

1952

# In the Matter of the Adoption of Sally Ann Druce : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](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.

Dallas H. Young;

---

## Recommended Citation

Brief of Respondent, *Druce*, No. 7864 (Utah Supreme Court, 1952).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1763](https://digitalcommons.law.byu.edu/uofu_sc1/1763)

This Brief of Respondent 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](mailto:hunterlawlibrary@byu.edu).

IN THE MATTER OF  
THE ADOPTION

OF

SALLY ANN DRUCE,  
A Minor.

Case No. 7864

## RESPONDENTS' BRIEF

DALLAS H. YOUNG  
of the Firm of  
YOUNG, YOUNG & SORENSEN

Utah Supreme (H)

# 7064

In re Adoption of  
Sally Ann Drake

Ronald R. Fuldberg

30 4 51 AM

## TABLE OF CONTENTS

---

	Page
Statement of Facts .....	1-13
Statement of Points .....	13
Argument .....	15-40
Point I	
APPELLANT'S FIRST CONTENTION IS THAT THE PETITION FILED BY RESPONDENTS IS INSUFFI- CIENT TO GIVE THE COURT JURISDICTION AND THIS ARGUMENT IS PREMISED ON THE GROUND THAT PETITION DOES NOT ALLEGE THAT THE CONSENT OF THE FATHER HAS BEEN OBTAINED. .....	13-14
THE CONSENT OF NATURAL PARENTS IN AN ADOPT- TION CASE IS A MATTER OF PROCEDURE UNDER THE STATUTE, AND NOT OF PLEADING. AN ADOPTION PETITION IS NOT SUBJECT TO A MO- TION TO DISMISS BECAUSE THERE IS NO ALLE- GATION THAT CONSENT OF NATURAL PARENTS HAS BEEN OBTAINED .....	14
Point II	
APPELLANT, BY HER PLEADINGS, RAISES THE QUESTION AS TO WHETHER SHE WAS A FIT AND PROPER PERSON TO HAVE THE CARE AND CUS- TODY OF THE MINOR CHILD AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE RE- SPONSIVE TO THE ISSUE THUS RAISED .....	14
Point III	
THE RECORD DISCLOSES THAT APPELLANT FREELY AND VOLUNTARILY AND WITHOUT CO- ERCION CONSENTED TO THE ADOPTION OF THE MINOR CHILD .....	14
Point IV	
THE TRIAL COURT'S RULING THAT APPELLANT COULD NOT ARBITRARILY REVOKE HER CONSENT TO THE ADOPTION WAS CORRECT .....	14
Conclusion .....	39-40

## TABLE OF CONTENTS (Cont.)

---

### AUTHORITIES CITED

	Page
Annotation, 138 ALR 1038 .....	28-29
Annotation, 156 ALR 1001, 1011 .....	28-29-30-37
1952 ALR Blue Book, Supplemental Decisions, 11th Issue .....	28

### CASES CITED

Barents, Ex parte, 222 Pac. 2d 488 .....	33
Bilderback et al., vs. Clark, et al., 189 Pac. 977 .....	22
Cooke vs. Cooke, et al., 67 Utah 371, 248 Pac. 83 .....	19
Minor, Re Adoption of a, 144 Fed. 2d 644 .....	30
Pitcher, Re Adoption of, 230 Pac. 2d 449 .....	35
Schultz, Ex parte, 181 Pac. 2d 585 .....	37
Stanford vs. Gray, 42 Utah 228, 129 Pac. 423 .....	23
Stuber vs. Stuber, 244 Pac. 2d 650 .....	18
Taylor vs. Waddoups, 241 Pac. 2d 157 .....	21-22
Wyness vs. Crowley, 292 Mass. 461, 198 N. E. 758 .....	29-31
Walton vs. Coffman, 110 Utah 1, 169 Pac. 2d 97 .....	39

### STATUTES CITED

Utah Code Annotated 1943, Section 14-4-4 .....	27
Utah Code Annotated 1943, Section 14-7-41 .....	24-26-27
Utah Code Annotated 1943, Section 14-7-42 .....	24
720 x 27 Compiled Laws of Utah 1907 .....	24

# IN THE SUPREME COURT

of the

## STATE OF UTAH

---

IN THE MATTER OF  
THE ADOPTION

OF

SALLY ANN DRUCE,  
A Minor.

---

)  
)  
)  
)  
) Case No. 7864  
)  
)  
)  
)  
)

### RESPONDENTS' BRIEF

#### STATEMENT OF FACTS

Respondents are not satisfied that the Statement of Facts by Appellant is complete enough to convey to the Court the points at issue and therefore Respondents add the following:

The Appellant, Merlyn Druce, mother of the child in question, went to live with her grand-

mother when she was six years old (Tr. 68-69) and continued to live with her until she married Charles Druce, father of the child (Tr. 69). The child Sally Ann Druce was born April 20, 1948 (Tr. 69) and when she was a month old she was taken to the home of the Appellant's grandmother and put in her care (Tr. 70). The Appellant lived at the home of the grandmother and worked as a waitress, which occupation she has since continued to follow (Tr. 14-15). In November of 1948, Appellant started to go out with one Lee James. The grandmother objected to this because Appellant was a married woman and because the burden of taking care of the child had to be borne by the grandmother (Tr. 71). The Appellant's work never ended later than 10:00 P.M. but she would not return to the home of the grandmother and to her baby earlier than 12:00 M. and from that hour to 4:00 A.M. When she came home she usually smelled of intoxicating liquor (Tr. 71-72). In December the grandmother insisted that she be paid something for the care of the baby and the Appellant took the child away from the grandmother's home (Tr. 72). After the baby had been gone a week, Appellant returned it to the grandmother (Tr. 74).

During all the time that the Appellant stayed

at the grandmother's home the grandmother had the care of the child. Appellant did not care for the baby. She was not there long enough to do so and she slept while she was there (Tr. 72-73). The grandmother was not financially able to take care of the child without the Appellant's help (Tr. 73).

The grandmother went to California in July of 1949 and left the child with a daughter of the grandmother. Appellant knew that the grandmother had gone to California but she did not take care of the child (Tr. 78). The grandmother returned in August and again took the child. After the grandmother's return from California, the Appellant worked at Sugar House and during a period of months she did not come to see the baby at all and communicated with the grandmother but once (Tr. 79).

Appellant left Sugar House and went to Denver and stayed for approximately three months and during this time she did not communicate with the grandmother or with the child. When Appellant returned from Denver she came to the grandmother's home with Lee James between 3:00 and 4:00 in the morning. Appellant then began staying with the grandmother (Tr. 79-80) and for about three nights she came home at an early hour.

Then she started to stay away and coming in late, smelling of beer (Tr. 80). The grandmother had difficulty getting her up so as to go to work (Tr. 80-81). In October of 1949, the grandmother asked for money for care of the baby and she and Appellant had words and Appellant left and she did not come home Sunday, Monday or Tuesday nights and came home Wednesday morning about 2:00 o'clock, and then took the baby up out of her bed. Appellant then went into the bathroom, took off her clothes and went out to her bed on the porch (Tr. 82). Appellant then let Lee James into her bedroom (Tr. 101) and Appellant at this time had no clothes on (Tr. 100).

Appellant kept company with Lee James for three years. Appellant's grandmother objected to this because Lee James smoked and drank beer (Tr. 44) and because grandmother was taking care of the baby while Appellant was out with Lee James ((Tr. 71). During this time she was with him practically every night and drank beer every night for three years (Tr. 45-46).

Appellant left the home of the grandmother in October, 1950, and during rest of month, Appellant saw Sally about three times (Tr. 83). On a Sunday night in October she came to grand-

mother's home with Lee James and promised grandmother that she would take care of Sally the following Tuesday. Appellant did not return to take care of Sally and grandmother took Sally to the Ward House where grandmother was attending Relief Society. Appellant came to Ward House and gave grandmother \$5.00 but did not see Sally, who was playing in the amusement hall in the Ward House (Tr. 84).

Appellant lived within three blocks of grandmother's home from October, 1950 to January, 1951, and during this time did not go to see Sally or inquire about her (Tr. 21).

Sally never called Appellant "Mamma". Appellant never stayed home long enough so as to become acquainted with the child and let her know who her Mamma was (Tr. 33).

Grandmother is 66 years of age (Tr. 48). Grandmother's health was poor and she was unable financially to get vitamins and other things for the baby (Tr. 85). The only income she had was from rental of a part of her home and monies she received from boarding a girl (Tr. 73).

Grandmother told Appellant she thought Ap-

pellant ought to permit someone to adopt the child and all of Appellant's relatives told her the same thing, and they have all tried to get Appellant to pay more attention to the child and give it better care and when Appellant would not do it, they have told her that she had better let someone adopt it (Tr. 38).

Sally was taken into the Jacobsen's home the latter part of December, 1950, and in January, 1951, the attorney for Respondents took Appellant to the home of the Respondents to see the home and to see Sally (Tr. 10) and at that time Respondents advised Appellant that she was welcome to come and see Sally any time she wanted to (Tr. 58). From the latter part of January until October 23, Appellant did not again visit Respondents' home and made no contact either with Sally or with Respondents during this period. In January, 1951, Appellant learned that the child, Sally Ann Druce, was in the home of Respondents and from that time until on or about February 8, 1952, Appellant never demanded the return of said child (Tr. 25) and never indicated in any manner that she wished to revoke her consent to the adoption of said child, until the filing of the purported answer.

Appellant has never obtained a divorce from Charles Druce (Tr. 19, 37). Appellant entered into a marriage ceremony with one Jack Farrer in Salt Lake City on October 6, 1951, and on October 23, 1951, she was living with Jack Farrer at 918 South West Temple as husband and wife (Tr. 27-28). Jack Farrer, at the time of the trial, was earning \$55.00 per week (Tr. 36). When Appellant was asked what she would do with the baby if awarded its custody, she said a Mrs. Baker would tend her (Tr. 16). The Bakers have a one-bedroom home and they have three children and Appellant and Mrs. Baker have always had arguments (Tr. 26).

Respondent Sheldon A. Jacobsen is a foreman at a garage for an automobile company and earns \$525.00 per month and owns his own home and has no children (Tr. 49). When Sally came to the Respondents' home, Sheldon A. Jacobsen's mother was living with Respondents and they built her a new home so that Sally might have the room formerly occupied by the grandmother (Tr. 50). The other Respondent, Ruby Jacobsen, is a school teacher and earns \$3,950.00 per year (Tr. 52). She would stop teaching and would be glad to stop when it is finally determined whether Respondents shall be permitted to keep Sally (Tr. 52). When Sally came to live with the Jacobsens, she

was very thin and was suffering from mastoid trouble and had a heart murmur and her feet were turning in. Respondents took the child to a foot specialist (Tr. 53). Since Respondents have had the child, she has been under the constant care of doctors (Tr. 54). Respondent Sheldon A. Jacobsen has built the child a sand pile and a swing and has provided a dog and a cat for the child and one room in the home has been set aside for a play room for the child (Tr. 55).

The testimony concerning the alleged coercion by the attorney for Respondents is as follows. Appellant testified that the first conversation with this attorney occurred in January, 1951, and her testimony follows:

“Q. Now, tell as near as you can the conversation you had with Mr. Young, what he said and what you said?

A. Well, he said that these people wanted to adopt Sally and that they would have to have my consent, and it was for Sally's benefit. And I said I didn't know, I had to see, I didn't think I would give my consent. And he said, “Would you like to see the home?” And I said, “yes.” And he

agreed to take me down to the Jacobsen home to see what it was all about and for me to find out a little more about it.

Q. Anything further said at that time?

A. I said that I wouldn't sign the adoption papers, I did state that.

Q. Then did he leave?

A. He left." (Tr. 9-10)

The next time Appellant saw the attorney was from two to three weeks later and the following conversation occurred:

"A. He said, "Would you like to come down to Provo and see Sally?" He wanted to know if I would like to come down and see Sally. I had said I would like to see her before. And I said, "yes." And so I drive down to Provo with Mr. Young, and visited the Jacobsen home and saw my daughter." (Tr. 10)

"Q. Then was anything said about your giving your consent then, or did you consent to

give it to her'

A. No, not then.

Q. Did you tell them you wouldn't, or you would consider it, or what?

A. I would consider it, I would think about it, I didn't know." (Tr. 10)

When Appellant first visited the Jacobsen home, counsel for Respondents said to her: "Merlyn if you aren't going to let Mrs. Jacobsen adopt her I think you better tell the Jacobsens now." (Tr. 57).

"Q. All right, when was the next time you saw Mr. Young

A. He came to where I was working again, that was at Ronnie's Restaurant.

Q. About how long after this?" (Tr. 10)

In February this attorney brought papers to a place where Appellant was working and she took them over to the Broadway Coffee Shop to show them to a friend of hers (who was Lee James) (Tr. 23) and he advised her not to sign the papers and she did not. This attorney again called on her, the time does not appear when this

occurred, and again Appellant refused to sign the papers but the attorney brought Appellant to Provo (Tr. 11). Again the attorney told her it was better for Sally and for her that she sign the adoption papers (Tr. 12). About three months later, the attorney again saw Appellant (Tr. 13).

“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. Do you know what you signed?

A. It was a consent to have the Jacobsens go ahead with the adoption.” (Tr. 13).

The attorney had not contacted Appellant for about three months prior to October 22, and had been in conversation with Appellant only about a minute when Appellant agreed that the Respondents should be allowed to adopt the child (Tr. 21). Appellant agreed on October 22, 1951 that if the attorney would come to Salt Lake and get her that she would come to Provo the next day and give her consent to the adoption (Tr. 21-22). After the adoption papers were signed, Appellant,

Sally and Mrs. Jacobsen went for a ride for about half an hour and Appellant raised no question or objection to having signed the consent to adoption (Tr. 22). After leaving Mrs. Jacobsen, Appellant went to the home of her relatives and told them that she had consented to the adoption (Tr. 22-23). She did not tell them that she had been coerced into consenting and told them she thought that it was for the best interests of the child that it be adopted by the Jacobsens and told them that because it was in the best interests of Sally (Tr. 23).

Testimony relating to coercion by the relatives follows

“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.

Q. I am speaking of besides Mr. Young and the Jacobsens.

A. Yes.

Q. Who?

A. My family said it was best.” (Tr. 28-29).

Appellant called her grandmother and other relatives and sought their advice as to whether it was best for her to consent to the adoption (Tr. 29).

The grandmother and all relatives told Appellant they thought it was best that someone adopt the child. They tried to get Appellant to pay more attention to the child and give it better care and when she didn't do it, her relatives told Appellant that she had better let someone adopt it (Tr. 38).

The Respondents will endeavor to answer Appellant's points in the order in which they appear.

## STATEMENT OF POINTS

### I.

APPELLANT'S FIRST CONTENTION IS THAT THE PETITION FILED BY RESPONDENTS IS INSUFFICIENT TO GIVE THE COURT JURISDICTION AND THIS ARGUMENT IS PREMISED ON THE GROUND THAT PETITION DOES NOT ALLEGE THAT THE CONSENT OF THE FATHER HAS BEEN OBTAINED.

THE CONSENT OF NATURAL PARENTS IN AN ADOPTION CASE IS A MATTER OF PROCEDURE UNDER THE STATUTE, AND NOT OF PLEADING. AN ADOPTION PETITION IS NOT SUBJECT TO A MOTION TO DISMISS BECAUSE THERE IS NO ALLEGATION THAT CONSENT OF NATURAL PARENTS HAS BEEN OBTAINED.

II.

APPELLANT, BY HER PLEADINGS, RAISES THE QUESTION AS TO WHETHER SHE WAS A FIT AND PROPER PERSON TO HAVE THE CARE AND CUSTODY OF THE MINOR CHILD AND THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE RESPONSIVE TO THE ISSUE THUS RAISED.

III.

THE RECORD DISCLOSES THAT APPELLANT FREELY AND VOLUNTARILY AND WITHOUT COERCION CONSENTED TO THE ADOPTION OF THE MINOR CHILD.

IV.

THE TRIAL COURT'S RULING THAT APPELLANT COULD NOT ARBITRARILY REVOKE HER CONSENT TO THE ADOPTION WAS CORRECT.

## ARGUMENT

### I.

APPELLANT'S FIRST CONTENTION IS THAT THE PETITION FILED BY RESPONDENTS IS INSUFFICIENT TO GIVE THE COURT JURISDICTION AND THIS ARGUMENT IS PREMISED ON THE GROUND THAT PETITION DOES NOT ALLEGE THAT THE CONSENT OF THE FATHER HAS BEEN OBTAINED.

THE CONSENT OF NATURAL PARENTS IN AN ADOPTION CASE IS A MATTER OF PROCEDURE UNDER THE STATUTE, AND NOT OF PLEADING. AN ADOPTION PETITION IS NOT SUBJECT TO A MOTION TO DISMISS BECAUSE THERE IS NO ALLEGATION THAT CONSENT OF NATURAL PARENTS HAS BEEN OBTAINED.

The attorney for Appellant seems to misconceive the issues in this case. Counsel argues in his brief now as he did at the inception of this case, that because we had not at that time obtained the consent of the father, that our petition was insufficient. We realized, perhaps even better than counsel for Appellant, that the adoption proceed-

ings could not be completed without the consent of the father. Had we had his consent, the decree of adoption would have been entered long before Appellant had a change of mind. Counsel for Appellant has never represented Charles Druce, father of the child, and we submit that his contention is untenable.

For a long time we could not locate the father of the child and when we were able to locate him, we learned that he was in Korea serving in the United States Armed Forces. We therefore felt that the Court would not look with favor upon any petition which sought to have the Court enter a decree that the father had deserted the child. We believe that the father would, on his return, give his consent to the adoption and in this belief, events have proved that we were right. It was while awaiting his return that Appellant filed what she characterized "Answer to Petition for Adoption of a Minor Child." Actually, this so-called Answer should have been denominated a petition to revoke Appellant's consent but whatever its proper nomenclature, it was clearly understood that the issues and pleadings raised two questions. First: Did Appellant have the right to revoke her consent to the adoption? Second: If she had that right, was she a fit and proper person

to have custody of the minor child?

Counsel for Appellant seemed to recognize that these were the issues as shown by his pleadings and also as shown by his statement at the conclusion of the trial, in which counsel for Appellant stated: "I take it that the purpose of this hearing today is asking the Court to determine whether Merlyn is a fit and proper person to have this child?" and to which counsel for Respondents replied, "Yes, and as to whether she can now withdraw her consent already given." (Tr. 110).

## II.

APPELLANT, BY HER PLEADINGS, RAISES THE QUESTION AS TO WHETHER SHE WAS A FIT AND PROPER PERSON TO HAVE THE CARE AND CUSTODY OF THE MINOR CHILD AND THE FINDINGS OF FACT AND CONCLUSIONS OF THE LAW WERE RESPONSIVE TO THE ISSUE THUS RAISED.

Under Point II. counsel for Appellant argues that the proceedings were not had to determine whether Appellant was a fit and proper person to have custody of her child. We submit that this issue was raised by Appellant in her pleadings

and the Findings of Fact and Conclusions of Law and the Decree are in conformity with the issue thus raised. Counsel seems to recognize that this is so because he proceeds to dwell upon that part of the evidence in an attempt to show that Appellant was and is a fit and proper person to have the care and custody of the minor child.

Counsel cites the case of *Stuber vs. Stuber*, 244 Pac. 2d 650 for the proposition that merely because the mother of the child lived with a man whom she expected to marry does not in itself make her an unfit and improper person to have the custody of the child. With that proposition we have no argument, provided that the mother is otherwise qualified. The facts in this case are quite different than in the *Stuber* case. In this case, the Appellant associated almost constantly for approximately three years with a man other than the one she entered into a purported marriage with and during this period drank intoxicating liquor nearly every night and seldom returned to her home where her child was living earlier than 2:00 A.M. (Tr. 44-45-46, 71-72). Her whole attitude toward the child has been one of indifference and she has shown a total lack of filial attachment for the child. Appellant may not, as urged by her counsel, have had illicit relations

with Lee James, but the circumstantial evidence as pointed out herein would indicate otherwise.

Appellant cites the case of *Cooke vs. Cooke, et al.*, 67 Utah 571, 248 Pac. 83 and we adopt what was therein stated and submit that the evidence in this case is positive and not speculative as to the unfitness of the Appellant.

We recognize that, even though the evidence shows Appellant has been indifferent to the welfare of her child and that she is morally unfit to have its custody, if she has a right to revoke the consent these factors would not prevent her from so doing. But as will be hereinafter pointed out, the welfare of the child is a determining factor as to whether consent may be revoked.

### III.

THE RECORD DISCLOSES THAT APPELLANT FREELY AND VOLUNTARILY AND WITHOUT COERCION CONSENTED TO THE ADOPTION OF THE MINOR CHILD.

Appellant's first paragraph of his argument on this point has nothing to do with the question of coercion, duress, or persuasion but the state-

ments therein contained are so erroneous that we cannot let them go unchallenged. Contrary to what counsel for Appellant states, Sally was not taken from the nursery home by the grandmother, and the child was in the grandmother's home approximately one year after its return by Appellant from the nursery to the grandmother's home. The Court found such to be the case.

We now address ourselves to the question of coercion. In our Statement of Facts, we have set out nearly all, if not all, of the evidence concerning the question of coercion. Appellant claims that the attorney for Respondents and that Appellant's relatives coerced her into signing the consent to adoption. Appellant's own testimony shows that this attorney called on her five times during the course of about nine months (Tr. 30). Appellant states that she refused to sign any adoption papers on each of the first four visits but that on the fifth visit she agreed to go to Provo and sign the consent that the child be adopted. Appellant stated that three months elapsed between the fourth and fifth visits and that the attorney had not been in her presence more than one minute when she agreed to consent to the adoption (Tr. 21). The evidence quoted in the Statement of Facts shows that after the consent had been signed in open Court, Ap-

pellant was taken to her relatives and that in their presence she stated that it was in the best interests of Sally that the Jacobsens adopt the child (Tr. 25).

The grandmother is accused by counsel for Appellant of exerting coercion upon Appellant to consent to the adoption. The grandmother testified that after the Jacobsens took the baby, she did not see much of Appellant thereafter (Tr. 91) and we submit that the most that can be said about the grandmother's attitude and that of Appellant's aunts is that they were concerned about the welfare of the child and requested Appellant to either give the child a mother's love and attention or permit its adoption (Tr. 85-96). Other matters quoted by Appellant in her brief regarding the matter of coercion occurred some time after October 25, 1951, when her consent was given.

We are not clear as to why counsel for Appellant cites the cases of *Taylor vs. Waddoups*, found in 241 Pac. 2d 157, but whatever his purpose we feel the case supports our position. Mr. Chief Justice Wolfe, in his opinion, quotes Section 14-4-9, Utah Code Annotated 1943, hereinafter set forth verbatim and which in effect provides that the Court must examine all persons appearing before

it, separately. In obtaining Appellant's consent we did exactly what Section 14-4-9 requires and what the Court said in *Taylor vs. Waddoups* should be done. We think it must be assumed that when Appellant went into Court and gave her consent, that the Court discharged its duty. The Court saw her demeanor on the stand and explained to Appellant what would be the effect of her consent. There is not the slightest evidence in this record that on the day that Appellant gave her consent that she was under any strain or that she was suffering from discouragement or despair. On the contrary, the record is replete with evidence that she knew what she was doing, that she felt it was in the best interests of the child, and that her consent was voluntarily and freely given. The case of *Bilderback, et al. vs. Clark, et al.*, 189 Pac. 977 is not in point, but we agree with the sentence extracted from that opinion, which is found in Appellant's brief.

#### IV.

THE TRIAL COURT'S RULING THAT APPELLANT COULD NOT ARBITRARILY REVOKE HER CONSENT TO THE ADOPTION WAS CORRECT.

Before proceeding with our argument in support of our position that a parent may not arbitrarily revoke consent to the adoption where the consent has been freely given, we at the outset concede that adoption was unknown at common law and that the statutes must be strictly followed. In many of the cases to which reference will be made hereafter, the decisions turn upon the wording of the statutes and we think the decision in this case is also largely controlled by our statutes. Later we shall set forth those sections of our statutes having to do with adoption proceedings, but for the present we call attention to the case of *Stanford vs. Gray*, 42 Utah 228, 129 Pac. 423 which case interprets Sections 14-7-41 and 14-7-42, Utah Code Annotated 1943.

The plaintiff instituted suit in habeas corpus in the State of Utah to recover a minor child born out of wedlock. The mother, while living in California, wrote to the California Society for the Prevention of Cruelty to Children asking the Society to find someone willing to adopt the child. Later she signed an agreement authorizing the Society to place the child with someone for adoption and waiving notice of the hearing on the proceeding for adoption. The defendants were at that time living in California and the child was placed

in their home and later they moved to Salt Lake City. The plaintiff came to Salt Lake and instituted proceedings to recover the child. The lower court granted the writ. Our Supreme Court reversed the lower court and in its opinion, stated that it assumed that the laws of California were the same as those of Utah unless the contrary was shown, and the Court interpreted Section 720x27 Compiled Laws of Utah 1907, which is now Section 14-7-41 and Section 14-7-42 Utah Code Annotated 1943. In this case the mother sought to have her consent set aside, claiming that she executed the agreement under irresistible pressure of circumstances and that her mind at the time she signed the document was, and for several weeks prior thereto had been excited and disordered. The Supreme Court found this issue against her.

“We now come to the question of whether, under all of the facts and circumstances as disclosed by the record, the social and intellectual training, as well as the future happiness, of the child, would be better promoted by restoring it to the custody of Mrs. Hansen than by leaving it in the care, control and custody of appellants. As we have pointed out, the weight of authority, which of course includes the better reasoned cases, holds that.

where a parent in writing voluntarily relinquishes and surrenders the custody of his infant child to the custody of another, he cannot recover the custody of the child in his own right: and, where the parent in such case comes before the court seeking to recover the custody of the child the burden is on him to show, not on his own behalf, but on behalf of the child, that it is not receiving the proper care, or that its physical, moral and intellectual training is not what it should be. The right, therefore, of a parent in such case to the custody of the child, does not depend altogether on the question of whether he is a suitable person to have the care and custody of the child as counsel for respondent seem to contend. Tested by the foregoing rule, which we think is a wholesome one, do the facts in the case support the decree of the court? We think not. The court found, and the finding is supported by the evidence, that appellants, ever since the child was given into their custody, have 'kept, maintained, nursed, and supported him with the utmost care and tenderness and have formed a deep attachment and affection for him and are desirous of continuing to support and educate him \* \* \* and are amply able to maintain, educate, and support said child, and are in all respects fit and suitable persons to adopt him and to have his custody and control.' We do not wish to be understood as holding, or

even intimating, that the Hansens are unsuitable persons to have the care and custody of the child in question. What we do hold is that, Mrs. Hansen having voluntarily relinquished and surrendered her right to the care and custody of the child, the burden is on her to show that the parties who acquired the custody of the child by virtue and in pursuance of the relinquishment have in some way been derelict in their duty to the child, and that it would be better for the best interests of the child to take it out of their custody and return it to her. This she has wholly failed to do.” (p. 428)

Section 14-7-41, Utah Code Annotated 1943, reads as follows:

“No parent or guardian or other person, who by instrument of writing surrenders, or has surrendered heretofore, the custody of a child to any children’s aid society or institution, shall thereafter, contrary to the terms of such instrument, be entitled to custody or control or authority over, or any right to interfere with, any such child, and these same conditions shall prevail where the child is or has been delivered to a children’s aid society or institution by the action of any proper court.”

It will be noted that a parent who surrenders

the custody of a child to a children's aid society may not thereafter change his mind.

Section 14-4-4 of the Code is as follows:

"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 acknowledgment, 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."

It thus appears that there are but two ways in which a parent may give consent to the adoption of a child. (1) In the manner provided by Section 14-7-41, *supra.*, and (2) By appearing in court and consenting to the adoption. No express provision prohibits a change of mind by a parent

where he has appeared in court, yet it would seem consent given in court should be as final as consent given to a placement agency. Both agreements are in writing and the court is surely as able to judge whether the consent is voluntarily given as is the employee of the agency. It must be assumed in this case that the Court discharged its duty and if Appellant was acting under any emotional strain or coercion, we are certain that the court would not have permitted the Appellant to consent to the adoption.

We now proceed to discuss the authorities found in other jurisdictions. We believe that a majority of the authorities dealing with the question of the right of a parent to withdraw consent to adoption will be found in 138 ALR 1038, in 156 ALR 1011, and in the 1952 ALR Blue Book, Supplemental Decisions, 11th Issue. In discussing the cases hereinafter cited, we do so upon the premise that the Court's finding that no undue influence or coercion was used in obtaining Appellant's consent was correct.

It will be noted that the author states, in 138 ALR 1038, that in a majority of the jurisdictions where the matter has arisen the parent may arbitrarily effectively revoked consent. But even in

those cases it is said that in the reported decisions the question is left open whether in every situation the natural parent is entitled to arbitrarily withdraw consent after the adoption order has been made, but under this citation are many cases which hold to the contrary. See: *Wyness vs. Crowley*, 292 Mass. 461, 198 N.E. 758 in which the court said:

“... a natural parent who has duly consented to the adoption of a child by indorsing her consent upon the petition for adoption cannot thereafter arbitrarily withdraw her consent notwithstanding that at the time it is endeavored to revoke such consent the hearing has not been had on the merits of the petition and no final decree has been entered thereon.”

The trend of the more recent decisions seems to be contrary to the cases cited in 138 ALR, *supra*, as is shown below. In 156 ALR 1011, the author states:

“While, as brought out in the earlier annotation, there is authority for the view 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, \* \* \* (citing cases) \* \* \* and a few courts have indicated that the right to withdraw consent is absolute and not dependent upon any particular reason, \* \* \* (citing cases) \* \* \* it must now be said, in view of the later cases (arising, it will be noted in jurisdictions other than those represented in earlier annotation), that the trend of the more recent authority is toward the position that where a natural parent has freely and knowingly given the requisite consent to the adoption of his or her child, and the proposed adoptive parents have acted upon such consent by bringing adoption proceedings, the consent is ordinarily binding upon the natural parent and cannot be arbitrarily withdrawn so as to bar the court from decreeing the adoption, particularly where, in reliance upon such consent, the proposed adoptive parents have taken the child into their custody and care for a substantial period of time, and bonds of affection, in the nature of a 'vested right,' have been forged between them and the child."

In *Re Adoption of a Minor*, 144 Fed. 2d 644, and reported in 156 ALR at page 1001, is a case in which the facts are somewhat analogous to the instant case and the law which permits adoption is somewhat similar to the Utah law pertaining to that subject. We quote from the decision:

“The single issue of the case in one of law, whether a natural mother, who has freely and voluntarily given consent to the adoption of her illegitimate child, can, without cause, withdraw that consent and thus prevent the adoption when, as in the present case, the adoptive parents have accepted the child, paid the expenses of prenatal and postnatal care, made a home for the child and in all respects satisfied the requirements of the law governing adoption.”

The court, in its decision, quoted from *Wyness vs. Crowley* supra.:

“To accede to the contention that such voluntary consent may be withdrawn would be equivalent to saying that parties may come to a court, deliberately give their assent to actions by the court in matters affecting their interests, and afterwards, at their will and pleasure, return to the court and undo what they did because on a future day they did not like it.”

The court further says:

“We agree with this statement and think that Congress, in enacting the District statute, intended to prevent just such results as those denounced by the Massachusetts court.”

The District of Columbia statute is as follows:

“If adoptee is under twenty-one years of age, no decree of adoption shall be made unless the court shall find that the following persons *have consented to the adoption*: Adoptee, if fourteen or more years of age; and *the natural parents* or adoptive parents by a previous adoption, if living. The consent of the father of an adoptee born out of wedlock shall not be necessary unless he has both acknowledged the adoptee and contributed voluntarily to its support.”

The court further says:

“In interpreting this language the trial judge concluded that consent of the natural mother accompanying the petition was not sufficient; that in order to satisfy the law she must be actually, presently consenting at the time of the hearing and, presumably, until the final order of adoption has been entered. That, however, is not what the statute says. It speaks, instead, in the perfect tense—‘unless the court shall find that the following persons *have consented to the adoption*’ — in other words, it speaks of an act completed.”

Further, the court says:

“In our opinion, Congress intended that consent of a parent once given and acted upon

should not be withdrawn without cause.”

In the case of *Ex parte Barents* reported in 222 Pac. 2d 488 the California court held that consent for adoption could not be revoked. The facts, in brief, were as follows:

The action was one in habeas corpus instituted by the mother of an illegitimate child. The child was born on May 11, 1949. Four days later she signed a written instrument stating that she was giving the infant into the possession of the respondents for the purpose of adoption and that she would sign any further document necessary to effectuate such adoption. On June 17 respondents, having had the infant in their possession since the mother gave it to them, filed a petition for adoption. On July 28 the mother signed a consent to adoption in the presence of an agent of the Department of Social Welfare. On October 20 following, she gave to the Department a document entitled “withdrawal of consent”, stating that she did thereby withdraw her consent to the adoption of the child and thereafter she filed the suit in habeas corpus. No evidence was introduced and the case was disposed of purely upon issues of law.

It was the mother’s contention that although

consent to adoption had been given, she had a right to withdraw it at any time before the final decree of adoption should have been made by the Superior Court and therefore, having withdrawn her consent, that the court was without jurisdiction to proceed further in the adoption proceedings. This case was decided on October 2, 1950. In 1949 the California Legislature added a statutory provision which provided that once consent is given to adoption it could not be withdrawn except with court approval. This legislation went into effect after the consent of the petitioner had been given but before her attempted withdrawal of that consent. The court decided the case upon the basis of the law which was in effect prior to the enactment of the statute. The court, in its decision, says:

“But in our opinion petitioner here, having given her consent under the statute in force at the time and in the form in which she gave it, was not free to withdraw the same or to revoke it merely because she had changed her mind, whether that change originated in whim and caprice or rationally by reason of changed conditions, which latter ground she avers in her petition. When the Legislature, exercising its wellnigh plenary power over the subject of adoptions, required the consent of a parent or parents to the adoption of a child and when it provided that such consent

should be given by execution of a form prescribed by the Department and before an agent thereof; when it provided further that this consent should be accepted by the Department and filed in the adoption proceedings, it could only have meant, although not expressly so declaring, as is later did, that the consent which the statute required was then to be considered as having been given irrevocably. We think that from that moment on the consent continued without the power of revocation until the court should have ruled on the adoption. This assumes, of course, that the consent was, as the form declared it to be, fully and freely given without fraud or duress, but we think that when such real consent had been so given it was intended that the statutory requisite of consent had thereby been irrevocably supplied."

Another interesting California case is *Re Adoption of Pitcher*, found in 230 Pac. 2d 449, decided on April 27, 1951. In this case the child was born on December 20, 1949. A petition for adoption was filed on December 22, 1949. On January 30, 1950, a representative of the State Department of Social Welfare saw the mother relative to obtaining the usual background information and to see about obtaining the written consent of appellant to the adoption. Appellant was ad-

vised to think the matter over carefully and the agent returned in March, 1950 and at the time appellant signed the written consent. On April 19, 1950, Appellant, through her mother as guardian, petitioned the court for permission to withdraw her consent to the adoption on the claimed ground that she was embarrassed and confused at the time of giving her consent and that she was assured by the Social Welfare Department that she could withdraw her consent by merely writing a letter of withdrawal to the Judge of the court in which the adoption proceeding was pending.

The Social Welfare Department filed its written report reciting the facts generally as related and found that the minor child was receiving good care in the home of the proposed adopting parents and that they had built a nursery room for the child and had taken out a policy of insurance for the child's education. The petition for her withdrawal of consent was denied. Appellant appealed from that order and contended that the order should be reversed because there never was a valid consent given to the adoption due to the tender years of appellant, due to undue influence exercised upon her, and due to fraud and her mistake.

Section 226a of the California Code provides:

“Once given, consent of the natural parents to the adoption of the child by the person or persons to whose adoption of the child the consent was given, may not be withdrawn except with court approval.”

The court, in its decision, says:

“After hearing the evidence the court was justified in concluding that appellant knew or should have known that she could withdraw the consent signed by her only upon offering a suitable plan for the child and obtaining court approval of the withdrawal. The question as to whether the consent was obtained under mistake, fraud or undue influence, as well as the question of the reasonableness of the application for the order sought and the questions of the child’s best interest and welfare were all factual questions for the trial court to determine. A mere reading of the evidence produced shows that no abuse of discretion appears in the court’s ruling.”

and then the court cites a number of cases, many of which are found in 156 ALR, 1001.

Another interesting case is that of *Ex parte Schultz*, 181 Pac. 2d 585, from the Supreme Court of Nevada. This is an action in habeas corpus instituted by the mother of a child born out of

wedlock against prospective adopting parents. The child was born October 21, 1946 and on November 7, 1946 the mother signed a purported relinquishment for adoption. Formal request for the return of the child was not made by the mother until December 6, 1946 and the proceeding in habeas corpus was initiated January 29, 1947. The court poses three problems. (1) Was the release and relinquishment valid? (2) If valid, is it revocable? (3) If revocable, is it for the best interest and welfare of the child to allow it to be revoked? The statutes of Nevada pertaining to adoption are very similar to ours. In its decision, the court says:

“The principal question raised by this proceeding is the right of the mother to revoke her relinquishment. Counsel have fully briefed this point. The authorities cited indicate that many courts have permitted revocation at the discretion of the parent; others allow revocation if estoppel or welfare of the child do not intervene.\* \* \* (citing cases) \* \* \*

“Conversely many tribunals have denied the right to revoke, and base such denials on (1) principles of contract; (2) estoppel or other equitable grounds; (3) Public policy favoring adoption of children, particularly illegitimate children, or (4) the welfare of the child as

apparent from the facts.”

and among the cases cited is that of *Stanford vs. Gray*, supra. We quote what the court said:

“Ordinarily the law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another. Where, however, a parent, by writing or otherwise, has voluntarily transferred and delivered his minor child into the custody and under the control of another, as in the case at bar, and then seeks to recover possession of the child by writ of habeas corpus, such parent is invoking the exercise of the equitable discretion of the court to disrupt private domestic relations which he has voluntarily brought about, and the court will not grant the relief, unless upon a hearing of all the facts it is of the opinion that the best interests of the child would be promoted thereby.”

Another case which holds that the welfare of the child is paramount is that of *Walton vs. Coffman*, 110 Utah 1, 169 Pac. 2d 97.

## CONCLUSION

We respectfully submit that the evidence conclusively shows that Appellant's consent to the

adoption of her child by Respondents was voluntarily given and that Appellant was not and is not a fit and proper person to have custody and control of the minor child and that it would be in the best interests and for the welfare of the child that Appellant be not permitted to withdraw her consent, so that Respondents may complete the adoption proceedings.

Respectfully Submitted

DALLAS H. YOUNG

of the Firm of

YOUNG, YOUNG & SORENSEN

