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Utah v. W.D. : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

890130

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the
interest of,

:

Case No. 870578-CA

:

W.D.,

:

Priority No. 13

890130

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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THIS IS A PETITION FOR A WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, in the :
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BRIEF IN OPPOSITION TO PETITION
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JURISDICTION AND NATURE OF PROCEEDINGS

This is a petition for a Writ of Certiorari to the Utah Court of Appeals. This Court has jurisdiction under Utah Code Ann. §§ 78-2-2(3)(a), (5) (Supp. 1988) and R. Utah S. Ct. 42 (1989).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly affirmed the Juvenile Court's yield of jurisdiction to California where the parties had substantial connections to California?

2. Whether petitioners were denied due process when the Court of Appeals affirmed the Juvenile Court finding, at a hearing subsequent to W.D.'s transfer, that it would have yielded jurisdiction to California even if the hearing had occurred prior to W.D.'s transfer?

STATEMENT OF FACTS

The State concurs with the facts set forth by the Court of Appeals in its opinion in In Re W.D. v. Drake, 103 Utah Adv. Rep. 26 (Ct. App. 1989). Any facts pertinent to the determination of this petition and not referenced by the Court of

Appeals are detailed in the relevant portions of the argument below.

SUMMARY OF ARGUMENT

Petitioners were not a Utah family at the time the Juvenile Court yielded jurisdiction to California. Petitioners and W.D. had substantial connections with California and declination of jurisdiction by Utah was proper at the time. Thus, the Court of Appeals opinion, based upon the record evidence before it, properly affirmed the lower court's order. Even though W.D.'s transfer to California without a prior Utah hearing initially infringed petitioners' due process rights, subsequent hearings established that the Juvenile Court would have yielded jurisdiction to California if a hearing had been held at the time of the transfer and it was not an abuse of discretion to decline jurisdiction after W.D.'s transfer.

ARGUMENT

POINT I

THE UTAH COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DECLINED JURISDICTION AFTER FINDING THAT UNDER THE SIGNIFICANT CONNECTIONS PROVISION OF THE UCCJA THE STATE OF CALIFORNIA WAS THE MOST APPROPRIATE AND CONVENIENT FORUM IN WHICH TO LITIGATE THE CUSTODY OF W.D.

Initially, the State agrees with petitioners' assertion that the Court of Appeals was correct in determining that the most appropriate forum in which to litigate the custody of W.D. depended upon the best interests of the child, in accordance with Utah Code Ann. § 78-45c-7(3) (1987). However, petitioners' further interpretation of this section is incorrect. Petitioners

suggest that all five factors listed under this section must be reviewed before a determination of the best interests of the child is made; but a closer reading of the statute reveals that the extent of the review of each of the listed factors is left to the discretion of the court. The language of this section directs:

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) if another state is or recently was the child's home state;

(b) if another state has a closer connection with the child and his family or with one or more of the contestants;

(c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) if the parties have agreed on another forum which is no less appropriate; and

(e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in § 78-45c-1.

(Emphasis added.) Although petitioners characterize the Court of Appeals' analysis as " cursory and sloppy" (see petitioner's brief at 5), the opinion demonstrates careful consideration of the lower court's exercise of discretion in determining that the best interests of the child would be served by yielding jurisdiction to California based upon the significant connections that the state of California had with the baby and his family. Subsection (c) of Utah Code Ann. §78-45c-1 (1987) explains that one purpose of the UCCJA is to:

(c) assure that litigation concerning the custody of a child take place ordinarily in the state in which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

This need for significant evidence and close connection with the state that will ultimately exercise jurisdiction under the UCCJA, has been addressed by a variety of jurisdictions and cases. In the Matter of Custody of Ross, 630 P.2d 353, 357 (Oregon 1981), the Court refers to the UCCJA when it states that "the purpose which pervades the Act is to provide that the child custody determination will be made in the state where there is optimum access to evidence." This "optimum access to evidence" requirement is reflected in Utah Code Ann. §78-45c-3 (1987), which explains the "home state" test, as well as the "significant connections" test. Logically, then, the purpose of the various factors is to give some guidance to courts of possible avenues to use in determining which state will have "optimum access to evidence" and thus be in the best interests of the child; rather than simply a list of several prongs which must be met.

Although the court noted that Utah may qualify as the "home state" of W.D. since he was born here, it chose not to decide that issue as it determined that the best interests of the child would be served if it looked to the significant connections between the child, his family, and the state of California. The Court of Appeals explained:

the Utah UCCJA does not give preference to the "home state." The significant connection or substantial connection basis "comes into play either when the home state test cannot be met or as an alternative to that test." 9 UCCJA (U.L.A.) §3 comment, 144 (1988) (emphasis added). Even though a certain state may be the "home state," if "the child and his family have equal or stronger ties with another state" that other state also has jurisdiction. Id.; see also Smith v. Superior Court of San Mateo County, 68 Cal.App.3d 457, 137 Cal.Rptr. 348, 352 (1977). Therefore, the fact that Utah may technically have "home state" jurisdiction will not prevent California from also having jurisdiction under the "substantial connection" basis.

In re W.D. v. Drake, 103 Utah Adv. Rep. 26, 27 (1989). Thus, the court turned its attention to the substantial connections between the child, his family, and California in accordance with Utah Code Ann §78-45c-3(1)(b) (1987) which provides:

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

Petitioners' brief suggests that the only "connection" California had with the child and his family occurred as a result of California's petition and the subsequent transportation of the child to that state (see petitioner's brief at 6). However, the facts in this case, and the opinion of the Court of Appeals, reveal that the connections existing at the time of the jurisdictional dispute were more substantial. As the Court of Appeals noted, "the facts and circumstances considered are those in existence when the petition was filed. Rexford v. Rexford, 631

P.2d 475, 478 (Alaska 1980)." 103 Utah Adv. Rep. at 28, n.2.

When Christine Drake gave birth to W.D. on August 24, 1987, the physical presence of the child and his parent were the sole connections that these two had to the state of Utah. All of the child's personal relations, including father William Mick, the baby's maternal grandmother and two maternal aunts, and W.D.'s only sibling, Ingrid, lived in California (T. 231-33). Although petitioners repeatedly refer to themselves as a "Utah family," no relatives except W.D.'s mother, Christine Drake, lived in Utah at the time surrounding this dispute, and Drake did not have any sort of permanent or even temporary residence in Utah. Between her arrival in Utah on August 1, 1987 and the birth of W.D. on August 24, 1987, Drake had lived in two motels and one apartment. (T. 211-14). Four days following the birth, she was evicted from the apartment for nonpayment and subsequently spent several days at a women's shelter. (T. 216-19). In contrast, the court noted that:

Drake and Mick had lived in California for several years. W.D. was conceived and carried nearly to term there. At the time the petition in California was filed, Mick was still living in San Francisco and Drake had only left to find another state with more favorable custody laws. Under these circumstances Drake, Mick and W.D. all had substantial connections with California, thereby meeting the first requirement of the substantial connection test. Additionally, California authorities had information on the parents' mode of living, psychological makeup, marital relationship, parenting skills, and past interrelationship with W.D.'s older sister. This was enough to meet the required need of substantial evidence on W.D.'s care, protection, training, and relationships to satisfy the second requirement.

103 Utah Adv. Rep. at 27 (1989). Petitioners suggest that the court's determination was flawed in that the child had never been physically present in California until he was transported to the state of California after the petition had been filed. However, Utah Code Ann. §78-45c-3(3) (1987) specifically directs that "physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody." Petitioners' dependence on the physical presence of the child as a necessary element for the "significant connections" test demonstrates their misunderstanding of the court's distinction between the "home state" analysis and the variety of factors which combine to establish substantial or significant connections necessary for a court to claim appropriate forum jurisdiction, or for one state to decline jurisdiction in favor of another forum.¹

Petitioners also submit that the evidence possessed by the state of California concerning W.D.'s parents and family does not pertain to W.D.'s present or future care, as required by the statute. (See petitioner's brief at 7,8). However, the evidence available in California about the parents and their eldest child served as a proper indicator of present and future care of W.D.. The information regarding the parents' mode of living, psychological states, parenting skills, and relationship with W.D.'s sibling in California was the clearest, and perhaps only, indicator of "the child's present or future care, protection, training, and personal relationships." Utah Code Ann. §78-45c-

¹ While Judge Orme in his dissent notes that the family now resides in Utah, that fact was not before the Juvenile Court at the time it yielded jurisdiction to California.

3(1)(b)(ii) (1987). This is especially true in light of the fact that at the time of the petition, such indicators were painfully lacking in the state of Utah. In fact, one of the reasons that Pat Rothermick, of the State Protective Services, did not feel comfortable releasing W.D. to his mother is that besides not having a place of her own (she told Rothermick that she was staying with friends), she did not have a baby bed, baby clothes, baby food, or any evidence that she was prepared to assume the responsibilities of caring for a child. (T. 15). She even asked Rothermick to lend her \$5.00. (T. 18). Petitioners' statement that "because the mother and the father intended to continue to live in Utah with the child and because they intended to keep the child and care for him in Utah, all evidence concerning the child's present and future care, protection, training, and personal relationships was in Utah" (see Petition at 8) and other references to this family as a "Utah family" (see petitioner's brief at 2, 3, 4, 9, 10, 13, 14) misrepresent the facts at the time of the Juvenile Court hearings in question, and offer no insight as to the question of "significant connections." If the facts have changed since the initiation of this case, petitioners should approach the Juvenile Courts requesting to move jurisdiction of this case from California to Utah. Continuing this attack of the decision of the Court of Appeals, which must be reviewed upon the facts at the time of the petition is not the appropriate means to introduce new evidence into the case.²

² The second point in the Petition asserts that the Court of Appeals' analysis is "half-baked" in that it does not recognize the rights of W.D.'s parents as Utah citizens with the result

Petitioners' final complaint concerning the Court of Appeals' opinion and analysis of the UCCJA is that the definitional section of the federal Parental Kidnapping Prevention Act (PKPA) was misconstrued as not applying to child neglect and dependency proceedings. (See Petition at 8). The court cites to the case of State ex rel. Dep't. of Human Serv. v. Avinger, 104 N.M. 255, 720 P.2d 290, 292 (1986) for the proposition that the PKPA does not apply to child dependency and neglect proceedings. 103 Utah Adv. Rep. at 28, n.1 (1989). In that case, the New Mexico Supreme Court identifies that "the legislative history of the PKPA demonstrates that the primary purpose of the PKPA is to prevent 'child snatching' by parents across state lines." Id. at 292. Further, the New Mexico Supreme Court held that "the history of the PKPA stresses the importance of preventing 'child snatching' and does not contain any reference to child neglect and dependency proceedings. This legislative history demonstrates that there was an absence of Congressional intent to apply the PKPA to child neglect and dependency proceedings." Id. Based upon this case, the Court of Appeals came to the logical conclusion that the PKPA was "not important to the resolution of this case." 103 Utah Adv. Rep. at 28, n.1 (1989). Petitioners cite an earlier case decided by the

² Cont. that "Utah parents deprived of the custody of their child cannot litigate the matter in a Utah court." (See petitioner's brief at 9-11). As a result, petitioners argue, the fundamental rights to travel and to sustain the relationship between parents and child have been violated. This argument ignores that the facts which existed at the time of the hearings do not permit recognition of W.D. and his parents as a "Utah family."

Court of Appeals of Arizona, Matter of Pima County Juvenile Action, 147 Ariz. 527, 711 P.2d 1200, 1206 (1985), and urge that "a more thorough analysis of the PKPA and its language would likely lead to the opposite conclusion, as the Arizona Court of Appeals held" in that case. (See petitioner's brief at 9). Yet, petitioners fail to provide the "more thorough analysis" they recommend. The Arizona case held that "in absence of any finding that Arkansas no longer had jurisdiction or had declined to exercise jurisdiction, juvenile court's order in dependency proceedings which awarded legal custody of children to Department of Economic Security was a modification of prior Arkansas custody decree contrary to provisions of Parental Kidnapping Prevention Act [28 U.S.C.A. § 1738A] and Uniform Child Custody Jurisdiction Act [A.R.S. §§ 8-401 to 8-424]." 711 P.2d at 1201 (1985). The fact that Utah, in this case, did decline jurisdiction, distinguishes the case at hand and suggests the inapplicability of the PKPA to the present facts, as was determined by the court in the present matter. In addition to petitioners' lack of analysis on this issue, petitioners failed to raise this claim to the Court of Appeals and that failure should bar review of the matter as part of the petition for certiorari. In State v. Steggell, 660 P.2d 252 (Utah 1983) the Court held that it will not consider issues raised for the first time on appeal. This is consistent with a policy of allowing the trial court the opportunity to remedy errors itself. By analogy, for the same policy reasons, the issue of whether the PKPA should control the jurisdictional issue in this case should not be reviewed as part of a petition for certiorari.

POINT II

PETITIONERS WERE NOT DEPRIVED OF THEIR DUE PROCESS RIGHTS BY UTAH'S RELEASE OF ITS JURISDICTION IN FAVOR OF THE STATE OF CALIFORNIA AS THE APPROPRIATE AND CONVENIENT FORUM FOR THIS DISPUTE.

Petitioners submit that "the opinion of the Court of Appeals in this case essentially states that the Utah courts must decline jurisdiction in UCCJA cases regardless of the manner in which the other state handles the case and whether or not the other state's actions are taken in accordance with the UCCJA, due process and principles of fairness." (See petitioner's brief at 12). This reading of the court's decision is unwarranted. In a footnote, the Court of Appeals stated that:

Although we cannot condone the manner in which W.D. was taken to California before Judge Matheson declined jurisdiction, nor the misstatement of information contained in the California petition, we believe the subsequent hearings provided the parents adequate due process to protect their rights. See In re Summers v. Wulffenstein, 616 P.2d 608, 610 (Utah 1980).

103 Utah Adv. Rep. at 28, n.3 (1989). The Court of Appeals at no time rules that regardless of the procedures employed, Utah courts must decline jurisdiction in favor of competing state claims to jurisdiction. In fact, the Court of Appeal's summary of the facts provides evidence that petitioners were sufficiently represented at both the California hearings and Utah hearings, or else were given an opportunity to initiate further action. Id. at 26. For this reason, the court distinguishes the present action from situations in which the due process violations have not been remedied by subsequent proceedings and prevents such a broad application of this case as petitioner suggests.

To hold that petitioners rights to due process were violated at this juncture of the proceedings does no more than punish California for its initial procedural defaults. Although the State admits that initially, the inappropriate action of transferring the child before Utah declined jurisdiction was a violation of due process, the State agrees with the Court of Appeals that this violation was successfully remedied by subsequent court actions. The record shows that even had W.D. remained in Utah until after the Utah hearing, the Juvenile Court would still have determined that California had substantial connections, and would have declined jurisdiction. Thus, the end result would not have varied, even if strict procedural rules had been followed.

Petitioners' final argument is based upon the claim that "this is a contest between Utah parents and a California social services agency." (See petitioners' brief at 13). Because the facts do not support the claim that this family may be characterized as a "Utah family" at the time of the hearing, petitioners' argument is without support. Even in Judge Orme's concurring and dissenting opinion, when he suggests that the appropriate action would have been for the Utah Court to simply stay the proceeding rather than to dismiss it entirely, he states that "all things considered, California may have initially seemed the sensible forum to exercise jurisdiction." Id. at 28,29. His purpose in asserting that the Utah court should have stayed the proceeding as authorized by Utah Code Ann. §78-45c-7(5) (1987) is that the court then could have reasserted jurisdiction if

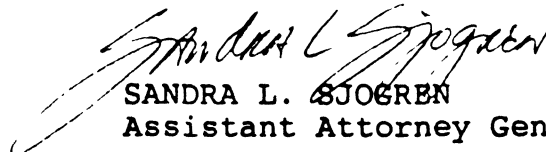
subsequent actions of the petitioners so warranted. However, in the event that petitioners terminate this appeal for review of the present decision, they may return to the trial court and move for a change of jurisdiction to the state of Utah if the present facts prove that such action is appropriate.

CONCLUSION

Petitioners assert that certiorari should be granted, however, they have failed to establish any grounds upon which this Court should exercise its discretion to review the decision of the Court of Appeals and the State requests that the Petition be denied.

RESPECTFULLY submitted this 10th day of May, 1989.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Bruce Plenk, and Martha Pierce, attorneys for petitioners, 124 South 400 East, Salt Lake City, Utah 84111, and Jeffrey Burkhardt, #8 East Broadway, Suite 629, Salt Lake City, Utah 84111, this 10th day of May, 1989.

