1960

Floyd Bradley and Rose Mary Eldridge Jude Bradley v. State of Utah et al : Brief of Respondents

Utah Supreme Court

Walter L. Budge; Vernon B. Romney; Attorneys for Respondents;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

FLOYD BRADLEY and ROSE MARY ELDRIDGE JUDE BRADLEY,

Appellants,

vs.

STATE OF UTAH in the interest of LINDA JEAN JUDE, ROBERT TAYLOR, RICKEY BRADLEY, DEBRA BRADLEY, DONALD BRADLEY, RONALD BRADLEY, JACKIE BRADLEY and JUDY BRADLEY,

Respondents.

Case No. 9329

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

The procedural course of this case has been explained correctly in appellants' Statement of Facts. Respondent has no knowledge of the facts alleged at page 7 relating to membership in Alcoholics Anonymous or the conquering of the drinking habit or the facts as to residence, income, and willingness of doctors and others to testify as to their sobriety, since

these matters are outside the record of this case.

There are, however, many additional facts of consequence to a determination of the merits of the issues. In order not to burden the Court at this point, however, and because a more logical presentation would so indicate, they will be set out in the Argument which follows.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN NOT SETTING A HEARING ON APPELLANTS' PETITION, NOR DID THE COURT ERR IN ISSUING ITS ORDER OF JULY 12, 1960.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN NOT SETTING A HEARING ON APPELLANTS' PETITION, NOR DID THE COURT ERR IN ISSUING ITS ORDER OF JULY 12, 1960.

Appellants rely on the provisions of Section 55-10-41, U. C. A. 1953, in urging error in the court's refusal to set a hearing on appellants' petitions for return of custody.

It is difficult to see how appellants can take com-

fort from this statute since it obviously sustains the court's position by its own clear terms.

The full text of the Section follows:

> "A parent, guardian or next friend of a child who has been committed to any children's aid society or institution except the state industrial school or the district court, may at any time file with the clerk of the juvenile court a petition, verified under oath, asking for the return of such child to its parents or guardian, for the reason that they have reformed or the conditions have changed and that they are fit and proper persons to have its custody and are able to support and educate it. A copy of such petition shall then be served by the court upon the proper authorities of such children's aid society or institution, and it shall be their duty to file a reply to it within five days. If, upon examination of the petition and the reply, the court is of the opinion that a hearing and further examination should be had, it may, upon due notice to all persons concerned, proceed to hear the facts and determine the question at issue. The court may thereupon order such child to be restored to the custody of its parents or guardian, or to be retained in the custody of the children's aid society or institution to make any other arrangements for the child's care and welfare as the circumstances of the case may require, or the court may make a further order of commitment as the interest and welfare of such child may demand."

Respondent is at a loss to know how appellants can

hope to evade the clear import of the sentence: "If, upon examination of the petition and the reply, the court is of the opinion that a hearing and further examination should be had, it *may*, upon due notice to all persons concerned, proceed to hear the facts and determine the question at issue." (Italics ours.)

It is an elementary rule of statutory construction that the term "may" is permissive and not mandatory. The term "shall" must be used in the latter case.

Respondent believes that the statute itself gives a full and complete answer to appellants' Point I. Nevertheless, it may be helpful to cite certain case law and draw somewhat from the careful memorandum prepared by Judge Ziegler in the instant case in the juvenile court.

Judge Ziegler's order denying a further hearing in the matter was issued on July 12, 1960. The Court's amended decree terminating appellants' parental rights had been signed on December 10, 1959, just seven months earlier. In *State* v. *Sorensen*, 102 Ut. 474, 132 P. 2d 932, this court sustained the juvenile court's order that a parent conduct himself "becomingly" for a period of ten months before the return of custody to him would be given. By analogy the juvenile court here was well within the mark in refusing to hold a hearing on the basis of changed circumstances just seven months after the decree was signed.

In making its determination as to the merits of appellants' first point, this court should examine Judge Ziegler's memorandum. One of the important things he points out is the repeated and apparently uncontrollable drunkenness on the part of the appellants. His careful observation of them in many hearings over a course of years clearly shows the lack of likelihood that they will ever be able to make the changes in their lives that will make them fit parents.

The memorandum points out (R.—1-8) that in 1951 the court found, among other things, "that the mother had failed to provide proper or necessary care for the children because of her constant drinking of alcoholic beverages and her frequenting taverns on 25th Street." The decree entered on that date declared the two children then born were "neglected and dependent," but on the promise of the mother that she would stop drinking, they were returned to her custody and she was continued on probation under supervision of the Court's probation officer.

In August of 1957 another petition was filed in the interest of the same two children and a separate petition filed in the interest of four more of the children, born subsequent to the time of the first hearing, each petition alleging the indicated children to be dependent and neglected. A hearing was held and the court found that appellants were living apart, that Mrs. Bradley was intoxicated on four different occa-

sions in July of 1957 and had been intoxicated in the presence of the children. At the end of the hearing the mother again promised to discontinue drinking, whereupon the court made a decree continuing the children under the jurisdiction of the court although in custody of the mother under supervision of the State Department of Public Welfare.

Again, in April of 1958 another petition for rehearing of the case and for modification of the 1957 order was filed in the interest of all the six children then concerned. The petition alleged the mother continued to drink to excess and continued to leave the children without provision for their care. Upon motion of the petitioner, a probation officer of the court, the petition was dismissed on the grounds that the mother was pregnant, had not recently been drinking and had reunited with the other appellant, her husband.

In June of 1959 another report and petition, prepared by a probation officer of the juvenile court seeking a rehearing and modification of order, was filed in the interests of the six children. Two other children, twins, were born in February, 1959, and a petition was filed in their behalf. A hearing was held upon these petitions and the court found that both appellants, Mr. and Mrs. Bradley, had continued to drink liquor in the presence of the children, that she was unable to care for them, and that the father of the oldest

of the children had failed to support her; that two of the Bradley children were dirty and sleeping in urine-soaked clothing and blankets, and were ill because of appellants' neglect to provide medical care; that four others of the children were found to be dirty; inadequately clothed against the weather and were away from home without supervision of the mother or any other persons.

The six oldest children, although adjudicated neglected and dependent, still were continued in the custody of the parents, subject to the protective supervision of the Utah State Department of Public Welfare. The twin babies were declared neglected children and placed under the jurisdiction of the court under the supervision of the Department of Public Welfare and continued in custody of the mother. The children were allowed to remain with the Bradleys only on condition that both appellants abstain from drinking alcohol and from attending places where beer was sold.

In August of 1959 another petition for modification of decree and judgment was filed in the interest of all the children. Upon being served with notice to appear for a hearing, the Bradleys left the State of Utah, returning in December of 1959. The hearing was then held, the court finding that the Bradleys had failed to abide the conditions established in the immediately previous decree in that they had consumed beer and whiskey and that Mrs. Bradley was found nude

in an apartment in the presence of the twin babies and in company of a man not her husband.

Thereupon, the amended decrees were entered having the purpose of terminating parental rights, placing the children under the control of the State Welfare Department and authorizing the Department to place them for adoption and to report back to the Court facts relating to the proposed adoptive homes. The mother, at the time of the last hearing, again promised not to drink intoxicating beverages.

At the conclusion of his memorandum, the juvenile judge wrote as follows (R. 1-10):

> "Even assuming that the mother during the requested hearing proved that she had not been intoxicated since the last hearing, it is doubtful that it would be in the best interest of the children that they be returned to her.
>
> "From the foregoing it is clear that the mother over a long period of time has had a serious problem of drinking alcoholic beverages and that her consumption thereof affected her care of her children. Undoubtedly each time the mother has promised that she would drink no more, she was sincere in her promise; however, her illness has not been arrested during the almost nine years the Court has had jurisdiction of some of her children. During this time the Probation Department of this Court and the Welfare Department has attempted and failed to bring about a change in the mother's illness.

> It would be in the best interest of the children that others be given the responsibility and privilege of rearing the children. Any longer delay would be injurious to the children."

In the course of their Brief, appellants point to a number of truisms, statements of general law dealing with custody questions. Most of them are indeed true as far as their own specific terms go. But either they do not pertain to the exact problems presented by appellants or they can easily be distinguished.

Deveraux v. *Brown*, 2 Ut. 334, 273 P. 2d 185, (A. B. 9), while indicating that orders of the juvenile court *may* be modified from time to time under various circumstances, goes on at page 186 of the Pacific citation to say:

> "The court is given broad and comprehensive latitude and discretion in determining the custody of the child and its orders may range from mere temporary custody, pending an investigation or hearing on this matter of temporary emergency, to an order entered to permanently deprive the parent of the custody of his child by committing the child to the custody of a child placement society to be placed in a family for adoption without the consent of the parents."

Fronk v. *State*, 7 Ut. 2d 245, 322 P. 2d 397, (A. B. 8), contained a statement that "the juvenile court did not have before it any evidence to establish appellants' unfitness to have the custody of his chil-

dren", a far cry from the present situation. The quotation therefrom (A. B. 8) merely indicates that a finding that children are neglected does not mandatorily require an order depriving them of custody, and not that upon a proper showing of fact it cannot be done.

There can be no purpose in going into the merits of the various rulings by the juvenile court since appellants have not even raised the question of their having originally been deprived of the custody of the children. The recitation of the facts set out above, was made, not for the purpose of convincing this court of the merits of the juvenile court's orders, but instead to show the repeated inability of the Bradleys over any prolonged period of time to abstain from the use of alcohol, which use clearly renders them incapable of properly caring for the children. Past history, judicially determined, argues strongly in favor of Judge Ziegler's refusal to grant another hearing in this matter.

There is no merit to appellants' second contention that the court was in error in issuing its several orders of July 12, 1960, each directing the Utah State Department of Public Welfare to proceed with the adoption of the children. Since the juvenile court had made careful findings over a period of nine years and since it had allowed repeated chances for appellants to discard their habits and make themselves fit parents for

the children, it was not now necessary to hold another hearing and do the same thing again.

Each previous time appellants failed and the only sensible indication was that they would continue to fail. The orders, in effect, related back to the time of the final hearing when sufficient facts were found to warrant the action taken.

It is axiomatic that the welfare of the children is the primary consideration in relation to such proceedings as are before the court. While it is true that the parents have a prior natural or presumptive right to custody, this right "cannot prevail if the interest and welfare of the child forbid it." *Hummel* v. *Parrish,* 43 Ut. 373, 134 P. 898. See also *Wallick* v. *Vance,* 76 Ut. 209, 289 P. 103; *Haines* v. *Fillner,* (Mont.) 75 P. 2d 803; *In re Hogue* (N. M.) 70 P. 2d 764; and *Kennison* v. *Chockie* (Wyo.) 100 P. 2d 97.

The children have, time and again, been made to suffer indignities and embarrassments which may effect them throughout their lives. They now gradually are being placed in environments which will give them a fair and decent opportunity in life. They have been away from their natural parents for some months and they should not be forced to suffer the shock of transferring back to an environment which so threatened their future happiness and success. This court should

not now overturn the careful decisions of the juvenile judge.

CONCLUSION

On the basis of the facts, statutes and citations set forth above, this court should affirm the decisions of the juvenile court and dismiss appellants' appeal.

Respectfully submitted,

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