken with the step-mother, and had not spoken with any of petitioners' expert witnesses nor had he spoken with petitioners' counsel.

Petitioner's counsel objected to Mr. Soltis appearing for the child at which time the court appointed him guardian ad litem for the child, (T. 182, L. 26) did not appoint him attorney for the child, and Mr. Soltis joined in counsel for the father's motion to dismiss the petition. This was the same motion that had been denied in part on December 1, 1975.

At the time of the granting of the motion to dismiss the petition in total, petitioner still had not been able to finish its case in chief. Petitioner had paid for three psychological examinations and engaged and paid for the services of two well respected psychologists, Dr. H. Max Cutler and Dr. Victor B. Cline. Petitioner had not had an opportunity to examine as hostile witnesses, the father of the child, and the step-mother of the child; or the psychologist who examined the child Dr. Victor B. Cline, despite the fact that counsel for the father had stipulated that Dr. Cline be permitted to testify and lay the ground work and basis for Dr. Cutler's testimony, and also to testify independently based on his examination of the minor child. (T. 157, L. 1-11)

Rule 41 (b), U.R.C.P., provides that,

"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence

in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." [Emphasis added.] See also Pratt v. Amalgamated Ry. 50 U. 472 167 P. 830 (1917).

Since the motion to dismiss was granted prior to the close of petitioner's evidence, and before petitioner had the opportunity to examine a number of witnesses, the court should reverse the decision of the Juvenile Court pursuant to Rule 41 (b), U.R.C.P. and remand the case back for further proceedings in conformity with the court's opinion.

The order of partial dismissal of petitioners' amended petition, dated December 1, 1975, should be reversed and remanded with the same directions and for the same reasons.

POINT II

THE JUVENILE COURT ERRED IN DISMISSING PETITIONERS' PETITION AND IN FAILING TO MAKE FINDINGS AND AN ORDER REFERRING THE MATTER BACK TO THE DISTRICT COURT FOR FINAL DETERMINATION ON THE WRIT OF HABEAS CORPUS AS ORDERED BY THE DISTRICT COURT.

When the natural father of the minor child filed his Writ of Habeas Corpus in the District Court a petition was pending in the Juvenile Court. The petitioners and the maternal grandmother had filed the petition in the Juvenile Court and the Court had granted temporary custody

to the maternal grandmother.

The District Court certified the question of custody to the Juvenile Court with an order that findings be entered and that the case be referred back to the District Court for final resolution of the custody issue as it related to the Writ of Habeas Corpus.

55-10-78, U.C.A. as amended, provides that

" . . . Nothing contained in this act shall deprive the District Courts of jurisdiction to appoint a guardian for a child, nor of jurisdiction to determine the custody of a child upon Writ of Habeas Corpus . . . provided that in case a petition involving the same child is pending in the Juvenile Court . . . , the District Court shall certify the question of custody to the Juvenile Court for determination.

A District Court may at any time decline to pass upon a question of custody and may certify the question to the Juvenile Court for determination or recommendation." [Emphasis added.]

In re State ex rel Thornton, 18 U. 2d 297, 422 P.2d 199, (1967) the court defined the word "Determination" as used in the aforesaid statute as follows:

The word determination in the statute providing that ". . . a District Court may at any time decline to pass upon a question of custody and may certify that question to the Juvenile Court for determination or recommendation, does not mean that once a case is referred to the Juvenile Court, the decision of that Court is final." [Emphasis added.]

The District Court in connection with the natural father's Writ of Habeas Corpus certified the question of custody to the Juvenile Court for findings and a

recommendation. The Juvenile Court then dismissed petitioners' petition but made no findings, entered merely a temporary order of custody in the natural father, not a final order of custody, and did not refer the matter back to the District Court for a final determination on the Writ of Habeas Corpus as provided in the order of Judge Maurice Harding signed on the 28th day of April, 1975, and as directed in 55-10-78 U.C.A. as amended. (Statement of Facts P.4)

Since the order of dismissal of the Juvenile Court was not only contrary to the aforesaid statute, but also contrary to the order which certified the custody issue back to the Juvenile Court, the order of Judge Larson should be reversed, the matter should be remanded for further proceedings in order that petitioners may complete their case in chief, and after the case in chief is completed, findings should be entered and a recommendation made to the District Court for a final determination on the Writ of Habeas Corpus.

POINT III

THE APPOINTMENT OF NEW COUNSEL AS GUARDIAN AD LITEM FOR THE CHILD WAS ERROR.

On April 15, 1976 the matter came on for further trial and a Mr. John Soltis appeared and said Mr. Stead, attorney and guardian ad litem for the child had left the County Attorney's office and that Mr. Soltis replaced him and took over his cases. (T. 182 L. 11-12)

Petitioners' counsel inquired of the Court whether or not Mr. Soltis had been appointed to represent the minor child. The Court then observed:

I don't know that there was action appointing him. He took over Mr. Stead's work. (T. 182 L.9-10)

Petitioners' counsel inquired of the Court as to whether or not Mr. Stead had been appointed guardian ad litem and attorney for the child in his individual capacity or as a Deputy County Attorney. Petitioners' counsel inquired as follows:

As I understand it, your Honor, he was not appointed as a Deputy County Attorney, that is the County Attorney's office was not appointed to represent the child, but Mr. Stead in his individual capacity was appointed to represent the child. (T. 182 L. 13-17)

The Court responded:

That is right is there any objection to my appointing Mr. Soltis at this time to represent the child? (T. 182 L. 18-19)

Petitioners' counsel objected on the basis that there had been no notice and that he had never had an opportunity to confer with Mr. Soltis. Mr. Soltis had conferred with and agreed to join with the father's attorney in a motion to dismiss. He did not even attempt to confer with counsel for petitioner.

The Court, over objection, appointed Mr. Soltis guardian ad litem, but not attorney for the child when it observed:

The Court will appoint Mr. Soltis as guardian ad litem. The matter before the Court is Mr. Schwobe's motion to dismiss. (T.182 L. 26-27)

The second day of trial had been continued twice due to Dr. H. Max Cutler's having suffered a heart attack and finally when the matter came on for the second day of trial on April 15, 1976, petitioners were denied an opportunity to finish their case in chief and the hearing was converted into one to determine the father's motion to dismiss.

55-10-96, U.C.A. annotated as amended provides that:

The Court may appoint counsel without such request if it deems representation necessary to protect the interest of the child.
[Emphasis added.]

In the instant case it is submitted that Mr. Soltis was improperly appointed, as one who does not obtain information about both sides of a case in an impartial manner to determine what is in the best interests of the child, cannot be said to be acting in the best interests

of the child nor to protect the interests of the child. In the instant case the former attorney for the child, Michael Stead, joined in the motion for psychological examinations of the father, the child and the stepmother of the child. He also observed with regard to his concern about the emotional condition of the father:

I'm concerned about the emotional and mental ability of the father to adequately take care of the child and would like more information about that. (T. 179 L. 1-3)

More information about the emotional and mental ability of the father to care for the child was not presented to the Court, as before any further witnesses were sworn and examined, the Court granted the motion to dismiss.

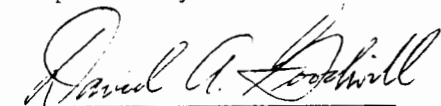
In a case such as this one where the amended petition alleges that (1) the stepmother threatened to castrate the minor child, (2) the father had abused the child, (3) the father had massive hostility, (4) the father is of significantly lower intelligence than the child and it is more probable than not that the child will not develop to his potential, if custody remains with his father, and (5) that the father's present wife, and her five children from two previous marriages, are of significantly lower intelligence than said child and it is more probable than not, that the child will not develop to his potential if he continues to reside with said persons, it is respectfully submitted that an attorney who fails to speak with the

father, the stepmother, the attorney for petitioners, and petitioners' two expert witnesses, is not acting to protect the interest of the child pursuant to 55-10-96, U.C.A. annotated as amended. The appointment of Mr. Soltis was, therefore, reversible error.

CONCLUSION

The order of partial dismissal and the order dismissing petitioners' petition in its entirety should be reversed and the matter should be remanded for further proceedings in order that the petitioners may complete their case in chief, and after the case in chief is completed, findings should be entered and a recommendation made to the District Court for a final determination on the Writ of Habeas Corpus as it relates to the custody issue.

Respectfully submitted,



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MAILING CERTIFICATE


I hereby certify that I mailed or hand delivered three copies of the attached brief to each of the following named parties at the addresses therein stated, postage prepaid, on this 1st day of March, 1977.

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