

1987

Matter of Adoption v. : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870415-CA

IN THE COURT OF APPEALS

STATE OF UTAH

IN THE MATTER OF
THE ADOPTION OF:

RESPONDENT'S BRIEF

INFANT ANONYMOUS.

Case No. 87-0415CA

AN APPEAL FROM THE DECISION OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT PRESIDING

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MAY 27 1988

ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 7

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PARTIES

THE PARTIES TO THIS ACTION ARE:

THE ADOPTIVE PARENTS (APPELLANT)

vs.

THE NATURAL MOTHER OF INFANT ANONYMOUS (RESPONDENT)

The Parties' names have remained confidential
throughout the proceedings leading to this Appeal.

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IN THE COURT OF APPEALS

STATE OF UTAH

IN THE MATTER OF
THE ADOPTION OF:

RESPONDENT'S BRIEF

INFANT ANONYMOUS.

Case No. 87-0415CA

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Annotated Section 78-2a-3(2) (g) (1987) and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF PROCEEDINGS

This is an appeal from a judgment of the Third Judicial District Court for Salt Lake County rendered by the Honorable Richard H. Moffat in which Judge Moffat ruled that the consent to the adoption of the infant anonymous was not given freely and unconditionally by the natural mother and consequently allowed the revocation of consent for adoption and dismissed Appellants' petition for adoption.

ISSUES PRESENT ON APPEAL

1. Does the setting aside of a consent for adoption by one judge constitute a reversal of the judge or commissioner (as allowed by Section 78-30-8 Utah Code Annotated) who took the original consent.

2. When the issue of which judge is to preside is raised and neither party expresses any objection to Judge Moffat and both parties participate in arguing the motion and no objection is made until after a judgment is rendered, have the parties waived their right to object.

3. Is it appropriate for the Trial Court to grant a revocation of consent for adoption when it is apparant from the facts that the consent was not given freely, voluntarily and unconditionally and when the mother was acting under a mistaken belief as to the finality of the consent.

4. Is it necessary to have an evidentiary hearing on a motion to set aside a consent for adoption or is an evidentiary hearing something which can be waviied.

STATUTES

Utah Code Ann. 78-30-8 (1987):

Procedure - Agreement of adopting parents. The person adopting a child and the child adopted, and the other persons whose consent is necessary, must appear before the district court of the county where the person adopting resides, and the necessary consent must thereupon be signed and an agreement be executed by the person adopting to the effect that the child shall

be adopted and treated in all respects as his own lawful child; provided, that if a person whose consent is necessary is not within the county the court may, in the same manner as is or may be provided for the taking of depositions in civil cases, appoint a commissioner to examine such person upon his deposition and to take his written consent and to certify the same to the court. The commissioner shall explain to such person the legal significance of such consent, and shall certify to the court his findings as to whether or not the consent is freely given. Where such person is within the state of Utah the commission shall issue to a judge of the district court of the county in which such person is located.

STATEMENT OF THE CASE

The natural mother at the time she gave birth to the infant anonymous, was 21 years of age. This was her first pregnancy and at the time she was living at home and working off and on. (Addendum "A" at page 2) Throughout the pregnancy, the natural mother was able to conceal the fact that she was pregnant and in fact the pregnancy was a mystery even to Respondent's mother. (Addendum "A" at page 2.)

Prior to the birth of the child, the natural mother spoke to some persons but the only real contact with any adoption agency was approximately June 1, 1987. (Addendum "A" at page 2.) On June 23, 1987, the infant anonymous was born. (R. 116 Addendum "B" at page 2.) At that time, since persons in the natural mother's household were not aware of the pregnancy nor the birth of the child, the natural mother had a chance to place the child for adoption and avoid any embarrassment or conflict with her immediate family and, in fact, inquired into the possibility of

adoption. (Addendum "A" at page 3.)

Between June 5 and the time the consent was taken, on only one occasion did the natural mother and the other persons involved meet to discuss the adoption. (Addendum "A" at Page 3.)

The child was born on June 23, 1987, a Tuesday, at approximately 4:19 a.m. (R. 116 Addendum "B" at page 2.) On Wednesday, June 24, 1987, the natural mother was before the Court at which time the issues of consent were addressed. After an extensive period of labor and the birth of Respondent's child, the Respondent, within 30 hours executed the consent for adoption. (R. 43 Addendum "C" at paragraph 15.) At the time Respondent signed the consent, she was on pain medication and prior to the time she went to Court, she had significant doubts about giving the child up for adoption. (See paragraph 3 of Affidavit of Respondent.) Subsequent to the signing of the consent, Respondent acknowledged that she felt the pain medication together with the stress of child birth had left her without sufficient will and strength to properly evaluate the matter. (R. 22; Addendum "D" paragraph 3.)

As soon as Respondent left the hospital and regained her strength and was able to rationally consider the matter, she realized that she did not want to lose her child and wanted to raise the child. (R. 22; Addendum "D" paragraph 4.)

In addition to the medication and stress, Respondent was

informed and believed that the Decree of Adoption did not become final for six months after signing the consent and that she had the six month period of time in which she could change her mind. She did not realize nor understand that the giving of her consent and the signing of the affidavit would conclude the matter but rather was under the belief that she had six months before the adoption became final and that any time prior to the finality of the adoption she could change her mind. (R. 22; Addendum D paragraph 6.)

Based upon Respondent's resolve to take whatever measures were necessary to regain her child, Respondent, within two days informed her councilor, Susan Bagley, that she wanted the child and in fact retained an attorney and as soon as sufficient monies could be raised moved to set aside the Findings of Fact, Conclusions of Law, and Consent. The Motion and Memorandum were timely and promptly filed with the Court on the 22nd day of July 1987. (R. 11; Addendum "E".)

In short, the baby was born early in the morning on Tuesday, June 23, 1987. On June 24, 1987, which was a Wednesday, the natural mother was before the Court on the issues of adoption. On Saturday, June 27, 1987, the natural mother called Susan Bagley, the counselor who was assisting in the adoption and informed her at that time that she wanted the child back and would not consent to the adoption. (Addendum "A" at page 3.)

After the natural mother had given birth and had appeared before the Court, she finally spoke to her family with regard to her circumstances and after she had seen the reaction of her family in that they were supportive and willing to stand by her at that time, the natural mother realized the circumstances and promptly notified Susan Bagley of her intentions. (Addendum "A" at page 5.)

The Respondent's Motion came on for hearing on August 31, 1987, before the Honorable Richard H. Moffat. At the time of the hearing, Judge Moffat was particularly concerned with two aspects of the case. First, Judge Moffat addressed the issue of whether Judge Murphy, the judge who originally took the consent, should be the judge who presided over the proceedings. At the time of the hearing, both parties argued their position and when confronted with the question of who should hear the matter, neither party objected to Judge Moffat hearing the arguments in lieu of the circumstances and, consequently, waived their rights at that time to have the matter heard by Judge Murphy. (R. 87-88; Addendum "F".) The Minute Entry attached as Addendum "F" specifically states that the parties had waived their rights to have Judge Murphy hear the matter based upon the waiver and agreement of the parties and, consequently, Judge Moffat rendered his decision. (R. 87-88; Addendum "F".)

The second matter of concern to Judge Moffat was whether an

evidentiary hearing was necessary. Again, counsel for both parties argued their substantive positions at the August 31, 1987, hearing and made no objection to having the evidence presented by proffer of counsel and, consequently, waived their right to have a full blown evidentiary hearing. The Court, having considered the matter, also stated in the Minute Entry attached as Addendum "F" that the parties having made no objection, had waived their rights to an evidentiary hearing. (R. 87-88; Addendum "F".)

Based upon the proffered evidence by way of oral argument and affidavit, Judge Moffat found that Respondent did not freely and voluntarily give an unconditional release of her parental rights and, therefore, ordered that the child be returned forthwith to her natural mother. (R.57; Addendum "G".)

Pursuant to the Minute Entry, attached as Addendum "G", the Court recognized that whatever decision it made was going to be emotionally disturbing to one or the other party. (R.57; Addendum "G".) However, the Court was convinced from the reading of the transcript of the proceedings, that the consent was not unconditional and in fact implied that her consent was not final and that the proceedings would have to "go forward." (R. 57; Addendum "G".) As an additional basis for the Court's ruling, the Court determined that the natural mother was not clearly apprised of the finality of signing the consent and specifically,

the Court found that the natural mother was confused and indeed believed that even though she signed the consent she would still have six months during which time the Decree of Adoption would not become final and that any time during that six month period she could withdraw her consent. (Addendum "H".)

The Court was further impressed that the natural mother had not consulted members of her family until after the birth of the child and in fact advised the counselor that she wanted the child back within days of the signing of the consent. (R. 57; Addendum "G".)

On September 4, 1987, counsel for Petitioners filed a Protective Motion for New Trial or in the Alternative Amendment from Judgment or Relief from Judgment on the basis that the Court had allegedly erred in setting aside the consent given in front of and accepted by another District Judge and failing to hold an evidentiary hearing. (R. 66-68.)

Petitioners' Motion was heard by Judge Moffat on September 23, 1987. For a second time, Judge Moffat heard argument and ruled that the consent was not voluntarily given, that the parties had waived their rights to an evidentiary hearing, and the parties had waived their right to have Judge Murphy hear the matter. (R. 87-88; Addendum "F".)

Petitioners requested Judge Moffat to stay his Order pending appeal. (R. 64.) Judge Moffat denied Petitioners' Motion and on

September 5, 1987, Petitioners, without involving counsel for the Respondent, obtained from this Court an Ex Parte Order staying Execution of the District Court decision. (Addendum "I".)

At no time prior to the signing of the Stay of Execution nor subsequent thereto has a hearing been held on the Order Staying Execution.

On February 5, 1988, pursuant to a Motion by the Petitioners to vacate Ruling, Findings of Fact, and Conclusions of Law, and Order and Judgment, a hearing was held again before Judge Moffat and for a third time the issues were presented to Judge Moffat and although minor changes were made to the wording of the Order, (Addendum "H") Judge Moffat upheld his prior rulings and again held that the prior proceedings were appropriate, that the consent be set aside and that the adoptive parents forthwith return the minor child to the natural mother. (Addendum "H".)

SUMMARY OF ARGUMENTS

POINT I

A party's failure to object to Judge Moffat hearing the matter prior to the rendering of his decision constitutes a waiver of the right to later object to his ruling. The first hearing set on August 31, 1987, pursuant to Respondent's Motion to Set Aside the Consent, Judge Moffat specifically addressed the issue of whether he should hear the case and counsel for both Appellants and Respondent made no objection to Judge Moffat

hearing the matter and in fact both parties argued the matter at that time. Consequently, the Appellants have waived their right to have the matter retried before Judge Murphy solely because they are not pleased with the outcome.

POINT II

Also, at the initial hearing on August 31, 1987, neither party raised the issue nor requested an evidentiary hearing. Both the Respondent and Appellants made no objection to arguing the motion as opposed to calling in witnesses and, proffered the testimony which would otherwise be given. At that point, the parties waived their right to an evidentiary hearing.

Once the affidavits and oral argument were presented to Judge Moffat then Judge Moffat had the responsibility of making a decision based upon the arguments and affidavits as well as to assess the credibility of the affidavits and evidence and to make a decision based thereon.

POINT III

In order for the ruling of Judge Moffat to constitute a reversal, it would be necessary for Judge Murphy to have previously ruled in an adversarial proceeding as to whether the original consent should or should not have been set aside. The fact of the matter is that Judge Murphy never addressed the issue of whether it was appropriate to set aside the consent nor did Judge Murphy ever make a ruling as to whether the circumstances

warranted a setting aside of the natural mother's consent. Judge Moffat's Ruling setting aside the consent was a matter which was heard for the first time by Judge Moffat who is the only judge who has ruled on the matter and in no way constitutes a reversal of any decision made by Judge Murphy or any other judge.

ARGUMENT

POINT I

THE PARTIES ARE BOUND WHEN COUNSEL WAIVES CERTAIN RIGHTS
AND CONSEQUENTLY, APPELLANTS' FAILURE TO OBJECT TO
JUDGE MOFFAT HEARING THE MATTER PRECLUDES APPELLANTS
FROM NOW ASSERTING THAT JUDGE MOFFAT INAPPROPRIATELY
RULED ON THE MATTER

Throughout Appellants' argument to Point I, they appropriately set out that a party who is not satisfied with a ruling of a Judge should be precluded from presenting the issue to a co-equal judge or, to forum shop until a favorable forum is found. In addition, Appellants correctly assert that one co-equal court can not over-rule another co-equal court. Respondent makes no argument and, in fact, agrees that those are correct principles of law. However, frankly, those principles of law do not support Appellants' position.

For some reason, Appellants have resolved that the natural mother in bringing her Petition before Judge Moffat was forum shopping or looking for some advantage in having the matter heard before Judge Moffat as opposed to Judge Murphy. In fact,

Appellants assert:

At minimum, Respondent should be asked to face the judge to whom she initially testified and convince that judge that he erred when he accepted her initial testimony as true and released the child to the Petitioners. (See page 17 and 18, Appellants' Brief.)

The allegations that the natural mother preferred one judge as opposed to another is ill founded and completely ignores the critical periods of time relative to which judge should hear the matter. At the time the natural mother filed her motion in the Third Judicial District Court in and for Salt Lake County, there was no reason for the natural mother to believe that the case would be assigned to Judge Moffat as opposed to any other Third District Judge. In fact, at that time, the natural inclination would be that the matter would be assigned to Judge Murphy as opposed to some other judge. The assignment of the matter to one judge as opposed to another was a decision which was made wholly by third parties for which the natural mother had no control or input. The allegations by Appellants that Judge Murphy should have heard the matter as opposed to Judge Moffat was a decision which was made by persons completely unattached to these proceedings. When Appellants assert in their brief that:

It is not uncommon that the parties on both sides of an issue are not wholly satisfied with the ruling of a judge. Are they then allowed to present the issue to another co-equal judge so long as neither party expressed a desire to have the first judge hear the issue again? If so, the policy behind the rule would be effectively undermined. (See Appellants' Brief

page 18.)

It is difficult to understand how the argument cited supra by Appellants can support their position. Certainly at the time the natural mother filed her motion in the Third District, the natural assumption would be that Judge Murphy would be the judge assigned to hear the motion.

At the time the matter was set for hearing, a notice was given that the motion would be heard before Judge Moffat as opposed to Judge Murphy. Appellants made no objection at that time as to the forum or the judge who would preside. At the time both parties actually came before Judge Moffat to present argument on the motion, Appellants made no objection to Judge Moffat presiding. In fact, as can be seen in the transcript attached as Exhibit "A" , there was no indication anywhere in the proceedings that Appellants had any feelings one way or the other which judge heard the matter. At the time oral argument was heard before Judge Moffat, the natural mother had no reason to believe that Judge Moffat's Court would be any more or less favorable to her position than Judge Murphy's Court. In short, at the time oral argument was heard on the natural mother's petition, the natural mother had no preference as to the forum and it appears that counsel for Appellants had no preference as to the forum because no objection was made. At no time prior to the time Judge Moffat rendered his decision did the natural

mother have a preference of forum and had Appellants objected to Judge Moffat presiding, the natural mother would not have resisted the motion being reassigned to Judge Murphy.

It is only after a decision has been rendered adjudicating the rights of the respective parties that the natural mother has an objection to a change in forum. The fact of the matter that Appellants have remained silent until after a decision has been rendered and only then complains as to the forum, is prejudicial and unfair to the natural mother.

When Appellants speak in their brief of sound policy considerations and the need for efficient consistent administration of a case, it would be entirely improper to allow Appellants to set back and wait for a decision to be rendered on the merits and only after realizing an adverse decision to be able to claim that Judge Moffat should not have heard the matter.

Appellants' argument in Point I of their brief also sets out at length that the natural mother directly attacked Judge Murphy's finding that her consent had been knowingly and voluntarily given and that her affidavit supporting her motion to set aside the consent contradicted the testimony which she gave Judge Murphy at the time the consent was originally taken. (See page 16 and 17 of Appellants' Brief.) Certainly, Respondent would not agree with the characterization set out by Appellants but the point is that Judge Moffat had a complete copy of the

transcript setting out verbatim the questions which were asked and answered at the time the original consent was offered to Judge Murphy. In essence, Judge Moffat read every word that was spoken in the proceedings in which the consent was obtained and, therefore, was fully aware of what went on before Judge Murphy and was fully apprised of those facts when he rendered his decision. There is no reason to believe that Judge Murphy would have ruled any differently than Judge Moffat had ruled had the matter been decided before him. Consequently, after a decision has been rendered by Judge Moffat, being fully apprised of the facts, to have the matter reheard before Judge Murphy would only mean that Appellants would have a second shot of obtaining a favorable decision, the very thing they claim and cite authorities for as being inappropriate. Consequently, when Appellants state:

Justice is not served by allowing Respondent to rescind the testimony given before one judge by submitting contradictory testimony to another judge.
(See page 17 of Appellants' Brief.)

Appellants ignore the fact that Judge Moffat had the benefit of the transcript from the original consent proceedings and was fully aware of what went on at the time the consent was given.

There is no question that the issue of whether Judge Moffat should decide the matter was raised and contemplated by the parties and the Court and that counsel for both parties agreed to allow Judge Moffat to preside over the matter. Judge Moffat's

Minute Entry attached as Addendum "F" states:

The reason for said denial is that while the matter should perhaps have initially been heard by the judge that took the consent, this Court discussed that matter with counsel for the parties at the time of the initial hearing herein and neither party expressed a desire to have the judge who took the consent hear the matter. In addition, the matter was submitted on affidavits and oral argument, without any request for entry of additional evidence. It is the Court's opinion that had the parties asked either to have the original judge hear the matter or have an evidentiary hearing, both of said motions would have been granted. However, having not done so, this Court is of the opinion that those matters have been waived.

A majority of the adjacent jurisdictions have also held that when a party participates in proceedings which are substantive and makes no objection to a particular judge presiding that a party's right to object to the judge presiding is waived. The Supreme Court of Alaska has stated as follows:

We conclude that Sebring waived his right to a peremptory challenge once Judge Carlson presided over the first trial. Civil Rule 42(c)(4)(i) provides that a party waives the right to challenge a particular judge when s/he knowingly participates in any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits . . .

Sebring vs. Colver 649 P.2d 932, 935 (Alaska 1982). See also State Ex Rel Welfare Division vs. Eighth Judicial District Court 462 P.2d 37 (Nevada 1969).

The Washington Court of Appeals has held:

One who claims a judge trying claimant's case is biased may waive his right to complain thereof by not timely raising the objection and proceeding with trial

or continuing with the pending trial as if the judge were not disqualified. This rule is applicable when disqualification of the judge is sought under RCW 4.12.040 and 2.28.030. (Citations omitted.) We see no reason for not applying a like rule when the disqualification claim is based on due process grounds. Even a due process right may be waived. See In Re Borchert 57 Wash. 2d 719, 359 P.2d 789 (1961). Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the Court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack. (Emphasis added.)

Brauhn vs. Brauhn 518 P.2d 1089, 1092 (Wash. 1974.)

Appellants cite several cases for the proposition that co-equal judges cannot over-rule or reverse another co-equal judge.

The Federal Court of Appeals of Florida in Atlantic Coastline R. Co. vs. St. Joe Paper Co. 216 F.2d 832, 833 (C.A.Fla.) defined a reversal as follows:

To reverse a judgment means to overthrow it by contrary decision, make it void, undue or annul it forever.

The critical question, therefore, is whether the taking of a consent constitutes a judgment for which a motion to set aside the consent would act as a reversal.

Frankly speaking, the issue as to whether or not the consent should be set aside in the above-entitled case has only been addressed by one judge, Judge Moffat. The issue of whether it was appropriate to set aside the consent was never addressed or brought before Judge Murphy and, therefore, there can be no

reversal of a judgment by Judge Moffat because there was no judgment ever entered to be reversed.

Respondent's do not refute the law cited by Appellants which states that one District Court Judge cannot reverse the ruling of a co-equal District Court Judge. Nor does the Respondent refute the proposition that litigants should not be allowed to forum shop and to bring their grievances between co-equal judges in an effort to obtain a favorable ruling. However, the proposition with regard to one District Court Judge over-ruling another is not the case nor the question presented by these proceedings.

As stated in the definition of reversal as cited in Atlantic Coastline Supra, there must first have been a judgment to reverse. Certainly all parties would agree that at the time Respondent brought her Motion to set aside the consent the only appropriate forum was to bring the matter in District Court. It would have been inappropriate at that time for Respondent to have brought the Motion in the Court of Appeals which would, in essence, have be required if one was to take Petitioners' claim to its logical conclusion. In other words, in order for Appellants to support the allegation that Judge Moffat's decision was reversing a co-equal judge would mean that Judge Murphy would have had to have previously considered the Motion and had ruled on the matter and, therefore, the appropriate forum would be for Respondents to go directly to the Court of Appeals. Certainly

those are not the facts nor law and, consequently, no reversal was made between two District Court Judges.

By analogy, when one looks at any other form of 60(b) motion, it is well accepted and established that it is not necessary for the same judge who hears the 60(b) motion also be the judge who actually rendered the judgment. Further no one would argue that in the event an alternative judge set aside the judgment pursuant to 60(b) that that decision was a reversal of the decision entered by the judge who rendered the judgment sought to be set aside.

In Appellants' brief, they contend that if a different judge hears the motion to set aside the consent as opposed to the judge who took the consent that the ruling by the judge on the motion to set aside would constitute a reversal of a co-equal judge. Appellants, however, cite no case law that those circumstances would constitute a reversal. Although Respondent has been unable to find case law in which a court of review has addressed the particular issue, there are several cases in which a different judge has heard the motion to set aside the consent as opposed to the original judge hearing the motion.

On March 13, 1969, Respondent filed a petition and motion with the Court to have the consent to adoption set aside and vacated and the care, custody and control of the infant restored to her. She claimed, at the time she signed the consent, that she was not aware of the nature and consequences of the act and was acting under undue influence, coercion and mistake.

The motion was heard by another judge who found Respondent knew and understood what was taking place when she signed the consent

In Re Adoption of K 465 P.2d 541 (Utah 1970).

When one reads the statute pertinent to the obtaining of a consent for adoption, it is apparent that it is not necessary for a judge to even make a ruling as to the validity of the consent.

. . . Provided, that if a person whose consent is necessary is not within the county, the Court may, in the same manner as is or may be provided for the taking of depositions in civil cases, appoint a commissioner to examine such person upon his deposition and to take his written consent and to certify the same to the Court. The Commissioner shall explain to such person the legal significance of such consent, and shall certify to the Court his findings as to whether or not the consent is freely given. Where such person is within the State of Utah, the commissioner shall issue to the judge of the District Court of the county in which such person is located. (Emphasis added.)

As set out in statute, the Court may appoint a commissioner who obtains the consent and to explain the consequences of signing said consent and then as per the statute, the commissioner is the one who certifies to the Court that the consent was freely given. If one were to follow the position of Appellants under those circumstances who would hear the motion to set aside the commissioner or a district judge. See also In the Matter of the Adoption of F, 488 P.2d 130 (Utah 1971).

POINT II

THE TRIAL COURT APPROPRIATELY ALLOWED RESPONDENT TO REVOKE HER CONESENT TO THE ADOPTION OF THE CHILD ON THE BASIS THAT SHE HAD BEEN INFORMED AND BELIEVED THAT SHE HAD SIX MONTHS TO CHANGE HER MIND AND AN EVIDENTIARY HEARING WAS NOT REQUIRED FOR RESPONDENT TO ARGUE HER MOTION TO SET ASIDE

A. The District Court appropriately set aside the consent on the basis that the consent was not knowingly and unconditionally given.

Appellants contend that once a consent is obtained that the Trial Court commits reversible error if after the child has been placed with adoptive parents the Court allows a party to revoke the consent without finding that the consent was obtained through fraud, undue influence or misrepresentation. (See page 21 of Appellants' Brief.) As authority for Appellants' position, they cite In re Adoption of K. 465 P.2d 541, 542 (Utah 1970). This characterization of the law is incorrect and inconsistent with the more compelling weight of the case law.

The Supreme Court In the matter of S. 572 P.2d 1371, 1374 Utah 1977) which was decided subsequent to In re Adoption K. and which is cited by Appellants specifically states that a consent can be set aside if it is shown that the consent was "induced through duress, undue influence, or under some misrepresentation or deception; or other grounds which would justify release from the obligations of any contract." (Emphasis added Id.)

The Utah Supreme Court has also held in D.P. vs. Social Services and Child W. Dept. 431 P.2d 547, 551 (Utah 1967):

. . . The important phrase of the case is that it recognized the right of a natural mother to revoke written consent, and, as pointed out, when the question of undue influence is an issue 'the Court should carefully scrutinize the evidence lest an honest, worthy and well-meaning natural parent be unjustly deprived of her child.' Id.

The Utah Supreme Court has also held:

The mother of a illegitimate child has the right both to its custody and to relinquish that right if for any reason she so desires. If she so decides and freely and voluntarily signs a release and consent for adoption, it is binding the same as any other contract. It is, of course, true that if no rights or interests of third parties have intervened, the Courts are quite liberal in permitting the withdrawal of such consent.

In Re Adoption of F. 488 P.2d 130, 132 (Utah 1971).

Adjacent jurisdictions are also persuasive in setting out the appropriate standard with regard to the revocation of a consent for adoption. The Washington Court of Appeals has held:

The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion.

In the Interest of Perry, 641 P.2d 641, 181 (Wash. App. 1982).

As set out by the Washington Court of Appeals it is appropriate to set aside a consent based on factors such as the inavailability of independent advice, susceptibility of the person persuaded and the unfairness of the resulting bargain, all

of which are factors which do not rise to the level of fraud or misrepresentation. When Appellants contend that the only basis for setting aside the consent is fraud, undue influence or misrepresentation, they mischaracterize the applicable case law.

When one applies the standard as set out above to the facts of this case, it is apparent that Judge Moffat's ruling setting aside the consent was appropriate. At the time the consent was obtained, less than 30 hours had transpired since the natural mother had given birth to her child. As set out in the transcript attached as Addendum "A", in which counsel for the natural mother proffered testimony as follows:

That this is the basis of her understanding. She was told by the councilor that the adoption could not become final for six months; and although she had given her consent, which she understood was binding at that time, she also understood and thought that she had a right, during that six months to contest the consent; and, therefore, the ambiguity or misunderstanding is created as to the relationship between the six month waiting period that is required for adoptions in the State of Utah and her right to revoke that consent during the same six month period of time.

She was under the assumption that she had the right that when she called up on Saturday, two days after she signed the consent, that she wanted the child back and that it was appropriate to do so.

(Addendum "A".)

Judge Moffat was also impressed as set out in the Minute Entry attached as Addendum "G" that the natural mother had not been counseled by any one other than Susan Bagley prior to the

time she offered the consent.

In addition, the record established at the time the consent was given which is contained on paragraph 3 lines 11, 12, and 13, of Addendum of "B", the Court said:

Do you understand -- for want of a better word -- the finality of this? That if it goes forward, that you relinquish all parental rights forever. (See Addendum "B".)

The language "that if it goes forward" connotes that in fact the consent was not final at that time and that there would be a period of time before the consent would become final.

Based upon those factors, Judge Moffat appropriately ruled that the natural mother did not voluntarily offer her consent.

B. The evidence presented to Judge Moffat did not render the motion the functional equivalent of a motion for summary judgment.

The Petitioners in subsection (b) of Point II of their Argument states to the Court that Respondent's motion to set aside the consent based upon affidavits rendered the preceding the functional equivalent of a motion for summary judgment. The mere fact that there were conflicting affidavits does not render the motion the equivalent of a motion for summary judgment. The motion before the Court was a motion to set aside the consent of the natural mother. The standard in which a Court applies to a motion for summary judgment and the standard in which a Court applies to a motion to set aside are entirely different standards. The standard pertinent to a motion for

summary judgment is a determination of whether there are any genuine issues of material fact and whether the moving party is entitled to a judgment as a matter of law. A motion to set aside the consent seeks a determination by the Court as to whether the consent was given voluntarily and with knowledge of its finality. When the Court rules on a motion for summary judgment, the Court gives deference to the affidavits of the non-moving party and, in short, the Court is required to assume the facts set out in the non-moving party's affidavit as being true. In Holbrook Company vs. Adams, 542 P.2d 191, 193 (Utah 1975), the Utah Supreme Court stated:

It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties, or witnesses, or the weight of the evidence, neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble, and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the Court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the trier of fact to his view. Id.

Conversely, when evidence was offered to Judge Moffat, he was ruling on the credibility of the affidavits and the oral argument and there was no assumption that the non-moving party's affidavits were true.

When Appellants cite in their brief:

It has long been established that a judge cannot summarily determine questions of fact on the basis of

conflicting affidavits.

Appellants misconstrue the nature of the proceedings before Judge Moffat. It was not the contemplation of the natural mother or the judge that all that was necessary to defend against the motion to set aside was that the appellants merely offer conflicting affidavits. Judge Moffat was setting in the position similar to a trial judge in making a determination or judgment of any other case. He was considering the facts which were presented to him and the credibility of the evidence and based thereon entered a judgment.

Appellants assert:

Such a resolution directly violates the rule that a Court cannot make factual determinations based upon conflicting affidavits. (See pages 24 and 25 of Appellants' Brief.)

This assertion ignores the fundamental purpose of a judge whom every day makes factual determinations based upon conflicting testimony whether it is offered by affidavit or otherwise.

Appellants also contend that the only evidence presented to Judge Moffat was contained in the affidavits submitted to him. As set out in the transcript of the August 31, 1987, hearing, evidence was also offered by counsel as to the circumstances surrounding the consent. By analogy, other motions do not require the Court to have an evidentiary hearing. For example, motions for new trials or motions to set aside default, motions in limine and motions to dismiss and the like do not require an


evidentiary hearing but the facts warranting a grant or denial of said motions are offered by counsel based upon proffered testimony and the record before the Court. Respondent will not reiterate its prior argument with regard to waivers except to state to the Court that counsel for Appellants had several opportunities to request an evidentiary hearing and not at one time prior to the rendering of an adverse decision did Appellants ever request or contend that an evidentiary hearing was necessary. In fact, Appellants participated in the hearing on the motion to set aside the consent and offered oral argument in defense of the motion and only after Judge Moffat rendered his decision did Appellants contend that an evidentiary hearing should have been held. Consequently, as set out in Judge Moffat's Minute Entry attached as Addendum "F", Appellants have waived their right, if any, to an evidentiary hearing and should be estopped from setting back and waiting for a decision on the matter and only then making an objection.

CONCLUSION

Therefore, based upon the foregoing points and authorities, Respondent hereby respectfully submits to this Court that the judgment rendered by Judge Moffat was appropriate and,

consequently, this Court should affirm the setting aside of Respondent's consent and petitioner's petition for adoption.

DATED this 25 day of May, 1988.



RICHARD B. JOHNSON
Attorney for Respondent

ADDENDA

A - J

* * * * *

ADDENDUM "A"

MOTION TO SET ASIDE FINDINGS OF FACT, ORDER AND DECREE

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * * * *

COPY

IN THE MATTER OF
THE ADOPTION OF:

INFANT ANONYMOUS,)

Civil No. A87 229

) MOTION TO SET ASIDE
) FINDINGS OF FACT, ORDER
) AND DECREE.

BE IT REMEMBERED, that on August 31st, 1987, the
above-entitled cause of action came on regularly for hear:
at the hour of 2:00 p.m. before the HONORABLE RICHARD H.
MOFFAT, one of the Judges of the above-named Court.

A P P E A R A N C E S

For the Appellee:

MR. RICHARD B. JOHNSON
Attorney At Law
1327 South 8th East #300
Orem, Utah 84058

For Adoptive Parents:

MR. DENNIS V. HASLAM
MR. LINCOLN W. HOBBS
Attornies' At Law
175 West Second South
Salt Lake City, Utah

WHEREUPON the following proceedings took place in chambers.

1 THE COURT: This is in the matter of, title in the
2 file, adoption of infant anonymous. It's number A87-229.

3 This is the Motion of Tonya Marie Williams, to set
4 aside Findings of Fact, Order and Decree in this matter; and
5 I take it those refer to the Findings of Facts and Conclu-
6 -sions of Law and the Decree of Adoption?

7 MR. JOHNSON: Yes, Your Honor.

8 THE COURT: That I would take it, that would also
9 mean that we're here to consider the question of the irre-
10 -vocation of the natural mother's consent to the adoption?

11 MR. JOHNSON: Yes, Your Honor.

12 THE COURT: Very well. It's your Petition, so I
13 suppose you have the burden. You may proceed.

14 MR. JOHNSON: Judge, I think that the standard that
15 applies to this case has been briefed by both sides and
16 there are, however, a couple of highlights that I would
17 like to bring to the Court's attention.

18 The natural mother in this case is twenty-one years
19 of age. This was a first pregnancy. Was living at home
20 at the time, working on and off. Apparently she did not
21 show, and therefore, the fact that she was pregnant was a
22 mystery with those around her, particularly her mother and
23 others with whom she associated. She had talked to some
24 persons early on; but the first real contact with the
25 adoption agencies was around the first of June. The baby

1 was born in the latter part of June. At that time
2 because persons in the household don't know about it, in
3 essence, she has got a chance to get through this without
4 anybody knowing it, she contacts these people, in essence
5 arranges to give the child up for adoption.

6 Contrary to how the affidavit sounds, as I underst
7 there was only one time after June 5th, that everyone
8 meeting together and that was in the lawyer's office.
9 After that date, she gave birth to the child on a Tuesday
10 and was in Court on a Wednesday. And the birth was in th
11 early morning;and because consent was given a little late
12 about thirty hours later.

13 Now, it is the contention of the mother, that just
14 as stated in the affidavit. On the Saturday after the
15 consent was taken on a Wednesday or Thursday;on that
16 Saturday, she called a counselor up and said,"I want the
17 baby back," and said, " I had a chance to think about this
18 and I want the baby." And the counselor told her she woul
19 have to talk to her. Come in the office and talk to her.
20 And that's the general arrangment.

21 Now, the thing that we're relying upon, Judge, is
22 the misunderstanding that the mother had. I think counsel
23 after reading the transcript, accurately stated what the
24 transcript said;Judge Young said something, " Do you
25 understand that when you sign this consent that you're

1 giving up rights forever? " And she says something
2 to the effect, she understood that. And then the Judge
3 asked the question again and she's cut off in her response

4 But this is the basis of her misunderstanding. She
5 was told by the counselor that the adoption could not
6 become final for six months; and although she had given her
7 consent, which she understood was binding at that time, she
8 also understood and thought that she had a right, during
9 that six months to contest the consent; and therefore, the
10 ambiguity or misunderstanding is created as to the relationship
11 -ship between the six months waiting period that is required
12 for adoptions in the State of Utah and her right to
13 revoke that consent during that same six months period of
14 time.

15 She was under the assumption that she had that right
16 that when she called up on Saturday, two days after she
17 signed the consent, that she wanted the child back. And
18 that it was appropriate to do so. Her explanation to the
19 Court, she comes before this Court knowing this is an
20 inconvenience to everybody and not an easy thing for the
21 adoptive parents and not an easy thing for the lawyers or
22 for the Court involved.

23 But she wants, more than anything in the world, to
24 have this child restored to her. She believes that when
25 she went to the adoption agency that she was acting

1 immaturely. That she thought that this was a
2 period of time in her life she would be able to avoid b
3 giving up the child for adoption. And when she saw what
4 the reaction of the family was, that they were supportiv
5 and they were willing to stand by her;and that she wante
6 to have the child with her.

7 Now, I don't think there is any misunderstanding
8 to the drugs she's on. And in her affidavit says she i
9 on pain medication. The record reveals that she was on
10 Tylenol 3, with codeine. The doctor's affidavit says th
11 it shouldn't affect her ability to make a knowing choice
12 I leave that to the Court, coupled with the stress eleme
13 that she was going through;and in essence, going through
14 a birth without a father, and without the natural family
15 around her to support her.

16 Now, Judge, the legal test to be applied in the ca
17 has been stated several times, and it is to that point th
18 I would like to address a couple of comments. The Court
19 has indicated, in three or four cases which we have cite
20 that the Court should allow the setting aside of consent
21 with liberality unless the rights of third parties have
22 intervened;and there has been kind of a reliance upon
23 that. My point, and I think what has been misstated in
24 the briefs is, that hiring a lawyer, the appearance in
25 Court are all expenses, if Tonya would have said No? I a

1 not going to sign the consent ;the only reliance that
2 there is, is that which comes after the consent was signed.
3 And that is the difference between June 24th, the time she
4 can raise some money,to get a lawyer and file the motion,
5 which was filed timely.

6 Now, there are several cases, and I think the timing
7 is important. One of the key cases cited by everyone is
8 In The Matter Of S. And that case which is a 1977 case,
9 there was about a three months delay. In fact, I think
10 just short of the three month period under Rule 60-B, by
11 just a couple of days.

12 One of the other key cases was one where there was
13 almost an eight months delay in time;and I think this case
14 where you have a natural mother, who comes in within two
15 days of the time that she gave her consent, says, Ok. I
16 would like to revoke it. Like the child back and then goes
17 about trying to raise some money to get a lawyer;gets a
18 lawyer and has the papers filed and a prompt motion. That
19 is, it's appropriate under those circumstances. I don't
20 think the adoptive parents could argue any bonding or long
21 term relationship with this child;and of course, as expres
22 -sed by all of the cases, the right of the natural mother
23 is paramount to the extent, that there have been costs
24 incurred that this Court feels are appropriate to be
25 reimbursed my client and is willing to do that.

1 THE COURT: Wait a minute. Let me go back and
2 ask you a question now. What you're saying to me, in
3 effect, is that we should look at the question of whether
4 or not, in the language of the case you've cited to me,
5 In Re: Adoption of S. That we should look as of the
6 time that she called and wanted to revoke her consent to
7 determine whether or not the rights or interests of third
8 parties have intervened?

9 MR. JOHNSON: Yes, Your Honor. That's right.

10 THE COURT: Not as of today. You wouldn't deny
11 that as of today, the rights and interests of third
12 parties have intervened.

13 MR. JOHNSON: I would think that's right.

14 THE COURT: Go down the road as far as an adoption

15 MR. JOHNSON: But, on the other hand, You know if
16 we filed a motion I think the last of July, so I think
17 about thirty days afterwards we filed the motions and we
18 set the argument before Your Honor within I guess I could

19 THE COURT: I can find it. Go ahead. Didn't mean
20 to interrupt you. I thought I would understand your
21 position.

22 MR. JOHNSON: That has to be our position. No
23 question that the adoptive parents have, in essence, had
24 from the end of June to now, almost two months with that
25 child. But it is our contention that two months coupled

1 with the timely filing of the consent and the social
2 worker is saying, well, you're going to have to come down
3 here or whatever. She gets a lawyer and just takes that
4 long to file it, Judge. This is a motion that my client
5 has not filed simply because of some whim. She wants that
6 child more than anything in the world and she feels that if
7 the Court understands that she bore the burden of this
8 pregnancy without anyone around her knowing of it, just I
9 guess escaping on a day to day basis of not anyone knowing
10 that coupled with the stress of birth that she had;and
11 having somebody's shoulder to cry on in the form of the
12 counselor. It gets her to the point of that upon adoption
13 with a supportive family looking at this I think it's
14 appropriate if she wants a right to have that child. And
15 most importantly, I think that inherently, this six months
16 ruling is one that is ambiguous. It's one I think we all
17 have to sit and talk about. We understand that if that
18 consent is given and a layperson is told an adoption does
19 not become final for six months;and whether the counselor
20 or my client perceived it the way she did, her understanding
21 is, that until that adoption becomes final, that during the
22 period of six months she had a right to reassert her right
23 to that child. That the determination was binding when she
24 gave it; during that six months period of time, she had the
25 right to revoke it. And I think that is sufficient under

1 the case law that we cite, to warrant the Court
2 allowing the withdrawal of the consent and setting aside
3 of the Findings and Conclusions of the Decree of Adoption.

4 THE COURT: Thank you, Mr. Johnson. Mr. Haslam.

5 MR. HASLAM: Your Honor, I think that I agree
6 generally, with the legal propositions presented by Mr.
7 Johnson. The cases that we both have cited are essentially
8 the same cases; and that is In Re: S. I think the most
9 important factor here today, Your Honor, is not the concept
10 of revocation or timely revocation.

11 Mr. Johnson would appear to lead the Court to believe
12 that revocation is something that can be done in cases of
13 this nature, much as a revocation of acceptance can be done
14 under Article Two of the Uniform Commercial Code; if you
15 do it timely, then it's okay. That's not the case, in an
16 adoption especially, where other rights have intervened.

17 In this case, the transcript of the hearing before
18 Judge Murphy, which is in the Court's file.

19 THE COURT: I read it.

20 MR. HASLAM: The Court specifically asked the key
21 question: Was she under the influence of any drugs and
22 did she understand the finality of what was about to take
23 place.

24 The law that we have cited in our Memorandum indicates
25 that there is a presumption of regularity to Court

1 proceedings and that's why a judge signs and witnesses
2 this consent. It's not acceptable for the Court Clerk to
3 do it and not acceptable for a Notary to do it. It has to
4 be by a judge; one of the very few people in the entire
5 State of Utah that can witness an adoption. It's a very
6 important proceeding.

7 Ms. Williams had the opportunity to spend approximately
8 twelve and a half hours counseling with the counselor at
9 the Utah Women's Health Center; and that was from March 31st
10 until the birth of the baby, which was June 23rd. That's
11 more than two months, Your Honor.

12 The affidavit of the counselor indicates that she did
13 not attempt to persuade this young woman as to what kind
14 alternative was best to her. And that she presented it in
15 a neutral fashion. The consent was given over thirty hours
16 after delivery. And you'll note in the transcript of the
17 proceedings, Judge Murphy specifically asked this natural
18 mother if she had seen the baby and she said yes. I have
19 seen the baby; and she, even after that, she came in and
20 executed the consent before the Court.

21 In this instance, it is the moving party who has the
22 burden of proving fraud, duress or coercion. The Court
23 knows that it's a terrific burden. Not sure that the
24 cases before the Court indicate that it has to be proved
25 to a very, very high level. But fraud is a nasty claim.

1 Duress is a nasty claim and coercion is a nasty claim
2 This woman went to a third party, a professional
3 counselor for help. She chose to not confide in her parent
4 Your Honor. She also went to a physician, who was licensed
5 She's an obstetrician. The obstetrician did not notice any
6 reluctance on this young woman's part.

7 Under the question of reliance, Your Honor, I can
8 represent to the Court and the Court's file will indicate,
9 that an order issued at the time the consent was signed,
10 placing custody with my client, who have since that time,
11 or a few hours thereafter, accepted this child from the
12 hospital into their own home.

13 They've paid all the medical bills, all of the legal
14 bills, all of the social workers' bills that have been
15 involved. At this time, I don't believe there has been a
16 case made out of fraud on anybody's part or duress. This
17 woman was not talked into it by anybody and there is no
18 evidence of any coercion on anybody's part. This woman
19 came to our office seeking assistance in placing the child.
20 Not as though we had been cajoling her for some period of
21 time and submit it on that basis, Your Honor.

22 MR. JOHNSON: Two quick comments. The cases that
23 are cited, do not leave it with fraud. The matter, as I
24 stated in my brief, no question it says that if the rights
25 or interests of third parties have not intervened the Court

1 liberally permit withdrawal of such consent. It is
2 otherwise where adoptive parents in reliance and good faith
3 have exerted efforts and expense and form emotional attach-
4 -ments, based upon the consent of the natural mother. In
5 this case, if the lawyer and the social worker convey to
6 the adoptive parents the filing of the motions, which I
7 assume that they did; and timely advised these people that
8 the natural mother had some problems. It has only been 2
9 months.

10 In Re: The Adoption of K___, the 1970 case, the
11 Court indicated, for good cause shown the Court ought to
12 consider carefully the welfare of the child. And I think
13 that those indicate that the test is not one of fraud, it's
14 one where this Court can look at the circumstances.

15 It is always surprising to me in analysing things.
16 Case Rule 60-B allows this Court to set aside a Judgment
17 within three months and for 60-B-1, for showing of excusa-
18 -ble neglect, good cause showing and that type of thing
19 that relates to money judgments and those types of things.

20 Now, in this case, it would appear to me, that where
21 the natural mother, who has her life with a young baby with
22 whom she wants a relationship pending; where there is an
23 honest ambiguity as to what the meaning of the consent is;
24 that it is appropriate to allow the setting aside of that
25 decree for good cause shown.

1 THE COURT: Mr. Johnson, so that I understand you
2 position. Would you, in this case, feel that the consent
3 could have been revoked for whatever reason; that is, that
4 the mother has an absolute right to revoke her consent at
5 any time?

6 MR. JOHNSON: I don't Judge.

7 THE COURT: Well, let's not say at any time. Sa
8 at any time within the first six months?

9 MR. JOHNSON: I don't think so. I think there--tl
10 case law says that the consent has a degree of regularity
11 attached to it. I think that's the law. But in this
12 case, I think you have to take each case as it goes.

13 We've got a young mother who comes through a very
14 stressfull pregnancy, no one knowing; and honestly, Judge,
15 I really think this six months issue is a problem. I thir
16 it is easy for lawyers and judges after you've been throug
17 it to understand. But when you tell-the social worker
18 tells her or she tells somebody else, that, Look, doesn't
19 become final for six months. It's easy I think, for a
20 natural mother to say, Ok. Then I have six months. It
21 isn't final yet; and that is the first thing that my client
22 indicated to me when she came to the office and tried to
23 talk to her about what it meant; and I think that that
24 ought to be an appropriate basis.

25 THE COURT: Well, I guess what you're saying to me

1 is, assuming we don't have the problem of intervening
2 rights or interest; that the natural mother can revoke her
3 consent at any time for whatever reason is satisfactory to
4 herself.

5 MR. JOHNSON: Or satisfactory to the Court?

6 THE COURT: Allright. And what I have to do then
7 is believe that her revocation, believe that her understand
8 -ing, the finality being six months down the road, instead
9 of the time she gave her consent, is clearly different than
10 what she has said at the time the consent was taken, because
11 it--you just have to read it, but--

12 MR. JOHNSON: Yes, sir.

13 THE COURT: "Q. Why is it that you think it's in
14 the best interest of the child that you relinquish any
15 rights you have and consent to the adoption?

16 A. I just cannot take care of her financially.

17 Q. Do you understand--for want of a better word--
18 the finality of this? That if it goes forward, that you
19 relinquish all parental rights forever.

20 A. Yes, I do.

21 Q. And you are doing this freely and voluntarily.

22 A. Uh huh. (Affirmative)

23 Q. No one has forced you to do this.

24 A. Nobody has. It's my own decision.

25 Q. Did you see that child after the child was born?

1 A. Not after she was born, but I did later that
2 day. I've been down there three times.

3 Q. Did you make up your mind to relinquish your
4 parental rights after you had seen the child?

5 A. What do you mean? I've decided all along to
6 have this adoption go through, and I know that there will
7 not be any rights for me to--" Then of course trailed off
8 and the Court made another statement.

9 MR. JOHNSON: Suggest one reading to the Court.
10 If you look at that question," Do you understand--for want
11 of a better word--the finality of this? That if it goes
12 forward, that you relinquish all parental rights forever."
13 So she is thinking--

14 THE COURT: Six months down the road.

15 MR. JOHNSON: Down here, this is the--in my mind
16 the key statement on line 21 on page 3:"Q. Did you make u
17 your mind to relinquish your parental rights after you had
18 seen the child? A. What do you mean? I've decided all
19 along to have this adoption go through, and I know that
20 there will not be any rights for me to--"and I think
21 counsel, who is there, I certainly was not there. In the
22 brief it is said that she was cut off or she trailed off,
23 trying to form a thought and the Court just proceeded. Bu
24 I think that reading is consistent with her proposition
25 that, Gee, I understood that if the six months goes by, the

1 adoption is granted. It's done. And I could
2 represent to the Court that was the first thing she
3 indicated to me; that she thought that she had been misled
4 into thinking that she had that time, because, otherwise,
5 it's strange for her to call up on Saturday, which in the
6 affidavit of the social worker, she acknowledges, and
7 says, " I want my child back." But, that's all we've got
8 Judge.

9 THE COURT: A strange thought just struck my mind
10 and that is, I really shouldn't be hearing this. The guy
11 who ought to hear it is Judge Murphy. He is the one that
12 took the consent; and in effect, I would be, in effect, if
13 I rule in your favor, I will be overruling to a certain
14 extent, on a fellow judge. But really, he took the
15 consent. May be he ought to hear this.

16 MR. HASLAM: We presented that to Mr. Burgi, and
17 Mr. Burgi suggested that I bring that to you.

18 THE COURT: Well, not sure I agree with Don in the
19 case. Tell, you what I'll do. I am not afraid to make a
20 decision. But I do think I ought to talk to Judge Murphy
21 to see whether or not he wants to make the decision.

22 MR. JOHNSON: Allright, Your Honor.

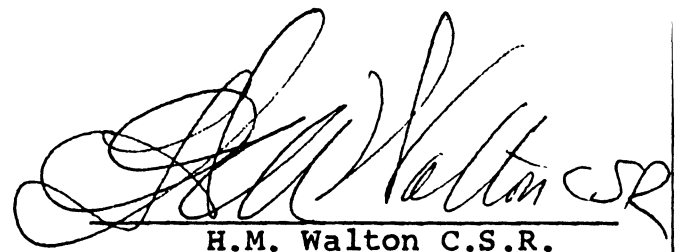
23 THE COURT: And I want to look at a couple of cases
24 I'll take the matter under advisement and advise you today
25 If you're going back to Provo, I'll call your office. I'll

1 advise you today, either my decision in the case or
2 whether or not I think it should go back to Judge Murphy
3 If I can reach Murphy today, and if I can't reach him, it
4 will have to be tomorrow. Either way, we'll get the ma
5 taken care of.

6
7 C E R T I F I C A T E
8 - - - - -

9 SALT LAKE COUNTY) :
10 STATE OF UTAH) ss.

11 I, Hal M. Walton, do hereby certify that I am
12 a Certified Shorthand Reporter of the State of Utah; that
13 on August 31st, 1987, I appeared before the above-named
14 Court and reported in Stenotype the proceeding matters
15 contained in the 17 pages of transcription herein and that
16 the same is a true and correct rendering of my shorthand
17 notes as reported by me.

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22 
23 H.M. Walton C.S.R.

24
25 Dated: May 6, 1988

ADDENDUM "B"

REPORTER'S TRANSCRIPT DATED JUNE 24, 1987

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the : Case No. A-87-229
Adoption of: : REPORTER'S TRANSCRIPT
INFANT ANONYMOUS :
:

BE IT REMEMBERED that on the 24th day of June,
1987, the above-entitled action came on regularly for
hearing before the Honorable Michael R. Murphy, Judge
in the Third Judicial District for the State of Utah,
and was reported by me, Gayle B. Campbell, a Registered
Professional Reporter and Notary Public in and for the
State of Utah.

A P P E A R A N C E S:

For Petitioners: Lincoln W. Hobbs
WINDER & HASLAM
175 West 200 South, Suite 400
Salt Lake City, Utah 84110

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

AUG -7 1987

GAYLE B. CAMPBELL
CERTIFIED SHORTHAND REPORTER
SALT LAKE CITY, UTAH

H. Dixon
By *Anna C. Dixon*

1 Salt Lake City, Utah

June 24, 1987

2 P R O C E E D I N G S

3 THE COURT: This is in the matter of the adoption
4 of Infant Anonymous, Case No. A-87-229. Lincoln Hobbs
5 on behalf of the petitioners is present before the court,
6 along with the natural mother. Mr. Hobbs, why don't you
7 go head. Let's have the mother sworn in, and you put
8 on what you believe is necessary.

9 MR. HOBBS: I have brought before the court
10 today who had an infant female born
11 at the Holy Cross Hospital yesterday morning at about
12 5:00 o'clock, or 4:19 a.m. She is before the court to
13 give her consent to the adoption of her infant child,
14 and I have met with her in the hall and provided her with
15 a copy of the document which she will be signing, the
16 affidavit relinquishing her paternal rights. She has
17 read the same and she indicated to me she understands
18 the same. If you would like to ask her any questions
19 respecting the knowing consent on her behalf.

20 THE COURT: Let me see your affidavit.

21 MR. HOBBS: It's among these documents.

22 THE COURT: Okay.

23
24 having been duly sworn, was examined and testified on
25 her oath as follows:

26 EXAMINATION

27 BY THE COURT:

28 Q Mr. Hobbs has indicated that

1 you have read this affidavit. Is that true?

2 A Yes, I've read it.

3 Q And you are

4 A Yes.

5 Q And you are the natural mother of the child
6 in question, who was born on June 23, 1987.

7 A Yes, I am.

8 Q Why is it that you think it's in the best
9 interest of the child that you relinquish any rights you
10 have and consent to the adoption?

11 A I just cannot take care of her financially.

12 Q Do you understand -- for want of a better
13 word -- the finality of this? That if it goes forward,
14 that you relinquish all parental rights forever.

15 A Yes, I do.

16 Q And you are doing this freely and voluntarily.

17 A Uh huh. (Affirmative)

18 Q No one has forced you to do this.

19 A Nobody has. It's my own decision.

20 Q Did you see that child after the child
21 was born.

22 A Not right after she was born, but I did
23 later that day. I've been down there three times.

24 Q Did you make up your mind to relinquish
25 your parental rights after you had seen the child?

A What do you mean? I've decided all along
to have this adoption go through, and I know that there
will not be any rights for me to --

1 THE COURT: All right. Mr. Hobbs, is there
2 anything that needs to be a matter of record and under
3 oath for the Order to be signed?

4 MR. HOBBS: I would just have two matters
5 I would want on the record.

6 EXAMINATION

7 BY MR. HOBBS:

8 Q Are you under the influence of any drugs
9 that may impair your ability to make a knowing consent
10 at this time?

11 A No, I'm not.

12 MR. HOBBS: The other thing I would like
13 on the record, I would like the record to reflect that
14 I have brought a certificate of search for acknowledgment
15 of paternity by the father. As of 9:01 a.m. this morning
16 there have been no acknowledgment of paternity.

17 THE COURT: All right. why
18 don't you go ahead and sign that affidavit. Fill in the
19 date, the 24th day of June, and sign it on the table there.

20 (Document signed)

21 THE COURT: Are you taking any pain medication
22 now?

23 THE WITNESS: Just for my stitches.

24 THE COURT; All right. And that doesn't
25 interfere with your ability to --

THE WITNESS: No, it doesn't.

Q -- know and understand what you're doing
here.

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THE WITNESS: No.

THE COURT: All right. The affidavit having been signed, and having heard the testimony, it's appropriate that the Order as submitted be signed, and I'll do it at this time. All right.

Good luck to you.

(Whereupon, the proceedings were concluded.)

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REPORTER'S CERTIFICATE

State of Utah)
 : ss.
County of Salt Lake)

I, GAYLE B. CAMPBELL, do hereby certify that
I am a Registered Professional Reporter and Notary Public
in and for the State of Utah;

That as such reporter, I attended the hearing
of the foregoing matter and thereat reported in stenotype
all of the testimony and proceedings had; that thereafter,
my notes were transcribed into typewriting under my direction,
and pages 1 through 5 constitute a full, true, and correct
report of the same.

DATED at Salt Lake City, Utah this 3rd day
of August, 1987.

Gayle B. Campbell
GAYLE B. CAMPBELL, R.P.R

My Commission Expires:
6 January 1988

90029

ADDENDUM "C"

AFFIDAVIT OF SUSAN BAGLEY

FILED IN CLERK'S OFFICE
Salt Lake County Utah

AUG 24 1987

Dennis V. Haslam (#1408)
Lincoln W. Hobbs (#4848)
WINDER & HASLAM
175 West 200 South, Suite 4004
Post Office Box 2668
Salt Lake City, Utah 84110-2668
Telephone: (801) 322-2222

H. Dixon Hindley, Clerk 3rd Dist. Court
By *[Signature]*
Deputy Clerk

Attorneys for Petitioners

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the : AFFIDAVIT OF SUSAN BAGLEY
Adoption of :
:
INFANT ANONYMOUS. : Case No. A-87-229

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

Susan Bagley, having been duly sworn, does depose and
state that:

1. I am a counselor, employed by the Utah Women's Health
Center, with various responsibilities in counseling patients
of the Center, including the counseling of pregnant women who
have made a decision to place a child for adoption.

2. I have a bachelor of science degree in Behavioral
Science and Health from the University of Utah, and am Assis-
tant Director of the Utah Women's Health Center.

3. I have, in the medical records of my patient,
, a signed and notarized Consent to Release of
Personal and Medical Information which authorizes me to re-

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lease to Winder & Haslam and to allow them to inspect and obtain copies of any and all of "personal or medical records, bills, notes, x-rays and medical reports pertaining to [her] physical or mental condition, past, present or future, upon a presentation of this consent or a photocopy thereof."

4. I first became acquainted with on or about March 31, 1987, when she came to the Utah Women's Health Center to determine the duration of her then-existing pregnancy. was at that time, and continues to be to the best of my knowledge, unmarried. She is 21 years of age.

5. Following initial consultation with me at the Center, I met with and counseled her on several occasions for a total of 12½ hours respecting her decision to place her child for adoption.

6. During the course of my counseling of , I did not advocate the option of adoption over any other of the alternatives available to her in her situation.

7. During the course of my counseling of she continually affirmed that her desire respecting her pregnancy was to place her child for adoption, and that an adoption would be in the best interests of her child, as she was unmarried and did not have the means to support the child.

8. At no time during my counseling of did she express any reservations respecting her decision to place

the child for adoption, other than the natural and expected feelings of ambiguity in such a situation.

9. After reached the final decision to place the child for adoption, we arranged an appointment and visited with Lincoln W. Hobbs, attorney for petitioners herein, and discussed the possibilities of a private adoption of her then unborn child. On or about June 5, 1987, at approximately 11:00 a.m., and I met with Mr. Hobbs at his office at the law firm of Winder & Haslam.

10. During that meeting, and in my presence, Mr. Hobbs advised that:

a. He would be paid by and acting as attorney for the petitioners herein, and as such could not provide any legal advice to He further advised her that should she have a legal question, she should direct the same to independent counsel, as he had an apparent conflict of interest in advising her of her legal rights.

b. He further told her that it would be necessary for her to visit with and sign a consent in the presence of a judge, and that following her signature on that consent, her rights to the infant would be terminated, and she could not thereafter change her mind and obtain custody of the child.

11. Following that meeting, I had several other conversations with in which we discussed the finality of a decision she was to make respecting relinquishment of her child for adoption.

12. On June 22, 1987, I was notified that had gone into labor and was expected to deliver at Holy Cross Hospital. I met her at the hospital and sat with and assisted her through labor and delivery of her child.

13. During a long labor, repeatedly stated her wishes to have the baby as soon as possible so she could return to her home and her "normal" lifestyle. During the labor, she waivered as to whether she wanted to know the sex of her child or whether she would want to see her child after its delivery.

14. At no time during labor did she ever express any reservations about her decision to place her child for adoption.

15. On or about June 24, 1987, approximately 30 hours after the delivery of her child, and I met with Mr. Hobbs at the Third Judicial District Court in and for Salt Lake County, prior to an appointed, scheduled meeting with Judge Michael R. Murphy of that Court, for the purpose of obtaining consent to the adoption and relinquishment of her parental rights.

16. At that time, and in my presence, Mr. Hobbs provided with, for her inspection, a copy of an Affidavit Relinquishing Parental Rights and Consenting to Adoption and asked her to review the same.

17. In my presence, read the Affidavit. Following her reading of the Affidavit, Mr. Hobbs asked

if she understood the contents of the document.

stated she did. Mr. Hobbs told her that, in the presence of the judge, she would most likely be read a copy of the consent, asked if she understood the contents, asked if she understood her relinquishment would be a final decision, and would further be asked if she were under the influence of any drugs which might affect her ability to make a decision.

18. Thereafter, Mr. Hobbs, and I proceeded to the chambers of Judge Michael R. Murphy, at which time, in the presence of a court reporter, signed the Affidavit Relinquishing Parental Rights and Consenting to Adoption.

19. Following the taking of consent in the judge's chambers, she and I went to lunch together in Salt Lake City. For approximately 2 hours we talked about her decision and about how she could now return to her normal activities. During our lunch, she appeared in full control of all of her mental facilities, and did not appear to be unduly tired or affected by stress.

20. During the course of my counseling of she advised me she did not desire her mother, with whom she resided in Lindon, Utah, to know of her pregnancy.

21. As a result of her request, and in light of the fact that I found her to be a mature, intelligent and sophisticated woman, I respected her decision and did not at any time allow

her mother to become aware of her pregnancy.

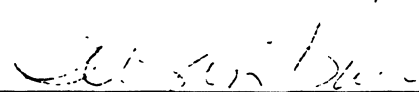
22. To the best of my knowledge, information and belief,
mother was unaware of her daughter's pregnancy
until several days following the delivery and
return home.

23. Several days after the consent was given, I was con-
tacted by who advised me she had spoken to her
mother about the pregnancy and the adoption, and that her
mother had expressed serious reservations about her daughter's
desire and decision to place the child for adoption.

then advised me she had "changed her mind" with re-
spect to the consent she had provided in the presence of Judge
Michael R. Murphy of the Third Judicial District Court in and
for Salt Lake County.

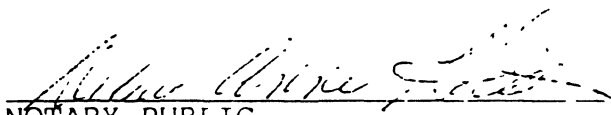
24. Since that conversation with , I have had
no further contact or communication with her.

DATED this 21 day of August, 1987.



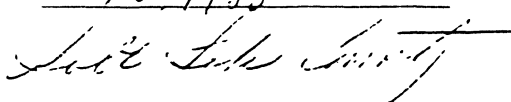
Susan Bagley

SUBSCRIBED AND SWORN TO before me this 21 day of Au-
gust, 1987.



NOTARY PUBLIC
Residing in Salt Lake County, UT


My Commission Expires:

10/1988


CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing AFFIDAVIT OF SUSAN BAGLEY to be mailed, first class, postage prepaid, this 21 day of August, 1987, to:

Mr. Richard B. Johnson
Attorney for
1327 South 800 East, Suite 300
Orem, Utah 84058

_____

ADDENDUM "D"

AFFIDAVIT OF TONYA WILLIAMS

FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUL 22 1987

RICHARD B. JOHNSON #1722
Attorney for Movant
1327 South 800 East, Suite #300
Orem, Utah 84058
Telephone: (801) 225-1632

H. Dixon Hindley, Clerk 3rd Dist. Court
By *[Signature]* Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE
ADOPTION OF:

AFFIDAVIT

Infant Anonymous.

Case No. A87-229

STATE OF UTAH)
 : ss
COUNTY OF UTAH)

, after first being duly sworn, deposes
and says:

1. I am the natural mother of the child involved in this matter.
2. I signed the attached Affidavit relinquishing parental rights and consenting to adoption.
3. At the time I signed that Affidavit, I had been on pain medication. Prior to going to the Court, I had significant doubts about giving the child up for adoption. I believe that the pain

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medication together with the stress that I was under because of childbirth simply left me without sufficient will and strength to properly evaluate that matter.

4. After I left the hospital and got my strength back, I was resolute that I did not want to lose my child and wanted the rights to raise the child. I believe that had it not been for the medication and stress of childbirth, that I would have indicated to the persons involved that I did not want to give my child up for adoption.

5. I do not have monies to fight this matter legally, and it took me the time from June 24, 1987 to to the time that I hired Richard Johnson to raise sufficient monies to be able to file the appropriate documents with the Court to request that the consent to set aside and that the Decree of Adoption be set aside.

6. Aside from the medication and stress, I was informed and believed that the Decree of Adoption did not become final for six months and that I had that period of time in which some action could be taken. I do not understand that the giving of my consent and the signing of the Affidavit were the end of the matter and that there was in fact a period of time that could change my mind.

7. I want very much to raise my child and have my parental rights restored. The child means everything to me and I would greatly appreciate the assistance of the Court in allowing me to have my rights with the child restored.

DATED this 22nd day of July, 1987.

Movant

SUBSCRIBED & SWORN to before me this _____ day of _____, 198____.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

RESIDING AT:

MAILING CERTIFICATE

I hereby certify that on the 22 day of July, 1987, I mailed a true and correct copy of the foregoing, postage prepaid, to:

Lincoln W. Hobbs
Dennis V. Haslam
WINDER & HASLAM
175 West 200 South, Suite 4004
Post Office Box 2668
Salt Lake City, Utah 84110-2668

Rhonda Bartholomew

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ADDENDUM "E"

MOTION TO SET ASIDE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUL 22 1987

RICHARD B. JOHNSON #1722
Attorney for Movant
1327 South 800 East, Suite #300
Orem, Utah 84058
Telephone: (801) 225-1632

H. Dixon Hindley, Clerk 3rd Dist. Court
By *[Signature]*
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE	:	MOTION TO SET ASIDE
ADOPTION OF:	:	FINDINGS OF FACT, CONCLUSIONS
	:	OF LAW AND DECREE
	:	
Infant Anonymous.	:	Case No. <u>A87-229</u>

COMES NOW _____ and moves this Court pursuant to Rule 60(b) of the Utah Rules of Civil Procedure for an Order setting aside the Findings of Fact, Conclusions of Law and Decree of Adoption and allowing the movant, _____ to withdraw her consent to the adoption.

There is attached hereto and incorporated herein a Memorandum of Points and Authorities in support of the Motion.

DATED this 22nd day of July, 1987.

[Signature]
RICHARD B. JOHNSON
Attorney for Movant

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MAILING CERTIFICATE

I hereby certify that on the 22 day of July, 1987, I mailed a true and correct copy of the foregoing, postage prepaid, to:

Lincoln W. Hobbs
Dennis V. Haslam
WINDER & HASLAM
175 West 200 South, Suite 4004
Post Office Box 2668
Salt Lake City, Utah 84110-2668

Ronda Baukolemeu

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FILED IN CLERK'S OFFICE
Salt Lake County Utah

JUL 22 1987

RICHARD B. JOHNSON #1722
Attorney for Movant
1327 South 800 East, Suite #300
Orem, Utah 84058
Telephone: (801) 225-1632

H. Dixon Hinckley, Clerk 3rd Dist. Court
By *[Signature]*
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE	:	MEMORANDUM IN SUPPORT OF MOTION
ADOPTION OF:	:	TO SET ASIDE FINDINGS OF FACTS,
	:	ORDER AND DECREE
	:	
Infant Anonymous.	:	Case Number: <u>A87-229</u>

COMES NOW _____, by and through her attorney,
Richard B. Johnson, and submits the following Memorandum of
Points and Authorities in Support of _____ Motion
to Set Aside Findings of Fact, Order and Decree.

ARGUMENT

POINT I

THE THIRD DISTRICT JUVENILE COURT FOR UTAH COUNTY HAS
JURISDICTION TO GRANT PLAINTIFF THE RELIEF SHE REQUESTS.

In adoption cases the courts are given broad discretion to
formulate a decree which is equitable and consistent with public
policy. The Supreme Court of Utah in,
D P v. Social Service & Child W. Dept., 431 P.2d 547, 551 (1967),

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quoting prior case law said:

. . .the important phrase of the case is that it recognized the right of a natural mother to revoke written consent, and as pointed out, when the question of undue influence is an issue "the court should carefully scrutinize the evidence lest an honest, worthy and well-meaning natural parent be unjustly deprived of her child."

Therefore, the courts not only have jurisdiction to hear the facts and make a decision, but the courts are also held to a high level of scrutiny to protect the rights of the natural mother to be with her child.

The Utah Supreme Court further stated in In Re Adoption of F , 488 P.2d 130, 132 (Utah 1971):

. . .The mother of an illegitimate child has the right both to its custody and to relinquish that right if for any reason she so desires. If she so decides and freely and voluntarily signs a release and consent for adoption, it is binding the same as any other contract. It is, of course, true that if no rights or interests of third parties have intervened, the courts are quite liberal in permitting the withdrawal of such a consent.

The fact that did not understand and freely and voluntarily consent to the adoption of her daughter along with the fact that petitioner forthwith moved the Court within a few days to regain her daughter should weigh heavily in movant's favor.

POINT II

THERE ARE LEGAL GROUNDS WHICH JUSTIFY THE
REVOCATION OF THE PETITIONER'S CONSENT TO ADOPTION.

The standard for revocation of consent to adoption is set out in In the Matter of S., 572 p.2d 1370, 1374 (1977):

A duly executed consent can be avoided only by showing the agreement was not entered into voluntarily but was induced through duress, undue influence, or under some misrepresentation or deception; or other grounds which would justify release from the obligations of any contract.

It seems quite clear that petitioner signed the consent from with the belief that she had six months before the adoption was final and during that period of time she could revoke her consent. The belief that consent was not final as of June 24, 1987, was based on the representations and statements. When one applies the standard set out above, the consent agreement should be revoked based on the fact that there was a misrepresentation and the petitioner signed the agreement with the justifiable deception that she could regain custody of her daughter at any time within the next 6 months and while she was under the influence of pain medication.

In addition to misrepresentation, the persons involved exercised undue influence. The essence of undue influence is

unfair persuasion. See In Interest of Perry, 641 P.2d 641, 181 (Wash. App., 1982).

The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion.

1 Restatement (Second) of Contracts Section 177, comment b at 491 (1981)

Certainly the petitioner's judgment, at the time she signed the consent, was impaired by the drugs taken and the representations that there was a six month period before the consent agreement was final.

Additional light is shed on the issue by the court in In the Matter of Anderson, 589 P.2d 957 (Idaho, 1978). The standard the court applied in the case was whether the consent was voluntarily, knowingly, and intelligently made, and with full awareness of the legal consequences. Movant does not meet any of these requirements. She was relying on the misrepresentations of the effect at the consent. She was in no position to make a intelligent decision regarding the permanency of her consent.

Similar issues to the ones raised in this case were addressed by the Washington Court of Appeals in In Interest of Perry, 641 P.2d 178 (1982). The mother of an illegitimate child received aid from an agency. As a result of the advice of her physician and the agency she signed a consent agreement. The court further stated:

During that time everyone advocated that she place her child for adoption. She was never clearly informed by the agency that even though it had spent money on her behalf, she was nonetheless free to retain her child and return to Michigan. She was not encouraged to consider alternatives and had no opportunity to reflect or seek independent advice. Although she was told the relinquishment was final, she was also improperly advised that another mother changed her mind 7 months after relinquishment and recovered her child.

. . . Additionally, she challenged her relinquishment immediately upon returning to Michigan. The findings further show this environment created in Miss. Perry's mind an obligation without option, to repay the agency's expenses by relinquishing her rights to the child. In view of these findings, the close relationship that must have developed and Miss Perry's dependancy upon the agency, we hold the court's conclusion must stand and the relinquishment be set aside.

In light of the above case, petitioner should be allowed relief. In the Washington case as well as the case at issue the mothers were not fully informed by the agencies of their rights. Neither mother was encouraged to seek legal advice. Both mothers

were faced with outside pressures from their family. The agency lead both mothers to believe that there was a period of time after signing the consent that they could regain their children. Therefore, just as the consent was revoked in the case cited above so also should the petitioner be released from her consent.

POINT III

NOT ALLOWING PETITIONER TO REVOKE HER CONSENT TO ADOPTION WOULD BE CONTRARY TO PUBLIC POLICY

The Supreme Court of Utah state in
D P v. Social Service & Child W. Dept., 431 P.2d 547 (1967):

I take it that most everyone will agree that there is a strong presumption that a baby is better off with its natural mother; that such presumption must be overcome only by clear and convincing evidence; that even though a written consent is given her it is revocable under certain circumstances.

. . .The ties by which a mother and child are bound together should not be severed except for grave and weighty reasons. The fact that this child may receive, at the hands of appellants, a better home that respondent can provide, is not sufficient reason for depriving her of her offspring.

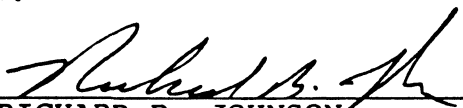
The natural affection which accompanies a child and her mother is a relationship which should be securely protected by the courts. Public policy dictates that children should not be severed from their mother unless it is the clear intention of the

mother to do so. The court in the above cited case stated that even though the mother was destitute and had no means of providing for the child, and that the adoptive parents could more adequately give the child the necessities of life, there still existed insufficient grounds for awarding custody to the adopting parents. Id. at 552.

CONCLUSION

therefore respectfully requests the Court to revoke the consent agreement and allow her child to be returned to her.

DATED this 22nd day of July, 1987.



RICHARD B. JOHNSON
Attorney for Movant

MAILING CERTIFICATE

I hereby certify that on the 22 day of July, 1987, I mailed a true and correct copy of the foregoing postage prepaid, to:

Lincoln W. Hobbs
Dennis V. Haslam
WINDER & HASLAM
175 West 200 South, Suite 4004
Post Office Box 2668
Salt Lake City, Utah 84110-2668

Rhonda Bartholomew

ADDENDUM "F"

MINUTE ENTRY DATED SEPTEMBER 25, 1987

FILED IN CLERK'S OFFICE
Salt Lake County Utah

SEP 25 1987

H. Dixon Hindley, Clerk 3rd Dist. Court
By K. J. Peterson
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ADOPTION : MINUTE ENTRY
OF: :
INFANT ANONYMOUS. : CASE NO. A-87-229
:

The "Protective Motion for New Trial, Or, in the Alternative, Amendment from Judgment or Relief From Judgment" of the petitioners in the above-entitled matter came on for hearing before the Court on September 23, 1987. The Court heard argument, and has carefully examined the Memoranda and cases cited to it by counsel for both the petitioners and the natural mother, and now denies the above-described Motions.

The reason for said denial is that while the matter should perhaps have initially been heard by the judge that took the consent, this Court discussed that matter with counsel for the parties at the time of the initial hearing herein, and neither party expressed a desire to have the judge who took the consent hear the matter. In addition, the matter was submitted on Affidavits and oral argument, without any request for the entry of additional evidence. It is the Court's opinion that had the parties asked either to have the original judge hear the matter, or have an evidentiary hearing, both of said motions would have been granted. However, having not done so, this Court is of the opinion that those matters have been waived. It has been urged

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that the question of having the matter heard by the judge who took the original consent cannot be waived. However, this Court is of the opinion that is not a correct statement and that, in fact, such waiver did take place herein. Therefore, this Court rules as above set forth, and the provisions of the Minute Entry, dated September 1, 1987, will remain in full force and effect.

The Court orders that the custody of the child be returned forthwith to the natural mother. The natural mother's attorney will prepare the Order. *IE*

Dated this 25 day of September, 1987.



RICHARD H. MOFFAT
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
CLERK
By *K. Grotas*
Deputy Clerk

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ADDENDUM "G"

MINUTE ENTRY DATED SEPTEMBER 1, 1987

SEP 1 1987

K Grotelas

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE ADOPTION : MINUTE ENTRY
OF: : CASE NO. A-87-229
INFANT ANONYMOUS. :

The Court having considered the pleadings on file herein, together with the Affidavits and argument of counsel, hereby grants the Motion of to withdraw her consent to the adoption of her natural child known herein as Infant Anonymous, who was born June 23, 1987 at Holy Cross Hospital in Salt Lake City, Salt Lake County, State of Utah.

The Court recognizes that any decision that it makes in this matter is going to be emotionally disturbing to one or the other of the parties herein. The Court is convinced, however, that a reading of the transcript of the proceedings at which the natural mother's consent was taken is not inconsistent and, in fact, implies that her consent is not final, and that the proceedings would have to "go forward." While the Court does not find fault with the judge that took the consent, when the language used therein at that time, ~~it~~ is considered in view of the allegations of the natural mother that she was told that the adoption would not become final for six months, which she took to mean that she could withdraw her consent at any time during that six month period, it becomes apparent that she probably did not knowingly

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consent to the release of her parental rights on an unconditional basis. The language involved is found on lines 11, 12 and 13 of page 3, where the Court said, "Do you understand -- for the want of a better word -- the finality of this? That if it goes

the forward, that you relinquish all parental rights forever."

(Emphasis supplied).

The Court is further impressed by the fact that the natural mother did not consult with members of the family, including her own mother, until after the birth of the child, but was consulted only by a counselor at the Utah Women's Health Center. Again, not in any way to impune the capacity or capability of the said counselor, nevertheless, the natural mother, after consulting with her own mother, decided that she wanted her child back, and as evidence thereof, within three days after the consent had been taken (which was taken about 30 hours after the birth), she advised the counselor that she wanted the child back. She thereafter filed the Petition herein as soon as possible in view of her financial conditions, which was within 30 days of the date that she had given the consent.

Under the circumstances, it is the Court's opinion that the mother did not freely and voluntarily given an unconditional release of her parental rights, that she was acting under a mistaken belief that the adoption would not become final for six months, and that she had the right to change her mind within that

six month period. The Court finds that if there was, in fact, less than a full, knowing, unconditional release of the parental rights, the equities in the matter weigh in favor of setting the consent aside, and the Court so orders.

The Court further orders that custody of the child be returned forthwith to the natural mother. The natural mother is ordered to repay to the adoptive parents the reasonable costs they have incurred in this matter. She may have a period of two years to pay those costs in equal monthly installments.

The natural mother's attorney will prepare the Order.

Dated this 1st day of September, 1987.



RICHARD H. MOFFAT
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
CLERK

By K. Grottepan
Deputy Clerk

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ADDENDUM "H"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH
DEC 3, 1987
BY
CLERK OF COURT

RICHARD B. JOHNSON, #1722
Attorney for Movant
1327 South 800 East, Suite #300
Orem, Utah 84058
Telephone: (801) 225-1632

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF	:	FINDINGS OF FACT AND
THE ADOPTION OF:	:	CONCLUSIONS OF LAW
	:	
INFANT ANONYMOUS,	:	
	:	Civil No. A-87-229
Defendant.	:	

This matter having come on for hearing before the Honorable Richard H. Moffat on the 31st day of August, 1987. The natural mother was present and represented by her attorney, Richard B. Johnson. The adoptive parents were not present nor represented by their attorneys Lincoln W. Hobbs and Dennis V. Haslam. The natural mother having filed a Motion to Set Aside the Findings of Fact, Conclusions of Law, and Decree of Adoption in this matter and to withdraw her Consent and the parties having submitted affidavits and memoranda in support of their position and having argued the matter before the Court

and submitting to the Court for decision based upon the memoranda and affidavits and in addition, having considered Petitioner's protective Motion for New Trial or in the alternative amendment from judgment or relief from judgment which came on for hearing before the Court on September 23, 1987. The natural mother was again present and represented by her attorney, Richard B. Johnson. The adoptive parents were not present but were represented by their attorney, David S. Dolowitz. The Court, having carefully examined the memoranda, affidavits and arguments presented by counsel and the Court being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

1. The Court finds that _____ is in fact the natural mother of a minor child born out of wedlock on June 23, 1987.

2. The Court finds that on June 24, 1987, that the natural mother, _____ appeared before Judge Michael R. Murphy and was questioned concerning the Consent.

3. The Court finds that the natural mother was not clearly apprised of the finality of signing the Consent. Specifically, the Court finds that the natural mother was confused and indeed believed that even though she signed the Consent, she would still have six months, during which time the Decree of Adoption, would not be final and at any time during that six month period she could withdraw her Consent.

4. The Court finds that the natural mother did not knowingly consent to the release of her parental rights on an unconditional basis.

5. The Court finds that the natural mother did not consult with members of her immediate family including her own mother until after the birth of the child and that the only consultation received by the natural mother was from a counselor at the Utah Women's Health Center.

and the consultation set forth in the affidavit of Reproductive A. J. Jones M.D. R.H.
6. The Court finds that after the natural mother had consulted with her own mother that the natural mother decided she wanted her child back and within three days advised the counselor that she wished to withdraw her Consent.

7. The Court finds that a Petition to withdraw the natural mother's Consent was filed as soon as practical in view of her financial condition which was accomplished within 30 days of the date she had given consent.

8. This Court finds in response to Petitioner's Protective Motion for New Trial or in the alternative Amendment from Judgment or Relief from Judgment that this Court discussed the matter of whether the case should be heard by Judge Murphy who originally took the Consent of the natural mother and finds that neither party expressed a desire to have Judge Murphy hear the matter.

9. The Court finds that since neither party expressed the desire to have Judge Murphy preside that said parties waived that right.

10. The Court finds that the Protective Motion for New Trial or in the alternative Amendment from Judgment or Relief from Judgment was submitted on affidavits and oral argument without any request for the entry of additional evidence and further finds that the parties waived their right to offer any additional evidence by neglecting to make said request.

11. The Court finds that the natural mother did not make an informed knowing unconditional release of her parental rights and is entitled to revoke her Consent.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

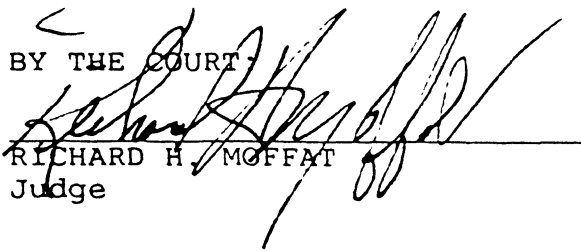
1. The Consent to adoption is hereby set aside and the adoptive parents are ordered to return the minor child to the natural mother forthwith.

2. The right to have Judge Murphy who took the original Consent preside over these proceedings has been waived by the parties to this action.

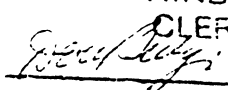
3. The right to offer additional evidence relative to these proceedings has been waived by the parties by their failure to timely assert said right.

DATED this 3rd day of November, 1987.

BY THE COURT


RICHARD H. MOFFAT
Judge

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ATTEST
H. DIXON HINDLEY
CLERK
By 
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that on the 24th day of November, 1987, I mailed a true and correct copy of the foregoing, postage prepaid, to:

Lincoln W. Hobbs
Dennis V. Haslam
Attorneys for Petitioner
175 West 200 South, Suite 4004
P.O. Box 2668
Salt Lake City, Utah 84110-2668

Caryl Rawlings

ADDENDUM "I"

ORDER OF STAY OF EXECUTION

DAVID S. DOLOWITZ (0899)
of and for
PARSONS, BEHLE & LATIMER
Attorneys for Petitioners
185 South State Street, Suite 700
P.O. Box 11898
Salt Lake City, Utah 84147-0898
Telephone: (801) 532-1234

FILED

SEP 25 1987

Timothy M. Shaw
Clerk of the Court
High Court of Appeals

IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

IN THE MATTER OF
THE ADOPTION OF:

INFANT ANONYMOUS.

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ORDER OF STAY
OF EXECUTION

Civil No. A87-229

* * * * *

This court, having considered the application of the petitioners for a stay of execution of the Order of the Third Judicial District Court directing return of Infant Anonymous to the natural mother and the district court having refused to stay said order pending presentation of the issues in this case on appeal, this court now finds and concludes that a Stay of Execution should be entered by this court prohibiting enforcement of the order of the District Court requiring return of Infant Anonymous to the child's natural mother until this matter is fully considered by the court.

Accordingly IT IS HEREBY ORDERED that:

Execution of the Order implementing the decision of the District Court of September 1, 1987, setting aside the

relinquishment of the natural mother and directing the return of Infant Anonymous to the natural mother is hereby stayed until this matter can be fully considered by this court.

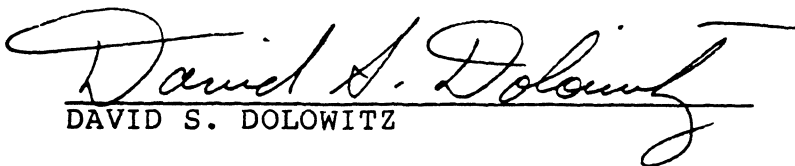
DATED this 25 day of September, 1987.


~~District~~ Court Judge
Appellate

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Order to the following on this 25 day of September, 1987:

Mr. Richard B. Johnson
Attorney at Law
1327 South 800 East #300
Orem, Utah 84058


DAVID S. DOLOWITZ

DSD:090487F

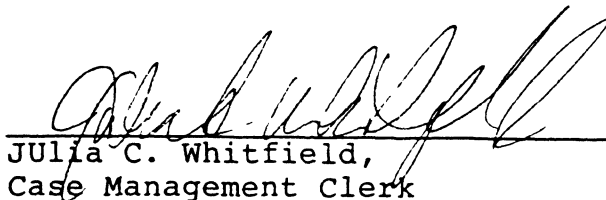
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 25th day of September, 1987, a true and correct copy of the foregoing Order of Stay was mailed to each of the following:

Honorable Richard H. Moffat
Third District Court
Salt Lake City, Utah

David S. Dolowitz, Esq.
PO Box 11898
Salt Lake City, Utah 84147-0898

Richard B. Johnson
Attorney at Law
1327 South 800 East #300
Orem, Utah 84058


Julia C. Whitfield,
Case Management Clerk

ADDENDUM "J"

ORDER REGARDING MODIFICATION OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW, ORDER AND JUDGMENT

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Petitioners
525 East 100 South, Suite 500
Salt Lake City, Utah 84102
Telephone: (801) 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

IN THE MATTER OF)	ORDER REGARDING
THE ADOPTION OF:)	MODIFICATION OF
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW,
INFANT ANONYMOUS)	ORDER AND JUDGMENT
)	Civil No. A87-229
)	Judge Moffat

* * * * *

The above-entitled matter came before the court, the Honorable Richard H. Moffat presiding, on Friday, the 5th day of February, 1988, to consider the objections of the adoptive parents to the proposed Findings of Fact, Conclusions of Law, Order and Judgment that had been accepted by the court and entered on December 3, 1987. Counsel for the natural mother agreed that Rule 2.9 of the Rules of Practice of the District and Circuit Courts of the State of Utah had not been followed

in this matter and agreed that it was appropriate for the court to consider the objections of the adoptive parents. The court then heard and considered the specific objections and ruled that the objection to Paragraph 1 of the Order and Judgment should be sustained, and, by interlineation, deleted the language "Findings of Fact, Conclusions of Law, and Decree of Adoption," and inserted the language "Order of Temporary Custody filed and dated June 24, 1987."

The court then considered the objections to the Findings of Fact and the court, examining the objection to the proposed Finding of Fact No. 3, determined that, although the adoptive parents objected to proposed Findings of Fact No. 3 on the grounds that there had been no trial and this could not be determined as a question of fact, there were conflicting affidavits, to-wit: those of Dr. Cynthia A. Jones and Susan Bagley, opposing the affidavit of the natural mother, and Judge Michael Murphy had made a determination directly contrary to this determination, the ruling of the court necessarily encompassed this finding and it was appropriate. The objection was overruled. On the same basis, the court overruled the objections of the adoptive parents to Findings of Fact, Paragraph 4, Paragraph 6, Paragraph 7 and Paragraph 11. The court determined that the objection should be granted in part as to Paragraph 5 and by interlineation at the end of

the existing provision, the court added the language ". . . and the consultation set forth in the affidavit of Cynthia A. Jones, M. D."

The objections of the adoptive parents to Paragraphs 8, 9 and 10 were withdrawn.

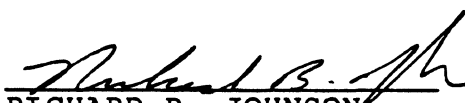
Having thus ruled on the objections and by interlineation made the corrections that the court deemed appropriate to make, the court now ratifies, and by means of this order, confirms its entry of the the Findings of Fact, Conclusions of Law, and Order and Judgment as thus modified, as previously entered on December 3, 1987, to the extent that the objections of the petitioners are inconsistent with this ruling, they are overruled.

DATED this ____ day of February, 1988.

RICHARD H. MOFFAT
District Court Judge

APPROVED AS REFLECTING
THE RULING OF THE COURT:

DAVID S. DOLOWITZ
Attorney for Petitioners



RICHARD B. JOHNSON
Attorney for Natural Mother

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, a true copy of the above and foregoing Order, this ____ day of _____, 1988, to:

Mr. Richard B. Johnson
Attorney at Law
1327 South 800 East #300
Orem, Utah 84058

DAVID S. DOLOWITZ

MAILING CERTIFICATE

I hereby certify that on the 25 day of May,
1988, I mailed ^{four} ~~a~~ true and correct copies of the foregoing to the
following, postage prepaid.

David S. Dolowitz
Julie A. Bryan
Cohne, Rappaport & Segal, P.C.
Attorneys for Petitioner/Appellant
525 East 100 South, Suite 500
Salt Lake City, Utah 84102

Richard B. [Signature]