

1951

LaPriel Taylor v. George Q. Waddoupe and Marie Waddoupe : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

In The Matter of Habeas Corpus for
Howard Wayne, Linda Kay, Sheryl Rae,
and Karen Taylor,

Minors

By LaPriel Taylor,
Petitioner and Appellant

vs.

George Q. Waddoups and Marie Waddoups,
his wife,

Defendants and Respondents

and

In The Matter of the Adoption of Howard
Wayne Taylor, Linda Kay Taylor, Sheryl
Rae Taylor and Karen Taylor,

Minors

By George Q. Waddoups and Marie Wad-
doups, his wife,

Defendants and Respondents

vs.

LaPriel Taylor,
Contestant and Appellant

FILED

SEP 24 1951

Clerk, Supreme Court, Utah

Case No. 7720

UNIVERSITY OF UTAH

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BRIEF OF APPELLANT

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doups, his wife,

Defendants and Respondents

vs.

LaPriel Taylor,

Contestant and Appellant

Case No. 7720

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In the case before the court the Petition for Adop-
tion of Howard Wayne Taylor, Linda Kay Taylor, Sheryl

Rae Taylor and Karon Taylor was filed by the defendants on the 8th day of December 1950. On the 6th day of January 1951 an Order of Adoption was entered by the court adopting the children to the defendants. A purported Consent of Adoption, which had been signed before a notary public, was filed by the defendants, and the Order of Adoption issued by the court was based upon said consent.

No notice of the hearing was given to either parents of said children. On the 26th day of February 1951 the plaintiff filed a Petition for Writ of Habeas Corpus and an Order of Writ of Habeas Corpus was issued by the court. The petition was filed by LaPriel Taylor, the mother of said children, and was filed for the purpose of obtaining the custody of the children. The plaintiff also filed on the 28th day of February 1951 a Motion to Vacate the Order of Adoption entered as aforesaid. The motion was based upon an affidavit and a Notice of Motion was filed on the same date, together with an Answer to the Petition of Adoption.

The defendants filed their Answer to the Writ of Habeas Corpus and the matter was set for hearing on the 12th day of March 1951 but was continued upon motion of the defendants to the 26th day of March 1951. On the 26th day of March 1951 the defendants filed a brief in support of the Order of Adoption and requested a continuance until the 8th day of April 1951. On the 26th day of March the plaintiff was given time to file a reply brief. On the 5th day of April 1951 the plaintiff

filed her brief. On the 8th day of April 1951 the court continued the matter until the 22nd day of April and gave the defendants the right to file a reply brief, which was done on or about the 20th day of April 1951. On the 22nd day of April 1951 the court granted plaintiff's Motion to Vacate the Order of Adoption and the hearing on the Writ of Habeas Corpus together with the hearing on the Petition for Adoption was set for the 14th day of May 1951 at the hour of 2 o'clock p.m. Since the facts in both cases were the same, the two cases were heard jointly. The hearing was had and the court on the 28th day of May 1951 entered its Findings of Fact and Conclusions of Law and Judgment on the Writ of Habeas Corpus. The court awarded the writ in part and awarded Howard Wayne Taylor to the mother, LaPriel Taylor, and denied the writ in part and awarded the custody of Linda Kay, Sheryl Rae and Karen to the defendants George Q. and Marie Waddoups. On the 18th day of June 1951 the court entered its Findings of Fact, Conclusions of Law and Judgment and entered an Order of Adoption and granted the Petition of Adoption in part and denied it in part. The court denied the Petition of Adoption for Howard Wayne Taylor but granted the Petition for Adoption of Linda Kay, Sheryl Rae and Karen Taylor to the defendants, and from these judgments the plaintiff appeals. LaPriel Taylor, the mother of the children in this case will be called the plaintiff and George Q. Waddoups and Marie Waddoups, his wife, the adopting parents, will be called the defendants.

STATEMENT OF FACTS

The plaintiff, LaPriel Taylor, and her former husband, Howard Wayne Taylor, were the parents of four children — Howard Wayne, Linda Kay, Sheryl Rae and Karen Taylor. She was married to Howard Taylor in 1940 and obtained a divorce in Cache County in 1944. She re-married him in 1946 and obtained a second divorce from Howard Wayne Taylor on the 13th day of December 1950 in the Third Judicial District. Throughout their marriage the husband of the plaintiff was very unstable and irresponsible and wilfully failed to support his family. He was sentenced to the State penitentiary upon a charge of burglary and received a dishonorable discharge from the Army Air Corps. He deserted his family intermittently throughout their marriage. He deserted them once in 1948, once in 1949, and deserted his wife in April 1950.

When Mr. Taylor failed to support his family, the plaintiff was forced to go to her parents' home and obtain assistance from the Welfare until she could obtain employment with which to support herself and minor children. From September 1948 until December 1950 the plaintiff was suffering from ill health and was unable to work to support herself and minor children. On June 1, 1949 she placed three of her children with the defendants who were plaintiff's second cousins. The Cache County Department of Public Welfare supported them in the defendants' home from June 1, 1949 to about January 15, 1950. On June 1st the mother placed the children

with the defendants so that she could go to California, where her husband was then working for the Southern Pacific Railroad, in an effort to effect a reconciliation and to persuade him to support her and the minor children.

He lost his job and they returned to Cache County around the 1st day of October 1949 and plaintiff and her husband lived with plaintiff's parents in Nibley, Cache County, Utah, until the 15th day of January 1950. The husband lived with the plaintiff until November 28, 1949, when he deserted the plaintiff and his children. Prior to the time he deserted them on the 28th of November 1949 he sold his automobile for the sum of \$450 and promised to give the plaintiff \$250 to enable her to obtain an operation needed to restore her to normal health. Instead of giving the money to the plaintiff he took the money and deserted her as above stated.

On or about the 15th day of January 1950 the plaintiff moved to Ogden and took her four minor children with her. She rented an apartment and due to her impaired health, and because of the tender years of the children, and also due to the fact that the father would not support them, she obtained assistance from the Weber County Department of Public Welfare.

Neither the Weber County Department of Public Welfare nor the Cache County Department of Public Welfare were able to give the plaintiff the needed medical attention to restore her to health. Her physical condition grew worse and throughout this entire time the

plaintiff had fainting spells and fainted once and twice a day due to anemia caused from hemorrhages.

During the last two weeks in February 1950 the plaintiff's parents were forced to take two of the children and care for them as the plaintiff was unable to do so on account of her ill health. On or about the 1st day of March 1950 the defendants went to the plaintiff's home and plaintiff told the defendants that due to her health and because of the acts of her husband she was going to be forced to place her children for adoption and if the defendant would bring a consent of adoption on the 9th of March 1950 her husband would be there and they would sign said consent. On the 9th day of March 1950 the defendants came to the plaintiff's home with a purported consent of adoption which the plaintiff and her husband signed before a notary public in Ogden, Utah. The plaintiff and her husband signed the Consent of Adoption and surrendered the children to the defendants.

That on the 9th day of March 1950 prior to the time that the plaintiff signed the purported Consent of Adoption, the defendants told the plaintiff that if her health improved and she got to the point where she could care for the children that they would return the children to her. That on the 8th day of March 1950 the defendants told the plaintiff's parents that they would return the children to the plaintiff if her health improved and she was able to care for them. This information was given to the plaintiff by her parents prior to the signing of the

purposed Consent of Adoption, and the defendants now refuse to fulfil the agreement entered into by and between the plaintiff and defendant on the said 9th day of March 1950.

The plaintiff then went to Salt Lake City with her husband who had promised to provide her with the necessary medical attention to correct the condition which was then causing her ill health. During the month of April the plaintiff's husband was arrested in Ogden, Utah, upon a misdemeanor and was sentenced to the Ogden City jail. He escaped from the jail and deserted the plaintiff. The plaintiff at that time was pregnant and due to her ill health and pregnancy she was forced to again apply for assistance from Salt Lake County.

From the 9th day of March 1950 to November 1950 she visited the children on several occasions and took presents and articles of clothing to them. She also kept in touch with the defendants by mail. The defendants are the second cousins of the plaintiff and the plaintiff was well acquainted with the home conditions in the defendants' home prior to the time she gave the children to the defendants.

On the 28th day of November 1950 a fifth child was born to the plaintiff and her husband and on that date the doctors at the Salt Lake County hospital performed an operation upon the plaintiff—the operation necessary to correct plaintiff's ill health.

On the 8th day of December 1950 the plaintiff informed the defendants that her health had improved and

that she wished the children returned to her, but the defendants refused to do so. During the Christmas holidays in December 1950 the plaintiff again requested the defendants to return the children to her and they again refused to surrender the children.

The Cache County Department of Public Welfare knew of plaintiff's desire to regain the custody of the children but they and the defendants failed to inform the court of this fact on the 6th day of January 1951 when the first Order of Adoption was granted.

That at the time of the hearing on the 14th day of May 1951 the plaintiff was then engaged to be married to one Kernoff Christensen, who was of the age of 41 years and is a welder by trade and capable of earning a regular weekly income of \$80 per week.

That since the hearing and on or about the 20th day of June 1951 the contemplated marriage was consummated. Kernoff Christensen testified in court that he had been with the children on different occasions and that if the children were given to the plaintiff, upon their marriage, he would assume the responsibility of supporting and maintaining them and that he would see they were not placed upon welfare. On the 28th day of May 1951 the court granted the Writ of Habeas Corpus in part and awarded the custody of Howard Wayne Taylor, age 10 years, to the plaintiff, and denied the hearing in part and awarded Linda Kay, Sheryl Rae and Karen to the defendants. On the 18th day of June 1950 the court granted the Petition for Adoption in part and granted

an Order of Adoption to the defendants of Linda Kay, Sheryl Rae and Karen and denied the Petition of Adoption for Howard Wayne Taylor. From these judgments the plaintiff now appeals.

ARGUMENTS

1. That the court erred in finding that the Consent of Adoption was in accordance with the provisions of Section 14-4-8, Utah Code Annotated of 1943.

2. The court further erred in finding that the Consent of Adoption as signed by the plaintiff was irrevocable.

3. The court erred in making any finding in the adoption proceedings that the plaintiff had abandoned her children for the reason that there were no allegations in the petition that the children had been abandoned by the plaintiff, nor did the petition pray that the children be found to be deserted and abandoned children.

4. That the court erred in finding that it was for the best welfare and interest of said children that they be adopted by the defendants.

5. That the court erred in entering its Findings of Fact and Conclusions of Law and Judgment in both the adoption proceedings and the writ of habeas corpus, as they were contrary to and not supported by the evidence.

The provisions of Chapter 4, Title 14, so far as are relevant to this case, are as follows: Section 14-4-4, Section 14-4-8, Utah Code Annotated 1943.

14-4-4. Consent to Adoption.

“A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion; provided, that the district court may order the adoption of any child, without notice to or consent in court of the parent or parents thereof, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, acknowledged before any officer authorized to take acknowledgements, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 3 of this Title, and such agency consents, in writing, to such adoption.”

14-4-8. 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.

It seems clear that the alleged consent in the case at bar was not made in conformity with the statutes, as it was not signed before the court nor was it signed in the county where the adopting parents reside.

That the petitioners and the children to be adopted and all persons whose consent is necessary must appear before the District Court in the county where the adopting parents reside and the necessary consent must thereupon be signed.

The consent in the case at bar was not signed before the court as required by this section of the Statute but was signed before a notary public in Ogden, a fact which was found by the trial court.

In the 1933 Utah Code Annotated, 14-4-8, the statute provides as follows:

Procedure — Contract 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 the persons whose consent is necessary are not within the county, then their written

consent, duly acknowledged in the manner provided for the acknowledgement of deeds, shall be filed at the time of the application for adoption.

This has been the law in Utah for a number of years but the Legislature in 1941 deemed it advisable to change the provisions of Sections 14-4-8 in the 1933 Code to correct certain abuses that then existed.

If the consent of adoption in the case now before the court is held to comply with the provisions of our Statute, then no change would have been made by the amendment made in 1941, as this holding would in effect continue the practice that existed prior to the amendment in 1941.

The Section 14-4-8 was made by the Legislature to protect both adopting parents and parents surrendering children for adoption.

By requiring persons to appear before the court when they signed a Consent of Adoption to their minor children, the court can then protect parents from fraud, misrepresentation, force or undue influence in obtaining consents of adoption. The court being an impartial body could see that parents are informed and that they fully understand the effect of the act which they are performing. In the case at bar if this consent had been signed before the court and, as in this case, the parents were told they could have the children back upon certain contingencies, the court would have taken the proper steps to

protect the mother's rights to the children. Oftentimes consents of adoption are granted while under great emotional strain and, as in this case, at times they are signed while suffering from discouragement and despair, and to permit a consent to be signed before a notary public and to allow prospective foster parents to take advantage of these conditions and to "railroad" persons into signing consents before the consequence of their acts have been duly considered. Since the adoption statute is purely statutory and since the matter involved is so extremely important, that of placing the lives of your children in the hands of another should be strictly construed.

Sufficiency of Consent

There was no adoption of common law. This aspect of jurisprudence was known to the Civil Law of Rome, to the ancient Assyrians and to the early Germans.

Ashlock v. Ashlock, 360 Ill. 115.

But what provisions we have on the subject is purely statutory, and in derogation of common law.

Hook v. Wright, 329 Ill. 299;

Keal v. Rhydderick, 317 Ill. 231;

Rabbitt v. Weber & Co., 297 Ill. 491, 31 So.

(2) 163 211 La. 910.

In Ashlock v. Ashlock, 360 Ill. 115, the Court said (P. 121):

Where a Court in exercising a special statutory jurisdiction the record must show upon its

face that the particular proceeding is one upon which the court has authority to act. Jurisdiction in such cases is never presumed . . . (Rice v. Travis, 216 Ill. 249) . . . Although adoption statutes are construed liberally . . . there must be substantial compliance with the provision of the statute conferring jurisdiction or the proceedings will be void.

In *Watts v. Dull*, 104 Ill. 86, one of the questions presented was the effect of the failure of the petitioner's husband to join in the petition for adoption. The Supreme Court held that the petition was insufficient to confer jurisdiction and that the adoption decree was a nullity.

In discussing the *Watts* case, the Court in the *Ashlock* decision said, P. 123:

In the recent case of *McConnell v. McConnell*, (345 Ill. 70) where it was announced that the rule of strict compliance was no longer adhered to, we expressly referred to the decision on the *Watts* case as correct for the reason that there had not been substantial compliance with the statute.

The Supreme Court in *People v. Cole*, 322 Ill. 95 (in reversing 320 Ill. Appr. 413 said:

"The adoption proceedings being statutory, the validity of a decree of adoption depends upon the compliance with every essential requirement of the statute authorizing it."

For the same ruling, see:

In re *Bohn*, 306 Ill. 214;
People v. Fahey, 230 Ill. App. 143.

One American Jurisprudence P. 37.

"The rule in the great majority of the jurisdictions wherein the question has arisen, is that a natural parent's consent to the proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to such adoption, may be effectively withdrawn or revoked by the natural parent before the adoption has been finally approved and decreed by the court, and a natural parent's withdrawal of consent to an adoption, even after the order confirming the adoption has been made, but prior to the expiration of the time for filing a petition for a rehearing, may sometimes prove effective.

And while it has been indicated that the natural parent's right to withdraw consent to adoption is entirely a matter of personal choice, but not dependent upon any stated reason, it has also been indicated that intervening vested rights on the part of the adopting parents or the child might exclude the natural parents from withdrawing consent and thus barring the adoption."

In 2 C. J. S. Adoption, Par. 21 (4) the general rule as the effect of the withdrawal of consent to adoption by the natural parent is stated as follows :

Consent may be Withdrawn Before Adoption.

"Consent may be withdrawn at any time before adoption, even though given in writing, and accompanied by transfer of the custody of the child, and even though the

natural parent had abandoned the child, and an adoption based upon a consent that has been withdrawn is void."

Washington

In *State Ex Rel Town v. Superior Court*, 165 Pac. (2nd) 862. "Certiorari issued to review the order of the Juvenile Court of Kitsop County adjudicating a four year old child to be dependent. It was the illegitimate child of one Irene who was admittedly unfit for its custody. On November 10, 1944 said Irene (mother) gave her written consent to the adoption of her child and on January 26, 1945, while said adoption proceedings were pending, she appeared in court and revoked her consent. The court allowed her revocation and returned to her the child. The statutes of Washington are almost identical with those of Illinois."

Other cases in this jurisdiction holding that a consent may be withdrawn are:

Nelms v. Birkland, 279 P. 748, 153 Wash. 243;
In Re Roderick, 291 P. 225, 158 Wash. 377.

In the *Nelms* case the court quoted with approval 1 C. P. 1378:

"A natural parent, by entering into a contract for the adoption of his child by another, waives his rights to the custody and control of the child, but subject to his liability to be sued for his breach of his contract, he may revoke his gift and resume custody of his child at any time before a legal adoption has been made.

Oregon

In re: Adoption of Capparelli, 175 P. (2nd) 1933, the Oregon Supreme Court said as follows in holding that a consent may be revoked:

It is the general rule that the natural parent who has consented to the adoption of a child in compliance with a statute which makes such consent a prerequisite to adoption may effectively withdraw or revoke his consent at any time before the court has made a decree of adoption. (cases cited).

West Virginia

In Harold v. Craig, 59 W. Va., the court held that the consent relates to the time of the entry of decree, citing with approval Marion v. Fehy, 11 W. Va. 402:

The entry of a consent decree is a statement on the record, not theretofore the parties agreed to enter such a decree, but that they now (when the decree is entered) consent to its entry, and if they do not when it is so entered, it cannot be entered.

The court went on to speak with approval of the above conclusions:

The rule announced by this court in that case seems to us to be sustained by sound reasoning . . . parties may agree out of court as they choose, but the entry of a consent decree requires consent to its entry by the parties, and if one of the parties who will be materially affected thereby withdraws his consent and objects to its entry at the time it is offered, it cannot be entered.

Michigan

In *Re White's Adoption*, 300 Mich. 378, 1 N.W. (2d) 579 (1940) the natural mother of the minor child had duly consented to its adoption in conformity with statutory requirements as to consent, and a decree of adoption was thereupon duly entered. Subsequently, before the expiration of the statutory period during which decrees might be modified or set aside, the natural mother filed a written withdrawal of her consent and petitioned that the decree of adoption be vacated. In affirming an order vacating the decree of adoption the court said:

The issue thus narrows itself down to the question whether the last part of the order of the probate court hereinbefore quoted at length, made upon the rehearing vacating and setting aside the previous order confirming adoption, was a proper order. This court is asked to reverse the findings of the probate court, and of the circuit court upon appeal, and to hold that this part of the order should be set aside. At the very outset, we are confronted with the fact that the natural parent did withdraw her consent to the adoption during the ninety days' period while the matter of confirming the adoption was still within the authority and control of the probate court if a petition for rehearing be filed. After a rehearing had been granted and before any further order might be made by the probate court, that court was then confronted with the established fact that it no longer had the necessary consent of one of the natural parents. It has been withdrawn.

Appellants contend that Marcena White, the natural mother, could not withdraw her consent

at the time it was attempted without showing fraud and duress in the procurement thereof. While this question has not been squarely before us, it has been raised in various proceedings in other jurisdictions. In Minnesota it has been held that the mother's consent may be revoked at any time before the child is legally adopted, *State ex rel Platzer v. Beardsley*, 149 Minn. 435, 183 N.W. 956. In Washington, it is held that adoption is a contract between the parties but that a natural parent may revoke his consent at any time before a legal adoption has been made, subject to his liability to be sued for breach of contract; and that when the written consent is once revoked, the necessary consent being absent, such an order cannot be made. *In re Nelms*, 153 Wash. 242, 279 P. 746. See, also, *Fitz v. Carpenter*, Tex. Civ. App., 124 S.W. (2d) 420. In the case at bar, the probate judge stated no reason for setting aside the original order, and the record before us contains none of the testimony taken either in the probate court or the circuit court on the appeal. Without a record disclosing what reasons impelled the mother to withdraw her consent, we have no occasion to pass upon the question whether such reasons were sufficient, if indeed any stated reason is necessary beyond the mere fact she had changed her mind. It is our opinion that under the circumstances of this case, no vested rights having intervened, the natural mother had the right to withdraw her consent to the adoption during the ninety days while the probate court still had control over the matter of rehearing."

In the annotation to the foregoing case (130 ALR 1030) the majority and minority rules as to withdrawal

of consent by the natural parent is thus stated (1038-39):

The rule in a majority of the jurisdictions wherein the question has arisen is that a natural parent's consent to the proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to an adoption may be effectively withdrawn or revoked by the natural parent before the adoption has been finally approved and decreed by the court, RE WHITE (Mich) (reported herewith) 1034: RE NELMS (1929) 153 Wash. 242, 279 P. 740. And see State ex rel. Platzer v. Beardsley (1921) 149 Minn. 435, 183 N.W. 956; Re Anderson (1933) 189 Minn. 85, 248 N.W. 657; Fitts v. Carpenter (1939); Tex. Civ. App. 124 S.W. (2d) 420.

Ohio

In French v. Catholic League, 60 Ohio App. 442, 144 N.E. (2nd) 113, the mother of an infant gave her consent to an adoption of her child and gave the child to the Welfare League. In allowing her to withdraw her consent before decree, the court used the following language:

Why should such an unfortunate mother not be permitted to revoke her prior consent for relinquishment when she has not been advised of its acceptance and it has not yet been acted upon? . . . She might have been destitute and shortly thereafter acquired an inheritance and an ability to care for her offspring. Must she adopt her own child? Surely, she being a suitable person, it would have been a cruel thing for a society devoted to the welfare of children to say you can-

not reclaim your given word and have back your child.

For similar decision see *In Re Rubin's Adoption*, 60 Ohio Supp. 26 Minnesota.

In *Platzer v. Beardsley*, 149 Minn. 435, the court said:

An illegitimate child cannot be adopted without the consent of the mother. Her consent, though given in writing and accompanied by a transfer of the custody of the child, may be revoked at any time before the child is legally adopted.

For another case holding that consent may be revoked, see *In Re Anderson*, 189 Minn. 85; 240 N.W. 657, where the court said:

Such a consent, once given, may be withdrawn at any time before adoption.

Mississippi

In *Wright v. Fitzgibbons*, reported in 21 So. (2d) 709 (April 1945) the facts showed that the mother of an infant child gave her consent to its adoption and petitioner, Mrs. Fitzgibbons, filed her petition to adopt the child based on said consent of the mother. The mother then appeared, objected and withdrew her consent before a decree was entered. The court, in allowing a withdrawal said:

This appellant having appeared and objected to the adoption of her child; her consent thereto theretofore given for its adoption, became ineffectual.

The court found that the mother had abandoned the child and the proceedings for decree of adoption were filed in 1945 after a consent had been given in 1938 and the mother evidenced little or no interest in the child during the seven years.

Pennsylvania

Piper v. Edbert, 28A (2) 460.

January 16, 1941 a mother in a hospital signed a contract to give custody of her baby to Edbergs for one year and that they may adopt child any time within that period. In December 1941, mother asked for her baby and this was refused. Adoption petition was filed by the Edbergs and December 26th mother was granted writ of Habeas Corpus.

In ordering the child be retained to the mother the court said:

It is a serious matter, and often times unfortunate to deprive a natural mother of her child. It is against public policy to destroy or limit the relation of parent and child.

Louisiana

Green v. Paul, 31 So. (2) 212 La. 337.

In March 1945, the Green petitioner for the adoption of Patricia Paul, alledging that they have had custody for 14 months and that the father, Charles Paul, gave his written consent. After a report of the Welfare Department, the court entered an interlocutory decree of adoption on May 28, 1945, and awarded custody of child

to the petitioners. On February 28, 1946, the father moved for revocation of the Decree.

The Court held that the motion of the father constituted a withdrawal of the consent, says:

In view of the fact that the motion filed by Paul operates as a withdrawal of his consent to the adoption of his child, we must initially decide if his opposition does not effectively destroy the adoption proceedings as a matter of law, even though it be assumed that the withdrawal is founded on whim or caprice. 1. (The court continues to quote with approval 1 CJS P. 21, P. 306). Consent may be withdrawn at any time before adoption, even though given in writing and accompanied by the transfer of the custody of the child . . . The application of the doctrine of equitable estoppel in an adoption proceeding does not appeal to us . . . Adoption is a creature of the law . . . Consequently, disallowance of the right to withdraw consent on the basis of estoppel would be tantamount to an approval of the adoption where the consent is actually lacking . . . a result contrary to the intention of the law.

California

Re McDonnell's Adoption, 176 P. (2) 778.

The Court stated the California rules as follows: (P. 782)

We think it must be concluded from the adoption statutes of this state that the natural parents have the right to withdraw a consent to adoption at any time before the rendition of the decree of adoption.

It is apparent that the court erred in finding that the Consent of Adoption was irrevocable as such finding is contrary to the law as stated by our own Supreme Court and by the courts throughout the United States.

In the case of *Harrison vs. Harker*, 44 Utah 541, 142 Pac. 716, the court held that the best welfare and interest of the child was the primary consideration of the court. In that case an illegitimate child was given to the defendants by the mother and she informed them that she was surrendering the child to them for adoption. Several months later the mother of the child intermarried with the plaintiff who was the father of said child. Several months later he commenced an action to regain the custody of the child and the court held that it was the best welfare and interest of the child that should be considered in determining the custody under these circumstances; that the presumption was that the best welfare and interest of the child is with the natural parents.

3. In the case of *Hardcastle vs. Hardcastle*, 221 Pac. (2d) 887, our own Utah Supreme Court, the court restated the law as laid down by *Harrison vs. Harker*. In the case of *Hardcastle vs. Hardcastle* the mother of a 15 year old girl left her child with the grandmother. Evidence showed that on two occasions she attempted to take the child from the custody of the grandmother but was prevented from doing so. The mother then went to Portland where she worked and had an income of approximately \$80 per week as well as an allotment

from her husband in the sum of \$80 per month. During that time and for the next seven years she sent no money whatsoever for the support of the child and only visited the child once. In 1944 she came to Salt Lake to obtain a divorce from her husband but did nothing to regain the custody of the child, and the court in awarding the divorce decree awarded the custody of the child to the grandmother. The plaintiff then remarried and 23 months after the decree of divorce was granted she returned and asked for the custody of the child. The court in deciding this case held it was the best welfare and interest of the child that should guide the court in awarding her custody and that this presumption was so strong that the neglect of seven years was not strong enough to overcome.

In the case of *Baldwin vs. Nielson*, 170 Pac. 179, a child was born to the plaintiff and his wife. The plaintiff was then in the military service. He returned home and upon returning home lived at the home of the defendant and while there he indulged rather heavily in the use of intoxicating liquors. The plaintiff and his wife then went to California and while in California the plaintiff drank heavily and was intoxicated continually. The wife obtained a divorce and the custody of the child was awarded to her. The child from its birth resided with the grandmother and with the defendant and maternal uncle. Approximately 2 years after the divorce the mother of the child died and the plaintiff requested that the custody of the child be awarded to him. Evidence

showed that since his discharge from the Army he had not worked; that he had married within a month after the divorce was granted and that at the time of the hearing in the above entitled action he did not at that time have employment but merely had the promise of employment. The court held in this case that there was a presumption that the best welfare and interest of the child was with the natural parent and the neglect by the father was not sufficient to overcome this presumption. During this time also the father had contributed nothing whatever toward the support of the child.

The petition for adoption in the case now before the court is based entirely upon the Consent of Adoption signed by the defendant and her husband. There were no allegations in the petition that the plaintiff had deserted and abandoned her children nor was there a request in the prayer that the children be found by the court to be deserted and abandoned children. Regardless of this fact the court made a finding in the adoption proceedings that the children had been deserted and abandoned by the plaintiff but since they had not been abandoned by the plaintiff they were eligible for adoption by the defendants.

This finding seems very unique, particularly because the court granted the petition in part and denied it in part. If the plaintiff had abandoned Linda Kay, Sheryl Rae and Karen, then certainly she had abandoned Howard Wayne also, as the facts concerning all of the children were identical. Since there were no allegations in

the petition for adoption that the child had been abandoned, the court would be restricted in its findings to the allegations of that petition. The petition could have been modified upon proper motion but no motion was ever made asking that the petition be modified. No objection was raised to the introduction of testimony because the testimony was being introduced in support of the defendant's answer to the Writ of Habeas Corpus, and even though the court was justified in finding that the children had been abandoned by the mother the court was making such findings contrary to the law as set forth by our own Supreme Court.

In the case of *Jensen vs. Earley*, 228 Pac. 217, an illegitimate child was placed with the defendant with the understanding that they were to be permitted to adopt said child. The mother filed a Writ of Habeas Corpus to regain the custody of the child and the defendant pleaded that the mother had abandoned said child. The court in that case made the following statement:

“Abandonment in such cases ordinarily means that the parent has placed the child on some doorstep or left it in some convenient place in the hope that someone will find it and take charge of it, or has abandoned it entirely to fate or change. To make arrangements beforehand with some proper and competent person to have the care and custody of the child is not abandonment of it, as that term is ordinarily understood.”

In the case at bar, the children were placed with the defendants who, according to their own statements,

are competent and proper persons. Throughout the time the children were with the adopting parents the plaintiff visited the children and took them presents and also contacted the defendants by mail. Certainly these children are not abandoned to fate or change nor were they left on a door-step or anywhere else with the hope that someone would find them and care for them.

In the case of *Lucas et al. vs. Strausser*, VTF Pac.

In the case of *Lucas and others vs. Strausser*, 196 Pac. (2nd) 862, the father had placed his motherless children with his mother in January of 1944. In October 1944 the father visited the children who were then with the plaintiff and stated he had come to make some arrangement to care for the children and that he was then going to Alaska. The father went to Alaska where he earned from \$110 to \$135 per week. From October 1944 until April 1947 he paid nothing whatever for the support of the children; he made no effort to contact the children or his mother; in 1946 he returned to Butte, Montana, but did not contact the children, who were in Wyoming, until April 1947. He found that the children were adopted and that the court had held that the children had been abandoned by him. The Wyoming court held in that case in order to show an abandonment the evidence must be clear that the parent did not reserve the right to re-claim the children and there must be conduct on the part of the parents which evinces a settled purpose to forego all parental duty and relinquish all parental claims to the children. The court then

cited *Winnans vs. Luppie*, 47 N.J. and Equity, 302-20A-969. In the case at bar there was no evidence whatever to show that the mother relinquished all claims to the children as there was an understanding between the plaintiff and defendant in the case now before the court prior to the signing of the purported Consent of Adoption that if the plaintiff in this case ever regained her health the children would be returned to her.

The mother visited the children and at all times manifested an interest in them, and nine months from the date they were placed with the petitioners she asked for their return. This was almost immediately after the operation which had corrected the condition of her ill health and which was the cause of these children being placed in the home of the defendants. When the children were placed with the defendants plaintiff had been suffering very ill health for a number of years and had been endeavoring to obtain medical care needed to restore her health, and had been endeavoring for ten years to get her husband to assume his responsibility toward the children, but had failed in both. She informed the defendants that because of her health and because of her husband's conduct she was being forced to give her children up. The court in *Jensen vs. Earley*, *supra*, stated "That in addition to all that has been said, a gift or an abandonment may not be lightly inferred from either acts or language induced by grief, discouragement or mental distress." Certainly the facts in the case at bar shows that these children were given as a result of both discouragement and mental distress.

4. That the court erred in making any finding that it was for the best welfare and interest of said children that they be with the defendants. That the defendant George Q. Waddoups is of the age of 54 years. (Transcript of Testimony, Page 117, Lines 5 and 6). While the defendant Marie Waddoups is of the age of 37 years (Trans. of Testimony, Page 149, Lines 20 and 21). While the natural mother is of the age of 30 years and her present husband is of the age of 41 years, and has a weekly income of \$80 per week (Trans. of Testimony, Page 85, Lines 13 and 14; Page 131, Lines 20 to 21; Page 84, Lines 2 to 9; Page 84, Lines 10 to 30; Page 17, Lines 21 and 22).

That the plaintiff's husband has good habits and appears to be a reliable person (Trans. of Testimony, Page 17, Lines 5 and 20). That the home of the defendants is but four rooms and the children are three girls and are forced to occupy the same bedroom as the defendants, while the home of the plaintiff has three bedrooms and the girls would have a bedroom separate and apart from the parents. Besides these physical facts there is the fact that the plaintiff is the natural mother of the children and the law is well settled in this jurisdiction that there is a presumption that the childrens' best interests are with the natural mother unless she is morally unfit to have the children. This point was discussed in the case of *State vs. Sorensen*, a Utah case, and in the case of *Hummel vs. Parish*, a Utah case, 134 Pac. 898. In that case, however, the child was awarded to the foster parents but the child had been away from

the natural mother from 1904 to 1911, during which time the mother manifested no interest whatsoever in the child and on one occasion in the testimony made a statement that she wished the girl for selfish purposes. However, the facts of this case are vastly different than the one at bar. These children have only been away from the natural mother for the period of nine months when she again asked that they be returned to her. They were also taken with the understanding that the children would be returned to her if her health improved. This point was also discussed in the case of *Jones vs. Moore*, a Utah case, 213 Pac. 191. There the contest was between the father and the maternal grandparents. The court made the statement as follows:

“Without now pausing to go into the question of what may be involved within the *term best interest and welfare* of the child, it must suffice to say that that term, as it is understood, applied in cases like the one at bar, has reference more particularly to the moral welfare than to mere comfort or advantage that wealth can give; if such were not the case poor parents could not sustain their rights to the custody of children where a rich man has taken a special interest and where between himself and the children there exists a strong liking or affection. Unless a parent by his acts has forfeited the rights to the custody of his minor children the presumption his rights to have the custody are all in favor of the parent.”

In this case evidence shows that the mother surrendered the children due to discouragement and despair brought on by ill health and by an irresponsible and

a neer-do-well husband. This point was also discussed in the case of *Hardcastle vs. Hardcastle*, 221 Pac. (2d) 887. There a parent, a mother, left her children with the grandmother for a period of seven years, during which time she showed little interest in the child and gave but \$20 for her support. In that case the court held that the best interests of the child is with the mother, and there is a presumption that the best interest is with the natural parents; and further stated that his presumption was so strong that the neglect of seven years would not overcome. In the case of *Baldwin vs. Neilson*, a Utah case, 170 Pac. (2d) 179, this doctrine was again invoked and the child was given to the natural father in preference to the maternal uncle. The evidence showed that the child had been with the maternal uncle from its birth, which was a period of four years. There is nothing in the evidence in this case which shows that the mother is morally unfit to have the custody of the child; that all of the testimony shows that from the time of her marriage her primary concern has been to provide her children with the best care possible, and it was from worry caused by an unsettled marital life that caused her to surrender these children with the thought that they would receive the care and attention necessary to afford them the opportunities in life to make good men and women of them.

5. That the court erred in entering its Findings of Fact and Conclusions of Law and Judgment as they were contrary to and not supported by the evidence. That in the Findings of Fact the court found that the

Juvenile Court preferred a charge against plaintiff and her husband for neglecting their children. The court was in error in this, as there was no evidence before it to make such a finding. The only evidence given in the testimony is on Page 32, Lines 18 to 22; Page 33, Lines 16 to 20; Page 34, Lines 1 to 3, and Page 70, Lines 1 to 4, and this testimony was not sufficient to justify a finding as that made by the court.

(a) In paragraph 3 the court found that the plaintiff requested the defendants to take her children for adoption, while, in fact, the testimony shows that she informed the plaintiffs that due to her health she was being forced to place the children for adoption.

(b) In paragraph 5 the court made a finding that during the summer of 1950 the plaintiff confirmed her consent of adoption on several occasions and instead the only thing stated was that she expressed satisfaction, stating she had done what was best for the children.

(c) That the court erred in finding that the plaintiff on the 9th day of March 1950 was in good health and able to care for said children and that she surrendered the children to avoid caring for them, as is shown by the evidence in the Transcript of Testimony, as follows:

| | | | |
|------|----|-------|------------------------|
| Page | 41 | Lines | 6 to 22 |
| | 43 | | 8 to 12 |
| | 5 | | 25 |
| | 7 | | 2; 4 and 7; 2 to 4; 29 |
| | 8 | | 14 to 16; 8 to 30 |
| | 10 | | 24 |

| | |
|----|------------------------------------------|
| 12 | 26 to 30 |
| 13 | 16 to 18 |
| 15 | 4 to 5; 10 to 13; 20 and 21; 22 to 30 |
| 16 | 1 to 8 |
| 34 | 5 to 13 |
| 35 | 1, 19, 23 |
| 9 | 2 to 4 |
| 44 | 27 to 30 |
| 59 | 10 to 13; 22 and 23 |
| 47 | 19 to 24 |
| 48 | 12 to 16 |
| 51 | 6 to 17 |
| 52 | 2 to 7 |
| 77 | 1 to 14; 19 and 21 |
| 78 | 1 to 7 |
| 79 | 21 and 23 |

(d) That the court further erred in finding that the plaintiff had lived separate and apart from her children except for short intervals in the past five years, and that she had lived very little, if any, with said children, as shown by the Transcript of Testimony:

| | | | |
|------|-----|-------|-----------|
| Page | 21 | Lines | 23 to 24 |
| | 22 | | 1 to 9 |
| | 27 | | 19 to 24 |
| | 28 | | 29 and 30 |
| | 140 | | 22 and 27 |

(e) That the court further erred in finding that the plaintiff could have made a home for the children but that she preferred to live separate and apart from them to satisfy her own selfish interests, and that she had shown a lack of interest in her children and that she was restless and uninterested in said children and that

she had abandoned said children. That this finding is contrary to the testimony. The question of abandonment has heretofore been discussed in this brief. The Transcript of Testimony touching on the other matters herein are as follows:

| | | | |
|------|-----|-------|----------------------|
| Page | 124 | Lines | 23 to 30 |
| | 125 | | 20 to 30 |
| | 141 | | 14 and 15; 19 and 20 |
| | 142 | | 6 to 20 |
| | 53 | | 29 and 30 |
| | 54 | | 1 to 7 |
| | 63 | | 4 to 30 |
| | 64 | | 1 and 2 |
| | 67 | | 10 to 20 |
| | 12 | | 6 to 30 |
| | 13 | | 16 and 18 |
| | 15 | | 23 and 27 |
| | 16 | | 4 and 6 |
| | 24 | | 8 to 10 |
| | 12 | | 16 to 24 |
| | 28 | | 10 to 14 |
| | 31 | | 20 and 27 |
| | 41 | | 10 to 22 |
| | 46 | | 3; 23 to 25 |
| | 48 | | 12 to 16 |
| | 50 | | 19 and 23 |
| | 51 | | 6 and 17 |
| | 52 | | 2 and 7 |
| | 69 | | 4, 5 and 18 |
| | 71 | | 26 to 30 |
| | 72 | | 18 to 21 |
| | 74 | | 24 to 30 |
| | 75 | | 1 to 11 |
| | 76 | | 5 to 11 |
| | 77 | | 3 to 14 |
| | 80 | | 25 and 26 |

| | |
|-----|-----------|
| 112 | 4 and 7 |
| 124 | 23 and 30 |
| 125 | 20 to 30 |
| 153 | 21 and 22 |
| 154 | 14 to 22 |
| 16 | 18 to 21 |
| 177 | 6 to 14 |
| 179 | 1 to 10 |
| 181 | 16 to 20 |
| 186 | 19 to 21 |

(f) That the court further erred in finding that the defendants were in the prime of life as that is a conclusion unsupported by the evidence; and they further erred in finding that the children had favorably reacted to their care, as shown by the Transcript of Testimony:

| | | | |
|------|-----|-------|-----------|
| Page | 117 | Lines | 5 and 6 |
| | 126 | | 7 to 11 |
| | 46 | | 12 to 16 |
| | 113 | | 15 |
| | 146 | | 15 |
| | 118 | | 24 to 30 |
| | 119 | | 1 to 4 |
| | 42 | | 17 and 18 |
| | 117 | | 18 to 30 |
| | 118 | | 1 |
| | 126 | | 1 to 6 |

(g) That the court further erred in finding that the father had signed a consent and waiver on the 24th day of May 1951, as there is no testimony whatsoever in the Transcript of Testimony, nor does the plaintiff have any knowledge whatsoever of such testimony.

(h) That the court further erred in finding that it was for the best welfare and interest of the children

that they remain with the defendants. The only testimony touching upon this subject is as follows in the Transcript of Testimony:

| | | | |
|------|-----|-------|--------------------|
| Page | 117 | Lines | 5 and 6; 18 and 30 |
| | 127 | | 7 to 11 |
| | 149 | | 20 to 21 |
| | 118 | | 1 |
| | 126 | | 1 to 6 |

That the plaintiff is much younger than the defendants and she is but 30 years of age and the purported marriage to Kernoff Christensen has now taken place and was consummated on the 20th of June 1951.

Transcript of Testimony:

| | | | |
|------|-----|-------|--------------------|
| Page | 85 | Lines | 13 to 14 |
| | 131 | | 20 and 21 |
| | 84 | | 2 to 9; 10 to 30 |
| | 85 | | 1 to 6 |
| | 17 | | 21 and 22; 5 to 20 |

(i) The court further erred in finding that when the plaintiff returned from California that she had the intent of abandoning said children, as there is no evidence whatsoever in the Transcript of Testimony or elsewhere to substantiate such a finding.

(j) The court further erred in finding that the plaintiff led the defendants to believe they would be free to adopt said children and that she would make no claim upon said children and that she had made none prior to her filing of the contest in this action. The Transcript of Testimony showing that this was an error is as follows:

| | | | |
|------|-----|-------|--------------------|
| Page | 44 | Lines | 20 to 23 |
| | 60 | | 22 to 26 |
| | 61 | | 1 to 11; 15 |
| | 78 | | 21 through 29 |
| | 79 | | 6 to 11 |
| | 109 | | 16 |
| | 17 | | 23 to 30 |
| | 18 | | 1 to 11; 22 and 25 |
| | 142 | | 21 to 30 |
| | 143 | | 1 to 23 |
| | 132 | | 2 to 18; 3 |
| | 133 | | 1 to 6 |
| | 162 | | 1 to 11 |

(k) The court further erred in finding that the plaintiff was keeping company with one Kernoff Christensen prior to the divorce, as there is no evidence whatsoever on which to base such a finding. The only testimony on this subject is as follows:

Transcript of Testimony:

| | | | |
|------|----|-------|-----------|
| Page | 16 | Lines | 11 to 16 |
| | 95 | | 17 and 18 |

(l) The court further erred in finding that the mother preferred not to have the care and custody of said children, as there is no evidence upon which to base said finding.

(m) That the court erred in finding that the plaintiff intended to obtain relief upon which to support said children, as the testimony was that she only intended to obtain it until the purported marriage was consummated, and that the said marriage was consummated on the 20th day of June 1951.

Transcript of Testimony:

| | | | |
|------|----|-------|---------|
| Page | 84 | Lines | 4 to 30 |
| | 85 | | 1 to 6 |
| | 98 | | 4 to 9 |

That the finding that it was for the best welfare and interest of the children that they be with the defendants has already been discussed in this brief.

(n) That the court erred in finding that no effort had been made to reimburse the defendants for the care they had given the children, as the testimony shows otherwise:

Transcript of Testimony:

| | | | |
|------|----|-------|----------|
| Page | 82 | Lines | 22 to 30 |
| | 83 | | 1 to 6 |

(o) That the court erred in finding that the plaintiff and her intended husband could not support the children if given to them, as such finding is contrary to the evidence:

Transcript of Testimony:

| | | | |
|------|----|-------|-------------------|
| Page | 84 | Lines | 4 to 30 |
| | 85 | | 1 to 6; 13 and 14 |
| | 86 | | 7 and 8 |
| | 87 | | 1 and 13 |
| | 98 | | 5 to 9 |

(p) That the court erred in finding that it would be wrong after permitting said children to be with respondents for such a long period of time to remove said children from the home of the defendants. The children have merely been with the defendants for nine months.

The children are young and under the age of ten years. The court should not only look to what temporary effect it will have upon the children at this time but the long range effect, and it is the settled law of this state that it is for the best welfare and interest of the children that they be with the natural parent. This was discussed in the case of *Hardcastle vs. Hardcastle, supra*, by our own Supreme Court. Two of these children were with the plaintiff during the month of July for the period of two weeks and they have visited with the plaintiff throughout their stay at the defendants' home. **Transcript of Testimony:**

| | | |
|------|-----|-----------------|
| Page | 59 | |
| Page | 57 | Lines 25 and 30 |
| | 58 | 1 to 6 |
| | 84 | 4 to 30 |
| | 205 | 9 to 17 |

athrough-s

Based upon the foregoing the plaintiff herein urges that the ruling of the District Court is in error and that the same should be reversed and the plaintiff given the relief sought in her Writ of Habeas Corpus and in her Answer to the Petition for Adoption.

Respectfully submitted,

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