1970

Utah v. Thomas : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Case No. 11607

vs. :

JAMES N. THOMAS, :

Appellant. :

REPLY BRIEF OF APPELLANT

An Appeal From The Judgment Of The Second District Juvenile Court, State Of Utah, The Honorable Regnal W. Garff, Jr., Judge

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The appellant in the above entitled matter, James N. Thomas, hereby submits the following Reply Brief in response to the Brief of the Respondent heretofore filed in the Supreme Court of the State of Utah on May 20, 1970.

POINT I

THE STATEMENT OF THE FACTS ASSERTED BY THE RESPONDENT WOULD DENY THE APPELLANT DUE PROCESS OF LAW AND VIOLATED THE PROVISIONS OF SECTION 55-10-109, UTAH CODE ANNOTATED 1953, AS DID THE JUVENILE COURT IF ITS ACTION WAS IN FACT BASED ON

THE FACTS ASSERTED BY THE RESPONDENT.

In respondent's Statement of Facts, Judge Regnal W. Garff, Jr., was quoted at length in regard to knowledge that he personally had about Mr. Thomas. Respondent then asserted that this personal knowledge of the Judge constituted the facts upon which the Juvenile Court could rely in this matter. Appellant would respectfully point out that this is contrary to that constitutional concept known as due process of law and would also be contrary to the provisions of Section 55-10-109, Utah Code Annotated 1953. There were no allegations whatsoever about the appellant, James Thomas of the nature "Judicially Noticed" by Judge Garff in the Petition filed in the Juvenile Court in this matter. There was no evidence of any of these "facts" introduced during the hearing. If Judge Garff relief on these "facts" in rendering his opinion, he did so totally without due process of law in that he went into matters not raised in the pleadings nor presented as evidence to the Court. This type of proceeding by

the Juvenile Courts has been previously condemned by this Court in State v. Lance, 23 Utah 2d. 407, 464 P. 2d 395 (1970). As is apparent from examination of the Petition and transcrip in this matter, there were no pleadings and there was no evidence introduced of anything in the nature of the "facts" "judicially noticed" by Judge Garff. Accordingly, any consideration of them by the Judge, if any was actually made, violates the very basic principle of fairness in our judicial system as described in the phrase, "due process of law." Article I, Section 7, Constitution of the State of Utah, Fifth and Fourteenth Amendments to the Constitution of the United States of America.

By introducing these "judicial observations" in support of the Court's action, the State would ask this Court to proceed on the same basis as did the Juvenile Court, that is, in violation of the basic constitutional protection of due process of law.

This attempt by the State to introduce Judge Garff's "judicial observations" is also in violation of Section 55-10-

109(2), Utah Code Annotated 1953, which provides:

> "(2) A termination of parental rights may be ordered only after a hearing is held specifically on the question of terminating the rights of the parent or parents. A verbatim record of the proceedings must be taken and the parties must be advised of their right to counsel. No such hearing shall be held earlier than ten days after service of summons is completed inside or outside of the state. The summons must contain a statement to the effect that the rights of the parent or parents are proposed to be permanently terminated in the proceedings. The statement may be made in the summons originally issued in the proceeding or in a separate summons subsequently issued."

Article I, Section 7, of the Utah Constitution is in accord with the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America. Together they each require that all proceedings must be handled in accord with due process of law. Construing Section 55-10-109(2), Utah Code Annotated 1953, in view of this constitutional guarantee, requires that the Summons that is issued give notice not only that the hearing is for termination of parental interest, but must also state the grounds upon which that termination of parental interest is to be made. There

was no allegation contained in the Petition on this matter that contained any allegation of which Judge Garff apparently took judicial notice. No evidence was introduced in this regard and, in fact, Mr. Thomas was not allowed to introduce any evidence which might show that these observations were untrue. Judge Garff so ruled on the grounds that appellant was the father of an illegitimate child and had no standing even to raise the issue as to whether or not he had any interest in these proceedings. The Petition raised only the issue that he was the father of an illegitimate child as the basis for the termination of his rights.

Accordingly, if this Court were to consider Judge Garff's statement to be part of the facts in this matter, this Court would be violating Section 55-10-109(2), Utah Code Annotated 1953, as well as the Constitutions of the State of Utah and the United States of America, as did Judge Garff when he rendered his original decision, from which this Appeal is taken. This Court has already held that only

matters properly raised and upon which evidence is property introduced in trial may be considered by the Juvenile Courts. State v. Lance, supra. That decision was not followed and applied by the Juvenile Court in the instant case and this Court should now correct that error.

POINT II

THE JUVENILE COURT HAS JURISDICTION TO ACT ONLY AS DEFINED AND GRANTED IN THE JUVENILE COURT ACT OF 1965, AS AMENDED.

The respondent asserts that the appellant has maintained that the Juvenile Court cannot apply statutes other than those enacted as part of the Juvenile Court Act, and accordingly, that by taking action on the basis of Section 78-30-4, Utah Code Annotated 1953, part of the judicial code, the Juvenile Court was exceeding its jurisdiction. It is respectfully submitted that this is an improper characterization of the position of the appellant. Appellant would assert that the Juvenile Court may apply any law of the State of Utah where it is empowered to do so, i. e., when it applies criminal statute

to juveniles. Section 55-10-77(1), Utah Code Annotated 1953. However, when a specific grant of jurisdiction and authority is given to the Juvenile Court, it may not assume the jurisdiction and authority of a District Court where that is not granted. State in the Interest of Graham, 110 Utah 159, 170 P. 2d 172 (1946), see Dimmitt v. City Court of Salt Lake City, 21 Utah 2d 257, 444 P. 2d 461 (1968), State In Re Thornton, 18 Utah 2d 297 (1967), cf. State In Re Scott, 24 Utah 2d 124, 467 P. 2d 43 (1970). There is no question that the Juvenile Court has been granted authority to terminate parental rights and place a child for adoption. Section 55-10-109, Utah Code Annotated 1953. However, by this grant of power in Section 55-10-109, Utah Code Annotated 1953, the Legislature established the exclusive grounds upon which the Juvenile Court was empowered to terminate parental interest. This Court so held in State v. Lance, supra. Thus, Section 55-10-109, Utah Code Annotated 1953, contains

the sole grounds under which the Juvenile Courts may terminate the interest of a parent in his child. Similarly, Chapter 30 of Title 78, Utah Code Annotated 1953, contains the grounds upon which a District Court may terminate parental rights in a child by his parent or parents.

Accordingly, it is clear that by enacting the provisions of Section 55-10-109, Utah Code Annotated 1953, as the basis by which a Juvenile Court could terminate parental rights and by establishing the provisions of Chapter 30 of Title 78, Utah Code Annotated 1953, as the means by which a District Court could terminate parental rights and permit an adoption, the Legislature adopted different standards for each court. The Juvenile Court in the instant case by attempting to apply the standards set for the District Court exceeded its specific jurisdiction as set by the Legislature. This usurpation is illegal and must not be condoned by this Court, as it is contrary to the intended and expressed command of the Legislature.

POINT III

BY AMENDING SECTION 78-30-4, UTAH CODE ANNOTATED, 1953, THE LEGISLATURE INTENDED TO ALTER THE CONSTRUED MEANING OF THAT STATUTE.

Section 78-30-4, Utah Code Annotated 1953, was altered after being construed by this Court by the 1966 Amendment to said provision. The Amendment required the Courts to include any parent asserting rights in a child had rights to that child, not just the mother of an illegitimate child. As pointed out in the appellant's Brief in this matter, prior to 1966, Section 78-30-4, Utah Code Annotated 1953, provided on its face, and this Court, Thomas v. Children's Aid Society of Ogden, 12 Utah 2d 235, 364 P. 2d 1029 (1961), so construed it, to require that the father of an illegitimate child had no legal right in or to said illegitimate child. That provision was amended in 1966. This Court must construe that legislative change had a definite desired effect and rationale. That rationale would be to establish the rule that any father of an illegitimate child who is asserting rights in that child, i.e., who,

is paying for the child pursuant to an action brought under Section 78-45-1, et. seq., or Section 78-45a-1, et. seq., Utah Code Annotated 1953, had rights in the child. If the Legislature had intended no change, then there would have been no reason to amend this statute in 1966 after the decision of this Court in Thomas v. Children's Aid Society of Ogden, supra.

> "Because it is defined as an act that changes an existing statute, the courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intends to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights. The legislature is presumed to know the prior construction of terms in the original act, and the amendment substituting a new term or phrase for one previously construed, indicates that the judicial or executive construction of the former term or phrase did not correspond with the legislative intend and a different interpretation should be given the new term or phrase." Section 1930, Sutherland Stat. Construction, 3rd Ed.

As was pointed out by the respondent, the trend in the law is to eliminate all distinction between legitimate and illegitimate children. Levy v. Louisiana, 391 U. S.

16 (1968), Glona v. American Guarantee and Liability Insurance Co., 391 U. S. 73 (1968). It is clear that the interests of the child outweigh all other interests. That interest is in having the natural parents care for it if they so desire. The interpretation of the statute asserted by the respondent, should this Court deem Section 78-30-4, Utah Code Annotated 1953, to have any application to this matter, would clearly be contrary to the policy of encouraging the father of an illegitimate child to take interest in it. It must be remembered that factually in this matter, we have the father of an illegitimate child trying to assert his rights to care for his child while the State is saying he has no rights to assert. This is clearly contrary to the intent of the Legislature when it amended Section 78-30-4, Utah Code Annotated 1953 in 1966 and cannot be permitted by this Court.

Respectfully Submitted,

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