

1957

Vernal K. Fronk v. State of Utah : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Patterson & Kunz; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *Fronk v. State*, No. 8734 (Utah Supreme Court, 1957).
https://digitalcommons.law.byu.edu/uofu_sc1/2927

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

MAY 6 1952

LAW LIBRARY

Case No. 8734

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

OCT 3 - 1957

Clerk, Supreme Court, Utah

VERNAL K. FRONK,

Appellant,

— vs. —

STATE OF UTAH in the interest
of VERNAL FLOYD FRONK,
RICKY DEAN FRONK, and
CINDY LEE FRONK,

Respondents.

Appellant's Brief

PATTERSON & KUNZ,
Attorneys for Appellant

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	5
ARGUMENT	5
POINT I. THE JUVENILE COURT DID NOT HAVE BEFORE IT THE PREPONDER- ANCE OF THE EVIDENCE NECESSARY TO ESTABLISH THAT APPELLANT WAS NOT A FIT AND PROPER PERSON TO BE AWARDED THE CUSTODY OF HIS MINOR CHILDREN, OR THAT HE SHOULD BE PERMANENTLY DEPRIVED OF HIS CHILDREN, AND THAT THE CHIDREN SHOULD BE PLACED FOR ADOPTION	5
POINT II. ASSUMING THAT SUFFICIENT EVIDENCE WAS BEFORE THE COURT TO JUSTIFY CONTINUING THE CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE, IT WAS A GROSS ABUSE OF DISCRETION ON THE PART OF THE COURT TO PERMANENTLY DE- PRIVE APPELLANT OF HIS MINOR CHILDREN AND ORDER THEM TO BE PLACED FOR ADOPTION	11
CONCLUSION	16

INDEX OF AUTHORITIES

STATUTES CITED

55-10-5(4) Utah Code Annotated, 1953	1
55-10-32, Utah Code Annotated, 1953	11

AUTHORITIES CITED

31 Am. Jur., Sec. 21, p. 794	6
39 Am. Jur., Sec. 25, p. 615	16
67 C.J.S., Sec. 12, p. 659	10

CASES

Alley v. Alley, 67 Utah 316, 247 P. 301, 304	6
Bradley, In re, 109 Utah 538, 167 P. 2d 978, 984, 985	7, 11, 12, 16
Case's Guardianship, In re, 135 P. 2d 681, 683, 57 Calif. Ap. 2d 844	9, 10
Cooke vs. Cooke, 67 Utah 371, 248 P. 83, 108	7
Day, Ex parte, 189 Wash. 368, 65 P. 2d 1049, 1056	13, 14, 16
Hummel v. Parrish, 43 Utah 373, 134 P. 898, 901	7
Minnicar's Estate, in re, 297 P. 2d 105, 108, 141 Calif. Ap. 2d 703	10
Moss v. Vest, 74 Ida. 328, 262 P. 2d 116, 122	14, 15, 16
State v. Sorensen,, 102 Utah 474, 132 P. 2d 132, 134, 134	6, 7, 12, 13, 16

IN THE SUPREME COURT
of the
STATE OF UTAH

VERNAL K. FRONK,

Appellant,

— vs. —

STATE OF UTAH in the interest
of VERNAL FLOYD FRONK,
RICKY DEAN FRONK, and
CINDY LEE FRONK,

Respondents.

No. 8734

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an Appeal from an Order of the Juvenile Court of the First District made June 10, 1957, depriving the parents of their three minor children. The matter was referred to the Juvenile Court after the conclusion of a divorce action between Betty Mae Fronk and Vernal K. Fronk in the District Court of Weber County. The action was referred to the Juvenile Court pursuant to Sec. 55-10-5(4), Utah Code Annotated 1953, for determination or recommendation concerning the custody of the children and to determine whether or not the parents should be permanently restrained from visiting the chil-

dren and the children released for adoption. The Juvenile Court on its own motion took judicial notice of the divorce case of Betty Mae Fronk, Plaintiff, vs. Vernal K. Fronk, Defendant, Civil No. 31760, in the District Court of Weber County, although the Juvenile Court had no reporter's transcript of the proceeding in the divorce case. Such judicial notice was confined to the pleadings, findings and decree, (R.2). The hearing from which this Appeal is taken was held before the Juvenile Court on June 10, 1957. The Appellant is the father of the three minor children concerned. At the time of the hearing, the three minor children were in a foster home under the supervision of the Weber County Department of Public Welfare.

Mr. Kent Leveridge, the Child Welfare Representative of the Weber County Department of Public Welfare, testified before the Court and stated that his Department found that they had not yet had sufficient time to properly evaluate the ability of the parents to care for the children, (R. 4, 5, 7, 11). Mr. Leveridge offered no testimony concerning the Appellant or his fitness to be awarded the custody of his children.

The only testimony in opposition to Appellant's fitness to be awarded the custody of his children came from his former wife and his mother-in-law. His ex-wife stated that Appellant went out with girls or worked on cars, (R. 16). She also stated that during the period prior to the divorce trial he followed her to a beer tavern with a camera, (R. 14). The only comment concerning

Appellant made by Mrs. Gorder, his mother-in-law, was that he was away from the children for about two years while he was in the Army, (R. 24). Appellant and his witnesses were not in the Court during the time that testimony had been given by Betty Fronk and her witnesses. They had been waiting in the Juvenile Court on the 8th floor of the Municipal Building and had not been advised that the hearing was being conducted in Judge Wahlquist's Courtroom on the 5th floor, (R. 28, 30, 31).

Following testimony relative to the fitness of the mother, the Court heard Appellant and the witnesses on his behalf. Appellant testified he was employed by the Ogden Iron Works in Ogden as an electrician and that he earned \$1.95 per hour, (R. 31). Appellant also said that he had made arrangements with his aunt, who had a three-bedroom home in Ogden, to care for the children in her home. Appellant stated that he could also reside in her home so that he could be with the children when he was not working, (R. 32). He indicated that he would make an effort to provide a good home for the children and would be willing to work under the direct supervision of the Weber County Department of Public Welfare, (R.34). This was confirmed by Mrs. Pearl Jenna, Appellant's aunt, who testified that she had a comfortable three-bedroom home with adequate room to provide a good home for the children, that she was not employed and was able to devote her full time to their care. She also stated that there was room for Appellant to reside in her home, (R. 46).

Other witnesses testifying on behalf of the Appellant were G. Albert Wimmer, Bishop of the L.D.S. Ward in which Appellant and his family were members. Bishop Wimmer testified regarding the favorable conditions in the Fronk home and Appellant's regular church attendance, (R. 38, 39). Mr. and Mrs. Arthur Pledger, a couple who had been acquainted with the Fronk family for many years, testified concerning home conditions of the Fronk family and the regular attendance of the family in the Church, (R. 41, 44).

During the course of the hearing on June 10, 1957, the Juvenile Court made several references to the fact that the custody of the children had been before it on September 7, 1956 and November 19, 1956, (R. 28, 29). Those hearings were not made a part of this Appeal because both of those hearings were devoted to an investigation of alleged misconduct on the part of the mother of the children who is not a party to this Appeal.

After the testimony of all of the witnesses had been heard, the matter was submitted to the Court. The Court immediately rendered a decision upon the matter, stating that it was reluctant to place the children for adoption but felt that it was the only course open. The Court further stated that under no circumstances would it consider returning the children to the father, (R. 49). The Order was then made that the children be placed in the custody of the Department of Public Welfare for the purpose of placing the children for adoption. The foregoing Order was made by the Court on June 10, 1957, the date of the hearing, (R. 49). The Findings of Fact

and Conclusions of Law, and the Decree and Judgment of the Juvenile Court were later filed on the 3rd day of July, 1957.

STATEMENT OF POINTS

POINT I.

THE JUVENILE COURT DID NOT HAVE BEFORE IT THE PREPONDERANCE OF THE EVIDENCE NECESSARY TO ESTABLISH THAT APPELLANT WAS NOT A FIT AND PROPER PERSON TO BE AWARDED THE CUSTODY OF HIS MINOR CHILDREN, OR THAT HE SHOULD BE PERMANENTLY DEPRIVED OF HIS CHILDREN, AND THAT THE CHILDREN SHOULD BE PLACED FOR ADOPTION.

POINT II.

ASSUMING THAT SUFFICIENT EVIDENCE WAS BEFORE THE COURT TO JUSTIFY CONTINUING THE CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE, IT WAS A GROSS ABUSE OF DISCRETION ON THE PART OF THE COURT TO PERMANENTLY DEPRIVE APPELLANT OF HIS MINOR CHILDREN AND ORDER THEM TO BE PLACED FOR ADOPTION.

ARGUMENT

POINT I.

THE JUVENILE COURT DID NOT HAVE BEFORE IT THE PREPONDERANCE OF THE EVIDENCE NECESSARY TO ESTABLISH THAT APPELLANT WAS NOT A FIT AND PROPER PERSON TO BE AWARDED THE CUSTODY OF HIS MINOR CHILDREN, OR THAT HE SHOULD BE PERMANENTLY DEPRIVED OF HIS CHILDREN, AND THAT THE CHILDREN SHOULD BE PLACED FOR ADOPTION.

It is a universally established principle of common law that a parent's right to the custody and control of his minor children is a sacred right and a right with which

the Court should not interfere except where by conduct the parent forfeits that right. The common law also strongly favors the maintenance of natural parent-child relations as an element of great advantage to the child when the question of custody of a child is to be determined.

“As long as parents properly exercise their duty, under their natural rights to rear, educate, and control their children, their right to do so may not be interfered with solely because some other person or some other institution might be better deemed for that purpose.” 31 *Am. Jur.*, Sec. 21, p. 794.

However, in cases where a parent fails to provide his children with the care to which such minor children are entitled, the proper courts, both at common law and under our statutes, may remove those children from the custody of the parents and place them in the care of a proper person.

The Utah Supreme Court has repeatedly recognized and applied the rule of law that “where the parent is a morally fit person to have the care and custody of his own offspring, his rights are paramount to the rights of all others.” See *Alley v. Alley*, 67 Utah 316, 247 P. 301, 304; and *State v. Sorensen*, 102 Utah 474, 132 P.2d 132, 134.

This Court has also recognized the rule to be that there is a legal presumption that it is for the best interests of the child and of society for the child to remain with its natural parents during the period of its minority

and be maintained, cared for, and educated by them and under their supervision and direction. *Hummel v. Parrish*, 43 Utah 373, 134 P. 898, 901; *State v. Sorensen*, *supra*.

The following rules have been laid down by the Utah Supreme Court in regard to the evidence necessary to support a decision depriving a parent of his minor children:

1. On any fact necessary to support a decision to deprive a parent of its child, the court must be first convinced of such fact by a preponderance of the evidence on such question, and the burden of persuading the court is never on the parent. *In re Bradley*, 109 Utah 538, 167 P.2d 978, 984.

2. "The unfitness which will deprive a parent of the right to the custody of the child must be positive and not merely comparative, or merely speculative." *Cooke v. Cooke*, 67 Utah 371, 248 P. 83, 108; *State v. Sorensen*, *supra*.

Appellant's first point then raises this question: Was the evidence produced at the Juvenile Court hearing of such character and of such weight to overcome the presumption of appellant's fitness to have the custody of his children and to establish by a preponderance of the evidence that appellant was not a fit and proper person to raise his children?

An examination of the evidence of appellant's conduct that could be construed as detrimental to his claim

to the custody of his children shows only the following acts on his part:

1. Prior to the divorce trial he took photographs of his wife while she was in a tavern and as a result of this there was some disturbance caused at the tavern, (R.14).

2. His divorced wife felt that he couldn't give the children a good home because "he has been going out with girls," and "he would be running around or else working on cars," (R. 16).

3. The only complaint his mother-in-law, Mrs. Gordon, made concerning him was that he had been away from the children for two years while he was in the military service, (R. 24).

4. The Child Welfare representative of the Weber County Department of Public Welfare testified that his department had not had sufficient time to make any recommendations concerning the fitness of the parents to retain the custody of the children. This witness offered no testimony that in any way indicated that appellant was unfit to care for his minor children, (R. 4, 5, 7, and 11).

The only other evidence that was in any way detrimental to appellant's position came from the Findings of the District Court in the divorce action. These findings indicated that appellant was *not presently* a fit and proper person to be awarded the custody of his children because "he had not been shown to be law abiding, honest

or understanding of the children's needs or welfare," and further that he had been convicted of a felony by a United States Military Court.

Certainly the evidence before the Juvenile Court concerning appellant's conduct was not of such a positive nature as to establish by a preponderance of the evidence that appellant should be permanently deprived of his minor children. The only remaining ground upon which the Juvenile Court's action could be justified then is the finding that appellant was convicted of a felony by a U. S. Military Court.

The question then raised is this: Does the conviction of a felony, *per se*, require that the Juvenile Court permanently deprive appellant of his children?

This question has twice been before the California appellate courts, and in both cases the court ruled that a felony conviction, standing alone, was not sufficient cause to deprive a parent of custody of his children. See *In re Case's Guardianship*, 57 Calif. Ap. 2d 844, 135 P. 2d 681, 683. The court in discussing this question said:

"Appellant contends that she was denied the privilege of cross examining Petitioner for the purpose of showing that petitioner was in a naval prison at the time that the maternal grandmother was appointed guardian of the minor. Upon a trial of the character and fitness of the father to have the custody of his child, a misdeed which may have occurred many years prior to the hearing is too remote to prove present unworthiness.

Serving a term in prison is not per se cause for depriving a parent of the custody of his child. The commission of mala prohibita which may result in penal servitude is not conclusive proof of vicious character."

Also in a very recent case the California court again affirmed the same principle. See *In re Minnicar's Estate*, 141 Calif. Ap. 2d 703, 297 P. 2d 105, 108, where the Court said:

"Appellant is right in saying that the time at which fitness may be judged is the present and not the past; that the mere fact that a parent has been convicted of a crime and has served a prison term is not an automatic bar to the award of custody."

In 67 C.J.S., Sec. 12, at page 659, the following rule is set out:

"In order to establish unfitness it must be shown that provision for the child's ordinary comfort or intellectual and moral development cannot reasonably be expected at the parent's hand."

We submit that a consideration of all the evidence before the Juvenile Court fails to establish the unfitness of the appellant. On the contrary, the evidence shows that appellant has steady employment in his trade, has sufficient earnings to properly support his children, (R. 31), has made real progress in rehabilitating himself since his release from military detention, and has the means and facilities to provide adequately for the ordinary comfort, education and moral development of his minor children, (R. 32).

POINT II.

ASSUMING THAT SUFFICIENT EVIDENCE WAS BEFORE THE COURT TO JUSTIFY CONTINUING THE CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE, IT WAS A GROSS ABUSE OF DISCRETION ON THE PART OF THE COURT TO PERMANENTLY DEPRIVE APPELLANT OF HIS MINOR CHILDREN AND ORDER THEM TO BE PLACED FOR ADOPTION.

The statutory provisions which concern the matter of depriving parents of the custody of their children do not mention permanently depriving the parents of such custody, nor do they set down any standards of conduct which constitute a justification for an order permanently depriving the parents of their children, Sec. 55-10-32 Utah Code Annotated, 1953. This court has previously had before it the question of what conduct is sufficient justification to permanently deprive a parent of a minor child in the case of *In re Bradley*, 109 Utah 538, 167 P.2d 978. Barbara Bradley was the mother of an illegitimate child. The evidence showed repeated acts of immorality on her part, that she became infected with a venereal disease as a result of such conduct, that she had neglected and abandoned her minor child, and that she was married to a person who had previously been convicted of a felony and had served time in prison. After consideration of the evidence of her conduct, the Supreme Court sustained the judgment of the Juvenile Court awarding the custody of her minor child to other persons, but significantly declined to *permanently* bar

her from regaining the custody of her child, saying, at page 985:

“This does not mean that Barbara will be forever barred from obtaining the custody of her baby, and the custody of the child may be changed when justified by the surrounding facts and circumstances.”

The case of *State v. Sorensen*, 102 Utah 474, 132 P. 2d 132, was a case wherein Fern Jensen, the natural father of a minor child, was deprived of the custody of his child because of his neglect and the further fact that he had kept the child, a girl, in an unwholesome environment by drinking, carousing, cursing, and swearing in the presence of the child. Sometime after being deprived of his child by the Juvenile Court, Jensen filed a petition to regain custody of the child on the basis that he had remarried, and that his home conditions were now sufficiently improved to adequately provide for the child. The Juvenile Court made an order to the effect that if Fern Jensen conducted himself “becomingly” for a period of ten months from the date of the order, he would be allowed to regain the custody of his child. Jensen appealed the decision of the Juvenile Court to the Supreme Court and the Supreme Court, in affirming the decision of the Juvenile Court, said at page 135:

“Did appellant make such a showing as required the lower court to award him the custody of his minor daughter? The writer doubts that the evidence adduced at the hearing which was adverse to appellant was such as to justify a refusal to so order. However, in view of such testimony, we cannot say that the court abused its

discretion in requiring appellant to conduct himself 'becomingly' for a period of ten months before such custody would be given, in view of the previous finding of appellant's unfitness. However, in reaching such conclusion, we interpret the court's order to mean that unless during the probationary period appellant so conducts himself as to indicate an unfitness to have the custody of his daughter, he shall at the end thereof be awarded such custody 'so long as said petitioner maintains a home in a suitable atmosphere to rear a child of the age and temperament of the child here in question; upon the failure on the part of the petitioner, Fern Jensen, the court will again deprive the petitioner of custody and place the child elsewhere.' "

The Supreme Court of the State of Washington, in the case of *Ex Parte Day*, 189 Wash. 368, 65 P.2d 1049, reversed an order of the District Court on a habeas corpus action which permanently deprived a parent of the custody of his minor children. The facts in the Day case were as follows: The parents of the minor children had been divorced about seven years prior to the hearing and the custody of the minor children awarded to the mother. Shortly before the hearing the mother died and the minor children had been placed in the custody of very close friends of the mother. The father, Frank F. Day, sought to regain custody of the minor children by a writ of habeas corpus. The evidence before the trial court indicated that following the divorce action the father did not support the minor children, although he was financially able to do so, that for a period of about five years he had not seen any of his children and ap-

parently made no attempt to visit them, nor had he manifested the slightest concern for their welfare, that he was an entire stranger to his children and that he had treated them with utter neglect. The District Court, after hearing the foregoing evidence, denied the writ of habeas corpus and entered an order permanently depriving the father of his three children. On appeal to the Supreme Court it was held that the writ of habeas corpus was properly denied but that the portion of the decree which permanently deprived the father of the children should be modified. The court at page 1056, said:

“In one particular the decree appealed from must be modified. By its terms, appellant was deprived permanently of the care, custody, and control of his children. No such provision should have been included in the decree. What the future holds, no one can tell. It may be that at some future time appellant’s children, or one or two of them, should go to him. The court properly made the children wards of the court. For the present at least, they should remain such wards. The decree appealed from will be modified by eliminating therefrom that portion purporting to permanently deprive appellant of the custody of his children.”

In the case of *Moss v. Vest*, 74 Ida. 328, 262 P. 2d 116, the Idaho Supreme Court, on an appeal from an order denying a writ of habeas corpus sought by a mother to obtain the custody of a minor child, considered the lower court’s finding of unfitness on the part of the mother and the decree awarding the custody of the child to another couple, who were the respondents in the

matter. In this case the petitioner, the mother of the child, was married to a man who failed to provide for the child and who used intoxicating liquors to excess. During a period of marital difficulties the child was delivered to the maternal grandmother by the petitioner. The petitioner then went to San Francisco and while there she was charged with a felony and confined to jail. However, she was permitted to plead guilty to a misdemeanor and was placed on parole to her mother for one year. During the time that petitioner was in California, the maternal grandmother became ill and placed the child in the home of the respondents with the understanding that respondents would be permitted to adopt the child. The Supreme Court affirmed the order of the lower court awarding the child to respondents on the ground that the petitioner was an unfit mother as of the time of the hearing because of her immoral conduct, but in regard to her opportunity to later regain the custody of her child, the court said at page 122:

“The basis upon which we affirm the judgment, and the only basis, is that petitioner as of the time of the hearing was not a fit and proper person to have custody of her child for the time being because of her immoral conduct.

“Affirming the judgment awarding custody to respondents on the ground of moral unfitness of petitioner does not necessarily mean that petitioner will be forever precluded from obtaining custody of her minor son. Such custody may be restored to her when she has repented and reformed and is otherwise shown to be a fit and proper person to have the custody. *Goldson v.*

Goldson, 192 Or. 611, 236 P.2d 314; 17 Am. Jur., sec. 684, p. 518; 39 Am. Jur., secs. 25 & 26, pp. 615 & 616."

The weight of authority supports the position that courts making awards of the custody of children should give substantial consideration to the fact that it is often necessary to modify orders affecting custody or even to make a completely different disposition of the child. 39 Am. Jur., sec. 25, p. 615.

The order permanently depriving appellant of his children gives no consideration to the rule adopted by the Utah Supreme Court, as well as by a great majority of appellate courts, which holds that a parent, whose child has been taken from him because of his misconduct, is entitled to have the child restored to him upon proof that he has reformed and is presently able to provide a suitable home for the child. *In re Bradley*, 109 Utah 538, 167 P. 2d 978; *State v. Sorensen*, 102 Utah 474, 132 P.2d 132; *Ex Parte Day*, 189 Wash. 368, 65 P.2d 1049; *Moss v. Vest*, 74 Ida. 328, 262 P.2d 116; 39 Am. Jur., Sec. 25, P. 615.

CONCLUSION

It is appellant's contention that the record before the Juvenile Court fails to establish by a preponderance of the evidence, or by any clear and convincing evidence whatever, that appellant was not a fit and proper person to retain the custody of his minor children. We earnestly contend that there is certainly nothing in the record to justify the Juvenile Court in making an order per-

manently depriving him of the custody of his children and ordering them placed for adoption.

In any event, the record clearly indicates that the Juvenile Court abused its discretion in not ordering that the Welfare Department continue to hold the children under its jurisdiction, and setting a hearing at a later date in order that appellant's fitness and ability to provide a proper home for his children could be determined at such time.

It is, therefore, respectfully submitted that the judgment of the Juvenile Court should be reversed with instructions to order that the custody of his minor children be granted to appellant, or in the alternative, that the matter again be heard by the Juvenile Court to determine appellant's present fitness to be granted the custody of his minor children.

Respectfully submitted,

DAVID S. KUNZ of

PATTERSON & KUNZ,

Attorneys for Appellant