

1977

State of Utah in the interest of Baby Girl Marie v. Nadine Munoz : Respondent's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH, in the interest of: :

BABY GIRL MARIE, a person under :
eighteen years of age, :

NADINE MUNOZ, :

Appellant. :

RESPONDENT'S PETITION FOR WRIT OF HABEAS CORPUS
AND BRIEF IN SUPPORT THEREOF

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FILED

MAR 30 1977

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IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - -
STATE OF UTAH, in the interest of: :

BABY GIRL MARIE, a person under :
eighteen years of age, : Case No. 14599

NADINE MUNOZ, :

Appellant. :

- - - - -
RESPONDENT'S PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF
- - - - -

APPEAL FROM JUDGMENT OF THE FIRST
DISTRICT JUVENILE COURT, WEBER COUNTY,
THE HONORABLE CHARLES E. BRADFORD,
PRESIDING
- - - - -

PETITION FOR REHEARING
- - - - -

The Respondent, State of Utah, by and through
the Utah Division of Family Services, respectfully petitions
this court for rehearing in the above entitled cause and
alleges that the court in its majority opinion erred on the
following points:

POINT I: IT WAS IMPROPER FOR A SUCCESSOR
JUDGE WHO DID NOT HEAR ORAL ARGU-

MENT TO PARTICIPATE IN THE
DECISION OF THE INSTANT
CASE.

POINT II: THE COURT ERRED IN ITS CON-
CLUSIONS AS TO ALLEGATIONS
AND CONDITIONS SUFFICIENT
TO SUPPORT A TERMINATION
DECREE.

POINT III: THE COURT IN VACATING THE
ORDER OF TERMINATION,
FAILED TO CONSIDER THE
LEGAL EFFECT OF INTERVEN-
ING ADOPTION PROCEEDINGS
OR TO GIVE LEGAL DEFER-
ENCE TO THE BEST INTERESTS
OF THE CHILD.

WHEREFORE, Respondent prays that this action
be reheard by this Honorable Court, that such rehearing
be scheduled for an early setting and that the fore-
going errors of the court be corrected in the interest
of law and justice.

ROBERT B. HANSEN
Attorney General

FRANKLYN B. MATHESON
Assistant Attorney General

Attorneys for Respondent

ARGUMENT

POINT I.

IT WAS IMPROPER FOR A SUCCESSOR JUDGE WHO DID NOT HEAR ORAL ARGUMENT TO PARTICIPATE IN THE DECISION OF THE INSTANT CASE.

The instant case was heard on oral argument before the Supreme Court on November 11, 1976. Oral argument was granted on Motion of Petitioner, good cause appearing therefore. The Honorable F. Henri Henriod, Chief Justice, and the following duly elected or appointed Judges heard the oral argument: Justice A. H. Ellett, Justice J. Allan Crockett, Justice Richard J. Maughan and Justice D. Frank Wilkins. On or about December 31, 1976, before the decision of the court was filed, Chief Justice Henriod retired from the Bench. On January 3, 1977, Justice Gordon R. Hall, was appointed by the Governor to fill the vacancy on the court. Decision in this case was filed February 24, 1977. Justice Hall had not heard or participated in the oral argument. Justice Maughan wrote the majority opinion, joined by Justices Wilkins and Hall. Both Justices Ellett and Crockett dissented and wrote dissenting opinions. The vote of Justice Hall, who was not a member of the court at the time the matter was heard or a participant therein, was in effect, the deciding vote. Without his vote the matter would have been deadlocked two to two and the cause of the Petitioner denied.

We believe that participation by Judge Hall in the decision of this appeal was improper and that for this reason a rehearing should be granted.

To our knowledge there is no provision in our State Constitution, statutes or rules of practice in regard the powers of successor appellate judges. It is also acknowledged that most of the reported authority as to the powers of successor judges deals with trial judges. (See 22 A.L.R. 3d 922) The exact question of whether or not a successor judge of our Supreme Court is precluded from participating in the decision of a matter heard on oral argument by his predecessor is, we believe, a question of first instance. However, by analogy to related cases and on the basis of fair play, we feel there is persuasive reason to find that it was improper for Judge Hall to participate in the decision of the instant case.

In the case of Cordner v. Cordner, 91 U. 474, 64 P.2d 828 (1937), the question was raised as to whether or not a successor judge who did not participate in the original decision could participate in the question of a petition for rehearing. In a per curiam decision this court said no, holding that the new member of the court should not participate in the consideration of a petition for rehearing. The original decision was rendered on a 3-2 vote. Though the Cordner case deals with participation of a successor judge

after the original decision was legally rendered, we think the reasoning of the court in that case is significant and perhaps determinative of our present situation. The Court stated:

The effect of the participation of a new member of the court, where the court is evenly divided on the question after the retirement of the former member, would establish a precedent fraught with dangerous implications. (64P.2d 828).

This reasoning is on all fours with our position in the instant case. After the retirement of Justice Henriod, who participated in the hearing of our case, the court was evenly divided. To allow Justice Hall, a new member of the court, to participate in the decision and in effect cast the deciding vote "establishes a precedent fraught with dangerous implications." Certainly this was the effect as to the respondent.

The Cordner case goes on to say:

. . . it would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court . . . (64 P.2d 829).

We submit that to permit Judge Hall to participate in the decision, after the oral argument which was apparently felt to be of utmost importance to the Petitioner, was mischievous.

The Cordner case cites a previous Utah case in In Re Thompson's Estate, 72 Utah 17, 269 P. 103 (1927), which in turn had cited with approval a Montana case of Gas Products Co. v. Rankin, 63 Mont. 376, 207 P. 993, 24 A.L.R. 294 (1922). In the Montana case a district judge substituted for an incapacitated supreme court justice. A 3-2 decision was rendered by the court, the district judge voting with the majority. The incapacitated judge subsequently died and was replaced. Even so, on the petition for rehearing, the new justice was excluded from participating and the district judge who participated in the original decision sat with the other members of the court to hear the petition for rehearing. In the case of Woodbury v. Dorman, 15 Minn. 341, likewise cited with approval in the Thompson case, supra, a Minnesota Court held it would be "a violation of propriety in the administration of justice" to allow a successor judge who did not participate in the original hearing to participate in the question of a petition for rehearing. We submit that if it is improper for a justice who did not participate in the original hearing to participate in the petition for rehearing, it is equally improper, nay more so, for a justice who did not participate in the original hearing to participate in the original decision.

It may be answered that we are placing too much importance on the oral argument stage of the original appeal. In rebuttal we respond as follows:

Petitioner classified his appeal as "an equity proceeding of the highest degree" (Brief of Appellant, pg. 5) to which we agree. See also Jones v. Moore, et al., 6, Utah 383, 213 P. 191 (1923); Nelson v. Pierce, 14 U 2d 317, 383 P.2d 925 (1963). This court was free to review both the facts and the law in arriving at its decision. It is obvious from the written decision that the majority opinion was greatly influenced by statements of alleged fact by Petitioner's Counsel in his brief and at the time of oral argument. For example, in regard to the very critical question of laches on the part of the natural mother in seeking the return of the child, the majority of the court apparently chose to believe assertions made by Petitioner Counsel that Petitioner, during a 15 month period "frequently went to the Division of Family Services seeking knowledge of her child," although there is absolutely no evidence that this was the fact in the record. (Decision, page 3, paragraph 2). On the other hand, on the issue of whether or not Petitioner voluntarily relinquished her child, the majority of the court relegated as hearsay unsupported by any admissible evidence the finding of the trial court according to uncontroverted representations to the trial court that the Petitioner voluntarily relinquished her child and neither "needed nor desired" counsel at the deprivation hearing. (Decision, page 2, concluding paragraph). It would appear that argument of counsel and representations made at the time of oral argument must have had a great deal of

influence on the writer of the majority opinion, in that he accepts counsel's unsupported allegations on the one hand but rejects findings, based upon uncontroverted representations, by the trial court on the other. In any event, review of facts whether real or imaginary, was apparently very critical in the decision of this case and we think it important that all the judges who participated in the decision should have had opportunity to hear argument in relation thereto. Apparently, Petitioner felt likewise in requesting oral argument. It seems improper to us that the deciding vote in any equity case with such deep emotional and sociological significance should be decided by a justice who was neither a member of the bench at the time of, nor a participant in, the oral argument.

In the early, early case of People v. Tidwell, 5 Utah 88, 12 P. 638 (1887), a decision of this court was challenged on the basis that a justice who sat in the hearing of the case and participated in the decision, was not a legal member of the court at the time of the hearing. This, again, is not our precise situation, and in any event, the court held it would not examine into the matter of the justice's standing on a motion for rehearing. But the court's discussion of the question is very interesting. The court recognized that the justice's standing would have been a legitimate question if timely raised, but concluded that the question was really of no consequence because the justice involved did not agree

with the majority, but dissented, so his vote did not effect the result. We emphasize that in the instant case, the justice whose authority is questioned, voted on the majority side, and his vote was to the contrary, of dire consequence.

We submit that one of two courses should now be followed:

1. The decision of the court should be reversed on the basis that a successor justice voting for Petitioner in the majority decision was not a member of the court or a participant in the case at the time of the oral argument.

2. A rehearing should be granted and oral argument permitted before the court as presently constituted.

POINT II.

THE COURT ERRED IN ITS CONCLUSION
AS TO ALLEGATIONS AND CONDITIONS SUFFI-
CIENT TO SUPPORT A TERMINATION DECREE.

Improper conclusion by the court either as to law
or fact justifies a rehearing of the case. In re McKnight,
4 U. 237, 9 P. 299 (1886)

The majority opinion concludes that an allegation
that a natural mother is unable to provide for the financial
support or needs of her child is insufficient to invoke the
jurisdiction of the court in an involuntary termination
proceeding. This conclusion is apparently based upon the
Court's construction of Section 55-10-109(1)(a), which reads:

(1) The court may decree a termina-
tion of all parental rights with respect to
one or both parents if the court finds:

(a) That the parents are unfit or in-
competent by reason of conduct or condition
seriously detrimental to the child;. . .

Juvenile Court proceedings are civil in nature.
(Section 55-10-105 U.C.A. 1953). In a juvenile court pro-
ceeding the precise language of the statute need not be
stated or used in the pleading if the qualifying circum-
stances are alleged. The pleadings should be liberally
construed. The petitioner did not use the words "unfit" or
"incompetent" in the petition. But it did allege a condition
seriously detrimental to the child, which if proven would
obviously render the mother unfit or incompetent to care
for the child; to-wit, inability of the mother to provide

bed or board for her child. It is difficult to conceive of a situation more detrimental to the welfare of the child. We submit the court was wrong in concluding that such allegation was insufficient to invoke the jurisdiction of the court under the wording of Section 55-10-109(1)(a).

The court also concludes that even if proved, inability to support will not justify a termination decree. "Impecuniosity will not support a termination decree." We believe this conclusion is likewise in error.

In a series of cases this court has recognized that the condition of the parent, regardless of the fault or conduct of the parent, may be seriously detrimental to the child and justify termination of parental rights by a juvenile court.

In the case of In re State in the Interest of Jennings., 20 U.2d 50, 432 P.2d 879 (1967) the juvenile court terminated a natural mother's parental rights to twin boys born out of wedlock upon finding that the mother was "emotionally unstable." Specifically citing Section 55-10-109(1)(a) this court affirmed the action of the juvenile court. In its opinion this court specifically referred to the fact that the mother had contributed only a minimal amount to the support of the children, and further that the children were illegitimate and sired by an unknown father, apparently being influenced by these considerations. In the case of In re State in the Interest of Mullin, 29 Ut 2d 376,

510 P.2d 720 (1973), this court, although obviously persuaded by a heinous act of the natural father, likewise affirmed termination of parental rights on the basis of the "emotional instability" of the parent. In the case State, in the Interest of T.G., 532 P.2d 997 (1975) this court affirmed a termination of parental rights by a juvenile court on finding that the natural mother had inadequate parental supervisory skills, was a poor housekeeper and of low moral standards. In the recent case of State of Utah, in the interest of Ricky Winger, 558 P.2d 1311, (Dec. 17, 1976 - No. 14368) this court reversed a juvenile court termination order based upon findings of emotional stability, but not upon the grounds that such condition might not justify deprivation of parental rights under Section 55-10-109 (1)(a), but upon the grounds that there had not been a sufficient showing in that case that such condition was immediately detrimental or harmful to the child. In the case of State, in the Interest of Summers Children, 560 P.2d 331, (1-31-77), the most recent termination appeal of which we are aware, this court affirmed the juvenile court on the basis that there had been an "abandonment" by the natural father under Section 55-10-109(1)(b), and did not review the issue of "unfitness" under Section 55-10-109(1)(a). The court did, however, sustain the abandonment on finding, among other things, that the father had not provided financial support for his children. If failure to provide financial support will support a finding of abandonment under Section 55-10-109(1)(b),

we feel it should with equal validity support a finding of unfitness under Section 55-10-109 (1)(a). We urge therefore that an allegation that a mother is unable to provide financial support or care for the needs of her child is sufficient to invoke the jurisdiction of the juvenile court under Section 55-10-109(1)(a), and that a finding of such condition of the mother is sufficient to support a termination decree based upon unfitness or incompetency under said Section.

Apparently the court also feels that the evidence doesn't support a finding of inability to support. This being the case, we feel the appropriate course in a matter of such moment would be to remand the case for further hearing in the trial court as to that issue.

For this court to only revoke the termination decree with nothing more, may recreate a situation where the child is simply restored to foster care, a situation which may last indefinitely or at least so long as the mother is unable to care for the child. The child may never have a permanent home and may be destined to perpetual public support. This latter circumstance is contrary to the expressed direction of the Legislature. (Section 78-45-4 U.C.A 1953 as amended - duty of woman to support her child). And the former circumstance of maintaining the child without permanent parental ties is abhorant to public policy. As stated by Justice Crockett in In re adoption of D---, 122 U. 525, 252 P.2d 223 (1953):

Public Policy favors the adoption of children who are left without parental refuge. Once a child has been cast adrift and is without responsible parental care, the policy of the law should be to assist in every way in establishing a satisfactory parent-child and family relationship. Adoptive parents should not be discouraged by a construction of the law which would cause them to fear the consequences of accepting a child because of the knowledge that the fate of their efforts would be at the will of the natural parent. (252 P.2d 229)

POINT III

THE COURT IN VACATING THE ORDER OF TERMINATION, FAILED TO CONSIDER THE LEGAL EFFECT OF INTERVENING ADOPTION PROCEEDINGS OR TO GIVE LEGAL DEFERENCE TO THE BEST INTERESTS OF THE CHILD.

Failure of the appeal court to consider material points in the case is grounds for rehearing. (In re McKnight, supra).

On a close reading of the court's opinion we find no consideration given regarding the legal effect of intervening adoption proceedings or any mention made as to the best interests of the child, both of which points were raised by respondent on appeal. (Brief of Respondent Points I and VI). We complain of this exclusion not from wounded vanity, but because both points are by previous case decision material to the issue of permanent deprivation of parental rights. As we understand, the majority opinion bases its decision on the matters of sufficiency of pleadings, invocation of jurisdiction and compliance with statute.

In the case of Harrison v. Harker, 44 Utah 541, 142 P. 716 (1914), the natural mother in a habeas corpus proceeding sought to recover custody of an infant child whom she had delivered through a third party to defendants for purposes of adoption shortly after its birth. In a lengthy and monumental opinion, the court discussed, among other things, the matter of "legal rights" in a custody contest. The court said: (142 Pac. 719):

This court is now firmly committed to the doctrine that in such proceedings we will be controlled by what appears to be the best interests and welfare of the child, rather than by the naked legal right of those claiming it.

We gather from this language that in custody cases there are matters of grave import which should be considered by the appellate court, matters which perhaps transcend technicalities of the law and "naked legal rights." Justice Crockett in In Re Adoption of D, supra, suggests that each of these type of cases depends upon its own facts, and enumerates several important things that should be considered, including the length of time the adopting parents have had the child; any "vested rights" that have intervened; the welfare of the child, and the conduct, as well as the character and ability of the respective claimants. All of these things seemed to have been lost in the instant case in the shadow of a controverted issue as to whether or not Petitioner had been advised of her right to counsel.

One wonders in all this legal haggle over whether this is a case of voluntary or involuntary termination, whether inability to provide constitutes "unfitness," whether the Juvenile Court had jurisdiction or not, whether Petitioner had waived or had not waived her right to counsel, and whether or not Petitioner had or had not, at the final hearing, been advised of her right to counsel--one wonders through all this as to who is speaking for the child. What are the rights of the child? Since we are only deciding relationships for the rest of her life, what does the child have to say about it? Where is her guardian ad litem? In the first place, her mother voluntarily gave her over to the Division of Family Services because she could not take care of her. The child had nothing to say about that. Fifteen months later, mother petitioner asks for her back, and now after three years in another home, the only home she has ever known, this court says back you go--and her interests are apparently not to be considered. The juvenile judge tried to speak for her, wherein he said:

Where there is a conflict between the interests--and even the rights--of parents and those of their children this court is obliged to give pre-eminence to the children's interests and rights. To take this child from her adoptive parents who have been found by the District Court to be fit and qualified, and return her to an unmarried mother who conceived her and bore her out of wedlock by a man she cannot even name would be a grave injustice to the child, to the loving adoptive parents

and probably even to the natural mother, who might then yet again be found incompetent to care for the child and go through the process all over again.

Certainly the mother was afforded more formality and far more protection of her rights by the judicial proceedings held in the instant case than would have been the case had she just signed over the child in the usual manner to Division of Family Services or other placement agency. (Memorandum Decision, Case No. 252370, District Juvenile Court for Weber County, May 11, 1976)

Our child's cause was perhaps more adequately stated in the case of In Re Adoption of Richardson, 59 Cal. Rptr. 323 (1967), wherein the California Court of Appeals accepted the testimony of Dr. Arthur H. Parmelee, Jr., Director of the Pediatrics Clinic at the University of California at Los Angeles as to the impact over a nine month old child on separation from the only parents it had known:

Disruption of the continuity of care of this baby at his present age is critical and could be permanently damaging to him. It is well known that babies manifest their greatest anxiety over separation from their parents in the age period of eight months to two years. This little boy is now being separated from the only parents he knows. He will go into a temporary foster home where he will try to make new attachments. Then he will be placed in a new home and the emotional separation from his foster home will take place. This sequence of events in that age period can be devastating to the development of healthy emotional attachments to people for the remainder of this child's life. (Emphasis in original)

In a letter to the editor appearing in the Salt Lake Tribune on March 4, 1977, Dr. Delbert T. Goates, M. D.,

Child Psychiatrist, on reading of the instant case, wrote:

The Utah Supreme Court has legally abused another child. . . . romantic decisions, such as this, in favor of the 'natural' mother are devoid of justice for the child. . . . If the young mother were standing alone two years ago, at 16 years of age, consider the plight of the three-year-old subjected to the recent abuse of the Utah Supreme Court. Even if the juvenile court had erred, removing the child, a second wrong, will not make a right. Compassionate parents of three-year-olds everywhere readily recognize, as did Judges Ellett and Crockett, 'that the court was not considering the welfare of the child' in transplanting her so cavalierly at three years of age.

In the Harrison v. Harker case, supra, Justice Frick states the matter as a legal proposition by quoting from the earlier case of Hummel v. Parrish, 134 Pac. 898 (1913), as follows thus:

The legal presumption is that it is for the best interests of the child and of society for the child to remain with its natural parents during the period of its minority, and be maintained, cared for, and educated by them and under their supervision and direction. But this is not an absolute right of the parent. The decisions rendered in this class of cases almost universally hold that where, as here, a parent has surrendered the control of his child when it was a toddling infant to other parties, and permitted them to maintain, clothe, feed, and care for it . . . and a strong reciprocal mutual affection has grown up between the child and its foster parents, . . . and the parent seeks to recover possession of the child, the natural or presumptive right of the parent cannot prevail, if the interests and welfare of the child forbid it. The law in such cases regards

the welfare and permanent interest of the child much more important than the natural or presumptive right of the parent. In other words, the paramount consideration in such cases is the well-being of the child. If it appears to the court that the physical, intellectual, social, moral, and educational training and general welfare and happiness of the child will be best promoted by leaving it with the foster parents, the presumptive right of the natural parent must yield to the interests of the child. (142 Pac. 719)

The court states in our instant case that the Juvenile Court did not comply with the provisions of Section 55-10-109; it thus exceeded its jurisdiction, and the termination order was void, subject to direct attack in a proceeding to vacate. So be it. But in the interests of the child, should their not be some court recognized statute of limitations. Is said decree to be subject to attack at 15 months, three-years, five-years, ten-years?

Over and over the court has said that the interests of the child are paramount in custody cases. We think it was error for the court to seemingly ignore this rule in the instant case and that said error is grounds for rehearing.

CONCLUSION

The day the court's decision was issued, I looked at my little three-year old girl lying asleep on her bed, teddy bear tucked under one arm and blonde locks loosely scattered on the pillow slip, and said to myself, "My God, what if I were the adoptive parent of Baby Girl Marie?"

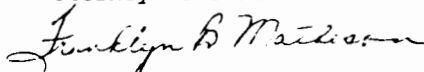
Respondent, child placement agencies, social service workers, psychologists, needful children, adoptive applicants, adoptive parents and all parents who have three-year old children view with alarm the impact of the court's decision. As lawyers, we should, of course, be equally concerned about the rights and feelings of the natural mother, and we would be if we could feel her rights have, in fact, been ignored and that she had made diligent and timely efforts to recover custody of the child. But the court has reviewed these procedural matters, discussed them in its opinion and we do not ask a rereview of same as justification for a rehearing of the appeal.

We do earnestly feel, however, that a rehearing is justified and should be granted on the basis, as argued under Point I, that Justice Hall, who cast a decisive vote in the case, was neither a member of the court nor did he participate in the oral argument of the case. We believe this circumstance is critical in the instant case. Further, we urge rehearing on the basis that the court erred in its conclusions as to the sufficiency of the allegations made by the Petitioner in its initial Petition and as to the jurisdiction of the Juvenile Court based thereon, as argued in Point II; and on the basis that the court failed to consider the legal effect of intervening adoption proceedings or to give consideration to the best interests of the child, as argued in Point III.

We respectfully and sincerely request a reconsideration and reversal of the majority opinion for these reasons.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

A handwritten signature in cursive script, reading "Franklyn B. Matheson".

FRANKLYN B. MATHESON
Assistant Attorney General

Attorneys for Respondent