1982

State of Utah v. Jones : Brief of Respondent on Appeal

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, in the interest of	:	
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Rae Lynn Jones (12/28/71)	:	
Robert William Jones (07/27/74)	:	Case No. 18189
James Robert Jones, Jr. (02/07/76)	:	
	:	
Persons under 18 years of age.	:	

RESPONDENT'S BRIEF ON APPEAL

Appeal from an Order of the Second District Juvenile Court of Salt Lake County, the Honorable Judith F. Whitmer, Judge

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RESPONDENT'S BRIEF

NATURE OF THE CASE

The appellant appeals from the Judgment of the Second District Juvenile Court in and for Salt Lake County, State of Utah, the Honorable Judith F. Whitmer, presiding, granting the petition of respondent James Robert Jones to terminate the parental rights of appellant, Vina Rae Jones Patereau, in the above-named children. All parental rights of appellant in said children were terminated by order of the juvenile court on grounds of abandonment pursuant to the provisions of Utah Code Annotated section 78-3a-48(1)(b)(Supp. 1981). The court then ordered legal custody of the children vested in LDS Social Services for adoptive placement. The court found that appellant, the children's mother, had abandoned the children in that her conduct evidenced a conscious disregard for her parental obligations and that this disregard had led to the destruction of the parent-child relationship.

DISPOSITION IN LOWER COURT

The Second District Juvenile Court in and for Salt Lake County, the Honorable Judith F. Whitmer, presiding, after trial entered an order permanently terminating all parental rights of appellant, on the grounds that her conduct indicated that she had abandoned the children. The matter was before the juvenile court on the petition of the children's father, respondent James Robert Jones.

NATURE OF RELIEF SOUGHT

Respondent seeks an affirmation of the judgment of the juvenile court, while appellant seeks reversal of that judgment.

STATEMENT OF FACTS

Appellant, Vina Rae Jones Patereau, is the natural mother of the three children: Rae Lynn Jones, born December 28, 1971; Robert William Jones, born July 27, 1974; and James Robert Jones, Jr., born February 7, 1976 (hereinafter "children"). Respondent James Robert Jones is the father of the children. Appellant and respondent separated in April of 1977. (R.2). Appellant took the children with her when she separated from respondent, but was unable to arrange for their care. She returned the children to respondent after a few days. (R.17).

Appellant and respondent were divorced on April 30, 1978, at the instance of respondent, approximately one year after appellant had left respondent. The decree of divorce awarded respondent custody of the children and required appellant to pay $15 per month per child in support for the children. Respondent cared for the children from April, 1977, a few days after the parties' separation, until they were placed in foster care through LDS Social Services in December, 1980. (R.8-9).

Appellant did not assist in the financial support of the children, either during the separation or after the divorce. (R.5). During the entire period commencing with the separation and continuing after the divorce until the present (over four years time), appellant visited the children only four or five times. Her most recent visit with the children, which was for a weekend, took place in February, 1980. (R.9-10).

Since prior to the separation of the parties, respondent has continuously had the same place of employment and has always resided within a few miles of appellant. He and the children were accessible to appellant at his work place and through his relatives with whom she was acquainted. (R.4). No written communications were received by the children from appellant after the parties' separation. Appellant also failed to telephone the children. She even ignored them at Christmas and on their birthdays. She never sent them presents nor asked about their health or happiness either by telephone or by letter. (R.5).

In the fall of 1980, respondent requested assistance from LDS Social Services in selecting and monitoring a suitable foster

home for the children. He sought to place the children in foster care because he was having difficulty arranging baby sitters and felt that frequently changing sitters was harmful to them. They were formally placed in foster care in December of 1980. (R.6).

Prior to making the foster care arrangement, respondent sought to counsel with appellant, but she refused to discuss the matter with him except in the hostile company of her new husband and her mother-in-law. (R.7). Soon thereafter, appellant apparently learned of the children's placement in foster care, but she took no action with respect to their placement until August of 1981. (R.22, 52).

Respondent and his counsel were unable to locate appellant in order to serve upon her the petition for an order of permanent deprivation of parental rights. Thus, the summons was published in "The Salt Lake Tribune". Only then did respondent contact LDS Social Services, although no mention of that agency was made in the published summons. (R.54, 104).

After several continuances granted by the court in order to permit appellant to engage counsel and to allow her to assist him in the preparation of her defense, the petition of respondent to terminate the parental rights of appellant was finally tried in juvenile court on October 23, 1981. An order permanently depriving appellant of parental rights in the children was entered November 30, 1981. The children were adopted by their foster parents on December 21, 1981.

ARGUMENT

POINT NO. I

THIS COURT SHOULD UPHOLD THE JUVENILE COURT'S FINDING OF ABANDONMENT UNLESS THERE IS A CLEAR SHOWING OF ABUSE OF DISCRETION.

This court has repeatedly declared that a trial judge's finding of abandonment should be upheld unless there is a clear showing of an abuse of discretion. The general rule consistently applied by this court in appellate review is that the findings of the trial judge are to be given great weight because of his or her opportunity to judge the credibility of witnesses. This court has also held that it will presume that the trier of fact believed those aspects of the evidence which support the findings and judgment being appealed.

In Robertson v. Hutchinson, 560 P.2d 1110 (Utah 1977), this court said that because of the trial court's advantage in judging credibility, sensing personality, and hearing the facts first hand, its judgment was to be upheld, even if reasonable minds could differ.

> [W]hether there has been an abandonment generally depends upon the facts of each case; and where the evidence is such that reasonable minds might differ thereon, it is a question of fact which it is the prerogative of the fact-trier to determine.

Id. at 112.

This same conservative standard of review was affirmed one year later in State in the Interest of S J , H J , and S J , 576 P.2d 1280 (Utah 1978), when this court declared that it was well established that the factual determinations of juvenile courts were "not to be overturned absent a clear showing of an abuse of discretion." Id. at 1282.

In the most recent case of Adoption of McKinstray v. McKinstry, 628 P.2d 1286 (Utah 1981), this court declared that even though a strict evidentiary standard was required in abandonment cases, the reasonable conclusions of trial courts should not be interfered with.

> Regardless of the strict evidentiary standard required in an abandonment case, the issues in most instances, including the present case, are factual, and as stated in Hall v. Anderson, supra, "if the evidence is such that reasonable minds may differ as to the conclusion to be drawn therefrom, it is the prerogative of the trier of facts to make the determination; and this court should not interfere with that prerogative by disagreeing with the determination thus made."

Id. at 1288.

Judge Whitmer's judgment in the case at hand was based upon evidence and testimony regarding the appellant's parental conduct over a four and one-half year period of time. The judge's finding that the appellant had abandoned her children is clearly supported by the evidence and, thus, was within the prerogative of the trier of fact. The judgment was therefore not an abuse of discretion and should be upheld.

POINT NO. II

THE APPELLANT'S FAILURE TO SUPPORT OR COMMUNICATE WITH HER CHILDREN MORE THAN FIVE TIMES IN OVER FOUR YEARS SATISFIES THIS COURT'S DEFINITION OF ABANDONMENT.

In determining what conduct justifies a finding of abandonment, the applicable standard is an objective, as opposed to a subjective, one. This court has warned that it must be careful to not focus too much attention on parent's wishful thoughts and too little on their conduct. State in the Interest of the Summers Children v. Wulffenstein, 560 P.2d 331 (Utah 1977).

> Whether or not there has been an abandonment within the meaning of the statute is to be determined objectively, taking into account not only the verbal expressions of the natural parents but their conduct as parents as well. The subjective standard often focuses too much attention on the parents' wishful thoughts and hopes for the child and too little on the more important element of how well the parents have discharged their parental responsibility.

Id. at 334.

This caution is followed by an objective definition of abandonment which consists of conduct on the part of the parent which implies a "conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship." Id.

A. The Finding of Abandonment Has Been Upheld in Cases Similar to the Present One.

Adhering to the above-mentioned standard, this court has upheld determinations of abandonment in cases similar to the

present one. A juvenile court's finding of abandonment was affirmed in Summers Children, supra, where a father, who did not have custody, had visited his children only twice in three years, had indicated only a minimal interest in the welfare of his children, and had demonstrated his inability to acquire a suitable home for them.

In McKinstray, supra, this court upheld the district court's finding that a father's failure to pay support for his children for several years coupled with his failure to make more than token efforts to communicate with them, all without good cause or justification, constituted abandonment.

Rarely seeing her children for a period of over two years was the principal fact apparently justifying termination of parental rights on the grounds of abandonment in State in the Interest of A, 514 P.2d 797 (Utah 1973).

A district court finding of abandonment under Utah Code Annotated section 78-30-5 (1953) was affirmed in Adoption of Guzman, 586 P.2d 418 (Utah 1978). The lower court had based its decision on the mother's failure, over a four year period, to exercise her rights of visitation and on her failure to communicate with her children and her former husband.

In addition to the guidelines contained in the decisions of this court, the Utah Legislature has established statutory presumptions of abandonment. Although the appellant did not have legal custody of the children and termination was accomplished by the juvenile court rather than as part of the adoption proceedings, so that neither of these presumptions is strictly applicable, they nevertheless are still instructive.

The Legislature has determined that parents having legal custody who surrender physical custody of the child for a period of six months and do not, during that period of time, manifest a firm intention to resume care or make arrangements for the care of the child, shall be presumed to have abandoned the child. Utah Code Ann. § 78-3a-48(1)(b)(Supp. 1981). Abandonment of a child shall also be found in adoption proceedings before the district court when a parent without good cause has not provided support and has made no effort or only token effort to maintain a parental relationship with the child. A rebuttable presumption that no effort has been made exists if the parent has failed to support and communicate with the child for a period of one year or longer. Utah Code Ann. § 78-30-5(1953).

In light of the cases and instructive statutory presumptions cited, appellant could easily have been found by clear and convincing evidence to have abandoned her children. She visited them no more than four or five times over a period of almost four and one half years. She did not support them financially although she was apparently able-bodied and employable. She gave them no gifts on birthdays or Christmas, nor did she write or call them on any occasion. On those few occasions when she inquired about visiting the children, she did not ask about their health or happiness. Appellant's actions show a consistent pattern of ignoring the children and their welfare for almost four and one-half years.

B. Cases Where Abandonment Has Not Been Found Are Factually Different From This Case.

Specific cases cited in appellant's brief may be distinguished from the instant case.

The Robertson case, supra, is cited by appellant as one in which termination of parental rights was not ordered despite a mother's lack of contact with her children for nearly five years. In that case, however, the mother, who lived out-of-state, was involved in a serious automobile accident in which she sustained multiple injuries including several broken bones. As a result she was hospitalized and received extensive and expensive medical treatment. This court apparently considered these extenuating circumstances as justification for such lack of contact and affirmed the district court's ruling.

In Hall v. Anderson, 562 P.2d 1250 (Utah 1977), a father's lack of visitation with, and support of, his daughter were excused because he had undergone a serious back operation and had thus been unemployed during all but five or six months of the four years involved and because he had written his daughter numerous times while he was incapacitated.

This court affirmed the district court's ruling with this language:

> On the basis of what has been said herein and applying the rules of review as set forth in the Robertson case referred to above, it is our opinion that the evidence is not so clear and persuasive that the defendant had deserted and abandoned his child that we would upset the refusal of the trial court to so find.

Id. at 1251.

Appellant's reliance on the Summers case, supra, is misplaced. The Utah Supreme Court merely affirmed the decision of the juvenile court, which rejected a subjective standard in abandonment cases.

In State in the Interest of E. and B. v. J. T., 578 P.2d 831 (Utah 1978), cited by appellant, this court reversed the juvenile court decision terminating a mother's parental rights. The main ground for reversal according to the opinion was that the Division of Family Services had frustrated the mother's efforts to regain custody of her children. No such frustration is evidenced in the instant case.

Appellant cites State in the Interest of A, supra, apparently for the proposition that termination is justified by a showing that the effort put forth by a mother to visit her children was "practically nil," unlike the efforts of appellant. It should be noted, however, that the cited case involved a mother who had legal custody but was deprived of physical custody by Division of Family Services because she neglected her children. The abandonment occurred when "she failed to manifest a firm intention to resume custody of her children for over two years" after they had been taken by the state on grounds of neglect.

Similarly, appellant notes that this court upheld an order of the juvenile court that terminated a father's parental rights in McKinstray, supra, but contrasts that father's failure to pay child support for six years despite his financial ability to do

so, his moving from the city, and his failure to attempt to locate his children with the facts in the instant case. Appellant fails to mention several mitigating factors in the cited case, e.g., that the children and the custodial parent had moved at least twice, one of the moves being out of state. Also, that the father in the cited case was on the road much of the time as a truck driver, making it difficult for him to locate his children. Perhaps in this case, as in each of the above mentioned cases where on appeal the lower court's decision was affirmed, this court simply refused to substitute its own judgment or its interpretation of the facts for that of the trial court.

POINT NO. III

A GUARDIAN AD LITEM NEED NOT HAVE BEEN APPOINTED FOR AND ON BEHALF OF THE CHILDREN IN ADVANCE OF TERMINATION OF APPELLANT'S PARENTAL RIGHTS.

This point was not raised by appellant in the juvenile court, and appellant is barred from raising it for the first time on appeal.

Respondent agrees with appellant that the rights of the children were seriously affected by the termination of appellant's parental rights. Respondent asserts, however, that such affect on the children was positive.

Under Utah law a guardian ad litem must be appointed only in cases where the infant is a party. Otherwise such an appointment is discretionary with the trial court. U.R.C.P. 17(b).

The children were not parties to the action. If they were not consulted as to their wishes in this case, as appellant urges they should have been, it may well have been because of their tender age.

In any event, it is difficult in this case to envision what benefits could have been derived by appointment of a guardian, let alone why such appointment would have been necessary. This was an action brought by one spouse to terminate the parental rights of the other spouse in their children. These children had been in a foster home for nearly a year under the supervision of both a state licensed child-placing agency and of the juvenile court.

The failure to appoint a guardian ad litem for the children was not an abuse of discretion under the circumstances of this case.

CONCLUSION

Judge Whitmer's finding that the appellant abandoned her children was based upon testimony and evidence that the appellant had not supported her children nor communicated with them more than five times in almost four and one half years. The evidence of abandonment was both clear and convincing. The judgment of the juvenile court should therefore be affirmed.

Dated this 19th day of May, 1982.

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CERTIFICATE OF MAILING

On this 19th day of May, 1982, I certify that I mailed, postage prepaid, a copy of the foregoing Respondent's Brief on Appeal to:

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