

1977

Jason Michael Wright v. State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

In the Matter of the	:	
Adoption of:	:	
JASON MICHAEL WRIGHT,	:	Case No. 15272
A Minor.	:	

APPELLANT'S BRIEF

An appeal from the Adoption of Jason Michael Wright
from the Third Judicial District Court

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In the Matter of the :
Adoption of: .

JASON MICHAEL WRIGHT, Case No. 15272

A Minor. :

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to said petition (R.p. 5-11). Because John Wayne Cox did not appear at the February 10, 1977, hearing the petition was granted as prayed by Judge Banks (R.p. 12-18). Subsequently, John W. Cox moved that the Decree of Adoption be set aside (R. p. 19). On March 25, 1977, pursuant to further hearing before Judge Banks the February 10, 1977, Decree of Adoption was set aside (R.p. 24-25). Judge Banks then ruled that John Wayne Cox had no parental rights to his son or that he had abandoned his son and therefore again granted the adoption as prayed (R.p. 36-42).

FACTS

Between November 1971 and August 1972, John Wayne Cox and the then Sherrie Lynn Wright maintained an amorous relationship (Transcript, page 4 line 25 to page 5 line 1; hereinafter references to the transcript will be cited "T." with "p." denoting the page or pages, and "l." the line or lines). Prior to August 1972 when Miss Wright learned she was pregnant they planned to marry but she changed her mind (T.p.5,l. 2-7). After learning that a criminal charge alleging bastardy and carnal knowledge had been filed against him, John Wayne Cox went to the State of Oregon (T.p. 5, l. 8-24). On October 13, 1972, Mr. Cox was arrested (T.p.6, l. 14-18) and jailed for one week (T.p. 7,l. 22-23, T. p. 38,l. 16-18) in Oregon on a fugitive complaint from the State of Utah on the bastardy and carnal knowledge charges filed by Miss Wright's mother (T.p. 74,l. 28-30 and T. p. 55,l. 27 thru p. 56,l.4). The criminal charges were dismissed

(Plaintiff's Exhibit 1P,T.p. 7, l. 25-28) on the condition Mr. Cox stay away from Miss Wright (T.p. 75, l. 1-30, T.p. 76, l. 1-13 and T. p. 73, l. 12-21). While in Oregon, Mr. Cox was afraid to contact Miss Wright because a Dectective informed him that the criminal actions against him would be reinstated if he contacted her (T.p. 20,l. 24 through T. p. 21, l. 8). On January 3, 1973, Mr. Cox enlisted in the United States Marine Corps (T.p. 21, l. 21-22). Mr. Cox wrote to Miss Wright's Bishop, Smoke Hills, requesting that Miss Wright and the unborn child be given a blessing (T.p. 21, l. 26-30 and T.p. 22, l. 1, 8-13). The parties' child was born March 11, 1973 (T.p. 13, l. 17-21; that Mr. Cox is the father see T.p. 17, l. 24-25, and T.p. 47, l. 9-15). On or about April 1, 1973, Mr. Cox returned to Utah and was anxious to learn of his newborn child (T.p. 22, l. 14-25). Since he was afraid of being arrested he did not contact Miss Wright directly (T.p. 22, l. 25-29) but got the desired information from the Bishop (T. p. 22, l. 30, T.p. 23, l. 1-10). On or about July 1, 1973, Mr. Cox was again in Utah and visited his four (4) month old son (T.p. 25, l. 14-30; T. p. 51, l. 3-7; and T.p. 76, l. 18-19). In mid July, 1973, Mr. Cox was sent to Japan (T.p. 27, l. 28-30 and T. p. 28, l. 1-6). While in Japan, Mr. Cox telephoned Miss Wright (T.p. 28, l. 14-15; T.p. 48, l. 4-6). While in Japan, Mr. Cox aranged for Miss Wright to receive an alotment for Jason (the parties' child) which she asked to be terminated

(Exhibit 2 p; and T. p. 28, l. 23-30; T.p. 29, l. 30 through p. 30, l. 6) In April, 1974, Mr. Cox returned to the United States and telephoned Miss Wright from California (T.p. 30, l. 8-18). In the California telephone conversation Miss Wright informed him that if he bothered her when he got back she would call the police (T.p. 51, l. 23-30).

Since April 1974 Mr. Cox has been keeping track of his son Jason through Miss Wright's brother and sister-in-law Mr. Mike and Mrs. Kathy Wright (T.p. 32, l. 9-20, T.p. 60, l. 10-14; T.p. 60, l. 20-21; T.p. 61, l. 7-10; T.p. 62, l. 3-9; T. p. 70, l. 18-25, T.p. 71, l. 1-5; T.p. 71, l. 16-18). Through these contacts Mr. Cox learned that Jason was in the Cottonwood Hospital. He went to see his son but aborted the errand after entering the hospital because he was afraid of being arrested if Miss Wright was there and she construed the visit bothersome (T.p. 31, l. 11 to p. 32, l. 2).

In August 26, 1975, Mr. Cox was seriously injured in a motorcycle collision and was ordered by his physician not to work until March 25, 1977. In May 1976 Mr. Cox sought legal assistance in obtaining visitation with his son (T.p. 32, l. 28 through p. 33, l. 6) but because of his poverty could not retain an attorney (T.p. 33, l. 15-22).

In June 7, 1976, Mr. Cox acknowledged his paternity of Jason on a Utah Division of Health form (Exhibit 3 P).

Besides the above, Mr. Cox claims: (1) by telephone he inquired of Miss Wright on several occasions about Jason

(T.p. 18, l. 6-12, T. p. 23, l. 11-25, T.p. 24, l. 2-16, T.p. 30, l. 21-30 through p. 31, l. 10). (2) by letter he inquired of Jason (T.p. 24, l. 5-16, p. 28, l. 7-22). (3) offered financial assistance (T.p. 24, l. 30 to p. 25, l. 12; p. 26, l. 1-7) and (4) he gave her at least \$200.00 (T.p. 32, l. 3-8). On the other hand Miss Wright does not remember any inquiry about Jason (T.p. 51, l. 8-22) though she admits Mr. Cox was very attentive to her while he was out of Utah (T.p. 42, l. 15-16). Furthermore, Miss Wright remembers she was afraid of Mr. Cox (T.p. 53, l. 1-30), wanted him to stay away from her and Jason (T.p. 55, l. 4-8) She intended to call the police if he came around (T.p. 55, l. 9-11, 24-26), and she never encouraged a relationship between Jason and his father (T.p. 57, l. 9-12).

ARGUMENT

POINT I

The District Court erred in its finding "that it was almost a statutory rape and it is the Courts (sic) opinion that he never acquired any rights by being the father, either by statute and or by common law...(R.p.36)."

A. The United States' Constitution protects the unwed father's rights to his child.

The lead case is Stanley v. Illinois, 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208 (1972). In Stanley upon the death of the natural mother an Illinois Court ordered the children into foster homes because the biological parents had not been married, so the natural father had no rights to the

children. The United States Supreme Court reversed and specifically held that the unwed father must be granted the same opportunity to custody of his children as a wed father because of the due process clause and equal protection clause of the Fourteenth Amendment to the United States Constitution. Stanley is still the law of the land.

B. The laws of the State of Utah protect the unwed father's rights to his child.

Until 1966 it was clear that under the provisions of 78-30-4, U.C.A. (1953), an illegitimate child could be adopted upon the consent of only the mother. The putative natural father had no standing in regard to such child Thomas v. Children's Aid Society of Ogden, 12 U.2d 235, 239; 364 P.2d 1029 (1961). §78-30-4, U.C.A. (1953) then provided:

A legitimate child cannot be adopted without consent of its parents, if living, nor an illegitimate child without consent of its mother, if living...

However, this provision was amended in 1966 to provide:

A child cannot be adopted without consent of each living parent, having rights in relation to said child...

Subsequent to said amendment, the Utah Supreme Court has recognized rights in a natural father. In State In Interest of M, 25 U.2d 101, 476 P.2d 1013, (1970), the Utah Supreme Court addressed for the first time the issue of whether the father of an illegitimate child, where he has publicly acknowledged it, has a legal right to care, custody, and

control of his child. The Utah Supreme Court stated:

...since the father of the illegitimate child has been given the statutory duty to support and educate the child, independent of the bastardy proceedings, he should have the corresponding right to the custody of the child in the proper case...Since the father's duty to support and educate the child is the same extent as if the child was born in lawful wedlock, it should follow that the father's right to custody should be almost as co-extensive. Id. at 1016.

The court followed Fierro v. Ljubicich, 5 Misc. 2d 202, 165 N.Y.S. 2d 290 (1957) saying:

the court stated that it was a fundamental principle that no court can, for any but the gravest reasons, transfer a child from its natural parent to any other person, since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court. This rule applies to illegitimate as well as legitimate children. Id. at 1017, emphasis added.

The Utah Supreme Court then explained that:

The common law doctrine of filius nullius has been superceded by legislative action. A statutory parent-child relationship has been established between the publicly acknowledged child and his putative father that places the child in parity with a legitimate child in rights of support, education, and inheritance. Id. at 1017.

The trend is to eliminate all distinction between legitimate and illegitimate children. The Utah Legislature continues to reflect the modern trend when in 1975, it again amended §78-30-4, Utah Code Annotated, by adding to it subsections 3(a)(b)(c) and (d). Those new sections clearly spell out the manner in which a father of an illegitimate child may claim his rights. There, the legislature requires

that the natural father file an acknowledgement of paternity with the Bureau of Vital Statistics. Once that acknowledgement has been filed, an adoption may not be granted without consent of the natural father, or a showing of his abandonment of the child. It is clear from those amendments that the Utah Legislature wants to protect the rights of natural fathers and lays out clear guidelines as to the manner in which those rights are to be safeguarded.

John Cox has followed the statutory scheme to acknowledge his son by filing the requisite notice with the Utah Bureau of Vital Statistics. His paternity is not contested and he has stated, under oath, in open court, that he is ready and willing to assume all duties and obligations that are contingent on his parenthood. Mr. Cox has not been convicted of any criminal act relating to the circumstances of his son's birth or his prior relationship with Mrs. Marsden. The court cannot properly view him as anyone but a natural father attempting to assert rights in his natural son. If the bastardy charges against Mr. Cox had been successfully pursued under Utah law Mr. Cox would have certain rights to his child. (77-60-12, U.C.A. as amended).

POINT II

The District Court erred in its finding, "that he abandoned the child and forfeited any rights that he may have had (R.p.36)."

The legal standard to be followed in this lawsuit is set out in §78-30-5, U.C.A.

78-30-5. Adoption of deserted child.--A child deserted by its parent or parents, and having no legal guardian, may be adopted as in this chapter provided, without the consent of the parent or parents having deserted said child, when the district court in which the proceedings are pending shall determine that such child has been deserted by its parent or parents.

Realizing that desertion is difficult to prove the Utah Legislature relaxed the standard by amending the above statute effective May 10, 1977.

The seminal case interpreting what desertion or abandonment means under the pre May 10, 1977, statute, which is the law in this lawsuit, is In re Adoption of Walton, 123 U. 380, 259 P.2d 881 (1953). There the court stated:

Courts have not hesitated to build a strong fortress around the parent child relation, and have stocked it with ammunition in the form of established rules that add to its inpregnability. To sever the relationship successfully, one must have abandoned the child, and such abandonment must be with a specific intent so to do - 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." Id. at 883.

Perhaps this Court has traveled as far as any in giving expression to the type of abandonment intended to exist in order to sever parental ties when we said in a custody case, that 'abandonment, in such cases, ordinarily means that the parent has placed the child on some doorstep or left it in some convenient place in the hope that someone will find it and take charge of it, or had abandoned it entirely to the chance or fate.' [citing Jensen v. Earley, 63 U. 604, 612, 228 P. 217, 220 (1924).] Id. at 883, 884

In Walton, the court reversed a Decree of Adoption holding that the evidence of separation and non-support did not sustain the finding of abandonment by the natural father.

Id. at 382-385 259 P.2d at 883-884. This position has been reaffirmed by the Utah Court when no desertion was found In re Adoption of Jameson, 20 Utah 2d 53, 432 P.2d 881 (1967) even though the natural mother was away from her child because of reoccurring imprisonment for criminal activity.

In the case at hand, there is nothing in the record that evidences a clear, specific, intentional severing of parental rights and duties by Mr. Cox when he was threatened with incarceration if he tried to contact his child. Clearly the very high burden of proof that Utah courts require for a finding of abandonment has not been met.

The Supreme Court of Utah most recently reaffirmed Walton, supra, on February 9, 1977, in the case of Robertson v. Hutchison 560 P.2d 1110 (1977). There the court cites In re Adoption of Walton, supra, and goes on to state:

Accordingly the court does not easily find such abandonment, but will do so only when the evidence is clear and convincing that the parent has either expressed an intention, or so conducted himself as to clearly indicate an intention, to relinquish parental rights and reject parental responsibilities to his child. Id. at 1112.

The facts of Robertson v. Hutchison show that the Robertsons had filed a Petition to adopt two children of Mr. Robertson by his former marriage to Judith Ann Hutchison. The former wife filed objections to said adoption. Mrs. Hutchison had practically no contact with her children from September of 1970 until the summer of 1975. The Utah Supreme Court took

into consideration the fact that Mrs. Hutchison was without financial means to visit or to attempt to obtain custody of her children until 1975. The Court pointed out that she was involved in a serious automobile accident in 1971 for which she was hospitalized and received extensive and expensive medical treatment. While not excusing Mrs. Hutchison's conduct, the Court found that she had not abandoned her children.

The child, Jason, was born March 11, 1973. Mr. Cox visited his child on or about April 1, 1973. Mr. Cox was required to be away from his child because of military service between January 3, 1973 and April, 1974. During his military service Mr. Cox offered financial assistance which was accepted for a period of time but later refused. Since April, 1974, Mr. Cox has followed his son's progress through relatives. He has acknowledged his son by filing a notice with the Bureau of Vital Statistics as required by statute before the Petition for Adoption was filed herein.

John Cox was involved in a very serious motorcycle accident in 1975. But for the physical and financial strain caused by that accident, Mr Cox would have taken affirmative actions to secure visitation rights with his son through the Courts. Mr. Cox has been precluded from establishing any sort of a relationship with his son because of the threat of criminal action against him by his child's mother and her parents.

There is no "conscious disregard of the obligations owed

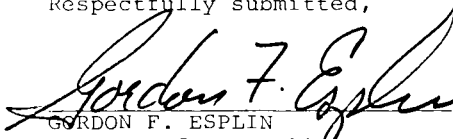
by a parent to a child State In Interest of Summers Children v. Wulffenstein, 560 P.2d 331 at 334 (1977)" in this lawsuit but a father who has been threatened with incarceration if he fulfilled his obligations.

CONCLUSION

The Third District Court erred in its order terminating John Cox's parental rights to his son Jason. Therefore, the Utah Supreme Court should reverse said order.

DATED this 5th day of October, 1977.

Respectfully submitted,


GORDON F. ESPLIN
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served the foregoing Brief by placing two true and correct copies of said Brief in the United States mail, postage prepaid, addressed to: Lambertus Jansen and Douglas P. DeJulio, Attorneys for Respondent, MFT Plaza, Suite s-1, 105 East 5900 South, Murray, Utah 84107, this 6th day of October, 1977.

