

1958

Marla Morse v. Joe Steed and Marjorie Steed : Brief of Appellant

Utah Supreme Court

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Case No. 8764

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IN THE SUPREME COURT

UNIVERSITY OF UTAH

of the

MAY 6 1958

STATE OF UTAH

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In the Matter of the Application

of

MARLA MORSE for a
WRIT OF HABEAS CORPUS,

MARLA MORSE,

Petitioner and Appellant,

Vs.

JOE STEED and MARJORIE STEED,

Defendants and Respondents.

BRIEF OF APPELLANT

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and Appellant

* * * * *

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IN THE SUPREME COURT

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In the Matter of the Application

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Petitioner and Appellant,

vs.

JOE STEED and MARJORIE STEED,

Defendants and Respondents.

* * * * *

Brief of Appellant

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STATEMENT OF FACTS

On September 6, 1957, petitioner, an unmarried woman and a domicilliary of Weber County, Utah, gave birth to a daughter in Brigham City, Utah, and on September 9, 1957,

surrendered custody of said daughter to the Defendants. The Defendants thereupon took the child to the State of Idaho. On September 19, 1957, upon learning of the presence of the Defendant, Joe Steed, in Weber County, Utah, the mother petitioned the District Court of Weber County, Utah, for a Writ of Habeas Corpus to issue for the production of the child. The writ issued, returnable September 23, 1957, and was personally served upon the Defendant, Joe Steed, in Weber County, Utah, on September 19, 1957. On September 23, 1957, the Defendant, Joe Steed, filed an Answer to the Petition alleging, among other things, that the Court was without jurisdiction on the ground that the child, at the time of the issuance of the writ, was physically absent from the State of Utah. The District Court set the matter for hearing September 25, 1957. At the time of the issuance and service of the writ there was no outstanding award of custody by either a Utah Court

or a foreign court. No evidence was taken at the hearing the Court requiring Petitioner to proceed to legal argument on the question of jurisdiction and the District Court, Parley E. Norseth, Judge, dismissed the writ for lack of jurisdiction, after hearing legal argument. From the order dismissing the writ for lack of jurisdiction, the petitioner appeals.

QUESTION PRESENTED

The question presented is whether a District Court sitting in Weber County, Utah, has jurisdiction to issue a Writ of Habeas Corpus and make an award of custody of a child domiciled in Utah and taken immediately after birth into the State of Idaho, when both of the child's parents are domiciled in Weber County, Utah, and where the Court has personal jurisdiction over the person who has the power to order the child to be brought into the State, although at the time of the issuance and service of the writ, the child is physically absent from the State of Utah.

STATEMENT OF POINTS

POINT I: THE CHILD WHOSE CUSTODY IS SOUGHT IS A DOMICILIARY OF THE STATE OF UTAH.

POINT II: UTAH COURTS HAVE JURISDICTION TO AWARD CUSTODY OF CHILDREN DOMICILED IN UTAH WHEN THERE IS NO OUTSTANDING JUDICIAL AWARD OF CUSTODY BY ANOTHER COURT.

POINT III: THE DISTRICT COURT HAD JURISDICTION TO MAKE A CUSTODY AWARD IRRESPECTIVE OF THE CHILD'S DOMICIL BY REASON OF ITS PERSONAL JURISDICTION OVER THE DEFENDANT, JOE STEED.

POINT I

THE CHILD WHOSE CUSTODY IS SOUGHT IS A DOMICILIARY OF THE STATE OF UTAH.

ARGUMENT

On appeal from a judgment of nonsuit, the record must be considered in the light most favorable to the party against whom the judgment is rendered. Salt Lake Engineering Works vs. Utah Concrete Pipe Co., 49 Utah 53, 161 Pac. 927; Oberg vs. Sanders, 184 P.(2) 229; Fidelity & Casualty Co. of N. Y. vs. Middlemiss, 135 P.(2)275.

The child was born in Utah and both of the parents of the child are domicil-

aries of the State of Utah. The general

rule covering the domicil of a person not capable of acquiring a domicil of its own by reason of a legal incapacity is stated clearly at 17A Am Jur 205, Domicil Secs. 13 and 14:

"Section 13. Generally. Domicil is of three kinds--namely, by birth or, more properly, of origin, by choice, and by operation of law. Domicil may also be classified as domestic and foreign, national, state, or county and city, depending on the laws to be construed or the questions involved... * * *."

"Section 14. Domicil of Origin. The domicil of origin, domicilium originis, is the domicil assigned to every child at its birth. Domicil of origin is a matter wholly irrespective of any animus or intention on the part of the person to whom it is ascribed. It is a domicil attributed to every person by law. This domicil continues until another is lawfully acquired.

Stating the definitive rule as to domicil of origin in another way, in which it is occasionally formulated by the authorities, the place of birth of a person is considered his domicil if it is, at the time of his birth, the domicil of his parents. Obviously, the place of birth is not necessarily the domicil of origin. If a child is legitimate, and its domicil has not been otherwise determined in judicial separation or divorce proceedings, the domicil of its father at the time of its birth is assigned to it. If it is not the legitimate child of its father, or is posthumous, the domicil assigned is that of its mother at the time of its birth."

This general statement of the law of domi-

cil is found at Sections 30 and 34 of the ReStatement of the Law, Conflicts of Law, as follows:

"Section 30. Domicil of Minor Child. Except as stated in Section 31 to 35, a minor child has the same domicil as that of its father."

"Section 34. Illegitimate Child. Except as stated in Sections 31, 33 and 35, an illegitimate minor child has the same domicil as that of its mother."

There has been no lawful change of the domicil of the child in this case. The purported consent relied upon by the Defendants is not recognized by Utah Statute as the proper method of surrendering custody of a minor child. Title 55, Chapter 8, Section 2, Utah Code Annotated, 1953:

"Section 2. Transferring of custody limited. No person shall hereafter assign, relinquish, or otherwise transfer to another, other than a relative of the child within the second degree, his rights or duties with respect to the permanent care or custody of a child under sixteen years of age, unless specifically authorized or required to do so by an order or decree of court or unless the transfer is made to or by an agency licensed by the state department of public welfare to receive and place children as herein provided. Any attempted transfer

or assignment written or otherwise made in violation of this section shall be null and void."

Title 78, Chapter 30, Section 4, Utah Code Annotated, 1953, reads:

"Consent to adoption. A legitimate child cannot be adopted without the consent of its parents, if living, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion; provided, that the District Court may order the adoption of any child, without notice to or consent in court of the parent or parents thereof, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing acknowledged before any officer authorized to take acknowledgments, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 8, of Title 55, and such agency consents, in writing, to such adoption."

A valid consent to adoption or any transfer of mere custody other than to a licensed agency or to a relative of the child within the second degree, in Utah must be made before a District Judge. There is no claim by the Defendants that the consent or transfer of custody was made to a licensed agency or

before a District Judge or to a relative within the second degree. The clear, concise and unambiguous wording of these statutes cannot be misunderstood. They prohibit the attempted transfer in this case.

POINT II

UTAH COURTS HAVE JURISDICTION TO AWARD CUSTODY OF CHILDREN DOMICILED IN UTAH WHEN THERE IS NO OUTSTANDING JUDICIAL AWARD OF CUSTODY BY ANOTHER COURT.

ARGUMENT

There is no outstanding judicial award of custody by a foreign court. (Petition Par. 3; Answer Par. 3). The decisions on this point are collected at 9 ALR 2nd 442, Section 5:

"Where there is no outstanding judicial award of custody by a foreign court, the courts are unanimous in holding that even though the children may be physically without the state, power in the court exists to make an award of custody of children domiciled within the State."

Sampsell vs. Superior Court (1948) 32 Cal 2nd 763, 197 P(2) 739.

Breene vs. Breene (1911) 51 Colo. 343, 117 Pac. 1000.

Moody vs. Moody (1942) 193 Ga. 699, 19 SE 2d 504.

S _____ 1933) 53 Idaho 427,
24 P2d 52.

Heard vs. Heard (1948) 323 Mass 347, 82 NE2d
219.

Beckman vs. Beckman (1949) Mo., 218 SW2d
566, 9 ALR 2d 438, affg(Mo App) 211
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See also Hope vs. Hope (1854) 4 De Gm & G
328, 43 Eng Reprint 534.

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Mass 452, 95 NE2d 184.

Edwards vs. Edwards 8 NJ Super 547, 73 A2d
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SW2d 363.

Robinson vs. Robinson Tex Civil Appeals
235 SW2d 228.

Smith vs. Smith West Vir. 76 SE2d 253.

Smith vs. Ansley Tex Civil Appeals 257 SW2d

The Restatement of Law, Conflicts of Law, formulates the jurisdictional rule based on domicil as follows:

"A State can exercise through its Courts jurisdiction to determine the custody of children or to create the status of guardian of the person only if domicil of the person placed under custody or guardianship is within the state." (Emphasis ours)

This recognizes the domicil of the child as the controlling factor in jurisdictional questions and not the physical presence or absence of the child.

POINT III

THE DISTRICT COURT HAD JURISDICTION TO MAKE A CUSTODY AWARD IRRESPECTIVE OF THE CHILD'S DOMICIL BY REASON OF ITS PERSONAL JURISDICTION OVER THE DEFENDANT, JOE STEED.

The District Court had jurisdiction over the person of the Defendant, Joe Steed.

Title 78, Chapter 3, Section 4, Utah Code Annotated, 1953; Rule 4(e) 1, Utah Rules of Civil Procedure; Sheriff's return of service.

There are holdings to the effect that if the court has jurisdiction of the parents or persons with power to order the absent child to be brought into the state, the court has

jurisdiction to make an award of custody.
Fagan vs. Fagan 131 Conn. 688, 42 A2d 41;
Stephens vs. Stephens 53 Idaho 427, 24 P2d
52; People ex rel Billotti vs. New York
Juvenile Asylum 68 NYS 279; May vs. May
253 NYS 606; Shaw vs. Shaw 114 SC 300, 103
SE526.

In the South Carolina case of Shaw vs. Shaw, it appeared that the children in question were physically absent from South Carolina at a time when the father of the children succeeded in having the mother of the children served with a Writ of Habeas Corpus to produce the children. The trial court held that since the children were not present in the State of South Carolina at the time of the issuance and service of the writ, the court was without jurisdiction to make a custody award. The Supreme Court of South Carolina reversed the trial court and held that since the court had personal jurisdiction over the person who had the power to order the children to be brought into the state the trial court was not

impotent and powerless and had jurisdiction to make a custody award.

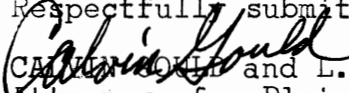
CONCLUSION

Our Courts have always zealously guarded the rights of infants. Our legislature has carefully enacted statutes designed to protect the right of a mother to the custody and control of her child whether legitimate or illegitimate. No citizen of the State of Utah could have acquired any right to the custody of this child by this purported consent; a method denounced by our statutes. A non-citizen of Utah cannot deprive Utah courts of jurisdiction to award custody by a bare removal of the child from this state and make a nullity of the protections afforded this mother by our carefully enacted statutes.

It is respectfully submitted that the factors of the birth of the infant in Utah, the residence and domicil of the mother in Utah, and the personal service of the Defendant, Joe Steed, in Utah, individually and

collectively justify the conclusion on sound conflicts of law principles that the District Court has jurisdiction to make a custody award. The judgment of the District Court should be reversed.

Respectfully submitted,


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