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Utah v. : 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 Terry G. a person under 18 years of age.

Case No. 13728

BRIEF OF RESPONDENT

Appeal from an order of the First District Juvenile Court, State of Utah, The Honorable Charles E. Bradford, Judge, Presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant H..... G..... appeals from an order given pursuant to Utah Code Annotated, Section 55-10-109 (1953) terminating her parental rights to her minor son, T..... G.....

DISPOSITION IN LOWER COURT

Upon hearings before the Honorable Charles E. Bradford, Judge of the First District Juvenile Court, it was determined that the parental rights of the appellant H..... G..... be terlminated with respect to T..... G....., and an order was issued to that end.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the Juvenile Court's

findings and sustaining of the Court order terminating parental rights.

STATEMENT OF FACTS

Respondent agrees with appellant's statement of facts with the following inclusions and exceptions.

1. The appellant, H..... G..... testified as to previous children who were removed involuntarily from her (T. 211-212).

2. Testimony was given as to a continuing condition of poor housekeeping which established some type of pattern of appellant's behavior (T. 17-70).

3. The termination order was not signed solely because of conditions which caused other children to be taken, as appellant's statement of facts purports, but Judge Bradford took notice that the other children must have been taken for some valid reason (T. 321).

4. No formal order was prepared outlining the conditions to be met in the six month test period, and appellant's attorney who was the only one present when the order was changed failed to inform both the counsel for the minor child and the counsel for the State that a change had been made (T. 334-340).

5. The Department of Social Services received only a copy of a letter sent to H..... G.....'s Bishop which set out as best as he could remember, the appellant's counsel's version of the requirements made by the

judge. No *formal* notice was ever given that the Department need do anything.

6. Respondent disputes the terminology used in appellant's statement of facts regarding "expressed hostility and prejudice towards the appellant and her attorney." (Appellant's Brief page 5.) That is clearly a personal judgment by counsel and no such findings are substantiated by the record (T. 386-390).

7. T..... G..... had been placed in homes and had been with families for baby sitting purposes, under the supervision of the Department of Social Services several times since H..... G..... had been in Logan. The night of April 27, 1973, was not the only time the appellant had had such relationships with the Department of Social Services of the State of Utah.

ARGUMENT

POINT I.

TAKING NOTICE THAT GOOD REASON MUST HAVE EXISTED FOR PREVIOUS CHILDREN TO HAVE BEEN TAKEN AWAY FROM APPELLANT DOES NOT CONSTITUTE PREJUDICIAL OR REVERSIBLE ERROR.

The appellant's brief makes it appear that the Juvenile Court relied in its decision almost exclusively on a statement by Judge Bradford that "the court had just

cause to remove the other children from the home . . ." (T. 321). The appellant testified that several children had been involuntarily removed. Under the laws of the State of Utah it is to be assumed that such children will have been taken away *only for good cause.* The court admitted and stated perfectly well, that it did not review any previous records and therefore was not basing its decision on the records it did not admit into evidence. This intent and fact is represented in Judge Bradford's own words:

> Well, you may recall, Mr. Hillyard, that there was a motion that the Court review the earlier testimony and you resisted that motion and I think you were justified in resisting the motion, however, the Court indicated that I would not review that testimony except on stipulation of counsel. Now, if you felt that it was appropriate that I have an opportunity to compare the situation now with the situation before, and counsel all agreed that that was appropriate for me to do, although under it wouldn't under ordinary circumstances be irregular, then I certainly would have been willing to take the time to listen to that. But, I have to, it may be that there has been more change since then, but I don't know all the reasons Judge Anderson might have had in mind when terminating as to these other children. There may have been more change than I assume. I just can't get away from picturing in my mind of this little boy having to be with babytenders all day. And really

> needing his mother and really needing the warm strong meaningful ties of his mother.

The appellant admits in her brief that the court gave no reasons for finding that allegations one, two, and three had been proven, but that in itself, custody did not need to be terminated on those grounds alone. (Appellant's brief p. 3.) Yet, the appellant contends in his argument that the judge relied *substantially* on past behavior and conditions in his decision, and that this is reversible error. Such substantial acknowledgment of the judge's reasons for so holding are not found in the record. As stated above, such prior reasons were not used. All inferences, except the small segment quoted by appellant, discuss and point to the *present* conditions of the child and its mother. It is not reversible error merely to take notice that some valid reason must have existed for the other children to be taken when the appellant, herself, testified to the fact that they were involuntarily taken from her. This makes light of reason and the decision making process, and infers that testimony given cannot be used to analyze the totality of the situation.

Fronk v. *State*, 7 Utah 2d 245, 322 P. 2d 397 (1958), is cited by appellant in an attempt to impose precedent for the present fact situation. The Juvenile Judge made formal findings of fact and conclusions of law incorporating findings of a divorce decree from a totally different court as to the lack of fitness of a father and discounted any evidence properly admitted to sustain the father's suitability. The court properly ruled that this was error,

for the facts of that case bear the decision out. The court concluded:

> The Juvenile Court did not have before it any evidence to establish appellant's unfitness to have the custody of his children.

In effect, the Supreme Court rejected the use by the Juvenile Court of evidence from another trial in another court without independent evidence to support the finding. The Juvenile Court could not properly conclude that the father was unfit.

In the case at bar, there was ample evidence before the court of the present status of the mother, making any reference to previous conditions superfluous as to paramount meaning. No reliance on other decisions was needed to ascertain the mother's unfitness, and in fact the only reference to such previous decisions is the following statements by Judge Bradford found on page 321 as quoted by the appellant as well:

> I realize that a person can change, I even realize that a person can change late in life, but I don't see evidence of the kind of changes most recently in Mrs. Gullett's life that would indicate a real recognition that she needs to change or a willingness to set aside her own personal feelings and desires to make the sacrifice, to pay the price to do the extremely difficult job of being both mother and father to this little boy. To see that he gets the entire upbringing that her other children didn't have.

Though Judge Bradford indicated some basic criteria to which he compares the present situation as argued by the appellant as error ,the facts indicate, with little reservation, the status of H..... G.....'s life and home at the time of the hearing. Knowing these present conditions, all that would need to be deduced is the following to arrive at the conclusion of the court:

> Setting aside any reason for the removal of the previous children, if conditions were worse at that time, her improvement has been unsubstantial to warrant the court allowing her to have custody. If conditions were the same as now, no change has been made and the present conditions are unacceptable. If conditions were better previously, then her retrogression to the presence status satisfied the court as to her unfitness.

Thus any measuring point need only be of a cursory nature since the present conditions are clear. The previous reference to "other children" and a willingness to change is solely compared to the present testimony and the judge's interpretation of how that relates to the fitness of the mother.

In *State* v. *Lance*, 23 Utah 2d 407, 464 P. 2d 395 (1970), cited by appellant, the issue involved a Social Services report which could not be introduced into evidence because of the type of hearsay information it contained, but where the judge nevertheless based his decision on such non-admitted evidence. There, the court

said that the evidence exclusive of the non-admitted report was insufficient to connect the mother's actions with any detrimental effect on the child. As to that non-admitted report, the court said that it was a:

> . . . denial of due process of law, since appellant had no opportunity to know, cross-examine, explain, or rebut this secret evidence.

Clearly, the present record is at exact opposites as to evidence substantiating a harmful connection between the mother and the child. *Lance* indicated that insufficient other evidence existed, whereas here, the record is full of such references.

Lance, further stated that:

> To support a decision to deprive the parent of its child the court must first be convinced of such fact by a *preponderance of the evidence.*

Sufficient evidence exists to clearly fulfill this test. The trial judge is the one who hears and discerns the sincerity, truthfulness, and weight of witnesses and accused persons. Simply because the appellant claims the Judge relied mainly on past decisions does not mean it is so, and in fact is disputed by the statements contained in the record.

Rule 61 of the Utah Rules of Civil Procedure is clear that if error does exist and if it is inconsequential to the outcome, that such error will not cause a ruling to be overturned. The rule says as follows:

> No error in either the admission or the exclusions of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Further, in *In re State in the Interest of K..... B.....*, 7 Utah 2d 398, 326 P. 2d 395 (1958), the court held:

> Due to the extreme concern of courts for the welfare of children, proceedings in their interest are sometimes stated to be equitable in the higest degree, because the most careful consideration will be given such matters. In equity proceedings we are charged with the responsibility of reviewing the evidence; *and it is the established rule* that we will not disturb the findings and determination made unless they are clearly against the weight of the evidence, or the court abused its discretion. (emphasis added)

This position was later upheld in *In re State in the Interest of C*, 9 Utah 2d 345, 344 P. 2d 981 (1959). The court, therefore upholds decisions based upon the weight of the evidence. No abuse of discretion has been shown or

proved by appellant. The court should therefore sustain the Juvenile Court.

Not only did prior situations not control the order so issued, but Judge Bradford held another hearing six months later to make sure he was correct and to give the appellant every opportunity to show improvement meritorious of receiving custody of T. G. The claimed error took place in June, 1973 and only after six months later, after another hearing was the judge convinced that the order must stand. Surely, the appellant cannot claim that the judge was "closed minded" in the January, 1974 hearing, when on his own initiative wanted that hearing to determine the correctness of his judgment. If anything, this mitigates the prior error complained of if error there was. The Judge corrected and reaffirmed the position of the court.

In light of Rule 61 of the Utah Rules of Civil Procedure, *In re State in the interest of K..... B.....*, and the facts cited above, respondent urges this court to sustain the Juvenile Court. This matter did not involve use of prejudicial, non-admitted evidence as the basis of decision nor was the evidence allowed insufficient to sustain the court's findings. It is therefore, submitted by respondent that no prejudicial error, if any, took place as suggested by appellant. If, however, this court holds that error did indeed take place, the respondent urges the court to recognize that in light of the record, the error was harmless as to the outcome of the decision.

POINT II.

THE EVIDENCE PRESENTED SUSTAINS THE DECISION OF THE JUVENILE COURT AND IS NOT INSUFFICIENT AS A MATTER OF LAW.

To be upheld as a matter of law, the evidence presented by the appellant must outweigh in every detail the evidence supporting the findings of the Juvenile Court. The record does not sustain that position. Sufficient testimony and fact was introduced at the hearing to fulfill the preponderance test cited under Point I.

John Gaddish, a former neighbor of several months testified that he had gone into appellant's home to adjust the thermostat to his apartment on various occasions and found the house in a complete mess (T. 17-20). Dog waste, dirty diapers, garbage and the like were on the floor, etc. (T. 18). He further testified that he saw numerous men come and stay over night fifteen to twenty times (T. 35). Also that he had never seen a babysitter but saw the mother go out frequently (T. 25-26).

Alan Nelson, a police officer who went to appellant's home on April 27, 1973, testified that there were beer cans and garbage all over the house, that there weren't any clean diapers to be found and that dog waste was on the floor (T. 48-49).

Delilah Everhart, a babysitter who had cared for T..... G....., testified that T..... "smelled

bad" most of the time when he was brought to her (T. 255), that T..... G.....'s bottle usually had sour milk in it, (T. 259) and that changes of clothes were seldom brought. Mrs. Everhart continued, that she had visited appellant's apartment once due to T..... G.....'s not being brought by. On this occasion the aparatment was in a real mess (T. 260).

Dorothy Craeger, a girlfriend of appellant testified that at times appellant's home was messy and other times not (T. 276). Further, she testified that appellant had threatened her not to testify (T. 277), that appellant frequently had men in her home (T. 281) and that appellant had men stay over night (T. 282).

As relating to this testimony, the appellant refuted all adverse testimony by saying it was not so (T. 189-192). More precisely, she testified that her house was not messy when she left the night of April 27th (T. 189) even though the baby sitter, Patty Craeger described it as a mess when she arrived and the police officer testified of the unpleasant odor and garbage from prolonged periods (T. 48).

At the hearing six months later, the appellant testified that she didn't know a Browny Hansen (T. 349), but after several witnesses had testified to seeing her with him, she admitted knowing him (T. 422). Appellant further gave confusing and contradictory testimony regarding a supposed date and wedding of a friend which took place in Nevada. Her date registered for a room in the name of "Mr. & Mrs. David Thatcher" (T. 426).

Appellant testified first that three rooms were registered for (T. 362). In later testimony she retracted that statement and said that only two rooms were used but that they only used them to cleanup and that she was never in the room alone with Mr. Thatcher (T. 428). She said they stayed over night (T. 362) yet in her later statement said that they came back early the next morning.

Appellant further testified that she had gone out of the county only once (T. 355) whereupon it was established that she had gone to Idaho and had seen Browny Hansen (T. 403) as well as to Nevada (T. 362). Mel Mower, a friend and acquaintance of Mr. Hansen testified that Browny was married at that time (T. 418).

On one occasion, when Mr. Gayle Morgan, the Social Worker in charge of T..... G.....'s case arrived late in taking T..... G..... to appellant, a gentleman was in the kitchen sitting quietly at a table. Appellant testified that he was the husband of a girlfriend who dropped in for five minutes to see how she was (T. 341, 348). Mr. Morgan testified that he was told the man was appellant's cousin or some relation (T. 374), and that he was there to fix the car (T. 386). Mr. Morgan further stated that the car parked outside had Idaho license plates (T. 385). Yet on another occasion when Mr. Morgan was late in picking T..... G..... up to return him to the foster family, appellant had liquor on her breath (T. 366-374).

From the record it is clear that extensive evidence exists bearing on appellant's actions, habits, fitness, and

change over the six month period. Respondent has not attempted to recount testimony supportive of appellant's fitness. Such is found in appellant's own brief. When examining and comparing the record, however, it cannot seriously be contended that the evidence is conclusivce "as a matter of law" that custody should remain in H..... G..... To be a "matter of law", the record must be so clear, so unambiguous, and so persuasive, that the court must have disregarded that great weight of evidence to rule otherwise. Respondent represents that neither this standard, nor any like standard has been met by appellant.

Respondent emphasizes in pointing out to the court, that many contradictions and inconsistencies are apparent in appellant's own testimony, which leads respondent to the conclusion that appellant exerted "self serving interests". The purpose being the return of custody of her child. The statements of other witnesses gave ample opportunity for the court to weigh this self-serving interest with all the testimony and fact. This the court did and ruled against appellant.

Therefore, respondent submits that the record sustains the judgment of the court and that the appellant fails to uphold her strict burden of proving as "a matter of law" that the record supports a different position than held by the Juvenile Court. As stated in *State* v. *Lance*, *supra*:

> To support a decision to deprive the par-

ent of its child the court must first be convinced of such fact by a preponderance of the evidence.

Such criteria have been fulfilled making it apparent that this court must sustain such findings.

POINT III.

THE DIVISION OF FAMILY SERVICES DID COMPLY WITH THE COURT'S ORDER AS FAR AS POSSIBLE UNDER THE CIRCUMSTANCES AND DUE TO PROBLEMS CREATED BY APPELLANT'S OWN COUNSEL APPELLANT SHOULD NOT BE ABLE TO CLAIM ERROR.

Appellant's brief under issue number 3 inaccurately reports that the final court order was prepared and the contents thereof forwarded to the Division of Family Services. The record contains the following dialogue on page 333:

> Attorney Sorenson: No, your Honor. And another problem with that, your Honor, we have no way of knowing what the Court's Order was, what those conditions were. There has never been an Order transcribed or issued or . . .
>
> * * *
>
> Attorney Hillyard: Your Honor, excuse me, may I just indicate that for the record that I did not prepare a formal Order, I anticipated

> that the County Attorney's Office would do it, and I did not, but I did write a letter on June 21st, 1973, to Bishop Welsh, who is Mrs. (G———'s) Bishop, I did send a copy of that to Mr. Gayle Morgan, Division of Family Services, which *generally* outlined the conditions as stated by the Court *from my notes,* from the Court Order. (emphasis added)

As to any information the attorneys for the State and the child had, a letter from the court was sent, but the following is all it said:

> First of all we tried to catch you, but were unable to do so. Second, a slight modification to the Order was my own idea, and was not induced by representations of any other persons. Third, the only change I made in the Order was I was continued disposition in the case for six months rather than have the Order go into effect immediately and I set some very stringent conditions that must be met before Mrs. (G———) will be allowed to have T——— in her home (T. 332).

The Appellant H..... G..... was not even informed of the requirements to be met, let alone any formal binding notice to the Department of Family Services. In a dialogue between the appellant and the court, the following is found on page 343:

> Q. And, Mr. Hillyard didn't ever tell you that I'd made any change in the Order?

A. I only understood that I could have visiting rights to him.

Q. Then you were never informed of any other type of arrangements by Mr. Hillyard or by Mr. Morgan or by anyone from Family Services other than Mr. Morgan?

A. No sir.

Mr. Morgan testified that he never received formal notice of any order, but that he had received a phone call relating to it (T. 364). His understanding was as Mrs. G.....'s in that H..... G..... was to be given her son *if* her behavior improved (T. 365).

Mr. Hillyard said his letter "generally outlined" the conditions, which outline was taken "from my notes". It becomes apparent that appellant is now basing her appeal on error or misunderstanding induced and perpetuated by her own counsel who also is representing appellant on appeal. This court has established that such error induced or carried on by appellant or appellant's attorney cannot be grounds for appeal. (See *Pettingill* v. *Perkings*, 2 Utah 2d 266, 272 P. 2d 184 (1954) and *Ludlow* v. *Colorado Animal By-Products Co.*, 104 Utah 221, 137 P. 2d 347 (1943).)

Clearly the error, if any, was in not getting the full and complete order of the court to the parties so they could act thereon. Though the court may have also been

at fault in not following through, appellant's attorney was the only attorney present when the original order was modified and appellant's attorney made some attempt, though obviously not sufficient, to convey the new terms to other involved parties. Attorney Hillyard further indicated before the court that he had never made the request to the Division of Family Services that H..... G..... be given the child; only that he had attempted to work through her Bishop, but that he and the Bishop never got together (T. 331).

With this confusion as to the requirements of the order, it was totally proper and fitting that Mr. Morgan move forward as best he could in working with the situation. As he testified, it was his belief and therefore his plan of action that any change in circumstances must come from appellant:

> A. Ah, our agency has worked with Mrs. (G———) for several years. We have had the relief society many people try to help her. After a while you get so you don't think there's much use trying. And this was my attitude with Mrs. G———).
>
> Q. Okay.
>
> A. We have tried, our agency has spent many hours with Mrs. (G———) over the last year. Before, after the removal of the other children or prior to them, to them and so this is part of the reasons why

> I didn't, I felt she had to change, do the changing herself.

Mrs. G..... knew that she would have to adjust or she would not get her child. The court did not find that that change had been made and that the misunderstanding over the court order was not crucial:

> The Court: It was my intent that particularly in view of the fact that I modified the original Order that all counsel have copies of it and be informed and if that wasn't done, then my intentions were not carried out. In any event, I think the only thing that we could do now is to go ahead and see what the situation is and see if there is a compelling reason to vacate the previous Order (T. 333).

It appears from the record that the appellant's attorney helped prolong this confusion as to the original order, that the Division of Family Services took the course of action it deemed proper under the circumstances, and that the Juvenile Court did not find the provision relied on by appellant as necessary in light of the evidence placed before it. This contention of appellant should therefore be rejected.

CONCLUSION

It was not prejudicial error for the Juvenile Court to take notice that conditions must have existed previously which would warrant the removal of other children. The evidence and testimony of the present situation not

only refute this contention but clearly establish that this court cannot hold the evidence as nonsupportive of the judgment as "as a matter of law". The Division of Family Services further did what it deemed proper under the circumstances to aid the appellant. It is therefore requested that this court sustain the judgment of the Juvenile Court.

Respectfully submitted,

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