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Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

DEC 12 1957

Clerk, Supreme Court, Utah

VERNAL K. FRONK,

Appellant,

vs.

THE STATE OF UTAH in the inter-
est of VERNAL FLOYD FRONK,
RICKY DEAN FRONK, and CINDY
LEE FRONK,

Respondents.

Case No.
8734

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

STATEMENT OF FACTS

For the most part, respondent does not dispute the basic facts set forth in appellant's statement, but does place different emphasis and interpretation on some of them, as will be pointed out in the course of the argument below.

STATEMENT OF POINTS

POINT I

A PREPONDERANCE OF THE EVIDENCE SHOWED THE APPELLANT NOT A FIT AND PROPER PERSON TO HAVE CUSTODY OF THE CHILDREN; AND THE COURT ACTED WITHIN ITS PROPER DISCRETION IN ISSUING ITS ORDER.

POINT II

THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN PERMANENTLY DEPRIVING APPELLANT OF THE MINOR CHILDREN AND ORDERING THEM TO BE PLACED FOR ADOPTION RATHER THAN MERELY CONTINUING THEM IN THE CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE.

POINT III

THE JUVENILE COURT JUDGE WAS IN A BETTER POSITION THAN THE COURT ON APPEAL TO DETERMINE THE MERIT AND WEIGHT OF THE EVIDENCE AND THE CREDIBILITY OF THE WITNESSES, AND HIS DECISION SHOULD NOT BE DISTURBED.

ARGUMENT

POINT I

A PREPONDERANCE OF THE EVIDENCE SHOWED THE APPELLANT NOT A FIT AND PROPER PERSON TO HAVE CUSTODY OF THE CHILDREN; AND THE COURT ACTED WITHIN ITS PROPER DISCRETION IN ISSUING ITS ORDER.

It is true that the Juvenile Court felt it had jurisdiction of the custody matter without the necessity of obtaining such jurisdiction through referral from the District Court by virtue of having held earlier proceedings involving said custody. It nevertheless is true also that the matter was referred by the District Court, and that the Juvenile Court Judge did accept it on that basis, and in doing so and in conducting the hearing on June 10, 1957, the Juvenile Court did affirmatively adopt the findings of fact and conclusions of law made by Judge Wahlquist in the divorce proceedings, which findings are set out below and which clearly show that appellant was unfit to have custody of the children (R. 2).

A determination as to appellant's character thus was made by two different courts, and the finding of both indicated him to be lacking in certain necessary traits of character, and to be incapable of properly caring for the children.

In the June 10th proceeding, (R. 2) the trial judge took judicial notice of the findings and decree in a divorce

action involving Mr. and Mrs. Fronk, out of which this matter arose. This the court was entitled to do by virtue of Section 78-25-1, U. C. A. 1953. See *State v. Bates* (Utah) 61 P. 905. It was found in the divorce matter (and adopted by the court below) that "The defendant Vernal K. Fronk is not presently a fit and proper person to have the care, custody and control of the said minor children. He has not been shown to be law-abiding, honest or understanding of his children's needs or welfare." (Par. 5 of Findings of Fact.)

It was found in the earlier proceeding and judicially noticed by the Juvenile Court trial judge that appellant had treated Mrs. Fronk cruelly, and that he had been convicted of a felony by a United States Military Court. (Par. 8, Findings of Fact.)

The fact of conviction of a felony alone was considered of much importance by the Utah legislature in enacting Section 55-10-32, which section deals with the preferred right of parents to the custody of their children. There, one of the exceptions to the general rule that a child should not be taken from the custody of the parents is a situation where a "parent, having full custody and control over a child, or the child's legal guardian has been convicted of a felony * * *." Here, of course, Mr. Fronk did not have full custody and control of the children in and of himself.

Both Mr. and Mrs. Fronk were deprived of custody in the same proceeding at the same time. If the court now were to restore custody of the children to appellant, how-

ever, having fully deprived his ex-wife of the custody on a permanent basis, he would again be covered by the above-mentioned exception. While it is admitted that it is not mandatory to take a child from a parent having full custody upon said parent being convicted of a felony, nevertheless the language of the statute certainly would seem to indicate the importance the legislature places on conviction of a felony.

Appellant minimizes the seriousness of his conviction of the felony, and his subsequent incarceration in a federal military prison. Other jurisdictions have granted to their courts the right to determine whether custody should be denied on such basis. 41 L. R. A., N. S., 592; 39 Am. Jur. p. 617; *Kelsey v. Green* (Conn.) 37 Atl. 679.

In re Case's Guardianship, cited by appellant to show that a felony conviction is not sufficient grounds for deprivation of custody, was a case where the appellant had been incarcerated for a crime which occurred many years before. There, the court held that the conviction and imprisonment were too remote in time to have a bearing on the custody question. The situation is much different here. Appellant still was in confinement at the time of the September, 1956 hearing (which initially deprived him of custody) for a crime which had only recently occurred. It is clear that this would not be at all remote as to time. It should be noted that the findings and decree in the divorce matter were dated April 26, 1957, and that the hearing from which this appeal was taken occurred on June 10, 1957, just six weeks afterward. It is beyond respondent's comprehension how the character of this man could so have

changed (particularly in light of the evidence introduced in the second hearing) in that short a period of time as in any way to weaken the effect of or make untimely the April 26th finding.

In *Kennison v. Chokie* (Wyo.) 100 P. 2d 97, the court states:

“It is stated in 22 C. J. 86, that proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference within logical limits that it exists at a subsequent time. That inference has been applied in cases of reputation or character, of chastity, and of personal habits. 22 C. J. 88.”

Appellant calls attention to a statement in 67 C. J. S. at page 659 to the effect that:

“In order to establish unfitness, it must be shown that provision for the child’s ordinary comfort or intellectual and moral development cannot be reasonably expected at the parents’ hands.”

In the very next paragraph, it is stated that:

“But it has been stated broadly that the requirement that the welfare of the child shall be the guide in awarding custody is satisfied if the parents are honest and responsible with a disposition and the capacity to maintain and educate the child.”

The text thereupon cites the case of *In re Bourquin* (Mont.) 290 P. 250, where the court inferred that the parents must be honest in order to be entitled to custody of the child. As pointed out before, there has been a positive finding that appellant has not been shown to be honest (Par. 5, Findings of

Fact in Divorce) and therefore, according to the terms of the rule cited in the above text and case, appellant is not of sufficiently good character to retain custody of the children.

Haines v. Fillner (Mont.) 75 P. 2d 803, well states the proposition that the welfare of the child is of paramount consideration. It says:

“On the other hand, it is equally as firmly established that the prima facie right of the parent is not absolute, but that the question of paramount importance is the welfare, present and future, of the child.”

Another Montana case, *In re Thompson*, 25 P. 163, states:

“The rule which obtains in most of the courts of this country is that in awarding the custody of a minor, the welfare of the child is to be regarded more than the technical rights of the parents.”

In re Hogue, (N. M.) 70 P. 2d 764 states:

“A child’s welfare and best interest as controlling right to custody of child in adoption proceedings is not measured altogether by material and economic factors, but parental love and affection must be considered.”

In *Kennison v. Chokie*, (Wyo.) supra, the court said:

“The paramount question at all times in the custody and control of a minor child, is the welfare of such child.”

Appellant minimizes the importance of the evidence brought to bear on his character as it relates to custody of the children. It would seem that the fact that appellant

was shown to “run around” and that on an occasion he caused a serious disturbance in a tavern, while frightening and upsetting his ex-wife, is not without importance (R. 14) particularly in that appellant chased his ex-wife into the ladies’ rest room (R. 14). The children’s mother testified that she did not believe, on the basis of appellant’s background, that he could be a good father to the children (R. 16). Evidence then is adduced that he would not be a proper person to have custody of the children because of his running around with girls (R. 16); and that he did not stay home with the children and tend to his responsibilities regarding them during the period in which his own mother had them, which is hardly proper conduct for a father (R. 16).

Mrs. Gorter, the mother of appellant’s ex-wife, testified that she thought appellant did not have love for his children, basing this estimate on the way appellant associated with the first baby (R. 25). Other evidence as to appellant’s immaturity is shown by appellant’s calling his former in-laws on the telephone late at night and telling them their daughter was drunk (R. 27), whereas considerable testimony indicated she was not.

Appellant’s summary of the evidence presented against him in the June proceeding and set forth on page 8 of his brief is at best quite sketchy. In addition to failing to take into account some of the matters just mentioned, it fails to consider the fact that appellant also had served time in the Industrial School, according to Albert Wimmer, who knew the family well (R. 39). At page 32 of the transcript appellant attempts to detail his plans for taking care of

the children. An examination of his statements shows that his plans at best are very vague. He states "Well, I could, my aunt could take care of them at the home, or I could live with my aunt at her home up on—between 26th and 27th." This sort of a life, with the father gone all of the time and an older woman caring for them during the day and probably several hours during the evening, would not be conducive to their proper care and growth. Clearly, the welfare of the children should come first, and they would certainly be much better off in a proper home as adopted children where they could receive the attention of both mother and father (R. 39). Findings in the divorce matter (paragraph 5) which were adopted by the Juvenile Court, state that Mrs. Fronk, mother of appellant, is not "such a fit and proper person because she shows gross hatred for the mother of the children, has indulged in physical violence with said mother, has shown inability to control her emotions and evaluate problem situations in the months just past." It is obvious that the children would have considerable association with this woman whether or not the aunt were to enter into the picture, which entry appears very indefinite.

At R. 38 evidence is introduced showing that appellant's mother was working full time during the day at Hill Field. The apparent indecision of appellant as to just how the children would be cared for in his absence while at work points up the importance of his establishing a good home life for them at such times as he should be unable to be with them. There is little question that from the ages of his aunt and his mother, and the fact of their having so many

outside interests that they would not be good people to care for young children. Appellant's aunt, in fact, has four grown and married children (R. 45) and is 63 years old (R. 47).

The case of *Clarke v. Lyon* (Neb.), 118 N. W. 472; 20 L. R. A., N. S. 171, states as follows:

“The degree of unfitness which would deprive a parent of the natural right to the custody of his children, while it must be positive and not comparative, must be considered in relation to the attending circumstances, such as the concern he has shown for them in the past, the suitability of his domestic parents to receive them, and the question of their general welfare.”

Appellant's brief refers to pages 31 and 32 of the record, wherein evidence is set forth relating to appellant's employment status, income, attitude toward the children, and his plans for their care. This evidence is said to preponderate over the negative evidence described above. It should be noted that the evidence is constituted mostly of appellant's uncorroborated statements. Therefore they are mostly self-serving and certainly must be considered in that light. As to the substance of appellant's evidence, his earning power and his employment are not indicative of his rights to have the care and custody of the children.

POINT II

**THE JUVENILE COURT DID NOT ABUSE ITS
DISCRETION IN PERMANENTLY DEPRIV-
ING APPELLANT OF THE MINOR CHILDREN**

AND ORDERING THEM TO BE PLACED FOR ADOPTION RATHER THAN MERELY CONTINUING THEM IN THE CUSTODY OF THE DEPARTMENT OF PUBLIC WELFARE.

Respondent agrees with the first sentence under appellant's Point II. The statute mentioned does not place any limitation whatever on the period of time for which an offending parent may be deprived of custody, assuming the other statutory provisions under 55-10-32 and 55-10-30, U. C. A. 1953, are complied with. It is true also that specific standards of conduct are not exactly defined. The application of standards is for the judge of the case involved acting on the basis of past precedents and his own best judgment after careful examination of the facts and upon observation of the demeanor of the witnesses. Therefore, considering the words of the statutes alone, if the judge properly so decides, he may take custody from the parents for an unlimited period of time, even permanently.

POINT III

THE JUVENILE COURT JUDGE WAS IN A BETTER POSITION THAN THE COURT ON APPEAL TO DETERMINE THE MERIT AND WEIGHT OF THE EVIDENCE AND THE CREDIBILITY OF THE WITNESSES, AND HIS DECISION SHOULD NOT BE DISTURBED.

The Supreme Court repeatedly has said that the trial judge stands in a superior position to determine the facts of a case and that he is better equipped to pass on the evi-

dence before him than is the court on appeal. This view is of general application. Specifically, it has been applied in a situation very similar to the one at hand in *In Re Bradley* (Utah), 167 P. 2d 978, cited by the appellants for another purpose. There the court said:

“Cases involving the custody of the child are cases in equity, and the Supreme Court on appeal is required to determine the facts as well as the law, having in mind that the trial judge who heard and saw the witnesses was in a better position than the Supreme Court to weigh and evaluate the evidence.”

CONCLUSION

It is respondent's conclusion that the Juvenile Court Judge acted within his discretion in permanently depriving appellant of custody of the child upon a preponderance of the evidence, which showed appellant not to be a fit and proper person to have such custody. The Juvenile Court did not abuse its discretion in ordering the children placed for adoption, rather than merely continuing them in the custody of the Welfare Department.

Again referring to the oft-cited rule of law that the welfare of the child is more important than the natural right of parents to keep custody of their children, we strongly urge the Court to uphold the decision of the Juvenile Court below in placing the children out for adoption. The children, during the last few months, have been transferred from place to place and been subjected to strong and contrary influences, and respondent believes that any further indecision as to their status will be most damaging to

their characters and personalities. As previously stated, there appears to be no statutory prohibition against the permanent deprivation of custody in such a case.

In the event this court decides that the children should not be taken permanently from the custody of appellant, it would appear that the children nevertheless should be continued under the jurisdiction of the Welfare Department until such time as a further order is entered.

It is respectfully submitted that the decree of the Juvenile Court of the First District should stand.

Respectfully submitted,

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