1969

Utah v. Thomas : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
In the Interest of:
BABY GIRL McMURTREY,

vs.

JAMES N. THOMAS,
Appellant.

Case No.
11607

BRIEF OF RESPONDENT

AN APPEAL FROM THE JUDGMENT OF THE SECOND DISTRICT JUVENILE COURT, STATE OF UTAH, THE HONORABLE REGNAL W. GARFF, JUDGE.

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TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

TREATISES CITED

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NATURE OF THE CASE

The Second District Juvenile Court, the Honorable Regnal W. Garff presiding, terminated all parental rights of the appellant James N. Thomas, in his daughter, Baby Girl McMurtrey. This is an appeal from that order.

DISPOSITION IN THE LOWER COURT

A petition for the permanent deprivation of all parental rights of Baby Girl McMurtrey was filed in the Second District Juvenile Court on December 23, 1968. 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 and request-

ing custody of the child. By Decree and Order entered April 3, 1969, all parental rights of both the appellant and mother of the child were permanently terminated. Custody of the child was given the Division of Family Services until placement in a suitable adoptive home.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Juvenile Court Decree.

STATEMENT OF FACTS

Respondent accepts appellant's Statement of Facts with one major reservation. Appellant asserts that the Juvenile Court's sole basis for terminating appellant's parental rights in Baby Girl McMurtrey was that he was not the legal father of the child. Respondent would add the following facts which modify this assertion. The Juvenile Court was well acquainted with appellant James N. Thomas as evidenced by this language taken from the Order of the Juvenile Court denying custody to appellant (R. 46).

> ". . . although Mr. Thomas is the putative father, he is not the legal father and, therefore, has no legal rights to the child; FURTHER, this Court has previously deprived Mr. Thomas of custody of two other children, Vincent Andre Thomas and Keith Antoine Thomas, Case Nos. 205941 and 205942; said action was taken on September 13, 1965; since that time the children have continued to live in foster homes and Court action has been required to force support payments from Mr. Thomas on behalf of the children; he still is unable to provide for these two children after 3½ years of

> foster case; FURTHER, it would be contrary to the interest of the above child to follow the same foster care pattern as these other two children."

This Order was entered the same day as the Findings of Fact and Decree terminating appellant's parental rights. Judge Garff specifically found that it was in the best interests of the child to terminate its parents' rights in it. See Findings of Fact (R. 44).

ARGUMENT

POINT I.

THE JUVENILE COURT PROPERLY TERMINATED APPELLANT'S PARENTAL RIGHTS IN BABY GIRL McMURTREY.

A. THE JUVENILE COURT HAS THE POWER TO TERMINATE PARENTAL RIGHTS AND THE EXERCISE OF THAT POWER WAS PROPER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

Appellant asserts that the Juvenile Court cannot apply statutes other than those enacted as a part of the Juvenile Court Act and since (according to appellant) the sole basis for terminating appellant's parental rights in this case was Section 78-30-4, Utah Code Ann.,* the Juvenile Court exceeded its authority. The logical responses are (1) that the Juvenile Court can apply any statute in Utah

*The issue of whether the rewording of Utah Code Ann. § 78-30-4 by the 1965 legislature changed the meaning of that statute will be discussed under subsection (B) *infra*.

Code Annotated in disposing of the cases within its jurisdiction, and (2) that Utah Code Ann. § 78-30-4 was not the sole basis for terminating appellant's parental rights.

Appellant's contention that the Juvenile Court must decide its cases applying only the statutes found in Sections 55-10-63 through 55-10-123, collectively known as the Juvenile Court Act, is too unsound to require rebuttal. Appellant admits that this Court has never held that the Juvenile Court must proceed solely on their own statutes, and respondent has not seen any other authority that would support such a contention. The Juvenile Court must act within the Constitution of the State of Utah and also within the statutes enacted under the Constitution unless there is a conflict with a provision of the Juvenile Court Act. In the situation where a provision of the Code conflicts with a provision of the Juvenile Court Act, the Juvenile Court is free to follow its own Act. Section 55-10-77 gives the Juvenile Court broad jurisdiction over a number of subjects. If the Juvenile Court could apply only the law found in the Juvenile Court Act, it would be severely handicapped in disposing of the cases it has jurisdiction over under 55-10-77. Respondent requests that this Court rule that the Juvenile Court is authorized to apply all the statutes in the Code and not just those found in the Juvenile Court Act.

Appellant repeatedly asserts that the sole basis for terminating his parental rights was that he was not the legal father of Baby Girl McMurtrey. The record indicates otherwise. In 1961 this Court held that Mr. Thomas had

no parental rights in another illegitimate child begotten by him. See *Thomas* v. *Children's Aid Society of Ogden,* 12 Utah 2d 235, 364 P. 2d 1029 (1961). Undoubtedly Judge Garff was aware of this fact and could have taken judicial notice of it.

Appellant places great emphasis on the policy of the Juvenile Court Act of strengthening family ties whenever possible. He emphasizes *family ties* (p. 13 of Appellant's Brief whereas in this case the emphasis should be on the last two words *whenever possible.* In custody and termination of parental rights cases, two conflicting considerations must be balanced out, i.e., (1) the superior rights of the parent to his child and (2) the welfare of the child. The parent, except where proven unfit, has rights superior to all others in his child. However, the principal and main consideration must always be the welfare of the child. See *Harrison* v. *Harker,* 44 Utah 541, 142 P. 716 (1914). In the situation where the family is a going concern, more weight is given to the rights of the parent. However, where, as here, the family is not a normal going family, the welfare of the child should be the sole criterion.

The Juvenile Court Act of 1965 provides:

> "The court may decree a termination of all parental rights with respect to one or both parents if the court finds that the parent or parents are unfit or incompetent by reason of conduct or condition seriously detrimental to the child. U. C. A. 55-10-109(1)(a).

In the present case the mother and father of the child had been married to each other, but were not married at the time the child was conceived nor at the time the child was born nor at the time the termination Order was entered. The mother is emotionally incapable of caring for the child. The father has been denied parental rights in another illegitimate daughter and has been deprived of the custody of two other children, which he is still unable to support. In short, this is not a normal going family. It was in the best interest of Baby Girl McMurtrey to take her out of such a family. Judge Garff, being well informed of the facts and circumstances in this case, acted within the authority granted him by section 55-10-109, Utah Code Ann. when he terminated appellant's parental rights.

B. THE FATHER OF AN ILLEGITIMATE CHILD DID NOT ACQUIRE ANY NEW RIGHTS IN RELATION TO SAID CHILD BY THE 1966 AMENDMENT OF UTAH CODE ANN. § 78-30-4.

Prior to 1966, Utah Code Annotated, 78-30-4, read in pertinent part:

> "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. . . ."

In 1966, the statute was amended to read:

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

Appellant contends that the amendment conferred upon the father of an illegitimate child the right to consent to the adoption of that child. The respondent contends that the amendment merely restated the law, as it has always existed in this State. The statute, as amended, is ambiguous, and since no legislative history can be found to enlighten us as to the legislative intent behind the amendment, it becomes the duty of this Court to construe the amendment consistent with public policy.

The key to understanding the amendment is the phrase, "each living parent having rights in relation to said child." Who is a parent in this context, and what is the nature of the rights possessed by such a parent? Does this statute deal with four people, the father and mother of a legitimate child and the father and mother of an illegitimate child, or only with three people, the father and mother of a legitimate child and the mother of an illegitimate child? The English case of *Re M*, (1955) 2 Q. B. 479, (1955) 3 Week L. R. 320, 51 A. L. R. 2d 488, is almost precisely in point. The statute construed by the English Court of Appeal in that case required for adoption the consent "of every person or body who is a parent or guardian of the infant or who is liable by virtue of an order or agreement to contribute to the maintenance of the infant." The Court held that the word "parent" in an act of Parliament does not include the father of an illegitimate child, unless the context otherwise requires.

Prior to the rewording of Section 78-30-4, it was clear

that the only father having rights in his child was the father of a legitimate child.

> "The putative father of an illegitimate child occupies no recognized paternal status at common law or under our statutes. The law does not recognize him at all, except that it will make him pay for the child's maintenance if it can find out who he is. The only father it recognizes as having any rights is the father of a legitimate child." 12 Utah 2d at 239.

Since the law was clear that the father of an illegitimate child didn't occupy parental status in relation to that child and didn't have any rights in relation to that child, it was perfectly consistent for the Legislature to use the language, "each living parent having rights in relation to said child." This phrase covered only those persons who occupied recognized parental status, namely the father and mother of a legitimate child and the mother of an illegitimate child. It is a settled rule of statutory construction that a word may take a particular meaning according to the context and subject matter of the statute in which it is used. Am. Jur., Statutes §§ 247 and 292. If the Legislature had intended to change the law and include the father of an illegitimate child as a "parent" whose consent was necessary, then the Legislature would have done so in clear, unequivocal language. The 1966 amendment of Section 78-30-4 was not intended to confer any rights that had not existed previously. The word "parent," as used in the amendment, refers only to the mother and father of a legitimate child and the mother of an illegitimate child. In the context of 78-30-4, the father of an illegitimate child is not a "parent."

The trend in the law is to eliminate all distinction between legitimate and illegitimate children. Possibly the reason for rewording the statute in question here was to eliminate the word "illegitimate" therefrom. The law has rightfully recognized that classifications which deprive the illegitimate child of rights enjoyed by the legitimate child violate equal protection of the laws. However, giving the illegitimate child the rights in relation to his natural father that the legitimate child has in relation to his natural father doesn't necessarily mean that the father of an illegitimate child is being endowed with the same rights as the father of a legitimate child.*

Good reasons exist for conferring upon the illegitimate child the same rights enjoyed by the legitimate child, but for sound public policy reasons the father of an illegitimate child should not enjoy the same rights in relation to his child as the father of a legitimate child does to his. The law favors making children legitimate and encourages action designed to effectuate this result. To recognize the natural father of an illegitimate child as one having rights in relation to such child, even though through legal process, voluntary or involuntary, the man has not legitimated the child, would be to grant the man the rights of parenthood without shackling him with any of the responsibilities. In

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*Illegitimate children can now maintain an action for their mother's wrongful death, (*Levy* v. *Louisiana*, 391 U. S. 68 [1968]), and the *mother* of an illegitimate child can maintain an action for the child's wrongful death (*Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73, [1968]). However, the father of an illegitimate child should not be allowed to acknowledge the child after its death and bring a wrongful death action under the *Glona* doctrine.

such a situation the man could refuse to consent to the adoption of the child on one hand and on the other refuse to support the child himself since he would be under no legal obligation to do so. Such a policy would be socially unwise and extremely disquieting to the adoptive and prospective parents in this State.

The father of an illegitimate child has no rights in the child.

> "The mother of an illegitimate child has both rights and obligations towards it . . . The father of a bastard, however, has under our law no rights in respect of it at all and to the best of my belief he never has had." *Re M,* 51 A. L. R. 2d at 495.

The above quoted language accurately states the law on this issue in the State of Utah. See *Thomas* v. *Children's Aid of Ogden, supra.* About the only rights which the father of an illegitimate child has in relation to such child are rights of visitation, and these rights are subject to the best interests and welfare of the child. See 15 A. L. R. 3rd 887. The cases which speak of the father's rights in his illegitimate child as being paramount to all the world except the mother's are cases in which the father sought custody of the child. See *Harrison* v. *Harker, supra.* In the situation where the father wants to take his illegitimate child into his home and support it, and in effect legitimate it his right to do so should supersede the rights of any other person or organization, except the child's mother, provided it is in the best interest of the child. But the State of Utah is firmly committed to the rule that the welfare of the child outweighs the legal rights of his par-

ents. See *Harrison* v. *Harker, supra.* In the present case appellant sought custody of his illegitimate daughter, but Judge Garff decided it would be in the best interest of the child to place her in the custody of the Division of Family Services. Whatever rights appellant may have had in his illegitimate daughter in this case, they were subordinate to the best interests of the child.

Respondent requests this Court to construe Utah Code Annotated, 78-30-4, as amended, as merely a restatement of the law as announced by this Court in *Thomas* v. *Children's Aid Society of Ogden, supra.* If the father of an illegitimate child wants to become a parent having legal rights in relation to that child, let him legitimate the child and assume the concommitant parental duties. The legal rights of parenthood are and should be inseparably connected with its legal duties and responsibilities.

C. APPELLANT DID NOT LEGITIMATE BABY GIRL McMURTREY UNDER THE LEGITIMATION STATUTES OF THE STATE OF UTAH.

Utah has three legitimation statutes. Utah Code Annotated 77-60-14 legitimates the child when the parents marry after the child's birth. Utah Code Ann. 74-4-10 legitimizes the child for purposes of inheritance. Utah Code Ann. 78-30-12 legitimates the child for all purposes, if the natural father publicly acknowledges the child, takes it into his family, and treats it as a legitimate child. Appellant claims that his acknowledgment of Baby Girl McMurtrey should have legitimated the child since he was

prevented from complying with the other conditions set out in the statute. The law, however, is clearly against appellant on this point. In order to legitimate an illegitimate child, the technical requirements of the legitimating statute must be strictly followed. Utah's statute requires acknowledgment, plus taking the child into the family, plus treating it as a legitimate child. See *In re Garr's Estate*, 31 Utah 57, 86 P. 757 (1906). Failure to comply with all three conditions results in the child remaining illegitimate even though the natural father desires to legitimate it and tries to comply with all the necessary statutory conditions but is prevented from doing so. See *In re Adoption of Irby*, 37 Cal. Rptr. 879 (1964).

It may be unfortunate that the State of Utah doesn't have a legitimation statute similar to that of Arizona which makes all children the legitimate children of their natural parents. The acknowledgment of an illegitimate child by its natural father would then be all that is necessary to legitimate the child. Requiring the father to take the child into his home in addition to the acknowledgment will result in the children remaining illegitimate contrary to the intention of the parties and in most instances contrary to the interest of the State. Some examples of situations where the child will not be legitimated even though all concerned desire to confer legitimate status on the child are: (1) the present situation, where the father is prevented from taking the child into his home, (2) where the father is married and his wife refuses to consent to having the

child in the home, (3) where the father is unmarried and has no home to take the child into, and (4) where the mother, who has prior right to the legal custody of the child, refuses to allow the father to take the child into his home.

Serious questions now exist as to how a child can be legitimate in Utah for purposes other than inheritance where the parents of the child do not marry and where the father acknowledges the child as his own but does not take it into his family. However, respondent must assert that Utah Code Ann. 78-30-12 is clear in requiring acknowledgment plus the other conditions, and any change based on social considerations would probably come from the Legislature rather than by forcing upon the present statute a meaning which its clear wording will not accommodate.

CONCLUSION

A man who begets an illegitimate child and does not legitimate that child is not a "parent" having the right to consent to the adoption of that child under the common law and statutes of the State of Utah. Appellant's efforts to legitimate his daughter were insufficient under the legitimation statutes of the State of Utah. The best interests of the child predominate over any rights of its parents, and under the facts and circumstances of this case, Judge

Garff acted within his authority when he terminated appellant's parental rights.

Respectfully submitted,

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