

1969

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
In the interest of:

BABY GIRL McMURTREY,

No. 11607

v.

JAMES N. THOMAS,

Appellant.

BRIEF OF APPELLANT

An Appeal From the Judgment of the
Second District Juvenile Court, State of Utah
the Honorable Regnal W. Garff, Judge

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
in Interest of: :
BABY GIRL McMURTREY, : No. 11607
:
v. :
JAMES N. THOMAS, :
Appellant. :

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an appeal by James N. Thomas, the father of Baby Girl McMurtrey, from the decision of the Second District Juvenile Court, State of Utah, the Honorable Judge W. Garff presiding, which terminated all parental rights of the appellant in his daughter on the sole ground that although he was the natural father of Baby Girl McMurtrey and acknowledged his paternity and expressed

desire for custody of her, he was not the legal father under the "laws of Utah," had no parental rights in child.

DISPOSITION IN THE LOWER COURT

On December 23, 1968 a petition for the permanent revocation of all parental rights of Baby Girl McMurtrey was filed in the Second District Juvenile Court. After a hearing on February 26, 1969, the matter was taken under advisement by the Court. On March 7, 1969 Appellant filed a petition reaffirming his paternity requesting custody of said child. By Decree and Order entered April 3, 1969, the parental rights of both the Appellant and the mother of said child were permanently terminated and legal custody and guardianship of said child was placed in the Division of Family Services for placement in a suitable adoptive home. The sole basis for the termination of Appellant's parental rights was the fact that he was not the legal father of Baby Girl McMurtrey.

RELIEF SOUGHT ON APPEAL

Appellant desires this Court to reverse the

decision of the Juvenile Court after determining that under the Juvenile Court Act the only basis for termination of parental rights are those set forth in Section 55-10-19 (1)(a)(b) or (c), Utah Code Annotated 1953 and, noting the legal father not being one of those conditions, under the Juvenile Court to hold a further hearing to inquire into the existence of those conditions or terminate jurisdiction over Baby Girl McMurtrey and inquiry into this matter.

STATEMENT OF FACTS

Baby Girl McMurtrey was born December 20, 1968 to Kathleen McMurtrey and the Appellant, James N. Thomas. The parents of the child were unmarried both at the time the child was conceived and at the time that the child was born. The parents had been married to each other from June 17, 1958 till in 1963, (R. 27-28) and planned to be remarried after the birth of the Baby Girl McMurtrey to establish a home for their child. (R. 28-29). However, their plans were frustrated by the trauma of having the child seized and taken from their custody three days after

her birth and then facing the permanent deprivation
petition in the Juvenile Court. (R. 28-29-57). A hearing
was held on the allegations of the petition on February 26,
1969. (R. 1). The whole hearing concerned the allegations
of the petition dealing with the emotional inability of the
mother to care for her child. (R. 1-37). The only inquiry
about the appellant was as to his marital status. However,
after the Court recognized him as the father of the child
(R. 1), he acknowledged his paternity and stated that he
wanted the care, custody and control of his child. (R. 27-38)
He was not questioned about his ability to do so. The sole
inquiry by the Court and the County Attorney was whether
or not he was the legal father of the child.

Thereafter, on March 7, 1969 appellant filed his
petition for custody with the Juvenile Court. He supported
it with his affidavit acknowledging paternity of Baby Girl
McMurtrey and requesting custody of her to be granted to
him. (R. 48-50). On March 13, 1969 appellant filed a
supplemental affidavit stating that he had a home for his

id, that he had purchased furniture and clothing to care
her, and requesting that a home study be made to
examine his fitness to care for his child.

The Court entered its Findings of Fact and Decree
terminating the parental interests of the Appellant and
Kathleen McMurtrey on April 3, 1969. (R. 44-45). The
basis for terminating the parental rights of the
Appellant was that he was not the legal father of Baby Girl
McMurtrey. Findings of Fact #3 (1) and (2).¹ The petition
for custody was denied without hearing by an order also
dated April 3, 1969. (R. 46).

The basis of the Juvenile Court's decision to
terminate the parental rights of Kathleen McMurtrey was
her emotional inability to care for the child. (R. 44-45).
This is not questioned or challenged in this appeal.

A R G U M E N T

POINT I.

THE JUVENILE COURT ERRED IN HOLDING THAT,
ALTHOUGH APPELLANT IS THE NATURAL FATHER,

see also the comment of the Court on this point quoted
in the record. (R. 37).

HE IS NOT THE LEGAL FATHER AND, THEREFORE, HAS NO LEGAL RIGHTS TO HIS CHILD, AND THE CHILD MAY BE PLACED FOR ADOPTION.

The Findings and Decree dated April 3, 1969,

be as the only reason for permanently depriving appellant

all parental rights to the child, the fact that he was not

married to the child's mother at the time of the child's

birth. Findings of Fact #3 (1) and (2) (R. 44-45).

Judge Garff stated during the hearing:

"I suppose; technically, the child is an illegitimate child and the . . . statute of course states that the fathers of illegitimate children have no legal rights to the children." (R. 37)

THERE IS NO PROVISION IN THE JUVENILE COURT ACT THAT PROVIDES THAT THE FATHER OF AN ILLEGITIMATE CHILD HAS NO PARENTAL RIGHTS IN THAT CHILD AND THE JUVENILE COURTS TERMINATION OF HIS PARENTAL RIGHTS UPON SUCH A SUPPOSED PROVISION IS ERROR WHICH MUST BE REVERSED.

Examination of the Juvenile Court Act of 1965,

Sections 55-10-63 through 123, Utah Code Annotated,

Section 63, reveals that there is no provision that provides that

the father of an illegitimate child has no parental rights

in his child. Accordingly, if the court based its action

upon the assumption and belief that such a provision existed, the error is obvious and must be reversed by this court.

Such a provision was a part of the adoption statutes² of the State of Utah until 1966, but it was repealed at that time. It is clear that the District Court applying the adoption provisions would be applying the standards of the Adoption Code, Section 78-30-1 et seq., Utah Code Annotated, 1953 in terminating parental rights and permitting an adoption. On the other hand the Juvenile Court would apply the standards of the Juvenile Court Act, Section 55-10-63 et seq. in terminating parental rights and declaring a child eligible for adoption.³ Each of these codes, the Judicial Code, Section 78-30-1 et seq. Utah Code Annotated, 1953, and the Juvenile Court Act, Section 55-10-63 et seq. Utah Code Annotated, 1953, would be the Legislative

Section 78-30-1 et seq. Utah Code Annotated, 1953.

Section 55-10-78, Utah Code Annotated 1953 provides in part: "Nothing contained in this act shall deprive the District Courts of jurisdiction in adoptive proceedings."

fructuation of different policies, and, therefore could have
different standards for the termination of parental rights.
Therefore, the fact that the Adoption Code contained until
1966 the provision apparently relied upon by the Juvenile
Court in this case would not permit the Juvenile Court
proceeding under its own act to apply a statute outside
its jurisdiction is clear error and must be prohibited by
this Court. Appellant will admit that the issue as to whether
or not the delineation of parental rights spelled out in
Section 78-30-1 et seq. Utah Code Annotated, 1953, is to
be applied back to the actions of the Juvenile courts or
whether the Juvenile courts are to proceed solely upon their
own Juvenile Court Statutes, Section 55-10-63, et seq. Utah
Code Annotated, 1953, has never been resolved by this
Court, but the very fact that they are two separate codes
speak for themselves. In addition there is that provision
Section 55-10-78, Utah Code Annotated, 1953, set out
in footnote #3 which clearly indicates each is separate
and should be read to govern the cases presented to the

even courts respectively. Thus Section 78-30-1 et seq. Utah Code Annotated 1953, being part of the Judicial Code should govern actions in the District Court, while Section 65-10-63, et seq. Utah Code Annotated, 1953, constituting the Juvenile Court Act should govern the Juvenile Courts. The provisions of the one should not be read into the other and if the Juvenile Court did so in the instant case, that error must be reversed.

Since, as noted above, there is no provision in the Juvenile Court Act that provides that the father of an illegitimate child has no parental rights in said child, none should be inserted by means of the Judicial Code, if such a provision is found to exist in that code. The policy of the Juvenile Court Act, as expressed in Section 65-10-65, Utah Code Annotated, 1953, is not the same as that of the Judicial Code. As discussed in Point I (C) of this brief, the policy of the Juvenile Court Act is to serve the best interests of the child. These clearly include the establishment of a normal home with his natural parents.

This would be precluded if the rule of the Judicial Code providing that the natural fathers of illegitimate children have no parental rights in said children, if said provision is found to be the rule of that code, is held to be part of the Juvenile Courts Act. As discussed below, appellant would maintain this is not the current rule of the Judicial Code though it has been the rule in the past. In any event should not, by this court, be read into and made part of the Juvenile Court Act even if it is found to still constitute the rule of the Judicial Code.

Until 1966 it was clear that under the provisions of Section 78-30-4, Utah Code Annotated, 1953, the Judicial Code provisions governing adoptions, an illegitimate child could be adopted upon the consent of only the mother; the putative father had no standing in regard to such child.

Thomas v. Children's Aid Society of Ogden, 12 Utah 2d 35, 239; 364 P. 2d 1029 (1961). Section 78-30-4, Utah Code Annotated, 1953 provided:

"A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living . . ."

however, this provision was amended in 1966 to provide:

"A child cannot be adopted without the consent of each living parent having rights in relation to said child"

This court had held prior to said amendment that

though natural parents have primary and superior rights their children this right may be surrendered or lost.

re: Adoption of D _____, 122 Utah 525, 536, 252 P. 2d

8 (1953). It could be lost voluntarily, Miller v. Miller,

Utah 2d 290, 333 P. 2d 945 (1959), In re Adoption of

_____, supra, or involuntarily through abandonment,

Mason v. Pierce, 14 Utah 2d 317, 383 P. 2d 925 (1963)

Application of Conde, 10 Utah 2d 25, 347 P. 2d 859 (1959)

through court determination of unfitness. State in the

Interest of K _____ B _____ 7 Utah 2d 398, 362 P. 2d 395,

58), Devereaux v. Brown, 2 Utah 2d 30, 279 P. 2d

5, reh. den. 2 Utah 2d 334, 273 P. 2d 185 (1954).

Since the parents have agreed to voluntarily permit

termination of their parental rights and the adoption of

their child, this permission is usually final. Thomas v.

Children's Aid Society of Ogden, supra. Miller v. Miller,
supra, In re Adoption of D. supra. Only extreme
circumstances permit the setting aside of that consent.

D. v. Social Service & Child Welfare Department,
Utah 2d 311, 431 P. 2d 547 (1967).

It is also established that the Juvenile courts have
jurisdiction to terminate parental rights and declare
children eligible for adoption. State in the Interest of
B. supra, Devereaux v. Brown, supra. With the
exception of the last two cited cases, all of these cases
arose under the Judicial Code and this court repeatedly
stated that there is a natural presumption that a child is
better off with its natural parents and it is the policy of
the courts to be reluctant to deprive parents of their children,

D v. Social Service & Child Welfare Department,

supra, State in the Interest of K B, supra, In re
Adoption of D supra, but the overriding concern
in all cases will be the welfare of the child. Wilson v.
Perce, supra, Application of Conde, supra, In re

option of D supra. This policy is Legislatively
the part of the Juvenile Courts Act, however, the policy
amendment goes even further, it states that actions by the
Juvenile Court should be to preserve and strengthen family
whenever possible." Section 55-10-63, Utah Code
Annotated, 1953 (emphasis added). In the instant case,
inquiry went no further than the marital status of the
parties. The testimony and affidavit of the appellant were
relied upon by the court. The Legislative mandate of the
Juvenile Courts Act was rejected by the Juvenile Court.

Appellant would have to admit that under Section
78-30-4, Utah Code Annotated, 1953, as it existed until
1966, the Judicial Code contained the rule applied by the
Juvenile Court in the instant case. Thomas v. Children's
Society of Ogden, 12 Utah 2d 235, 239, 364 P. 2d
109 (1961). However, appellant would submit that the
1966 amendment to Section 78-30-4, Utah Code Annotated
1963, changed that statute to include the father of an
illegitimate as one of the "parents" requiring notice of

and whose consent is necessary to an adoption⁴
under the special conditions as are hereinafter described.

Examination of the amended wording of Section
78-30-4, Utah Code Annotated 1953, as set forth above
demonstrates that the distinction between legitimate
and illegitimate children has been eliminated. It now
states:

"A child cannot be adopted without the consent of each
living parent having rights in relation to said child, . . ."

The term "parent" is defined in The Random House
Dictionary of the English Language, Random House, Inc.
New York, 1967 as:

"n.1. A father or a mother, . . . 3, a source, origin,

"It should also be noted that the instant fact situation is
clearly distinguishable from that presented in Thomas v.
Children's Aid Society of Ogden, supra. There the parents
were seeking to overturn by habeas corpus the voluntary
surrender of parental rights by the mother several months
after placement of the child with the agency. The father
took no part in any proceedings until the filing of the
application for the writ of habeas corpus. In the instant
case the father has been present at all hearings, has
repeatedly attempted to gain custody of his daughter, there
has been no voluntary giving up of parental rights by the
mother, and these proceedings have been conducted under
the Juvenile Courts Act while the Thomas case was
conducted under the Judicial Code.

or cause . . ."

As applied to the instant case there is no question but that the father of an illegitimate child must also be given notice of the proposed termination of his rights or his consent to said termination and adoption is required if he is included in the somewhat cryptic phrase:

" . . . having rights in relation to said child, . . ."

These words were chosen by the Legislature in lieu of the former provision. As construed by this Court in the Thomas decision, the former wording provided that the father of an illegitimate child had no parental rights in his child. The changed words must indicate some desire to change the meaning of the prior provision. It is submitted that this new phrase is intended to have the effect of differentiating between the father of an illegitimate child who has deserted his child and the mother, and a father who has not deserted his child but who has fulfilled his duties as a father except that of legitimizing his child. 5

As pointed out in Point I (C) of this Brief, there are
(continued over)

The language would also cover and include the father of a legitimate child. If this were not the intent of the Legislature, there would have been no need to amend the statute, particularly in view of the construction of the statute in Thomas v. Children's Aid Society of Ogden, supra. If this court were to construe these words as having the same meaning as before the amendment was made, it would be negating the intent of the Legislature to effectuate a change in meaning when it effectuated the change in wording.

As has been pointed out above, Appellant has acknowledged the baby as being his. He has taken every step possible to legitimize and gain custody of his child. He would assert, if that were to be required, that his actions have legitimized the child as being his own. He testified he would have remarried the mother anyway if this would not have the effect of immediately thrusting him back before the Juvenile Court because of her emotional

continued

three statutory methods of legitimizing a child. It is conceivable that a father could not do any of these yet want to assume his parental duties. He was one of those protected by this amendment.

instability. (R. 28-33, 36).

If this Court were to hold that this matter is somehow governed by the provisions of the Judicial Code rather than the Juvenile Code, it is clear that either by legitimizing the child as his own by public acknowledgment or by his attempts to legitimize his child, Appellant has brought himself under the revised provisions of Section 78-30-4, Utah Code Annotated, 1953. To hold otherwise would not only be a negation of Legislative intent by this court, it could also constitute a denial to the Appellant of his rights to Equal Protection of law as guaranteed by the constitution of the State of Utah, and the constitution of the United States of America. In addition, should this court find this situation is governed by the Judicial Code, it should note that Section 78-30-4, Utah Code Annotated, 1953, goes on to provide that:

" . . . 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; . . ." (emphasis added)

By this language the Legislature specifically stated

the only three cases where consent is not necessary, that
where a parent has been judicially deprived of
parental rights for cruelty, neglect or desertion. There
is no such finding relating to the Appellant in the instant
case. Accordingly, to uphold the termination of Appellant's
parental rights in the absence of both his consent and one
of these findings is not only an application of the wrong
provisions by the Juvenile Court, which should be applying
the provisions of the Juvenile Court Act, Section 55-10-63,
Utah Code Annotated, 1953, it is also an erroneous
application of that provision. Accordingly, the Court must
reverse this erroneous action and remand the case for
proper proceedings in accord with the correct law.

THE HOLDING OF THE JUVENILE COURT THAT THE
FATHER OF AN ILLEGITIMATE CHILD HAS NO
LEGAL PARENTAL RIGHTS IN THAT CHILD IS
CONTRARY TO THE PROVISIONS OF THE JUVENILE
COURTS ACT AND MUST BE REVERSED BY THIS
COURT.

In the Juvenile Court Act of 1965, Section 55-10-63
123, Utah Code Annotated, 1953, the term parent is
nowhere defined. However, Section 55-10-122, Utah

Code Annotated, 1953, states:

"The provisions of this Act, to the extent that they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments."

Application of this provision would require that examination of the Act existing before 1965 be undertaken to determine whether or not the term "parent" was defined, and if so, it could be applied to define the use of the term "parent" in the provisions of the 1965 Act. It was defined in the prior act and that definition was:

"Parent" when used in relation to a child, shall include guardian and every person who is by law liable to maintain a child."

Section 55-10-64 (3) Utah Code Annotated (1953).

As discussed in Point I (C) infra, pursuant to the terms of Section 77-60-1, et seq. Utah Code Annotated, 1953, the father of an illegitimate child is by law liable to maintain his child. This is consistent with the policies of the Juvenile Court Act as set forth in Section 55-10-63, Utah Code Annotated 1953, and discussed in Point I (C)

It is therefore clear that Appellant is a parent within the meaning and intent of the Juvenile Court Act. It is clear from the record that this definition was applied and appellant was recognized as the father of his child by the Court. (R. 1).

Accordingly, appellant would be entitled to all the considerations of the policy requirements expressed in Section 55-10-63, Utah Code Annotated, 1953, before the Juvenile Court deprived him of his parental rights under Section 55-10-109, Utah Code Annotated, 1953, as is required by Section 55-10-100 (18) Utah Code Annotated, 1953.

Since the appellant would be included under the term "parent" as used in the Juvenile Court Act as pointed out above, the Juvenile Court erred in holding that he had no standing as a parent before the court as the father of an illegitimate child. The sole basis for terminating his parental rights as a parent under the Juvenile Court Act are those set forth in Section 55-10-109 (1) (a), (b),

or (c). Being the father of an illegitimate child is not one of the grounds included in these provisions.

Accordingly, that ruling of the Juvenile Court must be reversed and remanded for further consideration in accord with the applicable provisions of the Juvenile Court Act, Section 55-10-63 et seq. Utah Code Annotated, 1953.

C. IT IS THE POLICY OF THE LAWS OF UTAH TO ENCOURAGE AND PROMOTE THE ESTABLISHING OF A NORMAL HOUSEHOLD BY THE PARENTS OF AN ILLEGITIMATE CHILD WITH THE CONCOMITANT LEGITIMIZATION OF THE CHILD AND THE RULE ADOPTED BY THE JUVENILE COURT, TO-WIT: THAT THE FATHER OF AN ILLEGITIMATE CHILD HAS NO PARENTAL RIGHTS IN HIS CHILD WOULD BE CONTRARY TO THIS POLICY.

Section 55-10-63, Utah Code Annotated, 1953, states:

"It is the purpose of this act to secure for each child coming before the Juvenile Court such care, guidance and control, preferably in his own home, as will serve his welfare and the best interests of the state; to preserve and strengthen family ties whenever possible; . . ."

The best interests of the state and the preservation and strengthening of family ties are most clearly

advanced by encouraging the assumption of paternal duties and responsibilities by the father of an illegitimate child. This is not only a matter of obvious public policy, it is a matter of law. The laws of Utah both encourage and force the normalization of a family by encouraging the father of an illegitimate child to assume the proper duties as a father and husband. At common-law, children born out of lawful wedlock could not be rendered legitimate by any subsequent act of their parents. The illegitimate child was regarded as the child of no one, not even entitled to a name unless he gained one by reputation. He could not inherit either through his father or his mother.

The sole duty his parents owed him was that of maintenance because of the ties of nature. However, as stated by this

Court:

"Even under the cold and pitiless rules of the common law, which were conceived and enforced to shield and protect the royalty and nobility of England against the consequences of their sexual derelictions, the putative father of an illegitimate child had rights respecting it which ordinarily were paramount to all the world except the mother." Harrison v. Harker, 44 Utah 541, 142 P. 716, 724 (1914).

To modify the harsh rule of the common law, the Utah Legislature has provided three statutory procedures by which a putative father may make an illegitimate child legitimate. Section 77-60-14, Utah Code Annotated, 1953, which provides that the illegitimate child becomes legitimate by the subsequent marriage of the parents, Section 74-4-10, Utah Code Annotated, 1953, which provides that an illegitimate child is the heir of the person who acknowledges himself to be the father of such a child, and Section 78-30-12, Utah Code Annotated, 1953, which provides that the child may become legitimate by public acknowledgment.

Under the facts of the instant case the decision of the Juvenile Court must be examined in light of the provisions of Section 78-30-12, Utah Code Annotated, 1953:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, -thereby adopts it as such, and

such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

The record here affirmatively shows that Appellant publicly acknowledged that Baby Girl McMurtrey was his child. He stated in open court, under oath, at the hearing February 26, 1969, that he was the father of the child, (R. 29) that he desired custody of the child, (R. 30) that he was once married to the mother of the child, (R. 27) and that although he and the mother were divorced at the time of the birth of the child, they had planned to re-marry and establish a home for the child after it had been born. (R. 28-29). If further public acknowledgment were needed, the record also contains Appellant's petition for custody with his affidavits in support thereof, which includes a statement of his acknowledgment of paternity and his desire to gain custody of his child. (R. 47-50).

This court has held that:

"The essentials to a legitimation are public acknowledgment by the father, receiving of the

child into his family and treatment of it as a legitimate child." In re Garr's Estate, 31 Utah 57, 86 P. 757, 761, (1906).

The appellant here meets all these requirements except that of having received the child into the home. This could not be effectuated solely because of the intervention of social workers of the State Division of Family Services who removed the child from the hospital three days after her birth, took her away to a paid foster care household and the erroneous ruling of the Juvenile Court which prohibited the appellant from giving his child the love, care and home he had anticipated providing.

This child could have been made legitimate by the subsequent marriage of the parents. Section 74-4-10, Utah Code Annotated, 1953. Indeed this was contemplated by them. However, because of the action for permanent deprivation of parental rights, in the first instance, and now because of the court's finding that the mother is unable to properly care for and nurture the child as a result of her severe and disabling emotional and

psychological problems. (R. 44), the appellant is placed in a dilemma. If he married the mother, the child will become legitimate, but the parents will probably again be forced to defend a deprivation action on the basis of the Juvenile Court's action in the case regarding the mother. If he does not marry the mother and legitimize the child, the Juvenile Court's holding, if let stand by this Court, would hold he has no legal interest in his child. This appellant has done everything he could to legitimize his child and gain custody of her. The tragic irony is that the actions and rulings of the Juvenile Court have barred him from legitimizing his child, yet it is this same lack of legitimization that is being used by the Juvenile Court as the basis for permanently terminating his parental rights without examining his fitness as a parent. Clearly this is a violation, not only of the policies of the law, but of fundamental fairness, that is, Due Process as well.

if the appellant had not chosen to act as he has, that is, attempting to assume his parental responsibilities, it is clear that the Laws of Utah would force him to assume them. The mother, through the State, could have prosecuted him for the "crime" of bastardy, Section 77-60-1 to 16, Utah Code Annotated, 1953. If "convicted" the appellant would have been forced to acknowledge and support his child; thereby legitimizing it. The mother or any public authority chargeable by law with the support of the child could have brought an action for paternity which, if the putative father were held to be the father, would result in his "acknowledgment" and support of his child. Section 78-45a-1 to 17, Utah Code Annotated, 1953. The duties established by these actions can be enforced in other states. Section 78-45-1 to 13, Utah Code Annotated, 1953. The statutory scheme thus established in Utah seeks to "encourage" the father of an illegitimate child to assume his duties and responsibilities as father and husband, and, if he does not respond, it

provides the machinery to force him to do so. The holding of the Juvenile Court in the instant case is directly contrary to these policies and must be reversed. It is ironic that it is the appellant, not the Juvenile Court, who is seeking to effectuate these policies and laws.

POINT II.

THE JUVENILE COURT ERRED IN PERMANENTLY TERMINATING ALL PARENTAL RIGHTS OF APPELLANT IN HIS CHILD WHERE IT FAILED TO FIND THAT IN REGARD TO APPELLANT THERE WAS EXISTING ANY CONDITION WITHIN SECTION 55-10-109, UTAH CODE ANNOTATED, 1953.

The sole authority for the permanent termination of parental rights by the Juvenile Court is Section 55-10-109, Utah Code Annotated, 1953. Any order of permanent termination of parental rights must be based on one of three conditions set forth in subsection (1)(a), (1)(b), (1)(c) of that statute. Since permanent termination of parental rights is such a drastic remedy, not only must the condition upon which the deprivation is based be one of those set forth in subsection (1), but also

party seeking to establish the basis has the burden of proving that the condition exists. State in Interest Pilling, et al v. Lance, Utah 2d _____, _____ p. _____ (No. 11181, filed January 19, 1970). As was stated by this court in this recent decision:

"Deprivation of the parents' custody of their children is a drastic remedy which should be resorted to only in extreme cases and when it is manifest that the home itself cannot or will not correct the evils which exist. A cutting of family ties is a step of utmost gravity and is undesirable, both socially and economically, and should be avoided unless that is the only alternative to be found consistent with the best interests of the children. There is a presumption that it is generally for the best interest and welfare of children to be reared under the care of their natural parents. Under this presumption, the burden of persuading the trier of fact is always on the person who claims that it will be for the best interests of the child to be reared by someone other than the natural parents of such child. To support a decision to deprive a parent of its child the court must first be convinced of such fact by a preponderance of the evidence."

It is clear from examination of the transcript of the proceedings (R. 1-37) and the Findings of Fact and Decree entered in this matter (R. 44-45), there was no inquiry into any of the three grounds which form the basis

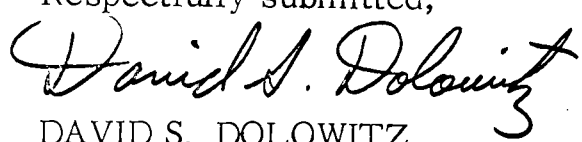
a permanent deprivation under the provisions of
section 55-10-109(1), Utah Code Annotated, 1953, to-wit:
a condition seriously detrimental to the child, (b)
abandonment of the child by the parent or parents, (c)
neglect or refusal of the parent or parents to give the child
proper parental care and protection after a period of trial.
Accordingly, there is no authority for or basis upon which
the Juvenile Court could permanently terminate the parental
rights of the Appellant and the court's order permanently
terminating the Appellant's parental rights in his child,
Mary Girl McMurtrey, must be reversed by this court.

CONCLUSION

Since the Juvenile Court permanently terminated
the Appellant's parental rights in his daughter on the sole
basis that he was not the legal father of the child in
violation of the applicable laws of the State of Utah,
the holding must be reversed. Under the Juvenile Court
the father of an illegitimate child is considered as
the parent of the child. The sole method of and basis

upon which his parental rights may be terminated permanently is by finding that one of the conditions set out in Section 55-15-109 (1), (a), (b) or (c) exist. No such condition was found to exist in the instant case. Accordingly, the decision of the Juvenile Court must be reversed and this matter reversed for further consideration by that court.

Respectfully submitted,



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