

<b>WILL TORGESON</b>	)	
	)	
<b>Plaintiff/Appellant,</b>	)	
	)	<b>Lawrence County Juvenile Court</b>
	)	<b>No. 10158</b>
<b>VS.</b>	)	
	)	<b>Appeal No.</b>
	)	<b>01A01-9603-JV-00090</b>
<b>WILLIAM BEARDEN and</b>	)	
<b>SHIRLEY BEARDEN</b>	)	
	)	
<b>Defendants/Appellees.</b>	)	

**IN THE COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE**

**APPEAL FROM THE JUVENILE COURT OF LAWRENCE COUNTY  
AT LAWRENCEBURG, TENNESSEE**

**HONORABLE LEE A. ENGLAND, CHANCELLOR**

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<p><b>FILED</b></p> <p><b>August 28, 1996</b></p> <p><b>Cecil W. Crowson</b> Appellate Court Clerk</p>
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**AFFIRMED AND REMANDED.**

HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE  
WILLIAM C. KOCH, JR., JUDGE

<b>WILL TORGESON,</b>	)	
	)	
<b>Plaintiff/Appellant,</b>	)	
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<b>SHIRLEY BEARDEN,</b>	)	
	)	
<b>Defendants/Appellees.</b>	)	

**OPINION**

William Torgeson has appealed from an order of the Juvenile Court denying his petition for custody of Allen Broc Torgeson, a minor, and awarding the permanent care and custody of said minor to William and Shirley Bearden.

The minor child was born to Monetta Bearden on November 25, 1992, when Ms. Bearden was cohabiting with Will Torgeson without marriage in the home of the parents of Ms. Bearden, William and Shirley Bearden. Will Torgeson was named in the birth certificate as the father of the infant. Monetta Bearden, Will Torgeson and the child continued to reside in the home of William and Shirley Bearden until January 1, 1993, when Monetta Bearden died as a result of a gunshot wound inflicted by the brother of Will Torgeson at a new years eve party. The testimony indicates that, on January 19, 1993, William and Shirley Bearden and William Torgeson jointly petitioned the Juvenile Court of Lawrence County for an order of joint custody of the child by the 3 petitioners, and the order was granted. (This proceeding is not recorded in the technical record before this Court.)

Will Torgeson and the child continued to reside in the home of William and Shirley Bearden until June, 1993.

In June, 1993, Will Torgeson left the home of William and Shirley Bearden, removed to another county, and, in July, 1994, married Margaret Diane Torgeson.

On December 20, 1994, Will Torgeson filed in Juvenile Court the following petition:

IN RE: ALLEN BROC TORGESON

PETITION TO CHANGE CUSTODY

Comes now your Petitioner, William Torgeson, and for his Petition would state and show to the Court as follows:

**I**

That the Petitioner is the natural father of Allen Broc Torgeson who was born on November 25, 1992.

**II**

The Defendants are the maternal grandparents of Allen Broc Torgeson.

**III**

The minor child, Allen Broc Torgeson, has resided in the home of the maternal grandparents, Shirley Bearden and William Bearden, under a custody order entered in this cause in January 1993.

The Petitioner would show that he is the natural father of the minor child and that he has married and has a stable home in Huntsville, Alabama and that it is in the best interest of the minor child that the Petitioner, William Torgeson, have complete care, custody and control of his minor son.

PREMISES CONSIDERED, WHEREFORE, PETITIONER PRAYS:

1. That proper process issue requiring the Defendants to answer this Petition but their oath is hereby expressly waived.
2. That upon final hearing in this cause that the Petitioner be awarded complete care, custody and control of the minor child, Allen Broc Torgeson.
3. That the Petitioner have such other, further and general relief as to which he may be entitled in the premises.

This the 7th day of December, 1994.

The cause was heard by the Juvenile Court on February 22 and March 2, 1995.

On February 22, 1995, during opening argument, the following occurred:

THE COURT: This is a petition for establishing visitation?

MR. DOERFLINGER: Yes, sir. We have filed a petition

to change custody.

THE COURT: Do you think that I can do that when the Child hasn't been legitimated?

MR. DOERFLINGER: As I understand it the child has been legitimated. He is acknowledged as the natural father and has joint custody of the child by order of this Court.

THE COURT: That was a petition that was submitted to me as an agreed order, but what legitimized the child?

MR. DOERFLINGER: Well, if this man has custody of the child, and has joint custody of the child, all we're asking is to exercise visitation rights. If I need to amend the petition and legitimate the child, that will be fine. We'll do that. We're not here today for a final order on custody.

THE COURT: I understand that. But the mother and father were never married, the child would be considered an illegitimate child of your client. My question to you is do I have any authority to do anything with respect to this man's rights and possibly his responsibilities without that child being legitimated?

MR. DOERFLINGER: We'll legitimize the child right today. This man is here. He feels that this is his child. He is named on the birth certificate.

THE COURT: That makes legitimation. You can't file a paternity suit, but you can file a suit for legitimation. My question is, can anything be done at all until that child is legitimized? I quite frankly haven't researched that issue, haven't looked that issue up.

THE COURT: Can we agree on an order of legitimation?

MR. DOERFLINGER: I believe we can.

MR. BATES: We can't.

THE COURT: Can't?

MR. BATES: Can not.

The Technical Record contains a document which does not bear a file date, but was served on February 28, 1995, and reads as follows:

Come now William Bearden and wife, Shirley Bearden, by and through counsel and move this Honorable Court to dismiss this cause in that same is premature. William Torgeson has not previously legitimized the minor child who is the subject of this cause of action.

That as an affirmative defense, it is affirmatively plead that the petitioner is unfit to have the custody of said minor child. Alternatively, William Torgeson has abandoned said minor child.

On March 2, 1995, at the conclusion of petitioner's evidence, the defendants moved to dismiss, on ground of no legitimation, and the Court responded:

THE COURT: I'm going to take that under advisement. I think the way to proceed is to go ahead and get what testimony that you want to offer. We'll take that testimony in.

MR. DOERFLINGER: Your Honor, if I might, for the record, state that the petitioner, Will Torgeson, has no objection to the entry of an order of legitimation.

The record also contains a document entitled "Motion" and reading as follows:

#### **MOTION**

Comes now your Petitioner, Will Torgeson, and moves to amend his original Petition filed in this cause and petitions this Court for an Order of Legitimation to legitimize the minor child, Allen Broc Torgeson, born 11/25/92 in Maury County, Tennessee.

1. The Petitioner would show that he is the natural father of Allen Broc Torgeson.
2. That the Petitioner acknowledges and has acknowledged the fact that he is the natural father of Allen Brock Torgeson having filed an acknowledgment of paternity pursuant to T.C.A. § 68-3-305 on November 26, 1992 and that the child's natural mother, Monetta Ann Bearden, deceased, also signed said acknowledgment of paternity and that the Petitioner's name is listed on the birth certificate of Allen Broc Torgeson.
3. The Petitioner would show that he is ready, willing and able to assume all of the duties and functions and responsibilities of parenthood toward this child.

Premises considered, Petitioner prays:

1. That he be allowed to file this Petition for Legitimation of Allen Broc Torgeson in the above-referenced cause.
2. That upon final hearing in this cause that the minor child, Allen Broc Torgeson, be found to be the legitimate child of the Petitioner, William Lee Torgeson.
3. That the Petitioner have whatever other further general

relief to which he might be entitled to in the premises, including custody and visitation with the minor child.

This the 14th day of March, 1994.

(Signed)  
\_\_\_\_\_  
WILLIAM LEE TORGESON

The date of 1994 probably was intended to be 1995. The motion bears no evidence of when, if ever, it was filed, and the record contains no indication that the motion to amend was ever ruled upon or that the proposed amendment was ever answered by the defendants or considered or ruled upon by the Juvenile Court.

It may be surmised that this document represented Torgeson's response to the above quoted motion to dismiss.

The answer of William and Shirley Bearden, filed on March 15, 1995, includes the following:

That as an affirmative defense, it is affirmatively plead that the petitioner is unfit to have the custody of said minor child. Alternatively, William Torgeson has abandoned said minor child.

It may be surmised that this answer of the Beardens was in response to the March 14, 1994(5) motion of Torgeson.

On October 5, 1995, the Juvenile Court entered the following order:

**ORDER**

This cause came on to be heard before the Honorable Lee A. England, Juvenile Judge of Lawrence County, Tennessee, upon the petition of Will Torgeson for custody of Allen Broc Torgeson, answer of the defendants, William Bearden et ux. Shirley Bearden, testimony of the parties and witnesses in open court, exhibits thereto, and the entire record in this cause. After due consideration including the credibility and demeanor of witnesses, the court concludes that the petition of Will Torgeson should be dismissed.

The court finds that the Beardens never interfered with Will Torgeson's visiting the minor child, Alan Broc Torgeson. Further, no plausible explanation exists for the prolonged period of time without Will Torgeson contacting, visiting, or communicating in any fashion with said minor child nor providing any means of support. Will Torgeson assumed no parental responsibility and totally ignored the minor child for an extended period of time without justification.

In view of the foregoing, the court concludes that Will Torgeson evidenced a settled purpose to relinquish all legitimate claims to the child; that his behavior evidenced an absolute, complete intentional relinquishment of all legitimate interest in the child. As a result of Will Torgeson abandoning said child and refusal to accept responsibility for said child, he cannot now inject himself into the child's life thereby denying the child the undisputed security and stability of the Bearden home. The court finds that the best interest of Allen Broc Torgeson and his welfare require the petition for custody filed by Will Torgeson be dismissed and custody of Allen Broc Torgeson be awarded to William Bearden and Shirley Bearden. It is, therefore

...further ORDERED, ADJUDGED AND DECREED that the petition of Will Torgeson for custody of Allen Broc Torgeson is overruled and denied.

It is further ORDERED, ADJUDGED AND DECREED that William Bearden and Shirley Bearden are awarded the permanent care and custody of Allen Broc Torgeson.

The costs of this cause are taxed against Will Torgeson for which execution may issue, if necessary.

The Juvenile Court apparently treated the "affirmative defense" of the answer, quoted above, as a counterclaim seeking termination of the previously ordered joint custody of Will Torgeson; and that the Juvenile Court sustained the counterclaim and terminated Torgeson's joint custody.

The Juvenile Court entered no judgment relating to legitimation or the relationship of Torgeson to the child, except custody.

On appeal, the appellant, Will Torgeson presents two issues, of which the first is:

- I. The Court was in error by failing to legitimate Allen Broc Torgeson.

As indicated above, the record does not indicate that the Trial Court accepted or acted upon Mr. Torgeson's oral, and belated written, application for legitimation. Since the record does not reflect that this issue was decided by the Trial Court, the judgment of the Trial Court is not final and the appeal is subject to dismissal as moot.

The issues of visitation and control are, in part dependent upon the parental rights claimed by Torgeson, and should not be determined finally without disposing of the issue of legitimation and, if properly raised, the issue of continuation or termination of parental rights.

For the reasons stated, this appeal is dismissed as premature. Costs of appeal are taxed against the appellant. The cause is remanded to the Juvenile Court for further proceedings.

**APPEAL DISMISSED, CAUSE REMANDED.**

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HENRY F. TODD  
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE