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Matter of Adoption v. : Reply Brief

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)	APPELLANT' S REPLY BRIEF
the Adoption of:)	
)	
INFANT ANONYMOUS.)	
)	
)	Case No. 870415-CA

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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JUN 15 1998

ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 7

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INTRODUCTION

The Petitioners submit this Brief in reply to the arguments raised in Respondent's Brief:

ARGUMENT

POINT I

JUDGE MOFFAT ERRED IN OVERRULING JUDGE MURPHY'S HOLDING THAT RESPONDENT'S CONSENT TO ADOPTION WAS VOLUNTARILY GIVEN.

In Point I of her appellate brief, respondent makes two arguments. First, she argues that the petitioners allowed Judge Moffat to hear the "Motion to Set Aside Findings of Fact, Conclusions of Law and Decree" and, therefore, petitioners waived the right to argue that Judge Moffat could not overrule the findings of Judge Murphy. Next, respondent argues that a district court need not find that a person is voluntarily and willingly consenting to an adoption before accepting the consent at the hearing required under Utah Code Ann. §78-30-8 (1987). Consequently, respondent concludes that Judge Moffat did not overrule Judge Murphy when he found that respondent's consent to adoption was not voluntarily given. Neither of respondent's arguments have merit.

A. Judge Moffat's decision did overrule the prior decision of Judge Murphy.

Utah Code Ann. §78-10-8 requires that consent to adoption be taken or approved by a judge to assure, insofar as possible, that the consenting party is informed and understands the consequences of the consent. *Taylor v. Waddoups*, 241 P.2d 157, 160 (Utah

1952). Indeed, consents taken by a court are presumed to be valid and binding because the judge is able to determine whether the consent is given voluntarily. *In re the Adoption of D.*, 252 P.2d 223, 230 (Utah 1953). Therefore, it defies logic that a judge may accept a consent to adoption, as required by Utah Code Ann. §78-30-8, without determining that the consent is freely and voluntarily given.

In the instant case, Judge Murphy specifically held that respondent's consent to the adoption of Infant Anonymous, "was given with the knowledge that by the execution of the consent she thereupon relinquished all parental rights as well as parental responsibilities in and to the child." See, Appellant's Brief, at Addendum "F", Order dated June 24, 1987 at paragraph 3.

Thus, when Judge Moffat held that respondent did not "consent to the release of her parental rights on an unconditional basis," Judge Moffat directly overruled the prior determination of Judge Murphy. See, Appellant's Brief at Addendum "I", Minute Entry dated September 1, 1987 at pages 1-2.

B. Petitioners did not waive the right to argue that it was improper for Judge Moffat to overrule Judge Murphy.

Respondent argues that the petitioners waived the right to argue that Judge Moffat improperly overruled Judge Murphy because petitioners did not raise the objection prior to Judge Moffat's decision. In support of her argument, respondent cites case law that sets forth the requirement that a party seeking to disqualify a judge for bias or prejudice must raise their

objection as soon as the basis for the objection is known or the objection is deemed waived. See also Utah Rules for Civil Procedure, Rule 63(b). Respondent's argument is flawed because the rule applicable to disqualifying a judge for bias or prejudice does not, and could not logically, apply to require that a party demand a matter be heard before the original judge to avoid waiving the argument that one district court judge cannot overrule another.

When a party objects to a judge for bias or prejudice it is probable that they have knowledge of grounds for their objection before the judge renders a decision. If the party does not know of a pre-existing prejudice before judgment is entered, that party may object when the grounds for bias become known. It is also possible that the judge may not know that the party believes that the judge is biased.

On the other hand, a party does not know whether a judge will overrule the prior determination of co-equal judge until the second judge renders a decision. However, the second judge is privy to the record in the case and should know what determinations have been made in the case and that he or she is bound by those prior determinations. Consequently, a party can not, and should not be required to, instruct a judge in advance that he is bound by the prior determinations of a co-equal judge.¹

¹Respondent cites to *In re Adoption of K*, 465 P.2d 541 (Utah 1970), for the proposition that a party can give consent to adoption before one judge and then revoke that consent before

The Utah Supreme Court has found that a party may not abstain from requesting modification of a judgment and fail to appeal the judgment then, after the time for such modification or appeal has expired, claim that the judgment is void because it improperly overruled the prior determination of a co-equal judge. *See, in Tanner v. Mechem (In the Matter of Mechem)*, 537 P.2d 312, 314 (Utah 1975). However, the Supreme Court held that where the second judge's ruling is "attacked by a proper and timely motion for a new trial; and that failing by . . . appeal" the appellate court should vacate the second court's decision for improperly overruling a co-equal judge.

In the instant case, the petitioners timely moved to modify Judge Moffat's judgment on the grounds that the judgment overruled Judge Murphy's determination. When that failed, petitioners filed the instant appeal. Thus, petitioners followed the proper course for objecting to the improper ruling of Judge Moffat.²

another judge. In *In re Adoption of K*, the second judge affirmed the first court's finding that the consenting party knew and understood what was taking place when she consented to the adoption. Petitioner knows of no rule that prohibits a second judge from affirming the prior decision of a co-equal judge.

²Respondent infers that appellates accuse her of "forum shopping." That is not the case. Appellates simply explained that finding that a party can waive the ability to argue that one co-equal judge cannot overrule another would encourage forum shopping, by parties who want a second opportunity to have their case tried. There is no requirement that a court find that either party is forum shopping before adhering to the rule that one judge cannot overrule a co-equal judge. *See, e.g. Conder v. Williams*, 739 P.2d 634 (Ut.App. 1987) (wherein this court declined to overrule a prior ruling of the Supreme Court after the case had been referred to the Court of Appeals pursuant to Utah Code

Finally, reviewing the transcript of the hearing held on August 31, 1987 before Judge Moffat reveals that petitioners did not waive the argument that Judge Moffat should not overrule Judge Murphy. Petitioner's counsel pointed out to Judge Moffat that Judge Murphy "specifically asked the key question: [was respondent] under the influence of any drugs and did she understand the finality of what was about to take place." See, Respondent's Brief at Addendum "A". Transcript of hearing on Motion to Set Aside Findings of Fact, Order and Decree, August 31, 1987 at page 9. See also, Respondent's Brief, Addendum B; Reporter's Transcript of Hearing of June 24, 1987, at pages 3-5 (wherein respondent testifies that she understands the affidavit relinquishing parental rights, that she understands the finality involved, that she is acting freely and voluntarily and that she is not under the influence of drugs that impair her judgment).

When Judge Moffat noted that he believed Judge Murphy should hear the Motion to Set Aside Findings of Fact, Conclusions and Decree of adoption, petitioners' counsel simply responded that he had presented the matter to the Clerk of the Court who suggested that it be brought before Judge Moffat. See, *Transcript of Hearing on Motion to Set Aside Findings of Fact, Order and Decree, August 31, 1987 at page 9. Addendum B, Reporter's Transcript of Hearing*, Respondent's Brief at Addendum "A" page 16, Transcript of Hearing on Motion to Set Aside Findings of Fact, Order and Decree, August 31, 1987 at page 15. That

Ann. §78-2-2(4) (1987)).

response is not equivalent to consenting to allow Judge Moffat to overrule the prior findings of Judge Murphy. In fact, Judge Moffat's statement appears to acknowledge that he understood that he could not overrule the prior decision of Judge Murphy. Thus, appellant had no way of knowing that Judge Moffat would overrule Judge Murphy until Judge Moffat's decision was rendered.

POINT II

THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO REVOKE HER
CONSENT TO THE ADOPTION OF THE CHILD ON THE BASIS OF HER
UNILATERAL MISTAKE.

As set forth in petitioners' initial appellate brief, under Utah law a consent to adoption given before a court cannot be revoked unless 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." *In the Matter of S*, 572 P.2d 1370, 1374 (Utah 1977); *In re Adoption of K*, 465 P.2d 541, 542 (Utah 1970). Respondent cites no case that sets forth any other standard for revocation of a consent to adoption that is given in court.³

³Respondent cites *In re the Interest of Perry*, 641 P.2d 178 (Ct. App. Wash. 1982) for the proposition that the court should consider factors such as unfairness of the resulting bargain, the unavailability of independent advice and the susceptibility of the person persuaded when determining whether to allow revocation of a consent to adoption. In fact, *Perry* stands for the proposition that those criteria should be considered in determining whether there is *unfair persuasion* or *undue influence* justifying revocation of consent.

In the instant case there is no indication that there was any undue influence or unfair persuasion. In fact, respondent admitted that she had "decided all along to go forward with the

In attempting to justify revocation of her consent to adoption, respondent states that she was told by her counselor that the adoption could not become final for six months. Although respondent understood that her consent was binding, she believed that she had a right, during that six months, to revoke her consent. See, Respondent's Brief, page 23.⁴

It is well established that a unilateral mistake of law is not grounds for release from the obligations of a contract. See, e.g. *Royal v. Colorado State Personnel Board*, 690 P.2d 253, 255 (Ct.App.Colo. 1983) cert dismissed 722 P.2d 1020 (Colo. 1986); *Mutual of Enumclaw Insurance Co. v. Wood By-products, Inc.*, 107 Idaho 1024, 695 P.2d 409, 411 (Ct.App. 1984). Thus, although it is true that a party may revoke consent to an adoption if the consent was induced through duress, undue influence, misrepresentation, deception or other grounds which would justify release from the obligation of any contract. Unilateral mistake is not among "the other grounds" that justify release from a consent to adoption. Accordingly, it has been held that a party cannot revoke consent by alleging that they did not

adoption." Respondent's counselor objectively informed respondent of all of the options available. Respondent's obstetrician noted no reluctance on the part of respondent to proceed with the adoption. Petitioner's counsel explained to respondent that he was not her counsel and that she was entitled to consult with her own counsel. Consequently, evidence indicates that respondent made her own decision to place the child for adoption, without any influence, undue or otherwise, from any person.

⁴Respondent's counselor notes that she specifically explained to respondent that her consent could not be revoked.

understand the seriousness or finality of executing the consent. *Anonymous v. Anonymous*, 530 P.2d 896, 899 (Ct.App.Az. 1975); *Batton v. Masser*, 369 P.2d 434, 437 (Colo. 1962).

The only other basis asserted by respondent and cited by Judge Moffat as grounds for allowing respondent to revoke her consent to the adoption is that she 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 Women's Health Center." See, Respondent's brief Addendum "G", Minute Entry dated September 1, 1987, page 2.

As noted in petitioners' original appellate Brief, under Utah law there is no requirement that a minor consult with her family prior to consenting to an adoption and, therefore, certainly no such requirement for an adult. In fact, there is no requirement under Utah law that a natural mother consult with anyone prior to deciding to place a child for adoption. Consequently, the fact that she discussed her decision only with a counselor, who specialized in such matters at the Utah Women's Health Center, is no basis for allowing respondent to revoke her consent to adoption.

Respondent further argues that her misunderstanding and the lack of her family's involvement in the decision justify allowing her to revoke consent because the Utah Supreme Court has stated that, although consent is binding to the same degree as any other contract, if no rights or interests of third parties have intervened, courts are liberal in permitting withdrawal of

consent. *In re Adoption of F*, 488 P.2d 130, 132 (Utah 1971). See, Respondent's Brief, page 22. Petitioners fail to see what relevance that has to the instant case. As in *In re Adoption of F*, petitioners herein were led to act upon the consent of respondent. They brought the baby into their home and family, paid the expenses for respondent and the baby. Even more importantly, they formed loving emotional attachments in good faith and reliance upon the respondent's consent. See, *In re Adoption of F*, 488 P.2d at 132.

Respondent may argue, as she did in the lower court, that such reliance was not material because she attempted to revoke her consent within three days after the child was released to appellants. That argument is not relevant and is without foundation. Infant anonymous and appellants functioned as a family until notified of respondent's intent to revoke her consent--thus creating "intervening rights". Moreover, the law should favor early bonding between a child and adoptive parents and there is no evidence that such bonding, in fact, takes more than three days. As the Utah Supreme Court has explained

"the policy of the law is to so operate as to encourage the finding of suitable homes and parents for children in that need. It is obvious that persons who might be willing to accept a child for adoption will be more reluctant to do so if a consenting parent is permitted to arbitrarily change her mind and revoke the consent, and thus desolate the plans of the adoptive parents and bring to naught all of their time, effort, expense and emotional involvement. . . . A moment's reflection will reveal that to the degree that such commitments are given respect and solidarity, so they can be relied upon, a person desiring children will be able to accept and give them homes. Conversely, to the degree that such commitments can easily be withdrawn and the

adoptive plan thus destroyed, such persons will tend to be discouraged from doing so."

In the Matter of the Adoption of F, 488 P.2d at 134. Similarly, in the instant case, if the court were to conclude as a matter of law that an adoptive parent cannot bond to an infant in three days it would discourage adoptive parents from immediately accepting and treating the child as their own. That is certainly not a policy that should be entrenched in Utah law.

Thus, because in this case there is no indication that respondent's consent was induced through duress, undue influence, misrepresentation, deception or other grounds that would justify release from a contract and because the interests of the petitioners intervened before respondent revoked her consent, Judge Moffat's court erred in allowing respondent to revoke her consent to the adoption.

POINT III

THE TRIAL COURT ERRED IN DETERMINING ISSUES OF FACT ON THE BASIS OF CONFLICTING AFFIDAVITS.

Respondent argues that the hearing in the trial court was not conducted as a Motion for Summary Judgment because the standard for a Motion for Summary Judgment is whether there are any genuine issues of material fact entitling the moving party to judgment as a matter of law and a Motion to Set Aside Consent seeks a determination by the court as to whether consent was given voluntarily and with knowledge of its finality. See, Respondent's Brief, pages 24-25. In fact, the hearing in Judge Moffat's court was conducted exactly like a Motion for Summary

Judgment in which the court was asked to determine, as a matter of law, whether respondent's consent to adoption was given voluntarily and with knowledge of its finality.

Respondent's Motion to revoke her consent was presented to Judge Moffat as the respondent's "Motion to Set Aside Findings of Fact, and Conclusions and Decree" of adoption. In support of that motion, respondent submitted her affidavit. In response, petitioners submitted the affidavits of respondent's counselor and respondent's obstetrician. The testimony in respondent's affidavit and the affidavits submitted by petitioners completely contradicted one another and, therefore, certainly raised issues of fact. Thus, Judge Moffat was asked to determine issues of material fact on the basis of affidavits.

Respondent argues that because a judge makes factual determinations every day based upon conflicting testimony, he should be able to do so by affidavit or otherwise. That argument simply ignores the fact that when a judge is faced with a Motion for Summary Judgment with conflicting affidavits he is required to make a determination that the case go to trial so that he may observe the parties testifying in order to have some basis for judging the credibility of each witness and their testimony. Furthermore, this case is not a case where there was a proffer of evidence at a trial. This case was presented as a motion and the hearing thereon was a hearing on a motion, set on a Law and Motion calendar--where evidence beyond affidavits is not ordinarily accepted. Judge Moffat did not request evidence

beyond the affidavits and neither party offered further evidence.⁵

Respondent asks this Court to disregard the fact that the hearing before Judge Moffat was conducted like a Motion for Summary Judgment and resulted in summary disposition of the petitioners' rights. Instead, respondent analogizes the Motion presented before Judge Moffat to a Motion to Set Aside Default, Motions in Limine and Motions to Dismiss, which do not ordinarily require evidentiary hearings. Respondent fails to note at those motions also do not ordinarily involve conflicting affidavits and do not require a judge to make a final determination on the merits of a case on the basis of those conflicting affidavits.

Finally, respondent argues that petitioners waived the right to request an evidentiary hearing by not requesting such a hearing. Respondent cites no authority for the proposition that failing to ask for an evidentiary hearing results in a waiver of the need to hold such a hearing when faced with contradicting affidavits. On the contrary, the rule is that a judge may not weigh evidence in conflicting affidavits but must require an evidentiary hearing. *See, e.g. Snyder v. Merkley*, 693 P.2d 64, 65 (Utah 1984); *Mountain States Telephone and Telegraph Co. v. Atkin, Wrighton, Miles Charter*, 682 P.2d 1258, 1261 (Utah 1984).

⁵Respondent incorrectly states that evidence of the circumstances surrounding the consent was also offered by counsel. The circumstances surrounding the consent were contained in respondent's affidavit and were reiterated in counsel's argument. Argument made by counsel is not considered evidence.

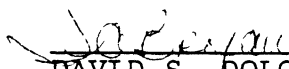
In the instant case, Judge Moffat purported to believe the evidence contained in the respondent's affidavit over that presented in the affidavit submitted by petitioners, although respondent's affidavit contradicted her prior testimony. How Judge Moffat made such a decision is impossible to determine in light of the fact that he could not observe the demeanor of any of the witnesses and saw only conflicting statements on paper. Thus, in the instant case, Judge Moffat's summarily disposed of the petitioners' rights at the trial level in violation of the long established principle that a judge cannot summarily determine a question of fact on the basis of conflicting affidavits. Consequently, Judge Moffat erred in granting the "Motion to Set Aside Findings of Fact and Conclusions of Law and Decree" of adoption without requiring an evidentiary hearing.

CONCLUSION

Based upon the foregoing points and authorities, the petitioners respectfully request that this Court reverse the ruling of the trial court and reinstate petitioners' Petition for Adoption.

DATED this 13th day of June, 1988.

COHNE, RAPPAPORT & SEGAL

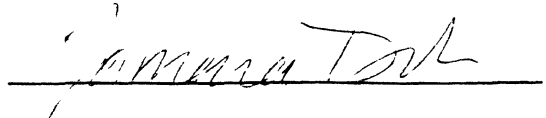


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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of June, 1988, I caused to be mailed a true and correct copy of the foregoing, express overnight delivery, postage prepaid, to:

RICHARD B. JOHNSON (1722)
Attorneys for Respondent
1327 South 800 East
Orem, Utah 84058

A handwritten signature, appearing to read "Emma Tol", is written over a horizontal line.

(td/julie/infant.bri)