

1958

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Morse v. Steed*, No. 8764 (Utah Supreme Court, 1958).
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In The Supreme Court
of the

State of Utah FILED

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Clerk, Supreme Court, Utah

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

No. 8764

BRIEF OF RESPONDENT JOE STEED

O. DEE LUND

Attorney for Respondent,

Joe Steed

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BRIEF OF RESPONDENT JOE STEED

ADDITIONAL STATMENT OF FACTS

The respondent desires to call to the Court's attention the following additional facts from those stated in appellant's brief.

The infant daughter of the unwed mother, Marla Morse, was voluntarily surrendered to the defendants, Joseph W. Steed and Marjorie Steed, his wife, with a written consent to adoption, a copy of which consent is marked exhibit "A" and attached to defendant Joe Steed's answer. The defendants, after receiving custody of the child and the written consent of the mother, paid the hospital charges of the mother in connection with her confinement and the

birth of the child and obligated themselves to pay the expenses of the doctor in connection with the confinement. They have cared for the child continuously since custody was given to them by the mother on September 9, 1957. The child has continuously been at the home of the defendants, in Idaho, during this period of time and the defendants have developed a strong, loving, attachment and affection for said child. The mother, Marla Morse, has at no time since the child was placed in the custody of the defendants by her, visited the home of the defendants or made any inquiry whatsoever as to the child's welfare or well-being.

The defendants on the 20th day of September, 1957, filed their petition for the adoption of said child in the Probate Court of Oneida County, Idaho. The petitioner and appellant, Marla Morse, is represented by counsel in connection with the adoption proceedings in the State of Idaho, which is being continued pending determination of this appeal.

The defendant, Marjorie Steed, has never been served with process in this action and the Utah Court does not have jurisdiction over her. The said Marjorie Steed has custody of the child and would be the one with power to produce the absent child in the State of Utah.

STATEMENT OF POINTS

POINT I. THE CHILD WHOSE CUSTODY IS SOUGHT IS NOT A DOMICILIARY OF THE STATE OF UTAH.

POINT II. THE CHILD IS DOMICILED IN THE STATE OF IDAHO BEING AN ILLEGITIMATE CHILD AND HAVING BEEN ABANDONED, DESERTED AND SURRENDERED BY THE NATURAL MOTHER UNDER A WRITTEN CONSENT AND RELEASE TO THE DEFENDANTS.

POINT III. THE DISTRICT COURT OF WEBER COUNTY, UTAH, IN A HABEAS CORPUS PROCEEDINGS, HAD NO JURISDICTION OVER THE PERSON OF THE INFANT IN THE STATE OF IDAHO.

POINT IV. NO SERVICE OF PROCESS HAS BEEN HAD UPON THE DEFENDANT, MARJORIE STEED, IN THE STATE OF UTAH, AND THE UTAH COURT HAS NO JURISDICTION OVER HER. THE DEFENDANT, MARJORIE STEED, IS THE ONE HAVING PRIMARY CONTROL OVER THE CHILD AND ONE WHO THE COURT COULD EXPECT TO PRODUCE THE CHILD.

POINT IV. THE DEFENDANTS HAVE FILED A PETITION FOR THE ADOPTION OF THE CHILD IN IDAHO WHICH IS THE PROPER COURT AND PROCEEDING TO DETERMINE THE CUSTODY OF THE CHILD.

ARGUMENT

POINT I. THE CHILD WHOSE CUSTODY IS SOUGHT IS NOT A DOMICILIARY OF THE STATE OF UTAH.

POINT II. THE CHILD IS DOMICILED IN THE STATE OF IDAHO BEING AN ILLEGITIMATE CHILD AND HAVING BEEN ABANDONED, DESERTED AND SURRENDERED BY THE NATURAL MOTHER UNDER A WRITTEN CONSENT AND RELEASE TO THE DEFENDANTS.

The child in question is the illegitimate child of the petitioner and appellant, Marla Morse. Said Marla Morse, following the birth of said child abandoned, deserted and surrendered the child to the defendants Joseph S. Steed and Marjorie Steed, his wife, to be taken by them to their home in Stone, Idaho. This written consent was given by said Marla Morse freely and voluntarily before a notary public. See the copy of the consent attached to the answer

of defendant Joe Steed in the file. See Also 17A Am Jur, 250, Sec. 71.

POINT III. THE DISTRICT COURT OF WEBER COUNTY, UTAH, IN A HABEAS CORPUS PROCEEDING HAD NO JURISDICTION OVER THE PERSON OF THE INFANT IN THE STATE OF IDAHO.

The general rule is stated in 25 Am. Jur. 222 Sec. 106, as follows:

"It may be laid down as a general rule that a court has no authority to issue a writ of habeas corpus directed to a person outside of its territorial jurisdiction since it is a cardinal principal of law that no sovereignty can by its judgments or decrees directly bind or affect property or persons beyond the limit of that sovereignty. Generally speaking neither a state nor a federal court has jurisdiction to issue writs of habeas corpus directed to persons outside the territorial limits of the district in and for which the court was established "

The Utah Rules of Civil Procedure dealing with habeas corpus appear to presuppose that the person wrongfully restrained is within the state, or in other words, within the jurisdiction of the court. See Rule 65B (f) (5) which reads:

"If the defendant conceals himself or refuses admittance to the person attempting to serve the writ or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant or other persons so retraining and bring him together with the person designated in the writ forthwith before the court before which the writ is returnable."

See also Rule 65B (f) (6) which reads:

"At the time of the issuance of the writ the court may if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue reciting the facts and directing the sheriff

to take such person and forthwith bring him before the court to be dealt with according to law."

Appellant's brief refers to the collection of cases in 9 ALR 2d etseq. In this annotation we read on page 439, Sec. 3.

"The judicial solution of problems regarding the custody of children, or for that matter of domestic relations generally has never been wholly satisfactory either from a social or legal viewpoint, especially when multistate elements complicate the situation. There is little accord among the authorities as to the proper basis of jurisdiction to award custody of a minor child, and the cases dealing with this question are in considerable confusion."

This same annotation discusses three theories as the basis for jurisdiction over the subject matter of a child custody proceeding. The one theory which has been adopted by the Restatement is simply one of status and as such subject to the control of the courts of the state where the child is domiciled. The second theory treats the problem as one of determining the conflicting rights of the parents to the custody of their child and has held that in personam jurisdiction over the parents is sufficient, irrespective of the domicile or whereabouts of the child. This annotation states the third theory as follows: "A third theory considers that the fact that a child is physically present within the state is sufficient to give the courts of the state jurisdiction to award custody of the child on the ground that the basic problem before the court is to determine what the best interests of the child are and the court best qualified to do so is the one having access to the child. This view has been well expressed by Judge Cardozo, when he stated:

"The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless For this the residence of a

child suffices though the domicile be elsewhere.”

See 9 ALR 2d 440.

In all of the cases cited in appellant's brief it is noted that the action grew out of a divorce proceeding. The cases deal generally with one state giving full faith and credit to an order or decree of another state or an instance where the court has jurisdiction of the parties to the divorce proceedings and exercises its power to make a custody award of the children. In the case at bar there is no connection whatsoever with a divorce proceeding nor a question concerning the power of a court in a divorce proceeding with jurisdiction over the husband and wife, to make its order or decree determining custody of their children in another state.

There are numerous cases holding that the courts of one state have no legal control over, or interest in, the children of another state, and can make no order through its courts with respect thereto except to adjudicate the equitable personal rights of the parents themselves if both be before the court. See the annotation in 4 ALR 2d 25, also *Peyton v. Peyton* 29 NM 618, 225 P 576; *Re Hubbard* 82 NY 90; *State ex rel. Clark v. Clark*, 4 So. 2d 517, 148 Fla 452.

In this same annotation, 4 ALR 2d, at page 26, Sec. 11, we read:

“Even though the court has jurisdiction over the parents or persons with power to bring the non-resident child within the state, still the court has been held to lack power to make a custody award.”

Numerous cases are cited therein in support of this rule. In particular see *Re Chandler* (1940) 36 Cal. App. 2d 583, 97 P2d 1048; also *Giachetti vs. Giachetti* (1946) 157 Fla. 259, 25 So. 2d 658; also *Ritchison v. Ritchison* (1945) 28 Tenn. App. 432, 191 SW 2d 188; and *Lake v. Lake* (1947) —Wyo—, 182 P2d 824.

POINT IV. NO SERVICE OF PROCESS HAS BEEN HAD UPON THE DEFENDANT, MARJORIE STEED, IN THE STATE OF UTAH, AND THE UTAH COURT HAS NO JURISDICTION OVER HER. THE DEFENDANT, MARJORIE STEED, IS THE ONE HAVING PRIMARY CONTROL OVER THE CHILD AND ONE WHO THE COURT COULD EXPECT TO PRODUCE THE CHILD.

As is apparent from the file in this case, the defendant, Marjorie Steed, was never served with process in the habeas corpus proceedings in the State of Utah and the Utah Court had no jurisdiction over her. Consequently she is not a party to this appeal. Yet she is the person who has cared for and mothered the infant since it was abandoned to her by the petitioner and appellant, Marla Morse.

Marjorie Steed and not Joe Steed is the one having primary control over the child and the one who the court could expect to produce the child.

POINT V. THE DEFENDANTS HAVE FILED A PETITION FOR THE ADOPTION OF THE CHILD IN IDAHO, WHICH IS THE PROPER COURT AND PROCEEDING TO DETERMINE THE CUSTODY OF THE CHILD.

The defendants, Joe Steed and Marjorie Steed, on September 20, 1957, filed in the Probate Court of Oneida County, State of Idaho, a petition for the adoption of the child. The petitioner, Marla Morse, is a party to that proceedings in Idaho and represented by counsel. That court would seem to be the proper court to determine the custody of the child, it clearly having jurisdiction of both of the defendants as well as the child. See opinion of J. Cardozo in *Finlay v. Finlay* N. Y. (1925) 240 N. Y. 429, 148 NE 624 wherein the court held:

“The jurisdiction of a state to regulate the custody

of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. (Several cases cited) For this the residence of the child suffices, though the domicile be elsewhere”

CONCLUSION

It is respectfully submitted that the District Court did not have jurisdiction in the habeas corpus proceedings and that its judgment dismissing the same should be affirmed.

Respectfully submitted,

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