

1952

In the Matter of the Adoption of Sally Ann Druce : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Benjamin Spence; Attorney for Appellant;

Recommended Citation

Brief of Appellant, *Druce*, No. 7864 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1762

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court
of the State of Utah

FILED

SEP 8 - 1952

IN THE MATTER OF THE ADOPTION

OF

SALLY ANN DRUCE, A Minor.

Utah Supreme Court, Utah

Case No. 7864

BRIEF OF APPELLANT

BENJAMIN SPENCE

Attorney for Appellant

1309 Walker Bank Bldg.
Salt Lake City, Utah

INDEX

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	17
ARGUMENT	18
Point I—The Court Erred in Denying the Objection of Appellant to the Introduction of Any Evidence on the Part of Respondents for the Reason that the Petition of Respondents Does Not State Facts Sufficient to Entitle the Petitioners to Relief	17
Point II—The Court Erred in Entering Its Findings of Fact and Conclusions of Law and Judgment that the Appellant Was Not a Fit and Proper Person to Have the Care and Custody of Her Minor Child, Sally Ann Druce....	17
Point III—That the Court Erred in Entering Its Judgment that the Appellant Voluntarily and Without Coercion, Duress or Persuasion Gave Her Voluntary Consent to Petitioners for the Adoption of Her Minor Child.....	17
Point IV—That the Court Erred in Entering Its Judgment Denying the Right of the Appellant to Withdraw Her Consent for Adoption of Her Minor Child by Respondents	18
CONCLUSION	34

AUTHORITIES CITED

State ex rel. Platzer v. Beardsley et al., 183 N.W. 956.....	20
Dwinnell et ux. v. Fallon et al., 248 N. W. 657	20
2 C. J. S. Page 386, Par. 4	20
7 Pa. Dist & Co., 139 Herbert v. Anderson	21
Nelms et ux. v. Birkland et ux., 279 Pac. 748	21

INDEX (Continued)

	Page
1 C. J. Page 1378	21
In Re Lease, 169 Pac. 816	22
State ex rel. Towne et ux. v. Superior Court of Kitsap County et al., 165 Pac. 2d 862	22
Williams et ux. v. Caparelli, 175 Pac. 2d 153	23
State v. Beardsley, 183 N. W. 956	23
2 C. J. S. Par 21, Adoption of children	23
In Re White's Adoption, 1 N. W. 2d 579	24
Fitts v. Carpenter, Tex. City App. 124 S. W. 2d 420	24
130 ALR 1030, Annotations	25
French v. Catholic League, 144 N. E. 2d 113	25
Wright v. Fitzgibbons, 21 So. 2d 709	25
Re McDonnell's Adoption, 176 Pac. 2d 778	26
LaPriel Taylor et al v. George Q. Waddups et al., Case No. 7720, not reported, Utah Supreme Court	26
Stuber v. Stuber, Case No. 7764, Utah Supreme Court, not reported	29
Cook v. Cook et al, 248 Pac. 83, Utah	30
LaPriel Taylor et al v. George Q. Waddups et al., Case No. 7720, not reported, Utah Supreme Court	32
In Bildervack et al v. Clark et al, 189 Pac. 977	33

STATUTE CITED

Utah Code Annotated 1943, Section 14-4-4	19
--	----

In the Supreme Court of the State of Utah

INTHEMATTER OF THE ADOPTION

OF

SALLY ANN DRUCE, A Minor.

Case No. 7864

BRIEF OF APPELLANT

On October 23, 1951 Sheldon A. Jacobsen and Ruby H. Jacobsen, his wife, through their attorneys, Young, Young and Sorensen filed their petition in the District Court of the Fourth Judicial District, in and for Utah County, State of Utah, petitioning the court for the adoption of Sally Ann Druce, a minor of the age of three years, which child was born issue of the marriage of Charles R. Druce and Merlyn Druce, and was born on the 20th day of April, 1948 (Tr. 3). That on the same day said petition was filed in said court, the mother of said minor child, Merlyn Druce, appeared in court and signed a consent for the adoption of said child.

That while said petition was still pending, the Appellant, and mother of said child, Merlyn Druce filed her answer to the petition of Respondents on the 9th day of February, 1952, alleging therein that said petition for adoption fails to state facts, or a claim upon which relief can be granted. Admitting that said child is a minor or the age of three years and that she is the child of Appellant, Merlyn Druce, and that said child is in the custody of Respondents and has resided in their home for eleven months, and did further admit and deny other allegations in said petition for adoption, which is revealed by said answer of appellant to said petition.

That on March the 8th, 1952, Appellant served and filed an amended answer to petition for adoption by the said respondents of the said child Sally Ann Druce in which she admits that said petitioners are husband and wife and that they have resided in Provo and their respective ages and are citizens of the United States and that the said minor child was born on the 20th day of April, 1948 in Salt Lake County, Utah and that said minor child has resided with respondents for several months last past.

She further admits that she did at one time give her consent to the adoption of said minor child by respondents, but under circumstances which she sets forth further in said amended answer and she further denies that it is for the best interest of said minor child to be adopted by respondents.

In paragraph one of her affirmative defense to said petition she alleges that said petition of respondents fails to state facts, or a claim upon which the relief claimed for by respondents can be granted.

In paragraph 2 of said affirmative defense she alleges the birth of said minor child as the issue of the marriage of herself and Charles A. Druce and in paragraph 3 of said affirmative defense she alleges that shortly after the birth of said child the father of said minor child deserted and abandoned the Appellant and has remained away ever since and has done nothing for the support of herself and said minor child and is in the military service of the United States, and because of her financial condition she was compelled to place said minor child with her maternal grandparent with whom she was residing and that she did assist her grandmother in caring for said minor child, but due to some differences she had with her grandmother she was compelled to leave the home of her grandmother and did leave the child with said grandparent, and that Appellant did take said child later and place same in a day nursery, and that said grandparent did, without the consent of Appellant take said child from said day nursery and place the same with respondents to care for said minor child.

In paragraph 4 of said affirmative answer appellant alleges that because of her financial condition and her emotional upsets and the constant persuasions of the attorney for respondents to get her to consent to the adoption of said minor child, and advising her that it was for the best interests of said minor child, she did give her consent in writing to the adoption of said minor child.

In paragraph 5 of said affirmative defense, she alleges that since she did give her consent to the adoption of said minor child, her financial condition has changed for the better

and she was then in a position to properly provide for said minor child and therein did revoke her consent to the adoption of said minor child by said respondents and that she is a fit and proper person to have the custody of said minor child and so prays the court to permit her to revoke her consent for the adoption of said minor child and have said child returned to her.

Respondents filed their reply to said amended answer of Appellant in which they deny that the consent for adoption obtained from said Appellant was obtained by persuasion or coercion on the part of respondents and that it is for the best interests of said minor child to have respondents adopt it and generally admit the allegations in said affirmative defense set forth save and except that they deny that the said Appellant is in a financial condition to properly care for said child and that she has a right to rescind her consent for the adoption of said minor child by respondents, or that she is a fit and proper person to care for said minor child.

Pursuant to the foregoing, the matter was set for trial before the court on the 24th day of March, 1952, and the parties thereto being present with their respective counsel and their witnesses and a trial was had thereon and on the 30th day of April, 1952 the court rendered its decision and concluded that respondents had in all ways complied with the statutory requirements having to do with the adoption of said minor child and that they were fit and proper persons to adopt said minor child.

That said Appellant did on the 23rd day of October, 1951 freely and voluntarily give her consent in open court for the

adoption of her child by said respondents and that no undue influence or coercion was used on Appellant to induce her to give said consent for adoption.

That Appellant's moral behavior has not changed since October 23, 1951 and her financial condition has not improved since that time.

That it is for the best interests of said child to have said respondents adopt said minor child.

That the father of said minor child has now given his consent for the adoption of said minor child by said petitioners.

That the court did make and enter its findings of fact in conformity therewith, and entered its decree accordingly.

From said findings of fact and conclusions of law and decree of the court the mother of said minor child, Merlyn Druce, takes this appeal.

The evidence in this case respectfully shows that Merlyn Druce, Appellant herein, has resided with her grandmother most of her life, her mother having died when she was six years old and she never knew her father (Tr. 28). That in 1947 she married one Charles Druce and that she lived with him only three months when they separated. They went back to live together intermittently until the child in question, Sally Ann Druce, was born on April 20, 1948. That thereafter the said Charles A. Druce lived with Appellant for about three weeks and then left her and has not lived with her since (Tr. 29). Appellant then went back to live with her grandmother and took the child with her. Her husband

has never contributed to the support of Appellant of their child since its birth with the exception of buying the child a dress on its first birthday and some little groceries (Tr. 52).

Appellant then went back to live with her grandmother and took her child with her. The child remained with the grandmother for about two years, when said child was placed with respondents at Provo, Utah, for them to care for her (Tr. 30). The child was placed with respondents by the grandmother because the grandmother felt she could no longer care for the child and the respondents consented to take and care for the child. The child was placed with respondents without the knowledge or consent of the Appellant and she did not know the child was with respondents until January, 1951 (Tr. 30-31).

During the time appellant and her child were living with her grandmother she did what she could to repay her grandmother for her confinement expenses and the support of the child, but due to her financial condition she was compelled to impose upon her grandmother to take care of the child (Tr. 30).

There was apparently no arrangements made or any understanding had with the Appellant for the adoption of this child at that time, nor at any time, until the appellant was persuaded and coerced by the attorney for respondents and the respondents themselves, to give her consent to the adoption of this child. The child lived in the home of the respondents for some eleven months and they decided they wanted to adopt the child and then took the steps to persuade the appellant to give her consent to this adoption.

In January, 1951, Mr. Young, respondents' attorney, called on Appellant and advised her that respondents wanted to adopt the child and had to have her consent and that it was for the child's benefit to have them adopt her. Appellant then stated that she would not give her consent to adopt the child (Tr. 31).

Within the next three weeks Mr. Young called on Appellant several times trying to persuade her to sign the consent for the adoption of this child and in response to the following questions she replied (Tr. 32-33):

Q. Was it in Salt Lake or Provo?

A. Yes, it was in Salt Lake.

Q. All right, what took place then?

A. Well, again he asked me if I would sign the adoption papers. Told me that it was selfish of me to want to deprive Sally of the things I couldn't give her because I didn't have the money or means.

Q. What did you say to him?

A. I wouldn't sign them then.

After this refusal, Mr. Young kept coming to see Appellant and trying to persuade her to sign her consent to this adoption (Tr. 33-34-35).

Q. You didn't have a home for Sally at that time, did you?

A. No, I didn't.

Q. Now, when did you see him again?

A. I believe I came down to Provo with him again.

Q. Did he come up to get you?

A. Yes.

Q. For what purpose?

A. To bring me down here.

Q. What was your conversation with him then?

A. The same thing, why wouldn't I sign, because it was better for Sally and better for me, and that I had nothing to give her, nothing to offer her.

Q. Pursuant to that what did you do?

A. I still did not sign. I said I probably would because I didn't have a place to take her, it was true, and I said I would consent to—I would think it over.

Q. About how long after that when you came to Provo and he took you back was it that you saw him again at your home in Salt Lake, if you know?

A. About three months.

Q. What was said then?

A. Oh, I consented to sign the papers then, and we came down to Provo, and I came in this very same room I think, I believe, I don't know, and signed the papers.

Q. And did you sign them?

A. Yes.

Q. Why did you necessarily sign them?

A. Because I didn't feel I could take care of Sally.

Mr. Young, respondents' attorney, worked on appellant trying to get her to give her consent to this adoption over a period of a year (Tr. 52).

Q. Now, about how many times did Mr. Young come

to see you regarding the adoption of this child and getting the consent?

A. About five times.

Q. Over a period of a year?

A. Over a period of a year.

Besides the efforts of Mr. Young, appellant's family used their influence upon appellant trying to get her to give her consent to this adoption, and she refused. Upon cross-examination appellant testified (Tr. 45):

Q. You didn't tell them you had been coerced into consenting, did you?

A. No.

Q. You told them you thought it was for the best interest of the child that be done, didn't you?

A. I told them I couldn't fight because I didn't have the money to fight with, no place to take Sally.

Q. And at that time didn't you tell them that you had no place to take the child and you weren't even going to contest the adoption matter?

A. I told them I wasn't in any position to do anything. (Tr. 48).

Q. What yid you tell them?

A. I remember that they came up and we were talking outside in the car and they wanted to know what I was going to do, just what I was going to do, and I said I didn't know, I wasn't in any position to say anything or do anything. (Tr. 48).

Again on redirect examination appellant testified as follows (Tr. 50):

Q. Mrs. Druce, when you appeared in court to sign this consent what remark was made by Mr. Young after the consent was signed about obtaining this consent?

A. Well, I remember that Mr. Young was awfully glad to get it and he had been working some time on it, and he said he had been working some time, if you remember, Mr. Young; and I believe it is the same Judge, and you said, "Well, I have been a year or approximately a year on this, I should get a thousand dollars for it."

Q. Now, did anybody else use any persuasions or influence upon you to sign this consent?

A. Why, of course, they were after me from January, 1951 until I signed the consent.

Appellant was persuaded and coerced by all of her relatives, her grandmother, Mr. Young and the respondents, to permit the respondents to adopt this child. Although appellant loved her child, she was not in a position financially to properly care for the child at that time and because of her financial position and her emotional upset by being continually harassed to give her consent she did so, but the evidence clearly shows that it was not willingly done (Tr. 51-52-53). The grandmother was tired of caring for the child and she was desirous of being relieved of this burden and did all she could to get the child adopted out. To confirm this fact Mrs. Jacobsen was asked as follows (Tr. 83):

Q. And you didn't know when you took the child whether you could adopt the child or not, did you?

A. No, we did not.

Q. You weren't even promised you could?

- A. The grandmother promised us if Merly didn't come back and help to raise her that she would do everything in her power to help us adopt her.

The appellant was recalled to the stand and testified as follows (Tr. 124-125):

- Q. Did you have a talk with Mrs. Jacobsen before you signed this consent with relation to whether there could be trouble or she was going to fight you if you didn't sign this consent?

- A. I was told by my grandmother that it would be impossible for me to take Sally Ann out of the Jacobsen home before this consent was ever signed. I was told I couldn't take her without signing it because of my past actions.

- Q. Now, you heard the testimony, Merlyn, about them coming up to the place where you lived and talking with you in the automobile?

- A. Yes.

- Q. What did they say then about creating some trouble for you?

- A. They said—well, this is just the exact words, "If there is any trouble we will just have to put you in jail, that's all," because of this bigamist position I am supposed to be living in or was at that time they supposed. And I stated I wasn't in any position to make them any trouble really, but I told Mrs. Gudmundson at the time that I did want Sally, that I did want her, but I didn't see how I could fight anyone with any money, or I didn't know what to do. I just didn't know what to do, I said.

- Q. But they did tell you you would go to jail if you attempted to fight this case?

- A. They said, "Well, you couldn't make too much

trouble, Merlyn, because we would just have to put you in jail, that's all."

Respondents, through their respective witnesses, including the grandmother of appellant and her sister have attempted to show that appellant was not a fit and proper person to have the custody of this child and in support of this proposition testified that appellant was never attentive to her child and did not come home to care for the child or visit with it only seldomly and her conduct was such by way of drinking beer and staying out late at nights and on one occasion was supposed to have been caught in a compromising position with a boy friend she was going with (Tr. 121). This was by her half sister, but appellant denied this (Tr. 125-126). There is little evidence in the whole record to show that appellant is an unfit mother to have her child. She was in unfortunate circumstances and a victim of such, but there is no evidence produced by respondents to show that she was an unfit person or unfit to have her child.

At the time appellant signed the consent for the adoption of her child, she met a young man by the name of Jack Farrer who wanted to marry her, and she, acting under a misapprehension about her marriage to Charles Druce, went through a marriage ceremony with the said Jack Farrer and lived with him a short while, until it was brought to her attention that she was still the wife of Charles Druce. Her own husband, Charles Druce, and her grandmother likewise led her to believe she was not married to Charles Druce (Tr. 56-57-58).

Appellant testified that she was under age when she married Charles Druce and her grandmother objected very

much to it. That after they came home and separated the grandmother would not let Charles Druce come to her home to see the appellant or his baby (Tr. 56). She further testified that she was under the impression she was not married to Charles Druce as follows:

Q. Now, Mrs. Druce, after you married Mr. Druce and you came back home, what took place between you and your grandmother about this marriage?

A. Grandmother and I fought about the marriage to begin with. . . etc.

Q. I am talking about, Mrs. Druce, with relation to the validity of your marriage to him.

A. I was under the impression until we found out that I wasn't married to him.

Q. What led you to that impression, what facts?

A. The fact that he told me I wasn't. That is why I never got any money out of him. And that it is just all mixed up, he told me I wasn't married to him, and between him and my folks I didn't know what it was, where I stood.

Q. What did your grandmother do about your marriage?

A. Grandmother had me to an attorney at one time; I don't know his name, I don't remember.

Q. Did she tell you you weren't married to Charlie?

A. Not actually come right out and tell me.

Q. Did she tell you she had procured an annulment?

A. Yes, she said she was going to have one.

Q. When you went through this marriage ceremony with Mr. Farrer, were you under the impression at that time you were not married to Charlie?

A. I was under the impression that I wasn't.

Q. When did you find out to the contrary?

A. The date, it was the 15th of February, around the 15th of February.

Q. What was the occasion for your finding that out?

A. I wanted to withdraw my consent to this adoption. The people dug into it and found out, and my mother-in-law, Jack's mother phoned to Elko and found out that the marriage was good.

Appellant further testified that since she found out her marriage to Farrer was not good she did everything she could to procure a divorce from her husband, Charles Druce, so that should could properly marry Jack Farrer. That Charles Druce was in the army and he would do nothing toward assisting her by letting her get a divorce. That she had tried to contact him to get him to sign a waiver, but she could not find him, nor would his people tell her where he was, and they finally informed her that her husband was not interested and he would not do anything about it. Druce later came home at the time of this hearing and he still would not do anything to let her have a divorce. He was in the army and she could not sue him unless he signed a waiver. She further testified that the said Jack Farrer wanted to properly marry her and that he was earning sufficient to care for her and the baby and provide a home for them (Tr. 57-58).

Pursuant to the foregoing the court took the matter under advisement and later rendered its judgment, denying to the appellant her right to withdraw her consent to the adoption. That no undue influence or coercion was used upon appellant

to obtain her consent, and she had freely and voluntarily gave her consent to the adoption; that it is for the best interests of said child that she be adopted by the respondents and accordingly entered its findings of fact and conclusions of law and decree herein (Tr. 142-143-144-145-146-147-148-149-150).

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN DENYING THE OBJECTION OF APPELLANT TO THE INTRODUCTION OF ANY EVIDENCE ON THE PART OF RESPONDENTS FOR THE REASON THAT THE PETITION OF RESPONDENTS DOES NOT STATE FACTS SUFFICIENT TO ENTITLE THE PETITIONERS TO RELIEF.

POINT II.

THE COURT ERRED IN ENTERING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT THAT THE APPELLANT WAS NOT A FIT AND PROPER PERSON TO HAVE THE CARE AND CUSTODY OF HER MINOR CHILD, SALLY ANN DRUCE.

POINT III.

THAT THE COURT ERRED IN ENTERING ITS JUDGMENT THAT THE APPELLANT VOLUNTARILY

AND WITHOUT COERCION, DURESS OR PERSUASION GAVE HER VOLUNTARY CONSENT TO PETITIONERS FOR THE ADOPTION OF HER MINOR CHILD.

POINT IV.

THAT THE COURT ERRED IN ENTERING ITS JUDGMENT DENYING THE RIGHT OF THE APPELLANT TO WITHDRAW HER CONSENT FOR ADOPTION OF HER MINOR CHILD BY RESPONDENTS.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING THE OBJECTION OF APPELLANT TO THE INTRODUCTION OF ANY EVIDENCE ON THE PART OF RESPONDENTS FOR THE REASON THAT THE PETITION OF RESPONDENTS DOES NOT STATE FACTS SUFFICIENT TO ENTITLE THE PETITIONERS TO RELIEF.

At the time of trial and before any evidence was introduced in said matter the appellant, by her counsel, objected to the introduction of any evidence in said matter for the reason that the petition of respondents did not state facts sufficient to entitle the petitioners to relief, and upon the further grounds that the appellant had the right to withdraw her consent to said adoption at any time before the adoption. The court overruled this objection and proceeded to trial.

Section 14-4-4 U.C.A. 1943, 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;"

At the time of filing the petition for adoption and hearing had thereon no consent was obtained from the father of this child to this adoption and appellant had withdrawn her consent and the court could not proceed to hear this adoption without the petitioners complying with the foregoing provisions of the Statute and the court should have sustained the objection of the appellant to any hearing on this petition, because it did not comply with the statute in alleging the consent of the parents of said child, nor did it allege that the father of said child had been judicially deprived of the custody of said child on account of cruelty, neglect or desertion. The only allegation therein contained was to the effect that the father, shortly after the marriage of appellant and the father of said child, deserted and abandoned it, and that petitioners had made diligent search to find him. Nor does the reply of petitioners therein filed cure any defects of the petition in setting forth the necessary allegations as required by the statute.

Aside from the foregoing the objections were further contended for upon the principle and the law, that a parent of a minor child could withdraw her consent to the adoption, although previously given, at any time before the adoption of said child, and that the consent, even though it was obtained

voluntarily and without undue influence, coercion or persuasion, could be withdrawn by the parent, and that the appellant had withdrawn her consent to said adoption and notified the petitioners of this fact before any hearing had hereon or before any proceedings for adoption was had in this matter and expressly withdrew her consent for adoption in her amended answer to said petition (Tr. 13).

In support of the foregoing contention the following authorities are cited:

183 N. W. 956. Minn.

"Appellants could not adopt the child without obtaining respondent's consent. Section 7153, G. S. 1917 Supp. Her refusal to consent still left the child in appellant's custody. They base their right to retain the custody of her agreement with them and on the claim that it is for the best interest of the child that it be left with them.

"The written agreement created no binding obligations respecting the custody of the child. State v. Anderson, 198 N. W. 681; State v. Armstrong, 169 N.W. 249; State v. Pelowski, 177 N.W. 627.

248 N. W. 657, Minn.

"Even if it could be assumed that in the distress of her unmarried motherhood she contemplated abandonment, it was but a fleeting impulse. If at one time there was temporary consent by her, it was withdrawn before commencement of this proceeding. Such a consent once given, may be withdrawn at any time before adoption. State ex rel. Platzer v. Beardsley, 183 N.W. 956.

2 C. J. S. Page 386, Par. 4.

"Consent may be withdrawn at any time before adop-

tion, 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."

7 Pa. Dist. & Co. 139, *Herbert v. Anderson* .

"Until a legal adoption has been affected, a consent may be revoked, even though the child has been placed with a welfare agency with a view to its adoption by others."

Nelms et ux, v. Birkland et ux., 279 Pac. 748. Washington.

"Without a statute or without compliance with a statute, there is no such thing in our law as the adoption of an heir. Adoption was not known to the common law, and is a matter purely statutory. Courts have passed upon this question frequently, and have adhered with much strictness to this rule. (Citing authorities.

"The mother in this case expressly gave a written consent, and the claimed right of adoption was based on that. From the facts stated and from others that appear in the record, it is clear that , prior to the time that the petition for adoption was first filed, the written consent given by the mother had been revoked, and this she had a right to do prior to the time that a legal adoption was made, assuming, without so deciding, that the written consent satisfied the requirement of the statute. In 1 C. J. P. 1378, it is said:

"A natural parent, by entering into a contract for the adoption of his child by another, waives his right to the custody and control of the child; but, subject to his liability to be sued for 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."

“The written consent having been revoked, it is plain that the necessary statutory requirement to enable the court to enter a legal order of adoption has not been complied with. The extinguishment of the rights of the natural parents to the custody and control of their child is not a matter of discretion on the part of the court. Before the natural parents’ right to the custody and control of their child can be extinguished, the statutory requirements must be complied with. If the statutory requirements are complied with then it becomes a matter of discretion as to the propriety of the proposed adoption, and the question of the moral, intellectual, and material welfare of the child becomes a matter for the court to take into consideration. In *Re Lease*, 99 Wash. 413, 417, 169 Pac. 816, 817, it is said:

“The legal parentage of a child is not and cannot be lawfully changed under our laws, as a matter of the court’s discretion, in so far as the consent of the minor’s parents is concerned. Until the consent of both living parents is given in the manner provided by our statute above quoted, or it is clearly shown that such consent is unnecessary, because of the existence of conditions specified in the statute, the court has no discretion to act in the matter at all.”

“The written consent in the present case having been revoked prior to the time that any legal action took place, and there being no other conditions which would authorize the court to extinguish the rights of the natural parents to the custody and control of their child, there is no legal basis under the statute to sustain the adoption order.”

State ex rel. Towne et ux. vs. Superior Court of Kitsap County et al. 165 Pac. 2d. 862. Washington.

“On November 10, 1944, Irene Vinsant gave her

written consent to Mack S. Kaliszewski and his wife, Sylvia M. Kaliszewski, for the adoption of the child. On January 26, 1945, while adoption proceedings instituted by the Kaliszewskis were pending, she revoked her consent given on November 10, 1944. That she had the legal right and power to revoke the consent she had given is not questioned."

Williams et ux, v. Capparelli, 175 Pac. 2d 153. Oregon.

"It is the general rule that a 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. 44 No. E 2nd 113; 124 S. W. 2d 420; 1 N. W. 2d 579; 279 N. Y. S. 427; 33 N. Y. S. 2d 793; 60 N. Y. S. 2d 421; 279 Pac. 748. A few holding to the contrary appear to have been based upon the provisions of the particular statutes under consideration."

"Nevertheless, it would seem that courts should not interfere with the natural relationship of parent and child upon the sole ground that the proposed adoptive parents are able to give the child superior advantages over those within the means or social status of the natural parents. State v. Beardsley, 183 N. W. 956."

"A text writer has suggested that some of the more recent decisions have shown a tendency on the part of the courts to deny the right of a parent to withdraw consent to adoption before final decree, if the consent was given voluntarily with a full understanding of every fact necessary thereto. 2 C. J. S. Par. 21 Adoption of children. It will be seen however from a study of the cases cited in support of the text, (and relied upon by petitioners herein) that the rule under which a parent is permitted to withdraw consent before final decree,

has not been departed from, but rather that in the case scited matters of equitable estoppel were invoked against the parent."

In *Re White's adoption*, 300 Mich. 378, 1 N. W. 2d 579. (1940).

"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, *Fitts v. Carpenter*, Tex. City 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 in 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 have 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 by 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) ante, 1034; *Re Nelms* (1929) 153 Wash. 242, 279 Pac. 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.

French v. Catholic League, 60 Ohio 442, 144 N.E. 2d 113.

"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 cannot reclaim your given word and have back your child."

Wright v. Fitzgibbons, reported in 21 So. 2d 709. Mississippi.

The facts show 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 the 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 in that case that the mother had abandoned the child and 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 seven years.

Re McDonnell's Adoption 176 Pac. 2d 778. California.

"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."

In a recent decision of our own Supreme Court in the case of LaPriel Taylor, mother of Howard Wayne, Oinda Kay, Sheryl Rae and Karen Taynor, Minors, vs. George Q. Waddoups and Marie Waddoups, his wife, decided March 3, 1952, but not reported, the court held that such a consent could be revoked by the natural parents of a child placed for adoption. I quote the words of Justice Wade in his concurring opinion:

"I concur on the ground that plaintiff had effectively revoked her consent to the adoption of these children

before it was consummated, and there was no showing that she had deserted them."

In the same opinion I quote the words of Justice Henriod:

" . . . and second that prior to the filing of the petition for adoption, the natural mother effectively revoked any consent to adoption that she may have given, a right generally conceded under the authorities, when applied to the facts of this case."

There are numerous other authorities of different states which hold to this proposition and it would only add a repetition of these holdings which would serve no further purpose other than to confirm the above cases and their holdings as cited.

POINT II.

THE COURT ERRED IN ENTERING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT THAT THE APPELLANT WAS NOT A FIT AND PROPER PERSON TO HAVE THE CARE AND CUSTODY OF HER MINOR CHILD, SALLY ANN DRUCE.

The proceedings had in this case were certainly not a proceeding to determine, by the court, whether the mother of this child, appellant herein was a fit and proper person to have the custody of her child, nevertheless the court apparently proceeding on that theory and while the court was silent in its decree on this matter, the court elaborated on the conduct of the appellant and in its conclusions of law set forth in paragraph 3 thereof (Tr. 147):

"That Merlyn Druce's moral behavior has not changed since October 23, 1951, and her financial condition has not improved since that time."

That in paragraph 7 of said findings of fact the court elaborated upon her supposedly misconduct and from such findings I am sure, this had a great influence upon the court in rendering the decision in denying the appellant the right to revoke her consent to adopt (Tr. 145).

I respectfully ask the court to review the transcript and the testimony regarding her supposedly misconduct, as to whether, from such evidence she could be adjudged an unfit mother to have this child. The most that was said was that she married without her grandmother's consent and while she was a minor and that she could not get along with her grandmother. She was accused of going out and keeping company with another man while she was still married to Charles Druce and keeping late hours and sometimes getting intoxicated and that she married another man before she could get a divorce from Charles Druce. The appellant admitted these things, but denied positively that she ever had any improper relations with these men, other than the fact that, she under a mistaken idea, and believing that she was not married to Charles Druce, did go through a marriage ceremony with one Jack Farrer, but upon discovery of this mistake, there is no proof that she continued to live with this man she supposedly married, and the findings of fact, set forth this fact that she was still continuing to live with this man (Tr-146), which the evidence does not support. She loves this man and wants to properly marry him, and he wants to properly marry her, but cannot do this until she can procure a divorce from

Charles Druce, who takes advantage of the fact that he is in the army and refuses to do anything to permit her to get a divorce from him, although proceedings are now pending for this purpose. The said Jack Farrer is able and willing to care for her and her child and provide a proper home for them.

Appellant is a victim of unfortunate circumstances. Her mother died when she was 6 years old and she never knew her father. She was raised by her grandmother, under apparently some hardships and unfortunate circumstances.

She married while she was 17 years of age (Tr-68). Her husband lived with her off and on until the child was born and three weeks thereafter deserted her and has never lived with her or done anything for her or the child since that time. She had to make her own way. She continually quarrelled with her grandmother, and her life with her grandmother was unbearable to her and she went her own way. She left the child with her grandmother because she had no place to take it. The grandmother got tired of taking care of the child and placed the child with the respondents and promised them she would do everything she could to see that they adopted the child (Tr-83).

I respectfully submit, that from the evidence as to the conduct of appellant, or misconduct, if it can be construed or determined that appellant is or was an unfit person to have the custody of her child.

In the case of Stuber v. Stuber, Case No. 7764, decided by this court, but not yet reported as of May 19, 1952, the court said:

"It was agreed by both counsel at the oral argument in this court that since the trial respondent had entered into an apparently advantageous marriage to another man. The fact that she lived with a man whom she expected to marry, although censurable, does not in itself make her an unfit and improper person to have the custody of her child. Citing *Walton v. Coffman*, 169 P. 2nd 97.

Again in *Cook v. Cook et al*, 248 P. 83 at page 108. Utah.

"Then too, the unfitness which deprives a parent of the right to the custody of a child must be positive, and not merely comparative, or merely speculative. And too, as heretofore observed, the referee with respect to this matter had before him the witnesses and heard their testimony and found that there was no evidence or even a suspicion of improper relations between the defendant and Welch. This a finding that the defendant is unfit to have the custody of the child is not, on the record demanded or justified."

We think there is nothing in the evidence in this matter to justify the lower court in finding that the appellant was not a fit and proper person to have the custody of this child.

POINT III.

THAT THE COURT ERRED IN ENTERING ITS JUDGMENT THAT THE APPELLANT VOLUNTARILY AND WITHOUT COERCION, DURESS OR PERSUASION GAVE HER VOLUNTARY CONSENT TO PETITIONERS FOR THE ADOPTION OF HER MINOR CHILD.

In the first place, appellant's child was placed with respondents by her grandmother, without the consent or knowl-

edge of appellant (Tr. 31). She did not learn of this until January of 1951 (Tr. 31). The child was taken by the grandmother from a nursery home where appellant had taken her and placed with the respondents (Tr. 54). Appellant was trying to support the child to the best of her ability.

When the respondents decided that they wanted to adopt this child, what did they do? They secured their attorney, Mr. Young, to contact the appellant to get her consent. Her testimony as outlined in her direct and cross examination and contained in (Tr. 26-27-28-31-32-33-34-35-43-44-45-50-51-52, etc.), shows that Mr. Young, the respondents and her family all worked on appellant to get her to consent to this adoption. She repeatedly refused to do so, until they finally persuaded her to go before the court and sign a consent. She testified that they had worked on her for almost a year by repeatedly contacting her at her work and otherwise, telling her that it was for the best interests of the child and that it was selfish of her to deprive the child of the comforts and things the mother could not give her child (Tr. 33). She further testified that the Jacobsens told her they would fight her if she tried to take the child out of their home (Tr. 124). She was further told that she could not take the child out of the home of respondents because of her past actions (Tr. 124). She further testified that the respondents even threatened to have her put in jail because of her conduct in marrying another man before she secured her divorce from Charles Druce.

After they finally persuaded appellant to go into court and sign the consent for adoption, appellant testified as follows (T. 50):

Q. Mrs. Druce, when you appeared in court to sign this consent what remark was made by Mr. Young after the consent was signed about obtaining the consent?

A. Well, I remember that Mr. Young was awfully glad to get it and he had been working some time on it, and he said he had been working some time, if you remember, Mr. Young; and I believe it is the same judge, and you said, "Well, I have been a year or approximately a year on this, I should get a thousand dollars for it."

Mr. Young: I still think I would like to have that much.

I respectfully asked the court if the consent of the appellant was obtained willingly and without coercion, persuasion, undue influence and even resorting to threats. The record speaks for itself. The appellant had no money or a proper place to take the child. She was torn between two fires. Love for her child and its care and custody, and persuasions, coercions, undue influence and threats to deprive her of it. What could she do or where could she turn, hence the signing of the consent.

Our own Supreme court said in the case of LaPriel Taylor et al. v. George Q. Waddoups, *supra*. Wolfe Chief Justice:

"The purpose of this requirement is that the court, representing the public, can see that the parents when they consent to the adoption of their children are informed and fully understand the effect of the act which they are performing. The court should endeavor to protect the parents from fraud, misrepresentation or undue influence in the obtaining of their consent. Oft times, consents of adoption are signed by parents while under great emotional strain, and, as in this case, they

may be signed while the parent is suffering from discouragement and despair. To conduct the welfare of all concerned, this safeguard is established as an assurance that the parents have duly considered the consequences of their act."

In *Bildervack et al v. Clark et al.*, 189 Pac. 977, Kansas, the court said:

"The natural parent must freely and voluntarily consent to the adoption. This consent includes consent to all the legal consequences of adoption."

If for no other reasons than the manner in which this consent was obtained, the judgment of the lower court should be reversed and the appellant regain the custody of her child.

Again the hearing on this matter was had, respondents obtained the written consent of Charles Druce, the father of this child, which consent was filed for record in the court on the 25th day of April, 1952. How this consent was obtained the record is silent. We conclude from the past actions of said Charles Druce in not coming to the assistance of the appellant, supporting her or her child and doing nothing towards straightening out their matters by way of permitting her to obtain a divorce from him by reason of being in the army, that his motive in signing this consent was ulterior.

POINT IV.

THAT THE COURT ERRED IN ENTERING ITS JUDGMENT DENYING THE RIGHT OF THE APPEL-

LANT TO WITHDRAW HER CONSENT FOR ADOPTION OF HER MINOR CHILD BY RESPONDENTS.

We think we have said enough in the foregoing brief under points I, II and III to cover Point IV. We respectfully refer the court to the argument and the authorities heretofore outlined under Point I hereinbefore set forth, which shows that the weight of authority in most jurisdictions permit a natural parent to withdraw her consent to adoption and have her child restored to her and we could add nothing hereto that would not be repetitious, other than citing additional authorities to the same effect.

CONCLUSION

We respectfully submit that the appellant is entitled to a reversal of the lower court's decision in this matter and that appellant be permitted to withdraw her consent and regain custody of her child.

Respectfully submitted,

BENJAMIN SPENCE

Attorney for Appellant

1309 Walker Bank Bldg.
Salt Lake City, Utah