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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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

REPLY 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

OCT - 7 1977

Clerk, Supreme Court, Utah

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NATURE OF THE CASE

See detailed statement in appellants main brief.

DISPOSITION IN LOWER COURT

See detailed statement in appellants main brief.

RELIEF SOUGHT ON APPEAL

See detailed statement in appellants main brief.

STATEMENT OF FACTS

See detailed statement in appellants main brief.

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POINT I

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

The order of partial dismissal of petitioner's amended petition dated December 1, 1975, granted in part and denied in part a motion to dismiss petitioner's amended petition with regard to a petition comprised of seven (7) counts for relief, four (4) under conduct and three (3) under condition alleged to be seriously detrimental to the child.

This Court observed In Re Fullmer 17 Utah 2d 121, 405 P. 2d 343 (1965) with regard to a complaint comprised of 8 causes of action wherein the Court dismissed the first cause of action and denied a motion to dismiss with regard to counts 2 through 8, from which partial judgment of dismissal the appeal was taken, with both parties treating it as an appeal from a final judgment, as follows:

> It is from the foregoing judgment that defendant appeals. Although treated as such by both parties, this is not a final judgment from which an appeal may be taken.
>
> The instant case might well have been entertained as an appeal from an interlocutory order or decision. However, defendant, did not see fit to follow that procedure.
>
> A case cannot be brought to this Court in fragments, and this appeal, not being from a final judgment, must be dismissed.

Therefore, since the order of December 1, 1975 dismissed only three (3) of seven (7) counts for relief and

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the Court denied the motion to dismiss with regard to the remaining four (4) counts, the order of partial dismissal was not a final order from which an appeal could be taken.

POINT II

THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS THE REMAINDER OF PETITIONER'S AMENDED PETITION BEFORE THE CLOSE OF PETITIONER'S CASE IN CHIEF.

A. THE CHILD HAS A RIGHT TO A NORMAL LIFE AND EVIDENCE BEARING ON THAT RIGHT SHOULD HAVE BEEN PRESENTED IN FULL TO THE COURT BEFORE IT GRANTED A MOTION TO DISMISS.

Dr. Cutler testified that the natural father was functioning in the adult dull normal range but that in

> school oriented areas, the areas which . . . learnings from school and the vocabulary and knowledge function, a general range of knowledge, he's functioning at about 75 IQ, which is borderline mental defective. (P. 146 L. 31-34 and P. 147 L. 1-3.)

In addition, Dr. Cutler stated that the father of the child has an extreme amount of misinformation and lack of information even for the relatively low level of function as follows: . . .

He thinks the capital of Italy is Spain (P. 147 L. 11-12.)

Dr. Cutler testified that in addition to the intelligence level problem, that the father has what is called a characterological type of disorder, the

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basic motivation to such being hostility. He testified that characterological hostility is acted out in amoral and asocial behavior stating that people with this characterological disorder don't see that what they do as wrong. (See P. 148, L. 24-29)

Dr. Cutler stated that the natural father had a very high lie score. (See P. 149, L. 21-32)

The doctor stated that the child as tested had an IQ of 105 and already showed signs of deterioration in function.

When asked about what effect the home situation would be on the child with regard to its learning and development if it were to reside in a home where the step-mother was functioning within the mental defective range with a full scale IQ of 67 and the father functioning in general range of knowledge at 75 IQ, which is borderline mental defective, and where the child would be residing with five children of the step-mother from two previous marriages, all of whom have had problems with education at one time or another and been in special education classes would this composite picture have a detrimental effect on the learning and development of the child, Dr. Cutler observed as follows:

> "I can very definitely say more so than just the father's structure alone, the mother being mentally defective and the mentally retarded children, the total input is even more restricted because the mother is going to have more to do with the child than the father. Usually the father is out working and this could lead to severe deprivation I think psychologically and

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intellectually." (P. 162 L. 31-33 and P. 163 L. 1-5.)

When the doctor was asked if in his opinion with the father being significantly lower in intelligence than the child whether it was more probable than not that the child would not develop to his potential if custody were to remain with the father, the doctor answered as follows:

> That is certainly my opinion. (See P. 165, L.2)

And when the doctor was asked as follows:

> Would it be your opinion that with the father's present wife and five children from two previous marriages who are significantly lower in intelligence than the child, that it would be more probable than not that the child would not develop to his potential if he were to continue to reside with the mother and these five siblings?

The doctor answered as follows:

> Very much so I would say. (See P. 165, L. 9)

Based on the testimony of an independent psychologist who was asked to examine the step-mother at the request of counsel for the father, Virgil W. Brockbank, in his report, observed as follows:

> The issue of course in terms of her intelligence would be: can she provide the adequate stimulation as well as adequate care for this child of normal intelligence? It is unlikely that the combination of this mother and father would be sufficient to provide the boy with the skills most necessary to his adequate adjustment in life . . . The boy will undoubtedly suffer some decrement in intellectual functioning from the lack of stimulation with these parents. [Emphasis aded.]

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The Court did not, on any occasion, either during the numerous hearings or during the trial itself have an opportunity to see either the father or the step-mother as they did not appear. Neither of these persons testified in Court and the Court had no opportunity to observe their demeanor or general attitude.

Based on the type of strong evidence heretofore set forth, the attorney for the child, Michael Stead, desired further and more detailed evidence and this evidence would have come out on the second day of trial if the Court had not granted the Motion to Dismiss.

B. THE PLAIN MEANING OF RULE 23 OF THE UTAH JUVENILE COURT RULES OF PRACTICE AND PROCEDURE, WHICH IMPLEMENTED THE INTENT OF 55-10-84, NOW 78-3a-25 U.C.A. ANNOTATED AS AMENDED DICTATES THAT ONCE A CASE HAS GONE TO TRIAL THE PETITION SHALL NOT BE DISMISSED UNTIL THE CLOSE OF THE PETITIONER'S CASE.

Rule 23 of the Utah Juvenile Court Rules of Practice and Procedures reads as follows:

> The Court may at any time during, or at the conclusion of any hearing, dismiss a petition and terminate the proceedings related 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.]

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The above rule provides that while the Court may dismiss an action during or at the conclusion of any hearing, it may not dismiss a petition until the petitioner has an opportunity to prove his case. This cannot be done until the close of petitioner's case and this is the sensible and plain meaning of the statute.

Anything less would be incompatible with the plain meaning of the foregoing rule for the following reasons:

1. First, a dismissal during the trial itself would not be a dismissal "during or at the conclusion of a hearing", as the same denotes something less than a motion in mid-trial, such as a Motion to Dismiss for Failure to State a Claim or a Motion for Summary Judgment.

Once the matter has gone to trial, a Motion to Dismiss should not be granted until petitioner has completed his case in chief and has not proven his case.

2. Second, to dismiss a case where the Court has already denied an identical motion for the reason that, as stated by the Court, "Mr. Goodwill had not rested," (P. 179 L. 7-9) would not be in the "interest of justice"

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within the meaning of the rule as that phrase dictates that petitioners have their day in Court.

3. Third, such an action could not be in the "welfare of the child" within the meaning of the foregoing rule, for a decision was made in this case without the Court even once seeing or hearing from the natural father or step-mother, and without receiving testimony from Dr. Victor B. Cline, the psychologist the Court ordered to examine the child and who made the observation with regard to the threatened castration by the step-mother.

C. THE PURPOSE OF THE RULE WHICH IMPLEMENTED THE STATUTE IN QUESTION WOULD ACCORD A PETITIONER THE SAME TREATMENT OF FAIRNESS AND IMPARTIALITY PETITIONER WOULD RECEIVE IF THE CASE HAD BEEN HEARD IN DISTRICT COURT.

If the case had been heard in District Court and the District Court at the time for hearing the Writ of Habeas Corpus had not certified the question to the Juvenile Court the Rules of Civil Procedure would undoubtedly have prevailed.

Rule 41(b) U.R.C.P. provides:

> After the plaintiff 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 a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

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Even if this Court determines that Rule 41(b), U.R.C.P. does not apply specifically to the foregoing issue, it is submitted that the purpose of Rule 23 implementing the foregoing statute is in conformity with the spirit and meaning of Rule 41(b) and therefore the Motion to Dismiss prior to the close of petitioner's case was premature and the order based thereon should be vacated and set aside.

D. TO INTERPRET THE STATUTE AS NARROWLY AS URGED BY COUNSEL FOR RESPONDENT WOULD BE A DENIAL OF THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION.

Article 1 Section 7 of the Due Process Clause of the Utah constitution provides as follows:

> No person shall be deprived of life, liberty or property, without due process of law.

In Jensen v. Union Pacific Ry. Co, 6 U. 2d 253, 21 P. 994, (1889), it is observed as follows:

> Many definitions have been attmepted, but it is believed that they all come to this citation, which means that a party shall have his day in Court, --trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense upon the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not "due process of law." Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial.

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In Christiansen v. Harris, 109 U. 1, 163 P. 2d 314, (1945), it is observed as follows:

> The phrase "Due process of law" apparently originated in our Judicial Parlance with Lord Coke. . . Many attempts have been made to further define "due process" but they all resolve into the thought that a party shall have his day in Court - that is each party shall have the right to a hearing before a competent Court, with the privilege of being heard and introducing evidence to establish his cause or his defense after which comes judgment upon the record thus made. Says the standard definition: It "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." The term "law of the land" embraces all legal and equitable rules which define human rights and duties and provides for their protection and enforcement, both as between the State and its citizen and between man and man." [Emphasis added.]

If Rule 23, which was passed to implement 55-10-84, now 78-3a-25 U.C.A. annotated as amended, were construed to mean that a petition could be dismissed at any time and under any circumstances without regard to the rights of a petitioner who has spent considerable time and money paying for Court ordered psychological examinations and for expert witnesses to appear and prepare to appear in trial, and to specifically permit the Court to dismiss a petition before the close of petitioner's case and over the objection of independent counsel for the child, then the statute and the rule in question are void as being a denial of due process within the meaning of Article 1 Section 7 of the Utah constitution.

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The minor child's right to a normal life and to develop normally would likewise be frustrated by such a narrow construction of the foregoing Rule. If Rule 23 as it implements 55-10-84, now 78-3a-25 U.C.A. annotated as amended, were construed to mean that once justiciable issues of fact are raised with regard to the rights of a minor child and the petition which gives rise to such issues has survived a Motion to Dismiss and the case has proceeded to trial, that the Court can dismiss the petition without giving petitioner the full right to be heard and to introduce evidence to establish his cause in his case in chief, said rule and statute would be void within the meaning of the Due Process Clause of the Utah Constitution.

POINT III

THE WRIT OF HABEAS CORPUS FILED IN THE THIRD JUDICIAL DISTRICT COURT RESULTED IN AN ORDER CERTIFYING THE CASE TO THE JUVENILE COURT WITH DIRECTIONS THAT IT MAKE FINDINGS AND AN ORDER WITH REGARD TO CUSTODY AND REFER THE MATTER BACK TO DISTRICT COURT FOR FINAL HEARING ON THE WRIT OF HABEAS CORPUS.

Following the death of the maternal grandmother, temporary custodian of the child and joint petitioner herein, the Juvenile Court, on April 1, 1975, entered an order providing for temporary custody and guardianship in the natural father subject to the protective supervision of the Division of Family Services as follows:

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IT IS ORDERED THAT THE ABOVE-NAMED CHILD BE RETURNED TO THE TEMPORARY CUSTODY AND GUARDIANSHIP OF THE FATHER, SUBJECT TO THE PROTECTIVE SUPERVISION OF THE DIVISION OF FAMILY SERVICES, PENDING TRIAL OF THE ABOVE MATTER, AND THE DIVISION OF FAMILY SERVICES IS DIRECTED TO EFFECT THE TRANSFER OF THE ABOVE-NAMED CHILD FROM THE AUNT, JANET STOWELL, TO THE FATHER, AFOREMENTIONED, WITHIN 24 HOURS HEREOF.

Dated this 1st day of April 1975.

BY THE COURT:

/S/ John Farr Larson
JUDGE

The child had never been in the legal custody of the father. In the divorce action custody was awarded to the child's mother. After the death of the child's mother, the Juvenile Court awarded temporary custody to the joint petitioner, the child's maternal grandmother, and following the death of the maternal grandmother the Juvenile Court placed temporary custody of the child with the natural father.

On March 21, 1975, a hearing on the father's Writ of Habeas Corpus was held in the District Court resulting in an order which directed the Juvenile Court, among other things, 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.

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> 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 a final hearing on the Writ of Habeas Corpus. . . [Emphasis added.]

The statute under which the District Court proceeded to make its ruling on the Writ of Habeas Corpus is clear and unambiguous in scope wherein it is observed in 78-3a-17, formerly 55-10-78, U.C.A. annotated as follows:

> 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 the child upon Writ of Habeas Corpus when the question of custody is incidental to the determination of a cause in the District Court; provided that in case a petition involving the same child is pending in the Juvenile Court or the Juvenile Court has previously acquired continuing jurisdiction over the same child, 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 that question to the Juvenile Court for a determination or recommendation. [Emphasis added.]

The Juvenile Court by refusing to act and by doing nothing more than dismissing petitioner's petition, in effect, left the child in limbo with no permanent order as to who should have the permanent legal custody of the child. On the date the Court entered its order of dismissal there was nothing in effect but a temporary order of custody in the natural father based on the jurisdiction of the Juvenile Court with regard to the petition which the Juvenile Court later dismissed.

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In addition, in making a temporary order placing custody in the natural father before hearing any evidence and without ever seeing the natural father or step-mother, the Court neglected to do what it was directed to do by the District Court in the order of March 21, 1975 wherein it was directed to make findings and an order with regard to custody.

The Juvenile Court cannot do more nor less than the statute and order under which it was directed to proceed. When the matter was certified to the Juvenile Court with directions to make findings and an order with regard to custody and refer the matter back to the District Court that is precisely what the Juvenile Court should have done.

By failing so to do the Juvenile Court acted contrary to law and the order of dismissal is invalid.

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POINT IV

THERE WAS NO WITHDRAWAL OF COUNSEL OF RECORD FOR THE CHILD AND THE CHILD WAS NOT REPRESENTED BY COUNSEL AT THE HEARING DURING WHICH THE PETITION WAS DISMISSED.

A. THE CHILD'S APPOINTED COUNSEL OF RECORD WAS NOT PRESENT ON THE DATE THE MOTION TO DISMISS WAS HEARD.

The Juvenile Court may appoint, on its own motion, counsel to represent the child if it is necessary to protect the interests of the child as is observed in 78-3a-35, formerly 55-10-96, U.C.A. annotated as amended as follows:

> . . . The Court may appoint counsel without such request if it deems representation by counsel necessary to protect the interests of the child or of other parties.

Pursuant to the foregoing statute, the Court appointed Michael Stead as attorney for the child and in that capacity, at the conclusion of the first day of trial, he opposed the mid-trial motion to dismiss petitioner's amended petition as it related to the mental and emotional condition of the father and step-mother, the threats of castration by the step-mother and the great disparity in intelligence between the child and the natural father, and between the child and the step-mother and step-siblings.

The Court denied the motion to dismiss as it related to the aforesaid claims.

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Michael Stead, the attorney for the child, had vigorously sought to bring out the issues relating to the mental and emotional condition of the father and step-mother and joined petitioner's counsel in a motion which resulted in an order that the child, the natural father and the step-mother should submit to psychological examinations.

On the day set for the second day of trial, the Court permitted counsel for the father once again to renew his Motion to Dismiss and at the same time the Court appointed John Soltis, a Deputy County attorney, as guardian ad litem for the child.

The Court at that time had not received a withdrawal of counsel from Michael Stead, attorney for the child, and the Court did not appoint John Soltis to act as attorney for the child.

Since the Court had previously appointed counsel to represent the child, deeming it to be in the best interests of the child that it be represented by counsel, and counsel for the child was not present to protect the child's interests on the date the second motion to dismiss was heard, it was not proper to proceed to hear the Motion to Dismiss and the order based thereon is invalid.

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B. THE APPOINTMENT OF A DEPUTY COUNTY ATTORNEY AS GUARDIAN AD LITEM FOR THE CHILD WAS IMPROPER AS ACCORDING TO UTAH LAW THE COUNTY ATTORNEY'S OFFICE IS DESIGNATED TO REPRESENT THE STATE IN ANY PROCEEDINGS CONCERNING A CHILD.

In 78-3a-35, formerly 55-10-96, U.C.A. annotated as amended, it is observed as follows:

> . . . The Court may appoint counsel without such request if it deems representation by counsel necessary to protect the interests of the child or of other parties. If the child and other parties were not represented by counsel, the Court shall inform them at the conclusion of the proceedings that they have the right to appeal.
>
> The County Attorney shall represent the State in any proceedings in a children's case.

The language of the foregoing statute is mandatory as it dictates that the County Attorney shall represent the State in a children's case and does not give discretion to the Court with the use of the language employed with regard to appointment of counsel wherein the same statute states that the Court, "may appoint" counsel to represent the child.

Since the County Attorney's office is designated by statute to represent the State of Utah in any children's case, that same office cannot represent the child.

The foregoing statute provides that if the child is not represented by counsel, the Court shall inform the

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parties that they have a right to appeal at the conclusion of the proceedings and that not having been done, and the child not having been represented by counsel, the order based on the motion to dismiss the petition is invalid and should be vacated.

C. THE GUARDIAN AD LITEM DID NOT PROPERLY REPRESENT THE BEST INTERESTS OF THE CHILD.

John Soltis was appointed guardian ad litem for the child only moments before he joined in the father's Second Motion to Dismiss the Petition and over the objection of counsel for petitioners that the appointment was not proper.

While counsel of record for the child, Michael Stead, had been concerned about the mental and emotional well-being of the child if the child was permitted to remain in the house of the natural father and wanted to hear more evidence concerning that portion of the petition, the guardian ad litem for the child, John Soltis, without talking to petitioner's counsel, petitioner's expert witnesses, the natural father or step-mother and without having read the independent psychological on the step-mother, joined in the Second Motion to Dismiss.

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This partial behavior and careless action is, on its face, not in the best interests of the child.

Assuming for the sake of argument, that the Court can appoint a Deputy County attorney as guardian ad litem to represent the child, rather than representing the State of Utah, all without notice to petitioner, and without first obtaining a withdrawal of counsel from the attorney of record for the child, if the attorney appointed as guardian ad litem for the child does not act to protect the "interest of the child" within the meaning of 78-3a-35, formerly 55-10-96, U.C.A. annotated as amended, the child is substantively denied the assistance of counsel, and a motion made by partial and uninformed counsel should be vacated and set aside.

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

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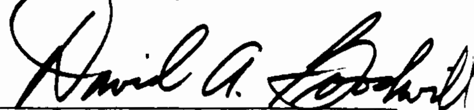
the Writ of Habeas Corpus as it relates to the custody issue.

Respectfully submitted,



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DELIVERY CERTIFICATE

I hereby certify that I hand delivered ~~three~~ one copies of the attached reply brief to each of the following named parties at the addresses therein stated, on this 7th day of October, 1977.

To Wit:

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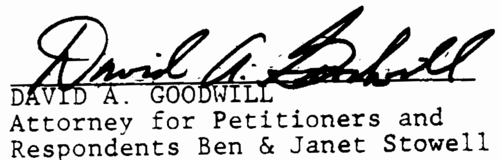

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