1984 WL 249874 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 30, 1984

***1** The Honorable William B. Traxler, Jr.
Solicitor
Thirteenth Judicial Circuit
Greenville County Courthouse
Room 112
Greenville, South Carolina 29601

Dear Solicitor Traxler:
You have asked whether it is unlawful in South Carolina for a parent to bargain away for monetary consideration the custody of his or her child to a stranger, thereby attempting to relieve himself or herself from all parental obligations and place that obligation upon another. Particularly, you wish to know whether such conduct is violative of any of the criminal laws of this State. The answer to your question is not a clear one, and for that reason, we recommend that corrective legislation be enacted to resolve this problem.

A thorough search of the Code of Laws of South Carolina fails to reveal the single statutory provision which expressly and unambiguously forbids the sale of a child in South Carolina. On the other hand, as we will point out, there are several authorities which suggest that this practice may, in one form or another, be prohibited. Those authorities are discussed in greater detail below. However, most of the authorities we mention are older court decisions. These decisions usually have addressed the question from the standpoint of the validity of the contract or agreement to sell the child, not whether the practice is violative of the criminal laws. And the authorities we cite often suggest the existence of loopholes or situations where the practice may in fact be valid. If then, the sale or gift of children is clearly to be prohibited in all forms, corrective legislation would be required.

The general case law authorities are divided as to whether the sale or gift of a child is prohibited by the common law.
According to some authorities, except to the extent that the transfer of custody is authorized by statute, an agreement by a parent permanently transferring the custody of his or her child to a third person is invalid as being contrary to public policy . . .. According to other authorities, and under the provisions of some statutes, a parent may by agreement surrender the custody of a child so as to make the custody of the person to whom the child is surrendered legal and binding. Such agreement is not against public policy.

67A C.J.S., Parent and Child, § 19a. See also, 59 Am.Jur.2d, Parent and Child, § 34. In Washaw v. Gimble, 50 Ark. 351, 7 S.W. 389, 390 (1888), the Supreme Court of Arkansas stated that a parent had no right to surrender the custody of his or her child for monetary gain. There, the Court stated:
The custody of a child is not the subject of gift or barter. A father cannot, by mere gift of his child, release himself from the obligations to support it, or deprive himself of the right to its custody. Such agreements are against public policy, and are not strictly enforceable.

The Court went on to note, however, that '[c]onsent to the abandonment of a child by legal adoption in pursuance of the statute and the establishing of the relation of master and apprentice, have no relation to the question under consideration.' 7 S.W. at 390. And in Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900), the Mississippi Supreme Court quoting from Weir v. Marley, 99 Mo. 494, 12 S.W. 798 (1890), said:

***2** The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody, and that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society . . . [the parent] cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature as well as by the positive law, and essential to the discharge of the duties of that trust by contract per se; otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties.

29 So. at 81. The Mississippi Court, later in Walker v. Williams, 58 So.2d 79 (1952), citing Hibbette v. Baines, stated that '. . . a parent of a child cannot irrevocably surrender the right to its custody by contract in that behalf, even if the same has been made at a time when the parent was not in great distress and was a free agent, such contract being void against public policy.' 58 So.2d at 81. But, as we have already indicated, other courts have held such contracts not to be against public policy, and valid. 67A C.J.S., Parent and Child, § 19a.

Just as the law in other jurisdictions is not clear in this area, there is also ambiguity in the South Carolina decisions. In Anderson v. Young, 54 S.C. 388, 393, 32 S.E. 448 (1898), the South Carolina Supreme Court observed:
A parent cannot, at common law, irrevocably divest himself of his trust and duty to care for and train his children, and surrender their care and custody to another merely for his own comfort or pecuniary gain . . ..

The Court went on to add, however that a parent was not prevented under that authority from lawfully placing his children in the custody of another, and from assigning 'their services during minority for their own welfare, as to learn some useful trade or occupation . . .'. Supra.

And, in Ex Parte Reynolds, 73 S.C. 296, 53 S.E. 490, 492 (1906), our Court stated:
The weight of authority sustains the doctrine that the right of a parent to the custody of a child cannot be defeated by a mere parol gift of the child by the parent to another . . . [citations omitted] The reason upon which this doctrine rests [is]—that such a parol gift is against public policy. [1]

However, in Reynolds, the Court further noted that its conclusion was 'strengthened . . . by the statute which sanctions the disposition by a parent of the custody and tuition of a child, but provides that such disposition shall be evidenced 'by his or her deed executed and recorded according to law.'' In other words, the Court in Reynolds found that parol gifts of children were violative of public policy; but if such gifts were made pursuant to the then existing statutory deed procedure, they were authorized.

***3** At the time the Reynolds case was decided, South Carolina's statute authorizing the deeding of children provided in pertinent part that
The father of any child or children . . . may by his or her deed . . . or by his or her last will and testament . . . dispose of the custody and tuition of such child or children for and during such time as he, she or they respectively remain under the age of twenty-one years, to any person or persons in possession or remainder.

Then, in Ex Parte Tillman, 84 S.C. 552, 66 S.E. 1049 (1909), the South Carolina Supreme Court declared in part this deed statute unconstitutional as violative of the Federal and State Constitution's Due Process Clauses and the Separation of Powers provision of the State Constitution. The Court in Tillman recognized in its opinion that the child possesses a liberty interest in remaining 'free from such illegal restraint of the parent', an interest which 'the Constitution forbids to be taken away except

by due process of law.' 84 S.C. at 560. In addition, each parent, said the Court, possesses a liberty interest in the child vis a vis one another. Said the Court,

If these family rights of the mother and children were not held to be within the protection of the Constitution, under statutes like this, the father could exercise a tyranny revolting to all sense of justice and conceptions of personal liberty. He could at any moment capriciously break up his family, take all his infant children from their mother without her consent and bestow them upon strangers; and the courts would be powerless to give any relief though manifestly such a course of conduct would itself be plenary proof of relinquishment of the duties of the parental office.

The argument comes to this: The guaranty of personal liberty expressed in the Constitution means, above all else, that no human being under the protection of the Constitution can be placed under subjection to the arbitrary power of disposition and control of any human being.

84 S.C. at 561. The Court noted also that only the judicial branch could decide questions of child custody; legislative exercise of this power violated the Separation of Powers provision. Supra. However, rather than construe the deed statute in such a way that it would facially violate the Federal and State Constitution, the Supreme Court sought to interpret the statute in a constitutional manner.

While the father cannot be empowered to convey away the rights of the children or of the mother with respect to their custody, there is no reason why the General Assembly may not provide that his deed should be binding on him. The result of this construction of the act would be to give effect as against the father himself to any deed made by him in accordance with the statute, so that after he had made such a deed he could not as against the grantee demand back the custody which he had voluntarily relinquished.

84 S.C. at 563-564. In short, the Court concluded that the deed of the child could have no legal effect in transferring rights in or the custody of the child, because such arbitrary transfer, without the sanction of the courts was violative of the Due Process Clause of the Federal and State Constitutions and the Separation of Powers Clause of the State Constitution.

***4** Only recently, our Court of Appeals reaffirmed the constitutional principles expressed in the Tillman case. In Morgan v. D.S.S., Op. No. 106 (Court of Appeals, March 2, 1984) Judge Shaw, writing for the Court, stated:

In Ex Parte Tillman, . . . our Supreme Court held that the determination of the right to custody of a minor child is a judicial question. The legislature is denied the power to exercise the judicial function or to confer upon any other person the right to exercise it. Any statute authorizing the conveyance of a minor child without permitting judicial investigation is violative of the separation of powers clause.

Slip Op. at 6.

Even though the Tillman case apparently remains good law in South Carolina, it should be noted that, immediately following that decision, the General Assembly amended the 'child deeding' statute apparently in an effort to conform to the constitutional requirements stated in the Tillman decision. The statute was amended in 1910, adding the following language:

Nothing herein shall be construed to abrogate, lessen or interfere with the right and duty of a court of competent jurisdiction at any time to transfer and assign the custody of a child for its best interest.

Following this amendment, our Supreme Court in Watson v. Watson, 134 S.C. 147, 132 S.E. 39 (1926) reviewed a transfer of custody by a mother, pursuant to the deed statute. The Court cited the statute as amended, and observed:

The General Assembly, recognizing the right not only of the parent, but that of the child, provided in this section, that nothing therein should be construed to abrogate, lessen, or interfere with the right and duty of a Court of competent jurisdiction at any time to transfer and assign the custody of a child for its best interest.

134 S.C. at 157. Interestingly, no mention was made by the Court in Watson of the Tillman case or the unconstitutionality of the deed statute, as amended. Neither was the deed attacked on the basis that, if enforced, would violate the Constitution. Instead, the Court noted that the mother who had made the deed, now sought to cancel it on the grounds of alleged coercion and intimidation. It was noted by the Court that the mother 'had no idea at the time of the execution of the paper that she was signing an instrument giving her child to the respondent permanently.' 134 S.C. at 158. The Court reviewed the facts as presented concerning coercion and stated:

This Court will assume that no good mother will very readily and willingly give up permanently her baby. The burden is, and should be, upon him, who would show otherwise, to prove his contention fairly and strongly. We do not think the respondent has done so in this case.

134 S.C. at 159. The Court held 'under the peculiar circumstances in this case . . . that the alleged deed should not stand, and that this Court has the right and duty to transfer and assign the custody of the little girl for her best interest. That 'best interest,' it appears to us, requires that the custody of the child be awarded to the mother.' 134 S.C. at 160.

***5** The clear implication of the Watson case is that, under certain circumstances, transfers of custody by deed or will in conformity to the 'child deeding' statute would be valid. In Watson, the Court invalidated the particular deed under review because of the facts and because such transfer was not in conformity with the best interest of the child. But the Court strongly suggested, unlike the Court had held in Tillman, that the deed statute was nevertheless valid, and under proper circumstances, transfers of custody by parents, pursuant to that statute, might be approved by the Court.

By Act No. 301 of 1951, the deed statute was again amended to make explicit that 'no such deed, except a deed to an agency or department of this State authorized by law to receive or place the custody of children, shall be of any effect unless approved by a court of common pleas of this State, or judge thereof, upon petition therefor.' The deed statute, as amended, was codified at 21-21-20 et seq. of the 1976 Code. The statute was repealed by Act No. 71, § 3 of 1981, but was reinstated, with minor changes by Act No. 398, § 20 of 1982.

In sum, the law in South Carolina regarding a parent's transfer of custody of his or her child to another for consideration appears to be this: South Carolina's common law apparently prohibits the surrender of a child's care and custody to another 'merely for his own comfort or pecuniary gain.' Anderson v. Young, supra. And such transfer by parol gift is apparently void as against public policy. Ex Parte Reynolds, supra. However, § 21-21-20 et seq., as amended apparently does still authorize such transfer by deed or will under certain limited circumstances. If the deed is made to another individual, it must be signed by both father and mother, if living, and meet all other requirements of the statute; and it is of no effect until first approved by a Court of Common Pleas upon petition therefor. If, on the other hand, the deed is to 'an agency or department of this State authorized by law to receive or place the custody of children', the statute on its face does not require advance approval by the Court of Common Pleas. [2]

Thus, Section 21-21-20 et seq. despite its earlier declaration of unconstitutionality in Tillman, appears in amended form still to be a valid statute, at least in light of Supreme Court decisions subsequent to the amendment of the statute following Tillman. Moreover, § 21-21-20 appears to be the one procedure for parental transfer to individuals which our Court has recognized may be effectual. But, both Tillman and Morgan v. D.S.S. are clear that even where, pursuant to § 21-21-20 et seq. a child is transferred by deed, approval by the court is still necessary for the transfer to be final and valid.

With respect to your question concerning whether there is any statute making the sale or gift of a child a criminal offense, again, we can find no such statute. However, one related criminal statute is brought to your attention. Section 20-7-80 makes it a misdemeanor, punishable within the discretion of the Circuit Court for any parent to wilfully abandon a minor child. This section is found in Sub-Article 1 of Article 3 of the Children's Code, which deals with the legal status of children in regards to the parent-child relationship; for purposes of Section 20-7-80, an abandoned child is defined in Section 20-7-1570.

***6** There is some case authority indicating that, in certain circumstances, an attempt by a parent to contract or bargain away parental responsibilities and the custody of a child may constitute an abandonment. In Hibbette v. Baines, supra, for example, the Mississippi Supreme Court noted that an abandonment could result from a parent 'contributing nothing to [a child's] . . . support, taking no interest in it, and permitting it to remain continuously in the custody of others, substituting such others in his own place so that they stand in loco parentis to the child . . ..' 29 So. at 81. In that case, we note, however that the Court found that the facts as presented showed no abandonment had occurred.

Sections 20-7-80 and 20-7-1570 have not to our knowledge, come under judicial scrutiny in the context of the sale or gift of children, and their applicability to that situation is presently uncertain. Whether these provisions might be applicable will depend on the facts of the particular case, and whether abandonment, as defined in those provisions can be proven. It would appear, however, that at least in the context of the deed statute, where that statute's provisions are followed, it would be difficult to argue that an abandonment had occurred, if the General Assembly had authorized the procedure for transfer. Thus, if employed in the criminal context, abandonment would have to be utilized for transfers other than those made pursuant to the deed statute.

In summary, then, the law in South Carolina concerning the legality of a sale or gift of a child by his or her parents remains uncertain. No South Carolina statute expressly and clearly prohibits in all instances the sale or gift of a child. And none clearly makes such a criminal offense. Previous decisions of the South Carolina Supreme Court do indicate, however, that certain forms of such sales are invalid as against public policy. But these decisions also suggest that where a transfer is made in conformity with the requirements set forth in Section 21-21-20 et seq. (the 'deeding of children' statute), it may be held by a court to be valid. Legislation is, therefore, required if such conveyances are to be effectively prohibited.

We note also that your specific questions raise other related issues, particularly in the area of so-called 'private adoptions', upon which much public attention has been focused recently. The law in this area is also unclear and probably should be clarified.

Of course, it is well recognized that
[t]he adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their child was against its policy and repugnant to its principles. Adoption had its origin in the civil law and exists in this State only by virtue of statutory authority which expressly prescribes the conditions under which adoption may legally be affected.

Goff v. Benedict, 252 S.C. 83, 165 S.E.2d 269, 270 (1969), quoting from Driggers v. Jolly, 219 S.C. 31, 64 S.E.2d 19 (1951). Our Court has stated that any contract for the transfer of a child must be in conformity with the adoption laws. Hatchell v. Norton, 170 S.C. 272, 170 S.E. 341 (1933). Moreover, the Court has noted that '[c]onsent lies at the foundation of the adoption statute' and therefore, in order for the court to issue a valid adoption decree,
***7** it must appear that the parent has consented, or has forfeited his or her parental rights by the abandonment of the child or by misconduct, even though the adoption would result in a benefit to the child.

D'Augustine v. Bush, 269 S.C. 342, 345, 237 S.E.2d 384 (1977). And some courts have held that an attempt to relinquish a minor child to an individual or agency other than an authorized one is without any force. 2 C.J.S., Adoption of Persons § 67; compare, § 21-21-20.

Again, the question of so-called 'private' adoptions is unclear under the adoption laws of South Carolina. For example, we note that under the present South Carolina adoption laws, there is no restriction upon the amount of money that can be exchanged for the adoption of a child above and beyond normal medical expenses of the adoption; we understand that most states now make it illegal to profit financially from placing a child. Some states prohibit the so-called 'private' adoption altogether and some require accounting of fees and some restrict payment only of legal and hospital costs. While the South Carolina case law regarding the sale or gift of children might in some circumstances be said to bear upon these issues (such as in the area of

parol sales or gifts), again, the cases themselves are not clear and they certainly do not address these questions in all instances. Statutory clarification is, therefore, necessary. Of course, any such clarification is within the province of the General Assembly.

The law in South Carolina is also unclear on the legal rights of an illegitimate child, apparently contributing to making South Carolina an easy place to finalize an adoption without giving consideration to the rights of the birthfather. Moreover, we note that under present law, there is no requirement that a home study be conducted by licensed or authorized social service agencies in the case of those adoptions not handled by authorized adoption agencies. Further, there is presently no provision in the law requiring legal representation or appointment of a guardian ad litem for the birthmother in a private adoption. And there is presently no criminal penalty provision for failure to comply with the adoption statutes. Again, such changes or clarifications in the law would be a legislative decision and would remain within the discretion of the General Assembly.

CONCLUSION

In summary, the law in South Carolina concerning the prohibition against the sale or gift of a child is presently uncertain. Loopholes exist within our present laws which permit such sales or gifts in various forms. This office, therefore, recommends that the General Assembly enact legislation closing those loopholes.

Sincerely,

T. Travis Medlock
Attorney General

Footnotes

1 'Parol' means: 'A word; speech; hence, oral or verbal. Expressed or evidenced by speech only; as opposed to by writing or by sealed instrument.' Black's Law Dictionary at 1005 (5th Ed., 1979).

2 Of course, Section 21-21-20 states, even with respect to deeds made to agencies authorized by law to receive or place the custody of children, that '[n]othing herein shall be construed to abrogate, lessen or interfere with the right and duty of a court of competent jurisdiction at any time to transfer and assign the custody of a child for its best interest.' This may be consistent with the Court's statement in Morgan v. D.S.S., supra, that, before there can be a final conveyance of a minor child, there must be court approval.

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