

1977

State of Utah, In The Interest of Douglas Rex Izatt, A Person Under Eighteen Years of Age : Brief of Sheldon J. Izatt Natural Father And Respondent

Utah Supreme Court

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David A. Goodwill; Attorney for PetitionerDavid H. Schwobe; Attorney for Respondent

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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 SHELDON J. IZATT
NATURAL FATHER AND RESPONDENT

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

DAVID H. SCHWOBE
343 South 4th East
Salt Lake City, Utah 84111
Attorney for Natural Father -
Respondent Sheldon J. Izatt

DAVID A. GOODWILL
455 East 4th South #50
Salt Lake City, Utah 84111
Attorney for Petitioners-
Appellants Ben & Janet Stowell

ROBERT B. HANSON
State Capital Building
Salt Lake City, Utah 84100
Attorney for State of Utah

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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
eighteen years of age.

Case No. 14576

BRIEF OF SHELDON J. IZATT
NATURAL FATHER AND RESPONDENT

NATURE OF THE CASE

Appellants, Ben and Janet Stowell, together with the maternal grandmother of the child in question, Ina Hellstrom, now deceased, petitioned the District Juvenile Court in and for Salt Lake County, for a determination that the child in question, Douglas Rex Izatt, was dependant or neglected under the laws of the State of Utah, that the Juvenile Court assume jurisdiction over said child, remove the child from the custody of his natural father, Respondent, Sheldon J. Izatt, and award custody to Petitioners; said Petition was subsequently amended, with the approval of the Court, to include a prayer for the termination of all parental rights of the natural father, Respondent herein. Petitioners, in their statement of the nature of the case, refer to a Writ of Habeas Corpus proceeding in the Third Judicial District Court in

and for Salt Lake County, State of Utah; however, Respondent takes issue with the inclusion of that Habeas Corpus proceeding in this appeal as more fully set forth in his argument herein.

DISPOSITION IN LOWER COURT

The Juvenile Court made and entered its Order on the 1st day of December, 1975, dismissing with prejudice a portion of Petitioners-Appellants' Petition; and on the 20th day of April, 1976 entered its Order dismissing with prejudice the remainder of said Petition.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the partial and final orders of dismissal entered in the Juvenile Court.

STATEMENT OF FACTS

1. Respondent does not controvert paragraph 1 of Appellants' Statement of Facts but would add thereto that the natural father, Respondent herein, was granted reasonable rights of visitation in the divorce action referred to by Appellant. (Tr. 236).

2. Respondent does not controvert paragraph 2 of Appellants' Statement of Facts but would add thereto that on the 25th day of February, 1975, after the death of the child's natural mother, Judith H. Izatt, Ina Hellstrom, one of the original Petitioners and the mother of the Appellant,

Janet Stowell, took possession of the child and refused to deliver the child over to his natural father, Sheldon J. Izatt, either for visitation or custody, (Tr. 237). The Petitioner-Appellants, upon acquiring possession of the minor child, did file on the 28th day of February, 1975 a Petition in the District Juvenile Court in and for Salt Lake County, for adjudication of dependency and/or neglect and award of custody. On the basis of that Petition and without hearing, Ina Hellstrom was granted temporary custody of the minor child in question, Douglas Rex Izatt. (Tr. 239-242).

3. Respondent does not controvert the facts as set forth in paragraph 3 of Appellants' Statement of Facts.

4. Respondent does not controvert paragraph 4 of Appellants' Statement of Facts. Respondent would add to said paragraph 4 to reflect the objections to the Petition for the adjudication of dependency and/or neglect and award of custody as filed by the natural father, (Tr. 236-238), to wit:

(4) That as of the death of Judith H. Izatt, mother of the child, on February 25, 1975, Sheldon J. Izatt has the legal right to custody and control of his child, Douglas Rex Izatt; further, that on February 25, 1975, Ina Hellstrom, one of the Petitioners herein, did, without legal right, take possession of the child, and did refuse to deliver said child over to his natural father, Sheldon J. Izatt, either for visitation purposes or custody.

(5) With the exception of the alleged delinquency in child support, the exact amount of which Sheldon J. Izatt is not certain at this time, Sheldon J. Izatt

denies the allegations inferring neglect contained within the Petition on file herein, and affirmatively alleges that the allegation contained within paragraph 5 of the Petition to the effect that he was living with a woman to which he was not married, is libelous, inflammatory and without basis of fact.

(6) That subsequent to the death of Judith H. Izatt, he has remarried, is currently residing with his spouse at 5645 South 4270 West, Salt Lake City, Utah, and is ready, willing and able to provide a home for his son, Douglas Rex Izatt.

5. With respect to the facts as set forth in paragraph 5 of the Appellants' Statement of Facts, Respondent does not dispute the same other than to take the position that the Writ of Habeas Corpus referred to herein was not part of the Juvenile Court action, dismissal of which Appellants' appeal, but was filed by Respondent, Sheldon J. Izatt, in the Third Judicial District Court in and for Salt Lake County in an attempt to regain temporary custody of the minor child.

6. Respondent does not controvert the facts as set forth in paragraph 6 of Appellants' Statement of Facts.

7. Respondent does not controvert the facts as set forth in paragraph 7 of Appellants' Statement of Facts.

8. Respondent does not controvert the facts as set forth in paragraph 8 of Appellants' Statement of Facts but the quote cited by Appellants should be clarified by pointing out that the quote cited by Appellants was a comment by the Court directed to arguments of counsel as to the affect of the Order in the Habeas Corpus proceedings as set forth in

paragraph 7 of Appellants' Statement of Facts and that after argument by counsel the Court did make the statement;

"Well, as a number one item we had better litigate the Petition. If there is no neglect shown on the part of the father then it seems to me that I would dismiss this Petition. Then maybe we had better wait until we get the Order from the District Court, but we can respond to that after we get the Petition out of the way".
(Tr. page 17 lines 2-7).

9. Respondent does not controvert the facts as set forth in Appellants' paragraph 9 but would point out that the transcript reflects an Order by the Court to allow visitation by the natural father, Respondent herein, on a weekly basis (Tr. 25), but does not reflect that visitation was in fact allowed by Petitioners and Appellants.

10. Respondent does not controvert the facts as set forth in Appellants' paragraph 10.

11. Respondent does not controvert the facts as set forth in Appellants' paragraph 11.

12. Respondent does not controvert the facts as set forth in Appellants' paragraph 12 with the exception of clarifying from the record the statements of the Court and counsel for Respondent regarding the visitation by the maternal aunt and uncle as follows (Tr. 208):

Judge Larsen: "...I think the maternal relatives have no rights to see the child. It might be important that the child go to Disneyland but that would not be an issue in this case.

Mr. Schwobe: If I may speak, Your Honor, to the issue. As I recall the Court suggested it. It was my legal opinion of which I advised my clients the duty (while the transcripts show "the duty to", it should read that due to) the obfiscatory tactics and the antics and the spurious allegations made by Petitioners and the now deceased grandmother, that it would be best for their interests and the child's interests to retain (retain should read refuse) any visitation.

13. Regarding the facts as set forth in paragraph 13 of Appellants' Statement of Facts, Respondent does not controvert the same.

14. Respondent does not controvert the facts as set forth in paragraph 14 of Appellants' Statement of Facts but would add the dialogue from the hearing as follows (Tr. 74):

Judge Larsen: Mr. Goodwill, you have the burden of going forward.

Mr. Goodwill: We call Sheldon Izatt as our first witness. Mr. Izatt is not here, Your Honor.

Mr. Schwobe: Your Honor, it is my understanding that the purpose of this hearing today was for Mr. Goodwill to put on his case.

Mr. Goodwill: He is a witness in my case.

Judge Larsen: Did you subpoena him?

Mr. Goodwill: No, but he is a party. Parties are obligated to attend. The only one that had an excuse was the wife, we had no knowledge or notice that he wouldn't be here.

Mr. Schwobe: I talked with Mr. Goodwill the night before last, Your Honor, and he made no desire for Mr. Izatt to be here. Mr. Izatt has

a job and I don't feel he needs this emotional upset. It is our duty to put on no evidence today.

Judge Larsen: Do you want to be heard on this one?

Mr. Stead: No.

Judge Larsen: I don't know that he was required to be here as long as he is represented by counsel. Ordinarily the father is here, but I suggest you go on to your next witness and subpoena him.

Mr. Schwobe: Mr. Izatt will certainly be here to present his own defense. I had no notice ---

Judge Larsen: Well, I suppose if Mr. Goodwill wanted him here as a witness he could subpoena him and require him here at the main case.

Mr. Stead: I know of no rule that would compel him to be here.

Mr. Goodwill: We will call Mrs. Sudbury. (Tr. 75).

15. Respondent does not controvert the facts as set forth in paragraph 15 of the Appellants' Statement of Facts but would point out that said facts are more properly couched as argument and will be responded to within Respondent's argument.

16. Respondent does not controvert the facts as set forth in Appellants' paragraph 16 with the exception that Petitioners' Amended Petition, insofar as those allegations contained within paragraph 1 (a) through 1 (c) under Conduct and (a) through (c) under Condition, was continued to the 15th day of December, 1975. Appellants filed no timely appeal from this Order dismissing with prejudice a portion of their Amended Petition.

17. With regard to the facts as set forth in Appellants' paragraph 17, Appellants do not correctly reflect the facts concerning the April 15th hearing (Tr. 197-198). Attorney for Respondent had previously set a motion to dismiss the remaining portion of Appellants' Petition on the 12th day of April, and the remainder of the trial had previously been set for the 15th day of April; due to illness of Attorney for Petitioners Appellants, the Motion to Dismiss was continued from the 12th day of April to the 15th day of April and the trial previously set on the 15th day of April was stricken, counsel for Petitioners did not appear on the 15th day of April for the purpose of completing his case in chief but only on the motion for dismissal by Respondent. (Tr. 197-198), as follows:

Judge Larson: Well, now, Mr. Goodwill, this date was set for hearing two or three days ago when you called up and asked to have it continued.

Mr. Goodwill: Because I was incapacitated your Honor.

Judge Larson: And you were advised it would be considered today. I don't know who told you you couldn't put on any evidence. You were told that you couldn't . . . that the court wouldn't consider at this time the main case, I would guess.

Mr. Goodwill: We were told that it was set for trial today, your Honor, we were told that the trial date was stricken. The only matter I couldn't speak with your Honor I asked and I was told that I would not be able to and I was told that it was stricken from the trial calendar and that the only motion would be Mr. Schwobe's motion to dismiss.

18. Regarding the facts set forth by Petitioners in paragraph 18 Respondent does not controvert the facts set forth therein; however, in that the facts are presented in argumentative style they will be responded to in argument as opposed to in the Statement of Facts.

A R G U M E N T

POINT I

THE ORDER OF PARTIAL DISMISSAL OF PETITIONERS' AMENDED PETITION DATED DECEMBER 1, 1975 WAS A FINAL ORDER FROM WHICH APPEAL WAS NOT TIMELY TAKEN.

On the 17th day of October, 1975, Petitioners' Amended Petition came on for hearing for the purpose of Petitioners presenting their case, with Respondent, the natural father, Sheldon J. Izatt to present his case at a later time when the Court had time available to hear the same. At the end of the hearing on October 17th, counsel for Respondent made a motion to dismiss Petitioners' Amended Petition, which motion, after argument, was taken under advisement by the Court (Tr. 176-181), and was subsequently granted in part on the 1st day of December, 1975. (Tr. 218-219). The Court in its Order of Dismissal on December 1st, 1975 did dismiss with prejudice that portion of Petitioners' Amended Petition contained within paragraphs 1 (a) through 1 (c). Those portions dismissed with prejudice read as follows, (Tr. 223):

1. That Sheldon J. Izatt is unfit and/or incompetent by reasons 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.

Section 55-10-112 (U.C.A. 1953, as amended), states in part:

"... an appeal to the Supreme Court may be taken from any order, decree or judgment in the Juvenile Court. Such appeal should be taken in the same manner as which appeals are taken from judgments or decrees in District Court. The appeal must be taken within one (1) month from the entry of the order, decree or judgment appealed from".

The Notice of Appeal filed in this matter by Petitioners (Tr. 215), was not in fact filed until the 29th day of April, 1976, and then only applied to the Order of Dismissal entered the 1st day of December, 1975, and was a final order dismissing with prejudice a substantial portion of Petitioners' Amended Petition. The position of Respondent is that it is improper at this time for Petitioners to request that this Honorable Court reverse the Lower Court and its Order of Partial Dismissal entered the 1st day of December, 1975 for the reasons that there has never been a filing of a Notice of Appeal from that Order or a preservation of a right to appeal on the Order until a final determination of other claims as provided for in Rule 72 (a), Utah Rules of Civil Procedure. Therefore, the Courts' Order of December 1st, 1975 should be affirmed.

In addition to the foregoing the Court was well within the discretion accorded to it by Section 55-10-84 (U.C.A. 1953, as amended), which provides "the Court may dismiss a petition at any stage of the proceedings," and Rule 23 Utah State Juvenile Court Rules of Practice and Procedure which provides:

"The Court may at any time during, or at the conclusion of any hearing, dismiss a petition and terminate the proceedings relating to the child if such action is in the interest of justice and the welfare of the child, and the Court shall dismiss any petition which has not been proven, (emphasis added).

The Court when entering its Order of Partial Dismissal had heard all of the Petitioners' evidence relative to those items dismissed with the exception of the testimony of the natural father, Sheldon J. Izatt, Respondent herein. Respondent's presence had not been subpoenaed by Petitioners prior to the hearing on October 17th, 1975 nor had requests been made of Respondent's counsel to have Respondent present at that hearing. It certainly was well within the discretion of the Lower Court to draw a conclusion upon the evidence that Petitioners had brought forth on October 17th, 1975 that the likelihood of Petitioners being able to elicit information from the natural father, your Respondent, to prove the allegations contained within paragraph 1 (a) through 1 (c) was not sufficiently great to require additional hearings at the expense of forcing the father, your

Respondent, to present defense to allegations which were unfounded.

POINT II

THE LOWER COURT DID NOT ERROR IN GRANTING RESPONDENT'S MOTION TO DISMISS THE REMAINDER OF PETITIONERS' AMENDED PETITION

As set forth in Point I above, 55-10-84 (U.C.A. 1953, as amended), and Rule 23 Utah State Juvenile Court Rules of Practice and Procedure, provides that the Court may dismiss a Petition at any stage of the proceedings. The position of Respondent is that the rule and the statute upon which the rule was based is controlling in this matter as the said rule and statute have exclusive application to the Juvenile Court system and they would certainly supercede Rule 41, U.R.C.P. as cited by attorney for Appellants.

The Court was well within its discretion as allowed by 55-10-84 (U.C.A. 1953, as amended), and Rule 23 Utah State Juvenile Court Rules of Practice and Procedure for at the time of granting the Motion to Dismiss the Court had heard testimony of Petitioners' expert, Dr. Cutler, regarding the remaining allegations in the Petition concerning "condition" (Tr. 223-224), as well as the testimony of Helen Marie Nelson, social services worker with the Division of Family Services, (Tr. 198-208). Petitioners in their Brief, discuss at some length that they were denied the opportunity to present the testimony of their expert witness, Dr. Victor

B. Cline, regarding the alleged condition of threatened castration; however, upon questioning by the Court, counsel for Petitioners was not able to proffer any proof as to the threatened castration other than that the child in question, who was three (3) years old at the time, was shown a knife by the examiner and was asked what it was for. The child then made a statement to the effect that it was for my mommy to cut my thing off. The dialogue between the Court and counsel for Appellants in reference to that proffer is as follows, (Tr. 193-194):

Judge Larson: Let me ask you, is the statment of the boy made to Dr. Kline, I presume, is that the basis of your claim that this statement was made?

Mr. Goodwill: That's right.

Judge Larson: Is there any claim ---

Mr. Goodwill: And we would also like the opportunity, Your ---

Judge Larson: Is there any claim that it was made on more than one occasion?

Mr. Goodwill: No. We haven't finished our case, Your Honor, and I'd also like the opportunity ---

Judge Larson: I understand that ---

Mr. Goodwill: May I finish? I'd like the opportunity --

Judge Larson: Just a minute, Mr. Goodwill. I was asking you a question. If you were permitted to put on your case are you going to be able to show any more than that in relation to this?

Mr. Goodwill: I don't know what the mother is going to say. I've never had an opportunity to put her on, but she is one of my witnesses. She may admit it. She may admit it on more than one occasion. I think to bring this motion prematurely --

Judge Larson: Well, are you suggesting then that when the case is tried you are going to call her and then you'll find out what was said? Why do we have to go to trial to find that out?

In light of the report and testimony of the social worker, Mrs. Nelson, the substance of which was that after residing with his natural father for more than one (1) year, the child was getting along very well, and in light of the testimony of the witnesses of Petitioners already before the Court, it is the position of Respondent that the Court was well within its discretion and was acting in the best interest of the child in dismissing the Petition. At the time of the April 15th hearing, the child had been in the home of his natural father for in excess of one (1) year. At the present time the child has been in the home of his natural father in excess of two (2) years. It was the fear of the Court that the very continuation of the proceeding could be detrimental to the child, (Tr. 196), and the Court was acting in the child's best interests, as allowed by 55-10-84 (U.C.A. 1953, as amended), and Rule 23 Utah State Juvenile Court Rules of Practice and Procedure when he dismissed the Amended Petition. The Court in making its ruling stated:

Judge Larson: Anything further from anyone? As the court looks at this, this has gone on quite a long while. Course the court does not approve any statements that may have been made to this child threatening castration, it seems to me that the matter that has to be looked at here is if this were to be proven, that a trial of this case, what would be the projected harm? Now we do have Dr. Cutler's report in evidence. I think that the best Dr. Cutler could do is say yes this is harmful. This has been threatened to a lot of people and it may have been harmful to some and not harmful to others. I think that looking at it in the light most favorable to the petitioners, the most it would be a matter of conjecture as to what harm this would do the child. And then, of course, if it was considered to get harmful whether it was sufficient harmful on which to base the jurisdiction of the court. It seems to me like we're working with a pretty obscure kind of comment that was made by a young boy to a psychologist. I don't know how you call the boy to the witness stand, probably call him to the witness would be more harmful than any statement that may have been made to him, in fact. Now there has been quite a bit made of the question of the divergence of mental abilities here between members of this presently constituted family. Court has just about every day dealt with families where there was a divergence of mental ability. There is a case on appeal in this court right now where the mother had an extremely low IQ, much lower than anything considered here, almost to the state of her being a vegetable. I felt in that case that the ability of the mother was a condition upon which the mother should be deprived of custody. I think it was a cruel act that the court was asked to perform. I've no idea whether the Supreme Court will sustain me or not, but my point is that even in that kind of

situation, as far as I was concerned it was very questionable. We had to weigh a lot of equities, and of course this case is not anywhere near that. So, I don't think there is anything there. Now, that leaves the question of the father's hostility. I've read Dr. Cutler's report on this and he does indicate that the father does have some explosive capabilities. Nothing in the report suggests that those explosive capabilities would result in any harm to this child. Now, I suppose if the stress situation was such that this might be a result, but here again we're just conjecturing. The motion to dismiss is granted. (Tr. 209-210).

POINT III

THE WRIT OF HABEAS CORPUS FILED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH BY THE NATURAL FATHER, RESPONDENT HEREIN, AND THE ORDER ISSUED UPON THE HEARING OF SAID WRIT OF HABEAS CORPUS IS NOT PART OF THIS ACTION AND HAS NO EFFECT UPON THE JUVENILE COURT'S DISMISSAL OF THE PETITIONERS' AMENDED PETITION ON FILE HEREIN.

As the Writ of Habeas Corpus issued in the Third Judicial District Court in and for the County of Salt Lake, State of Utah, in the matter of Sheldon J. Izatt vs. Ina Hellstrom, Civil No. 226267, on the 10th day of March, 1975, was not and is not a part of the action filed by Petitioners in the Juvenile Court and is not a matter of record in this proceeding, Respondent objects to the attempt by Appellants to utilize said action as a means of appeal from the Order dismissing their Petition in the Juvenile Court. Further, the Writ of Habeas Corpus action is now moot for the reason that the

person against whom the Writ was directed, Ina Hellstrom, (the Respondent therein) is now deceased and was deceased prior to dismissal of Appellants' Amended Petition.

POINT IV

THE APPOINTMENT OF MR. JOHN SOLTIS ON APRIL 15th, 1976 AS GUARDIAN AD LITEM FOR THE CHILD WAS NOT ERROR.

On April 15th, 1976 the matter did not come on for trial as set forth in the Brief of Appellants but only for the purpose of ruling on Respondent's Motion to Dismiss the remainder of Appellants' Amended Petition. This fact was acknowledged by counsel for Appellants (Tr. page 197 lines 29-32, page 198 lines 1-2):

Mr. Goodwill: We were told that it was set for trial today, Your Honor, and we were told that that trial date was stricken. The only matter I couldn't speak with your Honor I asked and I was told that I would not be able to and I was told that it was stricken from the trial calendar and that the only motion would be Mr. Schwobe's motion to dismiss.

At the time of April 15th, 1976, Mr. Stead who had been previously appointed attorney and guardian ad litem for the child had left his employment with the County Attorney's office and his work load had been taken over by John Soltis. Over the objection of Petitioners the Court appointed Mr. John Soltis guardian ad litem for the child (Tr. 182). Petitioners argue this appointment to be reversible error on the grounds that Mr. Soltis was appointed without notice to Petitioners

that he had apparently had conversation with Attorney for Respondent prior to the hearing, and lastly that he was not sufficiently familiar with the facts of this case to join in Respondent's Motion to Dismiss. As set forth in Appellants' Brief 55-10-96 U.C.A. (1953, as amended), provides:

The Court may appoint counsel without such request if it deems representation is necessary to protect the child.

Apparently the Court did not feel that it was necessary to appoint Mr. Soltis as the attorney for the child but it did feel it necessary to appoint him as guardian ad litem. Rule 33 Utah State Juvenile Court Rules of Practice and Procedure aforementioned, which Rule is based upon the 55-10-96 U.C.A. (1953, as amended), provides in part:

...if the interest of the child and those of the party appear to conflict, or if neither parent is available, or if counsel is necessary to meet the requirements of a fair hearing, the Court shall appoint a guardian ad litem or counsel or both to protect the interests of the child. (emphasis added)

It would appear under the statute and the Rule that the appointment of a guardian ad litem or counsel or both is fully within the discretion of the Court and there is not requirement that the Court give notice of its intention to appoint the same or hold a special hearing in that regard.

It is true that in this case counsel for Respondent had in fact discovered that Mr. Soltis was replacing Mr. Stead in the County Attorney's office, and had further, spoken

with him concerning his feelings toward the Motion to Dismiss. Said discovery and contact took place only as the result of counsel for Respondent's preparation for his Motion to Dismiss and it must be assumed that had Appellants or Appellants' counsel checked with the County Attorney's office to determine the position of the appointed representative of the child prior to the Motion, Appellants would have been apprised of the same information as was counsel for the Respondent.

It is apparent from the record that Mr. Soltis had in fact prepared himself prior to the April 15th, 1976, hearing in light of his informal replacement of Mr. Stead and anticipating that he would be appointed to represent the child's interest in some manner at the April 15th hearing. Appellants in Point III of their argument contend that by virtue of Mr. Soltis' limited contact with the case on April 15th, 1976 he was in no position to protect the best interests of the child. While Appellants would seek to hold out in their Brief that as of the April 15th hearing the Amended Petition retained an allegation that the father had abused the child, this Honorable Court should note that such allegation had been dismissed pursuant to the Court's Order of December 1st, 1975. Therefore, it would appear from Mr. Soltis' statement on page 190-191 of the transcript that he was familiar with

the case and had in fact spent a substantial amount of time preparing for and familiarizing himself with the Motion coming before the Court on April 15th, 1976. It must be remembered that Mr. Soltis' participation in the case was at the instance of an Order of the Juvenile Court and that the burden was not upon Mr. Soltis to act as the trier of fact with regard to Appellants' Petition, but his statement was simply part of the information taken into consideration by the Court in dismissing the Petition. Mr. Soltis stated, (Tr. 190-191):

I would like to comment Your Honor. Referring to the statute 55-10-99 that Mr. Schwobe made reference to, permanent deprivation is laid out in petitioners petition those to conduct or condition, not to be repetitive but that the parent or parents are unfit or incompetent by reason of conduct or condition seriously detrimental to the child. I have personally met with the child, with Marie Nelson, for a period of about an hour, I talked to the child and tried to become friends and tried to gather as much information from the child as I could, based on his age in the company of Miss Nelson, so I do have an opinion as to the care of the child and the present condition of the child. And I have been apprised by Miss Nelson that the child has been with the parents for a considerable period of time also. Leaving that separate and apart and directing our attention to the petition itself, the conduct that is alleged, I was not at the other hearings, this is true and I know nothing of the threats of the mother, if they were made. The conduct as alleged as to the castration threats to the boy seem to be the only basis of conduct that the petitioner is seeking to establish for permanent deprivation. In the alternative, to together with this stating a condition, I have never interviewed the father. This term toward massive hostility and the petition does not state that this hostility, if it does exist, has been directed toward the child by any specifics. More particularly

though, with B and C, I am concerned that a criteria of intelligence could be a basis for depriving people of a child, based on a probability that the child will not develop to his potential. I'm concerned that a man's level of intelligence could do that to him, could take his child from him. Coupling that with Miss Nelson's opinion, and my observations of the child, that his staying there, he has not been emotionally deprived or intellectually deprived. So I feel that intelligence could not be a condition that could be a basis for taking a child away from his natural parents, and I join Mr. Schwobe in his motion concerning the intellectual factors being a basis for taking a child away. In my capacity I have not, I must say, been with the parents, but I have questions concerning the substance alleged as condition or conduct as also being the basis for termination, and would join with them.

C O N C L U S I O N

The Order of Partial Dismissal and the Order dismissing the remainder of Petitioners' Amended Petition was fully within the discretion of the Juvenile Court as authorized by Section 55-10-84, U.C.A. (1953, as amended), and Rule 23 Utah State Juvenile Court Rules of Practice and Procedure. Further, the Order of Partial Dismissal should be affirmed for the reason that no timely appeal was taken therefrom. The dismissal of Appellants' Amended Petition, which had been brought and prosecuted under the Juvenile Court Act, had no effect on the Habeas Corpus proceeding in the District Court and further the Habeas Corpus became moot upon the 28th day of March, 1975, when the person against whom the Writ was directed, Ina Hellstrom, the maternal grandmother of the child, passed away.

Appellants' objection to the appointment of Mr. Soltis as Guardian Ad Litem is not well taken for the reason that such appointment was also within the discretion of the Juvenile Court.

On the 1st day of April, 1975, the Respondent, Sheldon J. Izatt, did receive temporary custody of his son, a son to which he had every legal right except for the untrue allegations made against him by Petitioners and Ina Hellstrom in their original Petition filed with the Juvenile Court. His son has resided with him continuously since that day.

The legislature in recognizing the expertise of the Juvenile Court system granted that Court great discretion in its ability to dismiss, at any stage of the proceeding, petitions which may be filed with it. In this case, the Juvenile Court properly exercised that discretion by dismissing the Amended Petition and thereby affirming the natural father's legal right to custody of his son.

Respondent would respectfully urge that this Honorable Court affirm the partial and final orders of dismissal as entered by the Juvenile Court and grant Respondent his costs as allowed by law.

MAILING CERTIFICATE

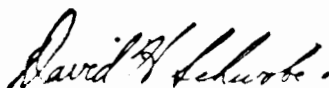
I hereby certify that I mailed or hand delivered three copies of the attached brief to each of the following named parties at the addresses therein stated, postage pre-paid, on this 8th day of June, 1977.

To wit:

David A. Goodwill
Attorney for Petitioners and
Appellants Ben and Janet Stowell
455 East 4th South, #50
Salt Lake City, Utah 84111

Robert B. Hanson
Attorney General
State Capital Building
Salt Lake City, Utah 84114

John Soltis
Guardian Ad Litem for
Douglas Rex Izatt
3522 South 700 West
Salt Lake City, Utah 84119



David H. Schwobe
Attorney for Respondent, Sheldon
J. Izatt
343 South 4th East
Salt Lake City, Utah 84111