

1976

James Reed Hall and Brenda M. Hall v. Thomas LeRoy Anderson : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Marc Nick Mascaro; Gunn and Mascaro; Attorney for Respondent;

Robert M. McRae; Attorney for Appellants;

Recommended Citation

Brief of Respondent, *Hall v. Anderson*, No. 14705 (Utah Supreme Court, 1976).
https://digitalcommons.law.byu.edu/uofu_sc2/446

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the Adoption)
of KARLA JEAN ANDERSON, a
minor,)

JAMES REED HALL and)
BRENDA M. HALL,)

Appellants,)

Case No. 14705

vs.)

THOMAS LeROY ANDERSON,)

Respondent.)

RESPONDENT'S BRIEF

MARC NICK MASCARO
GUNN AND MASCARO
Attorney for Respondent
7417 South State Street - Suite 1
Midvale, Utah 84047
Telephone: 566-0661

ROBERT M. McRAE
Attorney for Appellants
370 East Fifth South
Salt Lake City, Utah 84111
Telephone: 364-6474

FILED

Wes
NOV 3 - 1976

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	3
POINT I	3
THE TRIAL COURT CORRECTLY FOUND THAT THE MINOR CHILD WAS NOT "DESERTED" WITHIN THE MEANING OF SEC. 78-30-5, UTAH CODE ANN., BY HER NATURAL FATHER.	
POINT II	10
THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING THAT THE MINOR CHILD WAS NOT DESERTED.	
CONCLUSION	11

CASES CITED

<u>DOE V. DOE</u> , 48 Ut. 200, 158 P. 781	10
<u>IN RE ADOPTION A.J.N.</u> 525 P. 2d 520 (Alaska, 1974)	8
<u>IN RE ADOPTION OF MINOR CHILD</u> 438 P. 2d 398 (Hawaii, 1968)	8
<u>IN RE ADOPTION OF GREGORY</u> 475 P. 2d 1275 (Okla, 1972) -	8
<u>IN RE ADOPTION OF JAMESON</u> 20 Utah 2d 53, 432 P. 2d 881 (1967)	6
<u>IN RE ADOPTION OF WALTON</u> 123 Utah 380, 259 P. 2d 881 (1953)	5
<u>MAHONE V. LINDER</u> 514 P. 2d 901 (Oregon App., 1973) ----	8
<u>SMITH V. SMITH</u> 67 Idaho 349, 180 P. 2d 853	8
<u>WILSON V. PIERCE</u> 14 Utah 2d 317, 383 P. 2d 925 (1963) -	10

(continued)

TABLE OF CONTENTS - (cont.)

STATUTES

Rule 76 (A) URCP	----- 10
Ut. Code Ann. 78-30-4 (1953)	----- 3
Ut. Code Ann. 78-30-5 (1953)	----- 1,3,10

OTHER

WORDS AND PHRASES	----- 3
--------------------------	----------------

IN THE SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the Adoption)
of KARLA JEAN ANDERSON, a)
minor,)

JAMES REED HALL and)
BRENDA M. HALL,)

Appellants,)

Case No. 14705

vs.)

THOMAS LeROY ANDERSON,)

Respondent.)

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The Appellants' appeal from the judgment entered against them by the Fourth Judicial District Court, Uintah County, State of Utah, the Honorable J. Robert Bullock presiding, denying Appellants' Petition for Adoption without the consent of the natural father.

DISPOSITION IN THE LOWER COURT

On May 12, 1976, a hearing was held in the District Court in and for Uintah County, the Honorable J. Robert Bullock presiding, on Appellants' Motion to adopt KARLA JEAN ANDERSON without permission from KARLA JEAN ANDERSON'S natural father on the grounds of abandonment. The Petition was denied on May 14, 1976.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court's judgment finding that the minor child, KARLA JEAN ANDERSON, was not abandoned within the context of Sec. 78-30-5, Utah Code Annotated.

STATEMENT OF FACTS

A Decree of Divorce was entered on March 13, 1972 granting a final Decree of Divorce between Thomas L. Anderson Respondent and Petitioner, Brenda M. Hall, formerly Brenda M. Anderson, parents of the minor child, KARLA JEAN ANDERSON.

Custody was awarded to Brenda M. Anderson with visitation rights granted to Thomas L. Anderson. Thomas L. Anderson was required to pay support to the child. In 1972, Brenda M. Anderson married James R. Hall. (pp. 48-49, TT)

During the ensuing four-year period, the Respondent made numerous attempts to correspond with his daughter, but received no response from the Petitioner, Brenda M. Hall, with regards to the minor child (pp. 59-60, TT). In the late summer of 1975, the Respondent engaged the services of an attorney to instigate litigation requiring the Petitioner, Brenda M. Hall to allow the Respondent-Father visitation of the child. (p. 63, TT)

On December 5, 1975, the Petitioner-Appellant was served with a Motion to allow visitation (p. 38, TT). Shortly thereafter the Petitioner-Appellant filed a Petition for Adoption based on desertion on the 19th day of December, 1975. (p. 1, TT)

On May 12, 1976, the Honorable J. Robert Bullock of the Fourth Judicial District Court in and for Uintah County, head the Petitioner-Appellant's Motion to Adopt KARLA JEAN ANDERSON without the permission of the said minor child's natural father based on the grounds of desertion. The said petition was denied by the Honorable Judge on May 14, 1976, the Judge finding that the minor child was not "deserted" within the meaning of Sec. 78-30-5 of the Utah Code Annotated (1953) as amended. (p. 40, TT)

Petitioners-Appellants now appeal from that decision.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY FOUND THAT THE MINOR CHILD WAS NOT "DESERTED" WITHIN THE MEANING OF SEC. 78-30-5, UTAH CODE ANN., BY HER NATURAL FATHER.

Sec. 78-30-4 of the Utah Code Annotated (1953) as amended, provides that a child cannot be adopted without the consent of each living parent having rights and relation to said child except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion. Petitioners-Appellants have filed a Petition for Adoption based upon desertion and its allowance without the consent of the father under Sec. 78-30-5. "Desertion" is the abandonment of a relation or service in which one owes duties; the quitting, willfully, and without right of one's duties. WORDS & PHRASES, Vol. 12 at 374. The issue thus presented before the trial court was whether or not the father had, in fact, "abandoned" the child. Abandonment imports any conduct on the part of the parent which evinces a settled purpose to forgo all parental duties and relinquish all parental claims to the child and to renounce and forsake the child entirely. Voluntary abandonment

as used in the Utah Statute does not include an act or course of conduct by a parent which is done through force of circumstances or dire necessity, but relates to intentional and willful acts. The factual question must be determined by ascertaining the mental attitude and intent of the parent; there must be both the intention to abandon and the external act of abandonment. (2 AmJur 2d ADOPTION Sec. 32-33)

Thus according to well settled law, abandonment or desertion must be based upon the intentional acts of the parent. In the case at hand, the testimony is uncontroverted that the Respondent-Father sent no less than 19 Certified mailed letters to the Petitioner, Brenda M. Hall, and the parties minor child. On each of those occasions, the Respondent-Father received no response or correspondence with regards to his minor child. (pp. 14-37, 59-60, TT)

Also, during this four-year period, the Respondent-Father sent support of \$175.00 and Christmas, Easter and birthday gifts each and every year for the four years in the amount of \$211.73. (pp. 13 & 60, TT) To further exhibit his desire to visit and maintain a relationship with his daughter, the Respondent-Father engaged the services of an attorney to bring an action for visitation. That Motion was served upon the Appellant, Brenda M. Hall, on December 5, 1975. (pp. 38 & 63, TT). The Respondent-Father further testified under oath that on numerous occasions, he attempted to find out the whereabouts

of the Appellants and his daughter, but on each occasion, was unable to do so. (pp. 58-59, TT) In fact, the father reiterated his love and affection for his daughter and his desire during that four-year period to exercise his visitation rights to no avail. (pp. 57-67, 63-64, TT)

These many actions on the part of the father clearly do not exhibit a willful intent to relinquish the father-daughter relationship which he has been given a God-given right to have. The Case Law is well settled in the State of Utah as well as without the state. In a case which is closely on point with the case at hand, In Re Adoption of Walton, 123 Utah 380, 259 P 2d 881 (1953), the court stated:

"Courts have not hesitated to build a strong fortress around the parent-child relation and have stocked it with ammunition in a form of established rules that add to its impregnability. To sever the relationship successfully, one must have abandoned the child and such abandonment must be with a specific intent to do so - an intent to sever all correlative rights and duties incident to the relationship. Such intent must be proved by him who asserts it, by proof that not only preponderates, but which must be clear and satisfactory - something akin to that degree of proof necessary to establish an offense beyond a reasonable doubt or as one authority puts it, 'by clear and indubitable evidence'. . . consent is at the foundation of adoption statutes that evidence pertaining to it must be appraised in a light most favorable to him whose parental right is assaulted." at 883

The facts in the Walton case, Supra, are very similar to the facts in our case. A brief reading by the court of the facts in the Walton case will show the same type

of effort on that Father's part to exercise his Fatherly rights as the Respondent-Father has in this case, i.e., sending what support payments he could and gifts to the minor child; sending letters to the former wife and minor child; attempting in vain to exercise his visitation rights; and being told by the ex-wife and present husband that they no longer needed the support payments from the natural Father and for him to leave them alone.

The court in Walton, having before it the same testimony as is before the court in this case held, "We are convinced that these facts fall far short of that type and degree of proof required by the authorities to establish the necessary intent to desert a child, sufficient effectively to dispense with the parent's consent under our adoption statute." Id at 883.

The facts in the present case would indicate that the same decision must be reached here, i.e., that the Father, in fact, has not "deserted" his child sufficient to dispense with his consent under the adoption statute.

The Walton case and its attendant interpretation of the Utah Adoption Statute without permission was upheld in the case of In Re Adoption of Jameson, 20 Utah 2d 53, 432 P 2d 881 (1967). Here the court in affirming the lower court's decision that the child was not "deserted" within the meaning of the statute so as to permit adoption by the Father and his present wife without the mother's consent held; "Adoption proceedings are of statutory nature, and we are not inclined to give the statute

a meaning not intended by the Legislature. We are of the opinion that the Legislature in using the word "desert" meant to give it its ordinary meaning. We believe and so hold that the language of the statute means an intentional abandonment of the child rather than a separation due to misfortune or misconduct. The attendant's circumstances in this case do not warrant a finding of desertion and the Trial Court so held. The uncontroverted testimony of this case is that during the four-year period in question, the father was unemployed except for five to six months due to an injury to the back which has caused an operation to be performed to fuse his back. (pp. 61-62, TT).

The Respondent-Father's non-payment of support was also based upon the direction by the mother and now present husband, that they didn't need his money and didn't want him around any longer. (p. 60, TT). Should the mother and her present husband now be allowed to use the non-payment of support which they requested as a basis for finding desertion? I think not, and the decisions by this Court in the cases of Walton and Jameson Supra would tend to that result. The father even testified that in the summer of 1975, he sent a letter to the wife and present husband, offering to send them \$1,500.00 for support if they would allow him to visit. There again was no response to that letter. (pp. 62-63, TT).

It has long been held that non-support is not synonymous with abandonment in regards to adoptions without

consent of a non-supporting parent, In Re Adoption of Minor Child, 438 P. 2d 398 (Hawaii, 1968); that there can be no adoption without consent where the Father tried to furnish support payments, but was refused the offer by the natural mother and new father, In Re Adoption of Gregory, 475 P. 2d 1275 (Oklahoma, 1972); and that the natural Father had not "abandoned" his child where he had consistently sought to enjoy his visitation rights only to be frustrated by obstructions placed in his way by the mother and where the Father had established and maintained a trust account for the child's benefit. In Re Adoption of A.J.N., 525 P. 2d, 520 (Alaska, 1974), Mahone v. Linder, 514 P. 2d, 901 (Oregon App. 1973).

Respondent-Father does not contest the fact that he has not kept up support payments to his minor child. However, his non-support is not based on his desire nor intent to relinquish his filial relationship with his daughter, but was merely based upon inability to make said payments and also, the representation by the Petitioner-Appellants that they no longer needed his support.

In Smith v. Smith, 67 Idaho 349, 180 P. 2d 853, the Court held:

"If the rule were otherwise - that is if an adjudication of abandonment could legally be predicated on the mere failure by the parents to support their minor children - the result in innumerable instances would be to work a manifest wrong on parents. It is not difficult to conceive of circumstances wholly beyond the control of parents having the deepest

affection for their children which would render it impossible for them to support their children or care for them in a proper way. It would indeed, be a harsh rule which would, under these circumstances, authorize a judicial determination by which the natural right of the parents to the custody and control of their children would be forever severed." at 855.

The Respondent-Father exhibited on the witness stand his desire to see his daughter and his love and affection for her. The Trial Court because of its close relationship with the case and its ability to perceive the expressions of the witnesses found that the Father had no intention of willfully relinquishing his parental relationship with his daughter. During the past four years his attempts to visit his daughter and provide some means of contacting her and maintaining his relationship with her have only been frustrated by the Petitioner Appellants. This was exhibited by the testimony of the Petitioner Appellant, Brenda M. Hall, indicating that during the four-year period they had lived in Vernal, Price and Dutch John, Utah and in Grant, Arizona and on each occasion, had never notified the father of the new address or their whereabouts. (pp. 53-54, TT). Her frustration of his efforts are also exhibited in her refusal to answer letters and in refusing support money. (pp. 59-63, TT). Her frustration of his attempts to maintain his father-daughter relationship should not now become a basis for the Petitioner-Appellants to now claim that that inability on his part to maintain that relationship should be a basis for an adoption

based on desertion. To find such would be to allow the Petitioner-Appellants to gain from their misconduct, and this would be adverse to the decisions in Walton and In Re Adoption of A.J.N. Supra.

POINT TWO

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN FINDING THAT THE MINOR CHILD WAS NOT DESERTED.

Pursuant to Rule 76 (A) Utah Rules of Civil Procedure, the Supreme Court may reverse, affirm or modify any Order or Judgment appealed from. It is well settled law before this Court that the Supreme Court generally approves the findings of the Trial Court because of its better opportunity to test the credibility of the witnesses and the weight of the evidence unless on the record it is shown and the Supreme Court is persuaded that the finding is so clearly against the weight of the evidence as to show error. (Doe vs. Doe 48 Ut 200, 158 P.2781)

The evidence before the Trial Court in this case was clear and convincing that the Respondent-Father had not "deserted his child", but had made a concerted effort throughout the four-year period to maintain the relationship with his daughter. The trial judge made no error in its decision.

"Though it is appreciated that this Court has stated that this evidence must be clear and convincing that a parent has abandoned his child, whether the requisite degree of proof

has been met is largely to the Trial Court. Because of his close contact with the parties and the opportunity it affords him to form a judgment not only of their veracity, but of their qualities of character and sincerity of purpose, which are particularly important factors in proceedings of this kind, we make due allowance for his advantage position; and in accord with the traditional rule, review the evidence in the light most favorable to the findings and decree; and will not disturb them unless it is shown to clearly preponderate to the contrary."

Wilson vs. Pierce 14 Utah 2d 317


The Trial Court was in an advantage position and was able to perceive the testimony of the Father. Based on that testimony and his concerted efforts during the four-year period to visit his daughter and maintain the relationship with her, the Court found that there was no intent on his part to "desert" his child, and thus found that his consent to adopt was required and that the Petitioners' Petition should be dismissed.

CONCLUSION

Based on the foregoing cases and the testimony of the witnesses, it is clear that the District Court did not error in holding that the minor child was not "deserted" within the meaning of Section 78-30-5 Utah Code Annotated (1953) as amended. Therefore, the lower court decision should

be affirmed and the appeal herein dismissed.

Respectfully submitted,


MARC NICK MASCARO
Attorney for Respondent
7417 South State Street - Suite 1
Midvale, Utah 84047

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief to Robert M. McRae, Attorney for Appellants, 370 East Fifth South, Salt Lake City, Utah 84111 this 2nd day of December, 1976, postage prepaid.


JEAN B. WOODRUFF, Secretary