

1953

In the Matter of the Adoption of Gerald Asel Walton and John Earl Walton : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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CASE NO. 7933

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE MATTER OF THE ADOPTION
ERALD ASEL WALTON AND JOHN
WALTON,

Minors.

EL F. WORTHEN and CAROLINE
WORTHEN, his wife,
Petitioners & Respondents,

vs.

D. B. WALTON,
Defendant & Appellant.

R E S P O N D E N T S

PETITION FOR REHEARING
AND

BRIEF IN SUPPORT THEREOF

Case No. 7933

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ARTHUR H. NIELSEN
510 Newhouse Building
Salt Lake City, Utah
Attorney for Petitioners
and Respondents

RESERVE

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In the Matter of the Adoption of :
Gerald Asel Walton and John Earl :
Walton, :
Minors. :

Darrell F. Worthen and Caroline :
Walton Worthen, his wife, : Case No. 7933
Petitioners and Respondents, :

v. :

Gerald B. Walton, :
Protestant and Appellant. :

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

Respondents respectfully petition the Court to grant a rehearing in the above cause, and upon such rehearing to affirm the judgment of the lower court and for grounds therefore allege:

1. This Court failed to consider the entire record in determining that the evidence was insufficient to support the findings, conclusions and judgment of the lower court.

2. In determining that the evidence was insufficient to support the findings, conclusions and judgments of the lower court, this Court exceeded its powers of review, failed to give effect to the more advantageous position of the trial judge in having the witnesses before him, and adopted a rule of construction applicable in criminal cases for purpose of determining desertion or abandonment by a parent of a child.

3. The Court erred in determining that the judgment of the trial court in the matter involving the custody of the minor children did not satisfy the requirements of Section 78-30-4, Utah Code Annotated 1953.

4. In determining that the provisions of Section 78-30-4, Utah Code Annotated 1953 were not satisfied by the decree in the previous custody action, this Court has adopted a principle of construction which will render ineffectual the provisions of such section of the statute.

Respectfully submitted,



**Arthur H. Nielsen
510 Newhouse Building
Salt Lake City, Utah
Attorney for Respondents**

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B R I E F

General Statement

In support of the foregoing Petition for Re-hearing, Respondents desire to refer the court to argument set out in their brief heretofore filed herein and also discuss those portions of the court's opinion filed herein of which complaint is specifically made. The grounds set out in the Petition for Rehearing will be discussed under two headings: (1) The Sufficiency of the Evidence, and (2) The Effect of the Judgment of the Trial Court in the Custody Hearing.

A R G U M E N T

I

THE SUFFICIENCY OF THE EVIDENCE

The Court's opinion completely fails to follow the general criterion for determining whether the evidence supports the judgment of the lower court. In Respondent's brief several cases were cited including the case of Stanley vs. Stanley, 97 Utah 520, 94 Pac. 2d 465, to the effect that in determining whether

the evidence is sufficient to support the findings of the trial court, the Supreme Court will not, on conflicting evidence, set aside the judgment but will consider the fact that the trial court has before it the various parties and witnesses, and had an opportunity to observe their demeanor on the witness stand, their frankness and candor or want of it, and therefore is in a much better position to determine where the weight of evidence actually should be resolved.

In the instant case, for example, the trial judge had the opportunity of listening to the testimony as it came from Respondent as well as from Appellant who was protesting the adoption. It must be kept in mind that at the time this petition for adoption was filed and notice thereof given to Appellant Respondent was in no position to find out whether Appellant would appear and protest the application. As a matter of fact, the record discloses that no formal protest was ever filed but that Appellant appeared for the first time on the day of the hearing and then attempted to defeat the adoption proceedings. If for no other

reason the Supreme Court should look with a great degree of skepticism at the "glib" testimony of Appellant as to his illness and inability to support his children or his reasons for failing so to do. It was only through severe cross examination, for example, that counsel was able to elicit the fact that although Appellant claimed to have been ill, he was in fact working and earning a substantial sum of money during the period of time which he said he was not able to work and during which time he had not helped to support his children.

Too, it is very difficult, if not impossible, to contradict or impeach the testimony of someone in the position of the Appellant who has been residing in various states during the past 5 years with respect to earning capacity, state of health, ability to pay, his state of mind with respect to his children. Appellant well knew that he was in a position where he could not very well be investigated and certainly counsel had no opportunity to do that prior to the hearing. It would have been a completely futile and needless gesture to

to have attempted to take depositions or make investigation anticipating a protest on the part of Appellant until it was known that Appellant actually resisted the adoption and at the time it became known that he was protesting the adoption there was neither time nor sufficient funds so to do. Certainly, however, the Court should consider the facts relative to Appellant's failure to show an interest in his children as being more persuasive than his belated protestations at the hearing.

Again, in considering the sufficiency of the evidence, the Court has stated in its opinion that the intent to abandon on the part of the Protestant "must be proved by him who asserts it, by proof that not only preponderates, but 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.'" Although we feel that this statement by the Court puts a greater burden on the party seeking to establish desertion and abandonment than the

legislature intended, nevertheless even should that rule be applied in this case it has been satisfied by the evidence in the record and supported by the finding of the trial court.

In the instant case the Court apparently overlooked the citation by Respondent of the case of State vs. Clark, 148 Minn. 389, 182 N.W. 452. In the Clark case the Defendant was actually charged with the crime of willfully deserting and abandoning his minor child. The facts established that he had paid a considerable greater sum for support of his child during the alleged period of abandonment than the Appellant paid in the instant case for the support of two children, but the court upheld the conviction of the crime on the grounds that there was sufficient evidence to support the charge of desertion with intent wholly to abandon the children stating:

"We think there is an abandonment when the desertion is accompanied by an intention to entirely forsake the child. There must be an intention to sever the parental relation and wholly throw off all obligations

that spring from it."

Under the ruling of the Supreme Court as set forth in its opinion filed herein, it will be impossible ever to establish desertion and abandonment unless the Supreme Court is willing to allow the trial court as the trier of the fact to make such determination unless contrary to clear weight of the evidence. We respectfully submit that the trial court's determination came within such rule of construction.

The fact that the adoption statute is one in derogation of the common law and therefore to be strictly construed--as pointed out in the Court's opinion--in no way affects the quantum of proof that is necessary to sustain the allegations of the petition. Adoption has always been, and still is, an equitable proceeding and therefore the weight of the evidence as determined by the trial court is to be upheld by the court on appeal unless such decision or determination by the lower court is wholly against the weight of the evidence or that

there is no competent evidence to support it.

Unfortunately the Court in its opinion has in no way attempted to answer or explain the authority cited by Respondents in their brief to the effect that evidence of the type here involved is sufficient to sustain a finding of desertion and abandonment. The case of *Shumway vs. Farley*, 68 Ariz. 159, 203 Pac 2d 907, is neither mentioned, discussed nor distinguished from the instant matter. Nor does the reasoning of the various courts in the cases cited by this Court in its opinion require a reversal of the judgment. All of the cases referred to in the Court's opinion deal with general statements of the law and in harmony with Respondent's position.

Indeed, we respectfully submit that the court has failed to follow the principles announced in the case of *In re Olson*, 111 Utah 365, 180 P. (2d) 210. In the Olson Case the court was concerned with the sufficiency of the evidence to sustain the judgment of the juvenile court depriving the father of the custody of his minor child on the grounds of its

being "neglected and dependant". (Not only did the juvenile court deprive the father of custody of his child but made an order requiring him to pay \$30.00 for its support.) Assuming that the judgment of the juvenile court came within the requirements of Section 78-30-4, U.C.A. 1953, (although from what is hereinafter discussed it would seem that the Court's opinion in the instant case would preclude it) then we have the anomalous situation of having one statute (Sec 78-30-4, U.C.A. 1953) authorizing the adoption of a child without the consent of the parent after such parent has been judicially deprived of its custody by a juvenile court as the trier of the fact, and having another statute (Sec. 78-30-5 U.C.A. 1953) requiring the district court to be convinced of the neglect or desertion of the child "beyond a reasonable doubt".

At the risk of over emphasis, we would like to pursue the analogy a little further. Let us take the fact situation disclosed in the Olson Case. There the juvenile court deprived the father of the

custody of his child on the grounds of "neglect". Suppose that later the aunt and uncle, to whom custody of the child was given, filed a petition for adoption, setting up that consent of the parent was not necessary because of the decree depriving such parent of the custody of the child on account of such neglect. (See, Sec. 78-30-4, U.C.A. 1953). Certainly, unless the instant case changes the law applicable to the statute, the adoption would be allowed, despite all protestation of the father.

On the other hand, what if a petition had been filed originally in the district to adopt the child on the grounds of desertion and abandonment under the provisions of Section 78-30-5, U.C.A. 1953 (bearing in mind that both sections refer to the status of "desertion". Would the Supreme Court then say that upon the same state of facts adoption would not be allowed because the evidence was insufficient to satisfy quantum of proof necessary in a criminal case, to-wit: "beyond a reasonable doubt"? Is a district court to be more closely supervised and

its findings of fact more carefully scrutinized than those of the juvenile court?

We would also like to point out that this Court in the Olson Case gave weight to the fact that the minor involved "is contented with her grandfather's home where she has lived for 8 years and she wants to stay there." What about the minor children here who testified that they were happy with their foster father and that they wanted to be adopted as his children?

We sincerely urge the Court to reconsider its decision which apparently requires a different quantum of proof for adoption under one provision of the statute than under the other and gives effect to judgments of the juvenile courts where those of the district courts are reversed.

II

THE EFFECT OF THE JUDGMENT OF THE TRIAL COURT IN THE CUSTODY HEARING

The Court's opinion apparently refuses to give effect to the previous determination of custody made

by the lower court on the ground that such "judgment is conditional". We wonder what the court means by the expression "conditional". The judgment expressly provides that plaintiff (Respondent herein) "be and she is hereby awarded the exclusive care, custody, and control of the minor children of the parties."

This determination is based on a finding of fact to the effect that the defendant (Appellant herein) had deserted and abandoned his children. There is nothing equivocal or conditional about such determination. The fact that the decree goes even further and provides that Appellant has no right even to see, visit with, or otherwise exercise any parental rights to said children unless and until said defendant shall have made application to the court for permission so to do and shall have made proper provision for the support and maintenance of said minor children," is merely indicative of the power of the court in its continuing jurisdiction of the matter to make such modification of its decree as the circumstances may justify and require. Certainly a provision

inserted in the judgment for the protection of Mrs. Worthen and giving her security in the absolute right of parental control and supervision of the children should not be used as a basis for saying that the judgment awarding her custody of the children was anything less than what it stated it was.

This court has long subscribed to the doctrine that in a divorce action or other action involving the separation of husband and wife, the court retains jurisdiction to make such modification of the decree "with respect to the disposal of the children or the distribution of property as shall be reasonable and proper." The statute, Section 30-3-5, U.C.A. 1953, so provides with respect to divorce and the same interpretation has been given to separate maintenance and other actions involving custody of children. Therefore, if any judgment for custody of a minor child is subject to review and modification where circumstances require, what difference does it make whether the decree reserves jurisdiction to modify the decree or even prescribes

some of the conditions that must be met precedent to such modification? See, *Jones v. Jones*, 184 Utah 275, 139 P. (2d) 222.

As far as we have been able to ascertain the only courts having power to determine custody of minor children (outside of the power of the Supreme Court in special proceedings) are the District Courts and the Juvenile Courts. In both instances, the law specifically provides that such court shall have continuing jurisdiction to make such further order or modification as may be justified under the circumstances. Section 55-10-5(3), relating to the continuing jurisdiction of the juvenile court, provides:

"When jurisdiction shall have been acquired by the court in the case of any child, such child shall continue for the purpose of such case under the jurisdiction of the court until he becomes twenty-one years of age, unless discharged prior thereto. . ."

Section 55-10-32, further provides, in part:

"No child . . . shall be taken from the custody of its parents or legal guardian without

the consent of such parents or legal guardian unless the court shall find from the evidence introduced in the case that such parent or legal guardian is incompetent, or has knowingly failed and neglected to provide for such child the proper maintenance, care, training and education contemplated and required by both law and morals. . ." (emphasis added.)

Additional sections relate to proceedings by parents to regain custody of minor children placed in the care of an institution or licensed children's aid society.

The only judgment relating to custody of a minor child not subject to change or alteration is one of adoption. Counsel therefore respectfully submits that if the provisions of Section 76-30-4, U.C.A. 1953, are to be given any significance or effect then they must relate to adjudications of custody which are subject to modification or change. Thus the decree of the lower court in the case of *Caroline Walton v. Geraldine Walton*, being Civil No. 84033, although by its terms reserving jurisdiction of the matter to make such future changes as to visitation as the circumstances might justify, was one within

the purview of Section 78-30-4, U.C.A. 1953, and eliminated the necessity of obtaining consent of Appellant to the adoption by Respondents.

CONCLUSION

By way of summarizing briefly the Petition for Rehearing, counsel respectfully urges the following:

1. No consideration was given to principle of law requiring affirmance of the judgment of the lower court unless clearly against the weight of the evidence.

2. A different rule of law with respect to the quantum of proof necessary to establish "desertion or neglect" was announced by the court in the case of *In re Jones*, supra, than is laid down in the instant case for determining "neglect"—yet in each instance the determination of the fact finder obviates the necessity of obtaining consent from the parent as a condition precedent to adoption.

4. All cases involving custody of minor children (except the actual judgment of adoption) are subject to the continuing jurisdiction of the Court and the right to make modification or amendment of

the decree with respect to custody as the circumstances may require.

5. Therefore, whether the judgment itself contains a statement with respect to the continuing nature of the court's jurisdiction is immaterial, and the judgment is one within the contemplation of Section 78-38-4, U.C.A. 1953.

6. At all events, the judgment in the previous case involving the custody of the minor children was absolute in nature with respect to such custody--specifically granting custody of the minor children to Mrs. Walton (now Werthen) upon the ground of desertion and abandonment of the children by the father.

Counsel most urgently requests the court to grant this Petition for Rehearing to the end that the matter might be fully argued and the foregoing matters more cogently presented.

Respectfully submitted,

ARTHUR H. NIELSEN
310 Newhouse Building
Salt Lake City, Utah
Attorney for Respondents