1959

In the Matter of the Guardianship of the persons and estates of Ernes Hemingway O'Hare et al : Brief of Appellant

Utah Supreme Court

In the Supreme Court of the State of Utah

In the Matter of the Guardianship of the persons and estates of ERNEST HEMINGWAY O'HARE, ELIZABETH TALBOT, NICOLLE TALBOT, MICHELLE TALBOT, and EMELINE IRENE TALBOT, minors.

BRIEF OF APPELANT

Civil No. 8978

Appeal from the District Court of the First Judicial District of the State of Utah In and for the County of Cache

Honorable A. H. Ellett, Dstrict Judge

PRESTON & HARRIS
and B. H. HARRIS
Attorneys for Appellant

INDEX

Citations

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BRIEF OF APPELANT

Civil No. .....

STATEMENT OF POINTS RELIED UPON BY PETITIONER AND APPELLANT

1. That the Court erred in making and entering that portion of its decree and order dated the 8th day of October, 1958, which reads as follows:

> "IT IS FURTHER ORDERED that this Court declines to make any order concerning the guardianship of the persons of the said Talbot minors herein for the reason and upon the grounds that each child has a surviving parent who has custody of said child and that jurisdiction in this matter lies exclusively in the Juvenile Court of the First Judicial District of the State of Utah." (R. 6).

2. That the Court erred in refusing and failing to hear and take testimony and evidence pertaining to the best interests of said minors with relation to and in re-

gard to the appointment of a guardian of the persons of said minors, and in failing and refusing to take jurisdiction and make an appropriate decree and order respecting such guardianship of the persons of said minors. (R. 16, 17 & 18).

STATEMENT OF FACTS

This is an action, by petition of Charles Sweeny, the maternal grandfather for the appointment of himself as guardian of the persons and estates of the above minors.

The appeal presented herewith, involves purely a legal proposition concerning the jurisdiction of the district court to appoint guardians of the persons of children under 18 years of age. There are no disputed factual situations concerned herein, and a transcript of the evidence would in no way aid the Court in its decision on this appeal. Counsel for Verden L. Talbot (hereinafter referred to as "Talbot") who filed the objections and cross-petition concurs in this statement. The mother of the minors was divorced from Talbot on May 26, 1958, which would have, except for her prior death, become final on August 26, 1958.

Under the terms of the decree (Emeline Talbot, vs. Verden L. Talbot, Civil No. 8573, Cache County District Court.) the plaintiff, mother, was awarded the EXCLUSIVE care, custody and control of the four Talbot children. The two O'Hare children, one of which was

killed with his mother, were by the first husband of Mrs. Talbot.

Talbot was restrained from in any way molesting his wife, and was enjoined and restricted from entering on the home premises occupied by the family until further order of the Court.

Mrs. Talbot left for Salt Lake City on August 13, 1958 to complete final arrangements for a voyage of herself and all of her children to France, leaving the four Talbot children with an aunt at Lewiston. On the evening of the next day, returning to Cache Valley, she and her older son Charles Sweeny O'Hare were killed in an automobile accident near Wellsville, and the other son, Ernest Hemingway O'Hare was seriously and probably permanently injured. Thereupon, Talbot took custody of the four Talbot minors, and the court below, in its order, found that he had such custody, as will more fully appear under ARGUMENT.

The estates of all of said minors, excepting the tort claim against the Utah By-Products Company, resulting from the accident, has been furnished solely by the petitioner, Charles Sweeny, the income from which has been largely if not solely the entire means of support of the Talbot family for some years. He commenced these proceedings for the guardianship for the protection of their estates, and as incidental thereto, also requested guardianship of the persons of the minors alleging that the father ,also the step father of the O'Hare children)

was not a fit and proper person to be appointed guardian of their persons or estates.

The oldest living child (Ernest))is 11 years, and the youngest one is three.

At the hearing on the petition, objections and cross-petition, on September 29, 1958, and wholly upon the cross-examination alone of Talbot (called as a hostile witness by petitioner) the court announced that he was ready to appoint a guardian of the estates, but not the persons, of the minors. It was then stipulated by all parties that Cache Valley Branch, Walker Bank & Trust Company be appointed guardian of the estates of said minors. The court then declined to make any ruling, either upon the testimony before it, or any testimony and evidence which may be produced, upon the matter of the guardianship of the persons of the minors.

Attorneys for petitioner then made a detailed offer of proof in substance as follows: (R. beginning at 13).

> (To prove) that the reputation Verden L. Talbot, cross petitioner, hereinafter referred to as Talbot, was bad as to being law abiding, and as to fitness to act as guardian, and as to sobriety and moral character; that he was not a fit person to act as guardian, and that such was his reputation in his community; that he mistreated the children he sought to act as guardian for; that he unnecessarily remained away from home for long periods; that officers had to be called to the home to protect the family from him; that he, in his wife's divorce was not permitted the usual rights

of visitation with his children; that he engaged in bootlegging; that he associated with women of ill-repute; all of which more fully appears in the record.

The court then refused the offer and made the order appealed from.

ARGUMENT

The two statement of points relied on by appellant are so closely allied that no good purpose could be accomplished by separate treatment, and therefore will be considered as consolidated under the single question presented by this appeal, i. e. does the juvenile court, in a case such as this, have the exclusive jurisdiction to appoint a guardian of the person of a minor? Or to put the matter conversely — did the district court, in this case, have jurisdiction to appoint a guardian of the persons of the minors, or either of them?

It is apparent that the court below refused to take jurisdiction of the matter of the guardianship of the persons of such minors due to the provisions of 55-10-5, UCA 1953:

> "The juvenile court shall have exclusive original jurisdiction in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age . . . and the custody, detention, guardianship of the person, trial and care of such neglected, dependent and delinquent children, and the employment of children as provided by law."

We are only concerned with the catagory of dependency which is defined in 55-10-6 UCA 1953, (so far as applicable here) as "a child whose custody is in question or dispute".

The question presented by this appeal, is the same as presented by the case before this court in In Re State in Interest of Johnson, (Utah) 175 P. 2d 486, which held:

> "When the custody is conceded to be in the parent, but action is instituted to have the custody changed to another as a protection to the child, custody is not in question or dispute as contemplated by the statute."

The court below made a specific finding in its order that the minors were then in the custody of a natural parent, so that this matter falls squarely within the ruling of the Johnson case (supra). Applying the rule announced by this court in Re State (Utah) 170 P. 2d 172, it at once becomes perfectly apparent that the juvenile court had no jurisdiction whatsoever. So that if the portion of the order appealed from be adopted, we are at once faced with the dilema that neither court has jurisdiction and the matter of a guardianship of the persons of the minors could never beome settled so long as they were not actually dependent, neglected or delinquent.

55-10-5 UCA 1953 contains a saving clause which meets our situation:

sub (4) "Nothing herein contained shall deprive other courts of the right to determine the custody of children upon writs of habeas corpus, or when such custody is incidental to the determination of causes in such courts."

The order of the court below forces another inconsistency which only to mention points up the position of appellant. We submit that it is entirely clear that our juvenile courts have absolutely no jurisdiction to appoint guardians of minors estates. Thus in every guardianship matter involving both types the jurisdiction of two distinct courts of record must always be invoked. Such is not the law of this State.

Furthermore, if the lower court's rule is adopted, we may appropriately ask: What becomes of 75-13-12, UCA 1953? This statute in part states:

> "The district court for each county, when it appears necessary or convenient may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed," etc.

This, or similar statutes have been in force, and constantly practiced ever since at least 1888 wherein (Compiled laws of Utah, 1888, Vol. 1, page 103) it reads:

> "Probate courts, in their respective counties shall have jurisdiction in the settlements of the estates of descendents, and in matters of guardianship and other like matters."

That was legislation by The Congress of the United States, and it is interesting to note that in the Edmunds -

Tucker Law (same volume, page 117) the Congress disapproved and annulled all of laws of the Utah Legislative Assembly confering jurisdiction on probate courts, "other than in respect of estates of deceased persons, and in respect of the guardianship of the persons and property of infants," etc.

When the Utah Constitution was adopted on May 8, 1895 the Convention adopted what it called a "Schedule" for the conversion from Territorial existence to Statehood (Proceedings - Constitutional Convention, 1895, Vol. 2, page 1881) and among other matters provided that:

> "When the State is admitted into the Union, and the District Courts in the respective districts are organized, the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration pending therein, upon the expiration of the term of office of the Probate Judge, on the second Monday in January, 1896, shall pass into the jurisdiction and possession of the District Court", etc.

In the "Laws of the Territory of Utah", (Laws of Utah, 1884 p. 451), the 26th Session of the Legislative Assembly adopted language identical to that which appears in 75-13-12, UCA 1953, except that the term "probate court" was used, and "Territory" was used instead of "State".

In view of the historical background, and long and continued usage, it is inconceivable that 75-13-12, UCA

1953 was repealed by implication when 55-10-5, UCA 1953 became law.

Juvenile courts in Utah seem to be the creatures of the Sixth Legislature of Utah, 1905 (L. Utah, 1905 p. 182). This created juvenile courts in cities of the first and second class, and provided that such courts shall have jurisdiction "in all cases relating to children, including juvenile delinquents".

From this modest beginning, the Compiled Laws of Utah, 1917, p. 439 represented a significant development of the juvenile court movement in Utah, wherein it provided as to jurisdiction:

> "The juvenile court shall have jurisdiction in all cases relating to the custody, detention, guardianship of the person, probation, neglect, dependency, delinquency, examination, trial, and care of children who are under eighteen years of age", etc.

Then came the sweeping Act of the Session Laws of Utah, for 1931, p. 51 and repealed specified chapters of previous enactments, BUT DID NOT REPEAL ANY PREVIOUS ACT RELATING TO THE APPOINTMENT OF GUARDIANS. It was in this 1931 Act that we first find the words:

> "The juvenile court shall have *exclusive original jurisdiction* (ours) in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age", etc.

And it was in that Act wherein the saving clause preserved in other courts jurisdiction when custody is

incidental to the determination of causes in such courts. And likewise it defined a dependent child to include one "whose custody is in question or dispute".

This court has held (In re: Cowan's Estate, 99 P. 2d 605, and in other cases) that long usage and practice will not be passed over lightly by the Supreme Court in interpreting a statute. And now certainly, we submit that the general statute providing for the appointment of Guardians of the persons of minors by the district courts, was not repealed by the Juvenile Court Act.

It is a certainty that the question here presented is either (1) a civil matter, or (2) a probate matter. Assume it to be civil — then Art. VIII, Sec. 7 of our Constitution provides:

> "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law;" (Note: There is no exceptions).

Assume it to be a probate matter — is jurisdiction in this case prohibited by law? In addition to the provisions of 75-13-12 (supra) we are met with 75-1-6 UCA 1953:

> "The district and Supreme Courts and the judges thereof sitting in probate and *guardianship matters* (ours) shall exercise *all such powers* (ours), consistent with the provisions of this title", etc.

The juvenile court statute is not contained in that title. We think it appropriate to quote the following

from this Court. In Re Rice's Estate, 182 P. 2d 111:

> "The question of the jurisdiction and powers of District Courts in this state have been before this court on numerous occasions and particularly with respect to the powers, rights and remedies of a court when it is dealing with an action brought under the provisions of the Code of Civil Procedure, the Code of Criminal Procedure, or the *Probate Code* (ours). There is little need to again discuss the extent of the jurisdiction granted to District Courts by the Constitution of the State of Utah and the statutes consistent therewith. That District Courts have original jurisdiction in matters, civil, criminal, probate, *and guardianship,* (ours) is admitted".

It is no answer to the question at hand to state that petitioner has his remedy under the exclusive jurisdiction of the juvenile courts. He does not have such remedy because such courts have no jurisdiction over probate matters; and guardianships where uncontested are probate matters ,and when contested are tried as civil matters under our Code of Civil Procedure. The court below had not the right or power to attempt to force appellant into two separate proceedings.

This Court in the Rice case (supra) after stating standards to be met in determining the nature of an action stated:

> "If these standards are met, then the court can determine which is the appropriate arm but it cannot refuse the use of either. Had the court in this action sustained the demurrer on the grounds it did not have jurisdiction, it would have

denied petitioner the use of either arm, although he was entitled to the use of one".

That the juvenile courts do not have exclusive jurisdiction in matters concerning the custody of juveniles becomes clear when we refer to the matter of custody of children in divorce cases. We believe that no member of the Bar would contend that a divorce court must decide the matter of divorce, and then hold that it could not determine the matter of the custody of the children.

We feel that the court below has misconceived the nature of the juvenile court Act. That Act becomes applicable when facts are alleged or exist giving the State the right to step in and take control of the child. That is the explicit holding of the Johnson case (supra):

> "In other words there is no need for the State to take control of such a child, as by statute the parent is given that preferential right until adjudicated otherwise. On the other hand if the child is not in custody of a natural parent and the contestants for its custody are not obligated by law to assume responsibility for its care, it is a child whose custody is in question or dispute, *requiring the State to consider the child as a dependent child as defined in the third definition quoted above; and ASSUME CONTROL OVER IT* . . . It seems clear that the allegations of the petition in this case are *insufficient to invoke the jurisdiction of the juvenile court.*" (ours).

The specific finding of the court below appealed from, to the effect that the custody of the children are in a natural parent, makes it impossible, under the

ruling of the Johnson case (supra) to invoke the jurisdiction of the juvenile court. Thus, appellant is finds himself in the position that the district court will not take jurisdiction, and the juvenile court cannot do so under the facts alleged in this case. Hence, this appeal.

Respectfully Submitted
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