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State of Utah, In The Interest of Evan Orgill And Bart Orgill, Persons Under 18 Years of Age v. Joyce Thomason : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the
interest of Evan Orgill
and Bart Orgill, persons
under 18 years of age,

:

:

:

Case No. 11147

:

JOYCE THOMASON,

Appellant.

BRIEF OF RESPONSE

Appeal from an Order of the
District Juvenile Court, filed
John Farr Larson, president

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the :
interest of Evan Orgill :
and Bart Orgill, persons :
under 18 years of age, Case No. 15140
:
JOYCE THOMASON, :
:
Appellant.

BRIEF OF RESPONDENT

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District Juvenile Court, the Honorable
John Farr Larson, presiding.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, in the :
interest of Evan Orgill
and Bart Orgill, persons :
under eighteen years of
age. : Case No. 15140

JOYCE THOMASON, :

Appellant. :

BRIEF ON APPEAL OF
RESPONDENT, STATE OF
UTAH

STATEMENT OF THE NATURE OF THE CASE

This is a case in which the Utah State Division of Family Services petitioned the Juvenile Court of Salt Lake County to permanently deprive the natural parents of Evan and Bart Orgill of all rights to said children pursuant to the provisions of Section 78-3a-48 (formerly known as Section 55-10-109) Utah Code Annotated 1953, as amended.

DISPOSITION IN THE JUVENILE COURT

The Juvenile Court, the Honorable John Farr Larson presiding, after trial before said Court, granted the Petition and on March 22, 1977, entered its Order terminating all rights, including residual rights, of Leonard Orgill, father, and Joyce Thomason, mother, in and to said children.

RELIEF SOUGHT ON APPEAL

The respondent State of Utah asks that the Order of the Juvenile Court be affirmed.

STATEMENT OF FACTS

The respondent State of Utah does not feel that appellant has made a complete and adequate Statement of Facts, and for this reason accepts and adopts the statement of facts set forth by co-respondents.

ARGUMENT

POINT I

THERE WAS SUFFICIENT EVIDENCE PRESENTED
TO SUPPORT TERMINATION OF APPELLANT'S
PARENTAL RIGHTS BY REASON OF ABANDONMENT.

Appellant contends that the evidence was insufficient support an abandonment of the two children Evan and Bart, on the grounds:

1. Placing of the children with the Division of Child Services was prompted by the appellant's concern, not her disregard, for the children, (Appellant's Brief, pg. 5),
2. There is nothing in the evidence to prove that appellant did not attempt to see the children when in Salt Lake City between June, 1974, and the present, (Ibid. pg. 5),
3. The Division repeatedly frustrated appellants efforts to see the children, (Ibid. pg. 6)
4. The Division failed to take steps to reunite appellant with the children, (Ibid. pg. 6), and

5. There was nothing in the evidence establishing that appellant had the ability to support the children, nor was she legally ordered to do so. (Ibid. pg. 7)

As to alleged insufficiency No. 1: It may well be that appellants initial motivation in voluntarily placing the children with the Division was her concern for them. Initial motivation is not the determinative factor in a finding of abandonment. The Utah statute regarding abandonment says nothing of motive. Abandonment is a question of fact determined as follows:

"It shall be prima facie evidence of abandonment that the parent or parents, although having legal custody of the child, have surrendered physical custody of the child, and for a period of six months following such surrender have not manifested to the child or to the person having physical custody of the child a firm intention to resume physical custody or make arrangements for the care of the child." (Section 78-3a-48(b) UCA 1953)

The children were surrendered to the Division for placement in a foster home in February, 1974. They have been in the foster home ever since. The issue under consideration is whether appellant has manifested a "firm intention to resume physical custody or to make arrangements for the care of the . . . [children]." A "firm intention" obviously contemplates something more than perfunctory statements and broken promises. The fact is that appellant has visited with the children only

twice since they were placed in foster care: March 1974, (R. 63), and sometimes in June, 1974, (R. 165). In June 1974, appellant moved to Denver (R. 160) without conferring any future arrangements or plans for the children. (R. 174). On September 17, 1974, appellant finally wrote to the children. (R. 266-267). She has not written since. (R. 160-161, 170). She has provided no support for the children, even though she has had regular employment since October, 1974, nor has she even sent them a present or remembrance since December 1974. (R. 169). She has never even sent them a birthday card. (R. 169).

As to insufficiency Claim No. 2: It would be difficult for respondents to carry the burden of proving that appellant did not attempt to visit the children during her visits to Salt Lake City. The respondents cannot be under an obligation to prove a negative. Of her 7 or 8 visits to Salt Lake City between July, 1974, and February, 1976, there is affirmative evidence of only two attempts by her to try and see, or even ask to see, the children. (R. 86,90).

As to insufficiency Claim No. 3: In December, 1974, after six months of silence in regard to the children, appellant came to Salt Lake and while here asked to see the children. The social worker felt that a visit would be inadvisable unless appellant had definite plans for taking and caring for the children. (R. 86). Appellant later acknowledged

and agreed that it was best she not see the children at that time. (R. 88). On July 28, 1975, appellant, while again in Salt Lake City, asked to see the children. She came unannounced and the children were on vacation. A visit was not denied by the Division, but was impossible to arrange. (R. 90). There is no evidence that appellant, aside from these two occasions, has ever asked to see or attempted to see her children. If she had done so, surely she could have cited specific instances during the trial. The record certainly doesn't "reek" (Appellant's Brief, Pg. 6) with frustrations of appellant's efforts to be reunited with or resume physical custody of the children.

As to insufficiency Claim No. 4: The fact is that the Division did take steps, and went as far as it could as a practical matter, in attempting to reunite appellant with the children. In her letter of September 6, 1974, social worker Christine Colver advised appellant to contact the Division in order to establish a plan for the return of the children. (R. 243). Appellant made no such contact. On November 18, 1974, a Division worker again wrote to appellant suggesting steps she should take and decisions she should make in order to get her children back (R. 254). In December, 1974, the social worker attempted to work out a plan with appellant to enable return of the children to her, but obtained no commitment or cooperation from

appellant. (P. 86). In a letter dated February 9, 1970, a social worker inquired again as to appellant's interest in the children. (R. 91, 270). The Division was certainly willing to work out a program to assist appellant with the children - but appellant evidenced little interest to resume care and responsibility for the children until she was actually faced with their permanent loss, over two years after she had voluntarily placed them with the Division.

In the case of State of Utah, In the Interest of Mario A. et al., 514 P.2d 797(1973), likewise an abandonment case, the natural mother made a similar argument; to-wit, that the Division had failed to take affirmative action to reunite her with her children. The Mario A. case was on its facts almost identical to the instant case, involving a mother who placed three small children in the custody of the Division and then for two and one-half years showed very little interest in them. (514 P.2d at pg. 799). As in the instant case the Division caseworker had prescribed certain conditions to be followed by the mother in order to regain custody of the children. (514 P.2d at pg. 798). As in the instant case the mother failed to conform. She failed to visit the children, phone them, or inquire by phone as to their welfare, all as in the instant case. She then complained that the Division workers should have sought her out and initiated visits between her and the

children. (514 P.2d at pg. 799). This Court, in affirming the termination order, stated:

"We do not think the caseworkers are obligated to go to the extremes which appellant claims they should have done in order to kindle and increase a small flame of desire to be reunited with her children. We think if she was to escape the provision of the statute regarding evidence of abandonment, the duty was upon her to manifest an interest within the six month period after loss of custody. In this case she failed to manifest a firm intention to resume physical custody of her children for over two years." (514 P.2d at pg. 799).

It is therefore the duty of the natural parent to manifest her interest in the children and to establish a record in that regard when faced with their loss. In the instant case there were successive long periods of time; from June, 1974, to December, 1974, from December, 1974, to July 1975, from July 1975, to February, 1976, in which appellant made no attempt to contact the children, made no inquiry as to their welfare, and manifest no firm intent to resume custody or responsibility for the children. It would be error to fault the State for her lack of interest and establishment of firm intent.

As to insufficiency Claim No. 5: Contrary to appellant's Brief (pg. 7), there was evidence as to appellant's ability to support the abandoned children. She has had continuous employment from September, 1974, as a nurses aid (R. 168),

and as of December, 1976, at least, was making \$500.00 month. (R. 236). There is nothing in the record as to whether or not the Juvenile Court ever did or did not require appellant to contribute to the support of her children, or whether the Juvenile Court made a finding that appellant was unable to do so. In any event when children are voluntarily placed with the Division of Family Services it is for the Division to determine whether the parent will pay a fee for foster care, (Section 55-15b-13 UCA 1953), not the Juvenile Court. If a stone has been cast at appellant by the Juvenile Court Judge, in his finding, for her failure to make any contribution whatsoever to the support of the children, we think it was well thrown and said failure is certainly evidentiary as to her "firm intention" to make arrangements for the care of the child. Without equivocation our legislature has stated that "Every woman shall support her child; . . ." (Section 78-45-4 UCA 1953)

Conclusion regarding Point I: This court has adopted an objective test in determining whether or not a parent has abandoned his child in an involuntary termination proceeding under Section 78-3a-48(b) (Supra); to-wit, has the parents' conduct ". . . demonstrated a conscious disregard of the obligations owed by a parent to a child, leading to the destruction of the parent-child relationship . . ."

(State of Utah, in the Interest of Summers Children, v. Wulfinstein, 560 P.2d 331, (1977), at page 334. Adopting with approval D.M. v. State, Alaska, 515 P.2d 1234 (1973), and In Re B.J., Alaska, 530 P.2d 747 (1975).)

The case of D.M. v. State (Supra.) is of particular interest as it seems to parallel our instant case. In that case it was held:

[1] We hold that the evidence supports the conclusion of the trial court that the mother's parental rights should be terminated by reason of abandonment. Her failure to communicate with or to visit D.M. since 1965, her failure to support the child in any way either emotionally or financially, together with the long term commitment of D.M. to a foster home convinces us that the child has been abandoned. We take into consideration as well the finding of the trial judge that it was in D.M.'s own interest that appellant's parental rights be severed. That finding is strongly supported by the reports of Dr. Boyd, a qualified psychiatrist, who made psychological evaluations of the appellant, D.M., and D.M.'s foster parents. (515 P.2d at pg. 1236) (Emphasis added).

In the instant case (with the exception of one letter) appellant has not communicated with her children and her last visit took place in June, 1974. As in D.M. v. State, this appellant has also failed to provide her children with either emotional or financial support. (R. 168, 169). Further, both cases involve long-term foster-home care, and are supported by psychological studies. (R. 222-235; 239-242; 244-252).

Actions as well as words should be examined when determining whether there has been an abandonment:

[2] Whether or not there has been an abandonment, the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well. The subjective intent standard often focuses too much attention on the parent's wishful thoughts and hopes for the child and too little on the more important elements of how well the parents have discharged their parental responsibility. D.M. v. State, supra, 515 at page 1236. (Emphasis added)

In the instant case, appellant has been short on words as well as actions. As summarized by the Juvenile Court in its "Findings of Fact," (R. 215)

"B . . . the only positive steps taken by the mother to affect return of these children has been phone calls and letters to the Division of Family Services, a request for a home study in Colorado, and the leasing of a three bedroom home.

C. The mother has not supported these children although she has had regular employment since October, 1974.

D. The mother has not provided emotional support for said children. She has not sent Christmas gifts (except Christmas, 1974) or birthday cards; the mother wrote one letter to the children."

The test [for abandonment] focuses on two questions: has the parent's conduct evidenced a disregard for his parental obligation, and has that disregard led to the destruction of the parent-child relationship?" In Re I.

Alaska, 530 P.2d at page 749 (1975). In addition to disregarding her parental obligations by failure to maintain contact with her children, appellant admits that there is now no meaningful relationship between her and the children. (R. 167). And further, the psychological reports and testimony based thereon strongly indicate that both boys would suffer trauma if taken from their foster home where they have established a deep emotional commitment and psychological parent-child relationship (R. 26-31, 40-44, 60, 248, 251.). It appears obvious that appellant has consciously disregarded her obligations to her children. Such disregard constitutes an abandonment.

POINT II

APPELLANT IS UNFIT OR INCOMPETENT BY
REASON OF CONDUCT OR CONDITIONS SERIOUSLY
DETRIMENTAL TO HER CHILDREN.

Appellant acknowledges that ". . . the court must be convinced by a preponderance of the evidence that the conduct or condition [of the parent(s)] is seriously detrimental in its effect on the child" (Appellant's Brief p. 8). She has not, however, challenged the validity or accuracy of the rather thorough psychological studies and reports and other evidence supporting the Juvenile Court's decision. Dr. Gordon B. Wilson, consulting clinical psychologist, who evaluated appellant on November 27, 1976, concluded:

"She (appellant) is probably poorly equipped to be a strong, appropriately controlling mother of adolescent children and it would be very difficult for her to cope with emotional problems in younger aged children. (R. p. 227) . . . She seems to be a person who will sincerely attempt to do her best to cope with whatever difficulties arise, but a person who has great limitations in coping skills." (R. p. 226)

Dr. H. Max Cutler, clinical psychologist, concluded:

" It is my considered opinion that these boys ought to be adopted by the Rosers (foster parents) since their natural parents apparently either are not interested in them or are not able to take care of them and they both badly need structure to countermand the obvious emotional problems apparent in both boys' protocols." (R. p. 252)(Emphasis added)

The evidence pertaining to appellant's unfitness and incompetency appears to be uncontroverted. If the evidence is in fact insufficient, appellant should state how or why. Unless shown to be clearly against the weight of the evidence, the decision of the court below must stand.

According to appellant, "In the instant case, no showing is made in the evidence that there is any causal connection between any detrimental effect on Evan and Bart by conduct or condition of the appellant." (Appellant's Brief p. 8). Respondent would merely point out the inconsistent results which could arise from a requirement of "causal connection." Assuming no adverse effects prior to abandonment, it would defy all reason to require a court to return children to an environment which would most certainly be detrimental.

them in order that a causal connection might be established.

Dr. Wilson's report clearly demonstrate the inadequacies and incompetence of both the appellant and her husband Kenneth. (R. 222-235). Further, his "Psychological Evaluation" report of Evan and Bart Orgill indicates the existence of adverse effects prior to separation from the natural parents:

"It is evident that this . . . [Evan] is extremely frightened that his structure is going to be destroyed again. He was old enough when he was taken from his parents, and while he was with his natural parents, to be traumatized by their behavior. * * * He is terrified to get too close to people because that's the way to get hurt, to be rejected as he was by his natural parents and reportedly especially by his mother." (R. 248)

That the boys are better off where they are now is also reflected by the report:

"[Bart] very much wants to stay right where he is and feels that the foster parents are his real parents" (R. 231).

* * *

"Both boys reflect the consideration and love of the Rosers and it seems to me they ought to be a permanent family." (R. 252).

As stated in the case of In Re B.J., supra, ". . . in recent years the courts have become increasingly aware of the rights of the children." Respondent submits that appellant's disregard of her parental obligations has led to the destruction of the parent-child relationship and that the best interests of the children dictate a legal severance of that relationship.

A "psychological parent" relationship has been established between the child Bart and the foster parent (R. 15). In fact, he thinks his natural parents are dead and has no image of them whatsoever. (R. 11). This Court is no doubt aware of the pedagogical debate going on in social work circles and family law courts across this land as to the natural parent presumption vs. the psychological parent presumption. (See Drs. Goldstein, Freud, and Solnit, Beyond the Best Interest of the Child) The instant case seems a classic example of where the best interest of the child dictates that custody should remain with the psychological parents. In the case of Ross v. Hoffman, Md. Ct. Spec App, 1976, 264 A.2d 596, it was held that "mothering" is a function and not just a biological fact and that finding by the trial court that the interest of the child is best served by remaining with the "psychological parent" was not in error. In that case the Maryland Court also held that a long period of separation between natural parent and child served to rebut the presumptive preference for the natural parent, and that although the period of separation did not of itself require custody he denied the natural parent, it at least put both parent and surrogate on an even keel. The Court also suggested that additional preference should be given to the surrogate when the child was voluntarily surrendered as opposed to a court-ordered

parent's right of custody. Finally the Maryland Appeals Court was especially impressed by the trial court's attempt to eliminate the element of chance from the child's future. Certainly all these considerations which impressed the Maryland Court in denying the custody petition of the natural parent are present in our instant case.

In the case of In re John F., Pa. Ct. Com. Pleas, 1976, 3 FLR 2160, it was held that in a termination of parental rights proceeding involving three children placed in foster care, the biological fact of parentage is unimportant when a psychological parent-child relationship has been established.

In any event this Court cannot ignore its numerous commitments to act in the best interest of the child, (see State in the Interest of Mario A., supra at pg. 799), and its recognition that the welfare of the child is paramount to any custody rights in the natural parents. (In re State in the Interest of Jennings, 432 P.2d 879, 1967; State in the Interest of Winger, 538 P.2d 1311 (1976)). The great weight of the evidence in the instant case preponderates in favor of terminating the appellants parental rights if our desire is to serve the best interest of the child. At least one Court of which respondent is aware has even suggested that the right of a child to be cut from the control of his biological parent when it is in his best

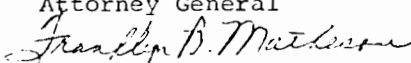
interest rises to the level of a constitutional issue.
"For this court to refuse to consider the child's best
interest because of an adult's title to him, albeit a
biological parent's, seemingly would be unconstitutional.
(In re Roy, N.Y. Fam. Ct., 1977, 393 N.Y.S. 2d 515).

CONCLUSION

The Juvenile Court correctly terminated appellant's
parental rights. There was sufficient evidence in the
record to support the Court's determination that appellant
has abandoned her children and was unfit or incompetent
reason of conduct or condition seriously detrimental to
them. This Court should affirm the decision of the Juvenile
Court.

Respectfully submitted this 31st day of October, 1977

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CERTIFICATE OF MAILING

I certify two copies of the foregoing Brief of Respondent State of Utah were mailed this day of October, 1977, to (1) Don Blackham Attorney for Appellant, 2525 South 3200 West, Salt Lake City, Utah, 84119, (2) David E. Littlefield, Esq., Guardian Ad Litem, Suite 707, Boston Building, Salt Lake City, Utah, and (3) David S. Dolowitz, Attorney for Foster Parents, Evan and Bart Orgill, 79 South State Street, Salt Lake City, Utah, 84147.

A handwritten signature, likely "David S. Dolowitz", is written in dark ink above a horizontal line.