

1977

# State of Utah, In The Interest of Tamara Summers And Tina Summer v. Beatrice Wulffenstein : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, in the interest  
of TAMARA SUMMERS and TINA  
SUMMERS,

vs.

Case No. 15141

BEATRICE WULFFENSTEIN,

Appellant.

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BRIEF OF APPELLANT  
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An action to review an Order of the Second  
Judicial District Juvenile Court holding that  
a paternal Grandmother has no standing to petition  
for custody where the mother is deceased and the  
father permanently deprived of custody. The  
Honorable John Farr Larson, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, in the interest  
of TAMARA SUMMERS and TINA  
SUMMERS, :  
 : Case No. 15141  
Plaintiff and :  
Respondent, :  
 :  
vs. :  
 :  
BEATRICE WULFFENSTEIN, :  
 :  
Defendant and :  
Appellant. :  
 :

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

The first question is procedural in asking if the Juvenile Court should be reversed for failure to make Finding of Fact or Conclusion of Law so we know which reason was the basis of the decision or if some other reason controlled.

The second question is substantive. That is, whether the paternal grandmother of two minors has standing to petition for their custody from the Juvenile Court.

The third question is procedural, whether the Juvenile Court has jurisdiction.

DISPOSITION IN THE LOWER COURT

The lower court, the Honorable John Farr Larson presiding, filed an Order on March 28, 1977, dismissing appellant's petition for custody without evidence and without Findings of Fact or Conclusions of Law. Thereafter, on April 19th, the

Division of Family Services denied appellant's request for custody or placement of the children in her home (see Exhibit A). The appellant filed this appeal on April 4, 1977.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the ruling of John Farr Larson, declare the right of grandparents to custody and remand the matter for a hearing on the merits to ascertain if this grandmother is suitable to have the custody of the minor children and if that is in their best interest.

#### STATEMENT OF FACTS

The minor children, Tamara Summers (age 7) and Tina Summers (age 6) lost their mother by death and their father when John Farr Larson deprived him of custody, sustained by this Court January 31, 1977.

The paternal grandmother, appellant herein, filed a petition on February 11, 1977, asking for custody of the children. On February 24, 1977, the State filed a motion to dismiss the petition on the grounds:

- "1. Said petitioner has no legal standing under the Juvenile Court Act to petition the Court for custody."
- "2. The Court has no jurisdiction..."

The motion and petition were heard March 21, 1977, and the motion to dismiss was granted without the Court making

any Findings or Conclusions and without any affidavits or testimony being received.

The appellant requested the Division of Family Services to place the minors with her and on April 19, 1977, that request was declined on the grounds:

"...it would not be in the best interest of Tammy and Tina to place them in Mrs. Wulffenstein's home. They are well-adjusted in their present foster home and any move from there would only cause undue emotional stress for them...."

On April 4, 1977, appellant filed an appeal herein.

#### POINT I

THE COURT COMMITTED REVERSABLE ERROR IN FAILING TO FILE WRITTEN FINDINGS AND CONCLUSIONS.

The record before the Court fails to contain the State's motion to dismiss the petition on grounds 1) Petitioner has no legal standing...; 2) The Court has no jurisdiction over the internal affairs of the Division of Family Services and once custody and guardianship has been placed with them it is an administrative decision by that agency as to where and with whom the children will be placed; 3) The petition fails to state a cause of action...

The record only contains the arguments of the State that the Juvenile Court Act 55-10-77 (RP7-13) requires a petition alleging neglect by the State before the Juvenile Court has jurisdiction; countered by argument that the Court has juris-



diction from the initial neglect petition and this petition asks that the grandmother be given consideration as a resource the same as the Division of Family Services (RP8-1).

The State then argues a grandmother has no standing (RP8-24); countered by argument that grandparents have visitation rights, inheritance, etc., and logically should have custody rights (RP8-16, P9-1, P5-3 & 4, P5-22). The Court said on the Record Page 9, line 5, "I believe that this grandmother does not have standing as a party in this proceeding and the motion to dismiss the petition is granted."

A logical reading of that statement can only cause one to believe the Court feels that there are continuing custody proceedings and that the grandmother has no standing to intervene in them. However, without written Findings and Conclusions we are left to speculate whether the Court does not want to place the children in a family home where the father can see them if he gets out of prison; whether the Court terminated its proceedings when it ordered custody given to welfare; whether the Court was prejudiced against all of the children's kin; whether the Court finds no natural family rights or desires to break up the sanctity of homes and the natural affinity of blood relations.

Utah Rule 52 is clear that Findings of Fact and Conclusions must be filed, and if they are not the case will be remanded to make specific Findings of Fact and Conclusions; Baker v. Hatch 74.1, 251 P 673; Semper v. Brown

44.178, 278 P 529; West v. Standard Fuel Co. 81 U 300,  
17 P 20/292.

## POINT II

WHERE THE MOTHER IS DECEASED AND THE FATHER PERMANENTLY DEPRIVED OF CUSTODY OF TWO MINOR CHILDREN AGES 6 AND 7, HAS THE PATERNAL GRANDMOTHER THE RIGHT TO PETITION FOR THEIR CUSTODY?

The father was deprived of custody by the Juvenile Court and you sustained them on January 31, 1977, 560 P 2d 331.

The grandmother, Mrs. Beatrice Wulfenstein, is an active woman of approximately 55 years who has by her own labor raised four children. She is a regular and active church member and has accumulated sufficient funds to have toured England and paid for this appeal and has done all this without going on welfare or getting help from her husband since he left in 1972. She lives alone in a large trailer home which has three bedrooms and is neat and clean.

She petitioned Family Services for the children and has been refused. She petitioned the Juvenile Court and has been refused. Both refusals were without hearing or investigation and before any adoption proceedings. She can demonstrate three children raised to professional positions with only one in prison. She loves the grandchildren and desires to have them live with her and wants nothing from the State, but will accept inspections and supervision.

A grandmother's rights have not been fully explored by the State of Utah although the Legislature has made some

effort to do so. In UCA 1953, Section 55-10-30(4) is asserted the proposition that in custody matters, all things else being equal, near relatives should generally be given preference over non-relatives (since repealed). In re Cooper 410 P 2d 475, 17 Utah 296. Still in effect and giving the policy and purposes of the Legislature is UCA 55-10-63:

It is the purpose of this act to secure for each child coming before the Juvenile Court such care..., preferably in his own home, as will serve his welfare and the best interests of the state; to preserve and strengthen family ties whenever possible...

Further, in UCA 55-10-100 the Court is authorized, after finding a child within its jurisdiction, to place the child first on probation and second in the custody of a relative and thereafter in State institutions; with the parents' home preferred (§ 18).

The Courts in construing legislative intent and public policy are recognizing once again that grandparents have a positive role to fill in our society and are not to be relegated to the to the junk bin just because their child-bearing days are over. In Kansas, in the case In Interest of Johnson 504 P 2d 217, 210 Kan 828, it was held a grandparent is not a natural guardian and has no legal right to custody of or to adopt a grandchild found to be dependent and neglected; however, a grandparent has capacity to maintain an action with respect to disposition of the custody.

of a grandchild and a bond of love and affection if shown,  
is a factor to be considered.

In Wilson v. Family Services Division of Region 2,  
554 P2d 227 the Court held though relatives have no right  
such as to require process of service nor an adjudication  
of the severance of any asserted right, yet the matter of  
family relationship may be a factor which should be given  
due and serious consideration.

In 1967 Tenn. Supp. CRS 22-1-8(2,3) is asserted that  
the grandmother's right to participate in the dispositional  
stage included her right to be informed by the Court of her  
right to cross-examine, to put on evidence and to receive  
notice.

The laws of Utah relating to succession UCA 74-4-5  
recognize the right of grandparents right behind husband,  
wife and children. In guardianship matters the parents are  
preferred, then the trustee of a fund, then a relative. UCA  
75-13-17. The legal description of appellant is that of  
a Grand or super mother, Commonwealth v. Shipp, 86 P.L.J.49,  
and all of us revere the sacred memory of the grandmother  
who had time, love and interest in us and made each of us  
important and part of a larger family. Further, the reli-  
gious tenor of Utah society recognizes the eternal sanctity  
of the family chain sealed in the Temple for time and eternity.  
This proposed adoption would put at variance the Church and  
State and leave unresolved the tender sensibilities of this  
loving, grey haired lady.

Being not insensitive, the Utah Courts in 1976 recognized a grandmother who sought to restrain Family Services from placing her grandchild out for adoption until her hearing on fitness. This Court held that she had some dormant or inchoate right or interest in the custody and welfare of the grandchild and that it was an abuse of discretion to refuse to continue that restraining order in effect.

A 1975 Utah case, State in interest of Pitts 535 P2d 1244, vacated a Juvenile Court deprivation order on the basis of a lack of diligent effort to notify pointing out that the grandmothers were not contacted, correctly assuming that they, of all people, would care and know where their children and grandchildren were and further pointing out in Justice Henroid's innemitable way that social services are victims of biological myopia and by some method have become unenlightened or calloused as to the depths of family affection.

Finally, this Court has recognized the right of the Juvenile Court to place a child with an aunt and uncle. In re Olson 180 P2d 210, 111 Ut 365. Thus, by a logical extension the custody of a child may and should be placed with a grandmother. The fear that the father will have some influence on the guardian if it is a relative does not preclude such a placement particularly as in this case

where the father may never get out of prison and where the Court found he has no interest in the children, abandoned them and only saw them three times in six years.

### POINT THREE

HAS THE JUVENILE COURT JURISDICTION TO CONSIDER APPELLANT'S PETITION.

In 1975 the Juvenile Court entered its order of deprivation of custody of the father and entered an order that the children be placed with Family Services for adoption. That decision was appealed but there is no stay of adoption or restraining order indicated in the file. The Juvenile Court was affirmed by the Supreme Court January 31, 1977 and the grandmother filed her petition February 11, 1977. Through all of this the children have not been adopted but are reposed in a Foster home at great expense to the State and without good prospects for adoption nor any contact with their natural family, i.e. cousins, aunts and uncles, or grandmother.

The State has taken the position that when the Juvenile Court says to Family Services, "You have custody so place the children where you will" that the Court has divested itself of jurisdiction and cannot hear a petition for the grandmother to intervene in the dispositional Proceedings.

The Utah Law is contrary to that position and stands for the proposition that the Juvenile Court has continuing

jurisdiction to modify an order made or to terminate it during the minority of a child when a change of circumstances warrants it. UCA 1953 55-10-63; 55-10-108; const art 8§§1, 7. R v. Whitmer, 515 P2d 617, 30 Utah 2d 206. In divorce cases the change of custody is always an open question looking to material change of circumstances and the best interests of the child.

Section 30-3-5, UCA (1953), Disposition of property and children:

When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

From the language of the statute, and as stated numerous times by the decisions of this Court, these propositions are firmly established: (1) that such proceedings are equitable; and (2) that under the authority conferred "to make subsequent changes or new orders with respect to... the custody of the children and their support and maintenance...the court retains jurisdiction to deal with such matters in supplemental proceedings with the same authority and in the same manner as it could deal with them originally." Harmon v. Harmon, 491 P 2d 231, 26 Utah 2d 436.

In adoption cases the Courts have set aside consents by the mother, D.D. v. Social Services 431 P 2d 547; Green v.

Paul 212 LC 337, 31 So 2d 819(1947); Taylor v. Waddoups 121 Utah 279.241 P 2d 157(1952), at least prior to adoption and sometimes thereafter.

The Juvenile Court is also given continuing jurisdiction under the Juvenile Court Act of 1965.

55-10-108 - Juvenile Court Act of 1965:

...next friend of a child whose legal custody has been transferred by the court to an individual, agency or institution...may petition the court for restoration of custody or other modification or revocation...on the grounds that a change of circumstances has occurred which requires such modification or revocation in the best interests of the child or the public...

Thus they must investigate and may dismiss if there would not be a change of the decree even if everything alleged were true or they may conduct a hearing after notice.

Their continuing jurisdiction is further indicated by UCA 55-10-102 which contains authority for the Juvenile Court to transfer to another Court a child which is under protective supervision or who is otherwise under the continuing jurisdiction of the Court. Also by UCA 55-10-103:

No judgment order or decree of Juvenile Court shall operate after 21.

...An order vesting legal custody of a child in an individual shall be for an indeterminate period, but shall not remain in force longer than two years...

Provided it may be renewed.

#### CONCLUSION

This brief has addressed itself to two questions raised by the State: whether the Court has jurisdiction and whether



the grandmother has standing. The research of both questions was made necessary by the Court's failure to make Findings of Fact or Conclusions of Law.

Since two children's continuing welfare is the question, and the Juvenile Court had a valid petition filed and found the children and their father subject to its jurisdiction and was sustained by the Utah Supreme Court, and placed them with Family Services who put them in a Foster Home, then it follows that that same Juvenile Court may take the children back from Family Services and place them in the State Industrial School; short term confinement; ranch; on work programs; with a guardian; for medical treatment; limit visits; at the State Training School; or with the family pursuant to UCA 55-10-100.

The Division of Family Services has no authority beyond that conferred by the Court and must account to the Court for their stewardship of the children so it is ridiculous to now have the State say that when the children are placed in Foster care they cannot be moved.

Since the children are in the dispositional stage of their lives it comports with equity for this grandmother to have her day in court and demonstrate, if she can, her fitness and that the children would be better off with the family than in the hands of the State.

Respectfully submitted,

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