

2001

# Utah v. Utah : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH, in the interest :  
of EVERETT DON TOM, DARLA  
JANAE PIKYAVIT and JOEL REED : CASE NO. 14273  
PIKYAVIT, :  
Mr. and Mrs. Earl Baker, :  
Appellants. :

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BRIEF OF APPELLANTS  
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APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT, IN AND FOR JUAB COUNTY, STATE OF UTAH,  
THE HONORABLE H.L. HERMANSEN, JUDGE, PRESIDING.

-----  
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FILED

APR 20 1976

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE  
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IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH, in the interest :  
of EVERETT DON TOM, DARLA JANAE  
PIKYAVIT, and JOEL REED PIKYAVIT, : Case No. 14273

Mr. and Mrs. EARL BAKER, :  
Appellants. :

---

BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

Appellants, Mr. and Mrs. Earl Baker, appeal from a decision of the Third District Juvenile Court, in and for Juab County, State of Utah, depriving them of the temporary custody, care and control of the above named children and awarding the temporary custody, care and control of said children to Mr. Delton Tom.

DISPOSITION OF THE LOWER COURT

In February, 1975, Milton T. Harmon, Juab County Attorney, State of Utah, filed a petition for hearing

concerning the custody of the above entitled children, requesting that custody of said children be vested in Mr. and Mrs. Reuben Tom, their maternal grandparents. This matter came on for hearing on April 15, 1975, and on July 15, 1975, before the Honorable H.L. Hermansen, who issued an Order on August 22, 1975, depriving Appellants of the temporary care, custody and control of the minor children herein, and awarding the temporary care, custody, control and guardianship of the children in question to one Delton Tom.

#### RELIEF SOUGHT ON APPEAL

Appellants seek to have the Order of the lower court vacated and the permanent care, custody and control of the children in this matter awarded and restored to Appellants.

#### STATEMENT OF THE FACTS

The minor children herein were born to Eldon and Donna May Pikyavit, husband and wife, who are now deceased. Prior to their deaths, the Pikyavits lived on or near the Moapa Indian Reservation at Moapa, Nevada. (Transcript "A", pp. 1,7).

Sometime after the death of Mrs. Pikyavit, Appellants Earl Baker, half brother to Eldon Pikyavit, and his wife, Wallea Baker, were informed by relatives at the Moapa Reservation that the minor Pikyavit children were being passed from family to family and that they often appeared hungry and unkempt. (Transcript "A", p. 57). Appellants were also informed that relatives of Mrs. Pikyavit may have caused the death of her husband, which one of the children claimed to have witnessed, and that the young child feared that these relatives would kill him. (Record on Appeal, pp. 46-48). After making inquiries, Appellants learned that no person had been granted custody of the children by any court. (Transcript "A", p. 19), (Record on Appeal, pp. 2, 3).

On or about October 10, 1974, Appellants journeyed from their home at the Goshute Indian Reservation in Utah, to the Moapa Reservation where Appellants located two of the minor Pikyavit children, Darla Janae Pikyavit and Everett Don Tom. Appellants transported the children to Utah. (Transcript "A", p. 8). The following day, Appellants filed a Petition for custody of the children in the Second District Juvenile Court for Salt Lake County, State of Utah,

alleging that the children were homeless and without a legal guardian. That same day, the Honorable Judge L.W. Garff, Jr. issued an Order granting Appellants temporary custody of the children. (Record on Appeal, pp. 1-4). On October 10, 1974, after discovering that Appellants had transported the children to the State of Utah, Mrs. Reuben Tom, maternal grandmother of the children, obtained an ex parte order from the Judge of the tribal court at the Moapa Indian Reservation, awarding her the temporary custody of the two children living with Appellants and Joel Reed Pikyavit. (Transcript, pp. 8, 9).

On February 26, 1975, Milton T. Harmon, Attorney for Juab County, filed a Petition in the Third District Juvenile Court of Juab County, State of Utah, requesting that the Court vest custody of the children in Mr. and Mr. Reuben Tom, the maternal grandparents of the children. (Record on Appeal, pp. 41-43) (Mrs. Tom is now deceased).

Subsequently, Appellants moved to dismiss the Petition on the ground that the Petition failed to set forth any

facts which would confer jurisdiction on the Court pursuant to Section 55-10-64(18), U.C.A., as amended, to alter the Order giving Appellants custody of the children in favor of Mr. and Mrs. Tom. (Record on Appeal, pp. 44-45). The Court took Appellants' Motion under advisement and held a hearing for custody determination on April 15, 1975. (Transcript "A", pp. 1-71).

At the initial hearing, the Juab County Attorney, Milton T. Harmon, appeared in behalf of Mr. and Mrs. Tom. Over the objection of counsel for Appellant, the County Attorney called witnesses who testified in favor of custody being awarded to the Toms, cross-examined Appellants and their witnesses, and testified informally to the Court as to reasons why the Toms rather than Appellants should have custody of the minor children. (Transcript "A", pp. 4-71). Appellants objected to the conduct of the County Attorney on the ground that Section 55-10-64(18), U.C.A., as amended, requires the County Attorney to participate in custody determination as the representative of the State, and not as the advocate and counsel of any private party seeking custody

of the children in question. The Court refused to rule on Appellants' objections and permitted the County Attorney to continue the course of conduct described throughout the hearings in this matter. At the close of the initial hearing, the Court ordered studies to be made of the Baker home and the Tom home and continued the matter until July 15, 1975. (Record on Appeal, pp. 56, 79-83).

On April 23, 1975, the County Attorney for Juab County filed an Amended Petition for Custody, this Petition alleging that the minor children were "dependent" within the meaning of Section 55-10-64(18), U.C.A. (1953), as amended, because, according to Appellant Baker's testimony at the first hearing, the children were being supported by federal welfare payments. (Record on Appeal, pp. 83-86) (Transcript "A", p. 30). On April 29, 1975, Appellants filed a Memorandum in Support of their Motion to Dismiss, asserting that the fact that the children were being supported by federal welfare funds did not make them "dependent" within the meaning of Section 55-10-64(18), U.C.A. (1953). (Record on Appeal, p. 91).

On July 15, 1975, the Court held a second

hearing in this matter. At this hearing, Mr. Larry Echohawk of Salt Lake City, Utah, also represented the Tom family. (Transcript "B", p. 1).

At the close of the second hearing, counsel for Appellants renewed their Motion to Dismiss for failure of the Tom's to properly invoke the jurisdiction of the juvenile court, and also moved the Court to grant a mistrial on the ground of County Attorney Harmon's illegal and improper participation in the matter as an express advocate for one of the parties seeking custody of the children. (Transcript "A", pp. 55-58). The Court denied Appellants' Motions and subsequently issued an Order depriving Appellants of the care and custody of the minor children herein and awarding Delton and Sandra Tom temporary custody of said children, which Order Appellants seek to have vacated on appeal. (Record on Appeal, pp. 110, 112).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A MISTRIAL BASED UPON THE IMPROPER AND ILLEGAL PARTICIPATION OF THE COUNTY ATTORNEY IN THIS MATTER AS COUNSEL AND ADVOCATE FOR PRIVATE PARTIES SEEKING CUSTODY OF THE MINOR CHILDREN HEREIN.

Section 17-18-1(7), Utah Code Annotated, (1953), as amended, provides that the County Attorney is a "public" prosecutor, and in reference to proceedings in the juvenile court, must:

At the request of the judge of the juvenile court, appear in juvenile court to represent the interest of any child charged with delinquency before said court, and represent the State in any proceeding before it where any rights in the custody of the juvenile are asserted by any third person, and prosecute before said court any person charged with contributing to the delinquency, neglect or dependency of a juvenile.

Section 55-10-96, U.C.A. (1953), as amended, also provides that in hearings before the juvenile court, "the County

Attorney shall represent the State in any proceedings in a children's case".

Clearly, the above cited statutes contemplate that in so far as juvenile custody proceedings are concerned, the County Attorney is not authorized to act as counsel or advocate for any private party seeking custody of children within the jurisdiction of the Juvenile Court, but must act solely as a representative of the State and "in the best interest of the child".

In the instant case, Milton T. Harmon, Juab County Attorney, filed a Petition in the Third District Juvenile Court, requesting the Court to vest custody of the children herein with Mr. and Mrs. Reuben Tom, the maternal grandparents of the children. This, in spite of the fact that Mr. Harmon was fully aware that the children were living with Appellants at the time by virtue of an Order of the Second District Juvenile Court giving Appellants the temporary custody of said children, and prior to any hearing or home study which would indicate the relative qualifications of Appellants and those whom Mr. Harmon represented, to have custody of

said children. At the hearings in this matter, particularly the initial hearing, County Attorney Harmon pleaded the case for the Tom family, introduced witnesses to demonstrate that the Toms were better suited than the Appellants to have custody of the children in question, and cross-examined Appellants and Appellants' witnesses.

Appellants submit that it was highly improper for the Court to permit the County Attorney to act as private counsel for the Tom family in this custody proceeding. Pursuant to Section 55-10-96, U.C.A. (1953), as amended, the juvenile court is required to notify parties to proceedings, and the child (sic), if old enough, that they have a right to be represented by counsel at every stage of the proceedings, to have the counsel of their choice, and to have counsel appointed by the court if they are without sufficient funds to obtain counsel. The cited statute further empowers the Court to appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the child or other parties.

In view of the fact that this case from the outset involved a hotly contested "custody battle", Appellants

contend that the Court should have appointed counsel to represent the interest of the Tom family rather than to permit Mr. Harmon to lend the prestige of his office to private litigants and to derogate from his statutorily authorized role as the representative of the State.

In the recent case of Ira K. Hearn, Jr. v. Utah Liquor Control Commission, No. 14267, filed March 25, 1976, this Court castigated the Attorney General for departing from his statutorily defined duties pursuant to Section 32-1-32(6), U.C.A. (1953), as amended, where the Attorney General's office represented both a private person who appeared at a public hearing in opposition to his removal as Director of the Liquor Control Commission, and also represented the Commission at the hearing. Appellant submits that the County Attorney in the instant case similarly departed from his statutory duties and that it was error for the Court not to grant Appellants' Motion for Mistrial on the basis of the County Attorney's participation as counsel for private parties seeking custody of the children herein.

POINT II

NEITHER THE JUAB COUNTY ATTORNEY  
NOR THOSE MEMBERS OF THE TOM FAMILY  
REPRESENTED BY THE COUNTY ATTORNEY  
POSSESSED STANDING PURSUANT TO  
SECTION 55-10-108, U.C.A. (1953),  
AS AMENDED, TO PETITION THE COURT  
FOR A MODIFICATION OF THE DECREE  
AWARDING TEMPORARY CUSTODY OF THE  
MINOR CHILDREN HEREIN TO APPELLANTS.

Section 55-10-108, U.C.A (1953), as amended,  
provides that

A parent, guardian or next friend  
of a child whose legal custody has  
been transferred by the court to an  
individual, agency, or institution,  
except the state industrial school,  
may petition the Court for a restor-  
ation of custody or other modification  
or revocation of the decree....

The statute indicates that to have standing  
petition the Juvenile Court for a restoration of custody or  
other modification or revocation of a custody decree, the  
person petitioning the Court must be a parent, guardian or next  
friend of the child who has had custody of the child prior  
to the time that the Court issued an Order vesting temporary  
custody of the child in another individual. Presumably, this

"standing" requirement is imposed by the state legislature to protect the child and the person or persons to whom his or her custody has been entrusted, from disruption of the custodial relationship by some individual who has no prior custodial right in regard to the child.

Since neither the County Attorney nor Delton Tom and Sandra Tom, the parties ultimately awarded custody of the children herein, were parents, guardians or next friends of the children in the sense that they had some prior custodial right in regard to the children whose custody had been "transferred" by the Court, they had no standing to petition the Juvenile Court to deprive Appellants of the temporary custody of the minor children herein, and to award the custody of said children to the Tom family.

POINT III

THE PETITION FILED BY THE JUAB COUNTY ATTORNEY IN BEHALF OF THE TOM FAMILY FAILS TO SET FORTH THE FACTS NECESSARY TO INVOKE THE JURISDICTION OF THE COURT TO REVOKE THE ORDER GRANTING APPELLANTS TEMPORARY CUSTODY OF THE MINOR CHILDREN HEREIN.

Section 55-10-108, U.C.A. (1953), as amended, provides that a petition may be made to the Court for restoration of custody or other modification or revocation of the decree, on the ground that "a change of circumstances has occurred which requires such modification or revocation in the best interest of the child or the public". The Statute further provides that once a "change in circumstances" is alleged, the Court should make a preliminary investigation, and dismiss the petition if it finds the alleged change in circumstances, if proved, would not affect the decree. If the Court finds that a change in circumstances should be reviewed, the statute authorizes the Court to hold a hearing concerning the matter.

In the instant case, neither the original Petition nor the Amended Petition filed by the Juab County Attorney on behalf of the Tom family, set forth any "change in circumstances" alleged to warrant the Court in issuing an order depriving Appellants of the temporary custody of the minor children herein "in the best interests of the child".

In State in Interest of F , D ,  
and P v. Dade, 14 U.2d 46, 376 P.2d 948(1962), this  
Court held that

The drastic remedy of depriving parents of the custody of children in cases where there was delinquency, dependency or neglect was to be resorted to only in extreme cases and when it was manifest that the home itself could not or would not correct the evils which existed.

In the instant case, two of the minor Pikyavit children had lived with Appellants for nearly six months at the time original Petition seeking to deprive them of custody was filed by the Juab County Attorney on behalf of the Tom family. Appellants had come to regard the minor children

as their own and the children had become accustomed to a stable, healthful, and continuing relationship with Appellants. Neither the original Petition or the Amended Petition filed herein asserted that these children were in any way "delinquent", or "neglected" within the provisions of Section 55-10-77, U.C.A. (1953), as amended, by reason of Appellants' actions.

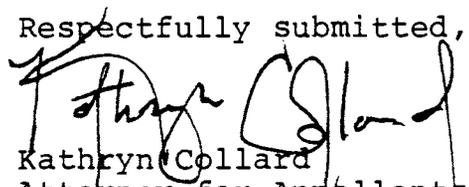
Although paragraph 5 of the Amended Petition contains an allegation the minor children in Appellants' custody were "dependent" for the reason that "said children are being supported by public welfare from the State of Utah", said allegation does not establish that said minor children are "dependent" within the meaning of the jurisdictional statute, even if the alleged fact is true. Certainly, no one would contend that any of the numerous parents in this country who are forced to maintain their children on welfare payments from the State or federal government might lawfully be deprived of their children for that reason alone, simply because a more economically stable family wanted the children. Yet this seems to be the only reason set forth in the Petitions filed herein, on the basis of which the Court was asked to deprive

Appellants of the custody of two of the minor children herein and to transfer the custody of said children to the Tom family. Thus, Appellants contend that the Court erred in assuming jurisdiction to hear the Petitions filed herein where they failed to set forth any "change in circumstance" pursuant to Section 55-10-108, U.C.A. (1953), as amended, that would give the Juvenile Court jurisdiction to revoke or modify the decree granting Appellants custody of the two minor children herein.

CONCLUSION

Based upon the foregoing points and authorities, Appellants contend that the Juvenile Court was without jurisdiction to issue the Order of August 22, 1975, depriving Appellants of the temporary care and custody of two of the minor children herein, and that the Court erred in not granting Appellants' Motion for a mistrial based upon the improper and illegal participation of the Juab County Attorney as counsel for private parties in this action, entitling Appellants to have the Order of the lower court vacated, and the custody of at least two of the minor children herein restored to Appellants.

Respectfully submitted,



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