

2002

Kimberly and Kenneth Scott v. Susan Garth Hardinger : Unknown

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH IN THE INTEREST OF B.B., A child under 18 years of age.	Supreme Court Case: 20020404-SC Appellate Case No.: 20000949 Juv. Case No.: 968282 001 Priority Number: 4
Kimberly and Kenneth Scott Respondents on Certiorari (Appellants in the Court of Appeals), v. Susan and Garth Hardinger, Petitioners on Certiorari (Appellees in Court of Appeals).	

**KIMBERLY AND KENNETH SCOTT'S OPENING BRIEF ON CERTIORARI
FROM THE UTAH COURT OF APPEALS**

**APPEAL FROM A VISITATION ORDER OF THE FOURTH DISTRICT
JUVENILE COURT HONORABLE JERIL V. WILSON, PRESIDING**

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LIST OF THE PARTIES

Current Parties

Baylie Scott is the center of this case. She is the child who was adopted by Kimberly and Kenneth Scott.

Kimberly (Kim) and Kenneth (Ken) Scott, Appellants in the Juvenile Court and the Respondents in this court.

Martha Pierce, Guardian Ad Litem for Baylie Scott on Appeal.

Susan and Garth Hardinger, Appellees before the Court of Appeals and Petitioners before this Court.

Former Parties

Alfie Dominique (Nick) Blundell, Biological father who was represented by Melissa Hawkley at the Termination of Parental Rights Trial.

Rose Blakelock, Attorney for Nick Blundell during divorce proceedings in the Fourth District Court.

Jenifer Blundell, biological mother who was represented by Chris Creer at the Termination of Parental Rights Trial.

Gary Weight, Attorney for Jenifer Blundell during divorce proceedings in the Fourth District Court.

Troy Crossly, first Attorney for Jenifer Blundell for the divorce case.

Darold McDade, Attorney General representing the Office of Recovery Services prior to the Decree of Adoption.

Kelly Frye, Guardian Ad Litem for Baylie Blundell during the Juvenile Court Proceedings.

Lorraine Warren, biological paternal grandmother and now biological paternal grandmother and adoptive maternal grandmother.

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JURISDICTION

Utah Code Ann. §78-2-2(3)(a) (Supp. 2002) grants jurisdiction to the Utah Supreme Court to review an opinion of the Court of Appeals by Writ of Certiorari. The Court granted Susan and Garth Hardinger (hereinafter “Hardinger”) petition

parenting verses the court's desire to support grandparent's desire to visit with grandchildren

2. Course of Proceedings and Disposition Below. The Proceedings originated in the Fourth District Court when the child's biological mother, Jenifer Blundell, filed a Petition for divorce. At that time, her child, Baylie, was residing with her so Jenifer had physical custody of Baylie. The child's biological father, Alfie Dominique (Nick) Blundell, filed an answer to the divorce complaint from jail. He was not allowed visitation while he was incarcerated. Nick's mother, Lorraine Warren, intervened and requested paternal grandparent visitation while Nick was incarcerated. The District Court granted Lorraine Warren temporary visitation. Upon release from jail, Nick sought visitation with his child, Baylie. Nick was granted supervised visitation. His sister Kimberly Scott and her husband Kenneth Scott (Appellants in this matter and hereinafter referred to as "Scotts") were appointed to supervise Nick's visitation with Baylie.

The biological mother, Jenifer Blundell, was having trouble with her family and with the law. Jenifer determined it would be in Baylie's best interest for the Scott's to have custody of Baylie. In accordance with her decision, Jenifer signed custody of Baylie to the Scotts. Based on this voluntary assignment of custody and

other factors the Scotts filed a Petition for Custody and Guardianship in the Juvenile Court. The issues related to Baylie were removed from the Fourth District Court to the Fourth District Juvenile Court based on the Petition alleging neglect.

Jenifer's parents, Susan and Garth Hardinger, filed a Petition in the Juvenile Court seeking custody and Guardianship be awarded to them. They did not and never have filed a petition for maternal grandparent visitation or adoption. While competing custody and guardianship petitions were pending, the Guardian Ad Litem for Baylie, Kelly Frye, filed a Petition to Terminate the Parental Rights of Nick and Jenifer Blundell. The Juvenile Court granted the Petition after an evidentiary hearing and terminated Nick and Jenifer's parental rights.

After two custodial evaluations recommending the Scotts be awarded custody and multiple mediation sessions, the Scott's and the Hardinger's signed a Stipulation whereby the Hardinger's Petition for Custody and Guardianship was withdrawn and the Scott's were awarded Custody and Guardianship over Baylie Blundell. The Hardingers were awarded visitation similar to the visitation normally awarded to a non-custodial parent in a divorce case as set forth by the Utah Legislature as the Utah Minimum Visitation Schedule.

The Scott's filed a Petition for Adoption. A Decree of Adoption was entered by the Juvenile Court. Upon the entry of the Decree of Adoption, Baylie Scott came into existence.

After the entry of the Decree of Adoption, the Hardinger's continued to spend time with Baylie. The Scotts and the Hardingers worked with a Special Master appointed by the Juvenile Court to facilitate timesharing. While the parties were addressing these issues, Baylie disclosed to the family therapist potential sexual abuse by Garth Hardinger. The Scotts suspended visitation pending the investigation by Child Protective Services.

At the direction of Child Protective Services investigator and the family therapist, the Scott's refused visitation with the Hardingers. While the Child Protective Services worked on an investigation the Hardingers demanded visitation and requested that the Juvenile Courts enter an Order requiring the Scotts to appear and show cause why they should not be held in contempt for violating the Guardianship and Visitation Order entered prior to the Decree of Adoption. The Scott's responded to the Order to Appear and Show Cause by filing a Motion to Quash the Order based on the juvenile court lacking jurisdiction.

The Juvenile Court denied the Scotts Motion to Quash the Order to Appear. The Juvenile Court entered an Order of visitation as well as an Order granting judgment against the Scotts for the Hardinger's attorney fees incurred to bring the matter before the Juvenile Court. Judge Wilson issued the Orders after refusing to hear testimony from the Scotts. The Scotts appealed the assertion of jurisdiction and subsequent orders to the Court of Appeals. The Court of Appeals reversed the Juvenile Court's assertion of jurisdiction and the award of attorney's fees to the Hardingers. The Hardingers sought and obtained certiorari to this Court.

STATEMENT OF THE FACTS

1. This case began with the Petition for Divorce filed on June 5, 1998 by Jenifer Blundell against Alfie Dominique (Nick) Blundell. (4th District Court Docket print out. Addendum 1).

2. Baylie Blundell is the biological child of Alfie Dominique (Nick) Blundell and Jenifer Blundell (4th District Court file, Petition and eventual Findings by Juvenile Court in support of the Order terminating Parental Rights and the findings in support of the Custody and Guardianship Order. (Juvenile Court Record (JCR) 278-286 & 338-343.)

3. Jenifer Blundell was granted temporary custody of Baylie Blundell by the 4th District Court. (District Court Docket, Petition for Custody file by the Scotts JCR 1-9.)

4. Lorraine Warren, as paternal grandmother, filed a Petition for Grandparent visitation. Temporary visitation was granted to Lorraine Warren (District Court Docket).

5. Nick Blundell was granted visitation with Baylie Blundell to be supervised by the Scotts. (District Court Docket).

6. February 23, 1999: Ken and Kim Scott filed a Petition for Custody and Guardianship in the Fourth District Juvenile Court seeking Custody and Guardianship of Baylie Blundell (JCR 1-23).

7. Jenifer Blundell signed an agreement to transfer physical custody of Baylie Blundell to the Scotts. (Attachments to Petition for Custody JCR 1-23).

8. The District Court certified the issues of custody and visitation to the Fourth District Juvenile Court. (District Court Docket showing Order of Transfer and Amended Order of Transfer of September 28, 1999: JCR 229-235).

9. On May 5, 1999, a Pre-Trial hearing was held in the juvenile Court at which time temporary legal and physical custody was awarded to the Scotts. (JCR 84-88).

10. On May 12, 1999, Maternal grandparents, Susan and Garth Hardinger, filed an Answer to the Scott's Petition as well as a Counter Petition seeking custody and guardianship. (JCR 49-57).

11. On June 15, 1999, the Guardian Ad Litem filed a Petition on behalf of the child to terminate the biological parent's parental rights. (JCR 134-139).

12. On June 16, 1999, the court entered an Order continuing temporary custody to the Scotts and setting forth visitation for the grandparents, the Hardingers. (JCR 148-151).

13. Dr. Daren Featherstone was appointed as an evaluator to complete a custodial evaluation. (JCR 148-151).

14. Dr. Featherstone submitted his evaluation to the Court and the Hardingers requested a second evaluation be prepared. An Order was signed for a second evaluation to be completed by Dr. Robert Williams. (JCR 221-224).

15. On November 23, 1999 an evidentiary hearing was held on the Guardian Ad Litem's Petition to Terminate Parental Rights. The Court granted the

Petition to Terminate Parental Rights and an Order with supporting findings terminating the biological parent's parental rights entered on January 28, 2000. (JCR 278-286).

16. On March 28, 2000 a hearing was held wherein the Scotts and the Hardingers entered a Post-Mediation Stipulation on the record. The Stipulation stated that the Hardingers would withdraw their Petition for Custody and Guardianship, receive visitation privileges, and that they would support the Scott's adoption of Baylie. (Clerk's Minute Sheet, JCR 291).

17. On May 19, 2000, the Findings of Fact, Conclusions of Law and Order of Custody and Decree of Guardianship were entered. The court appointed Elizabeth Dalton to act as a Special Master to help the parties implement the Court's Orders. (JCR 314-317).

18. On May 19, 2000, the Guardian Ad Litem was released. (JCR 344-346).

19. On June 5, 2000, the Juvenile Court granted the Scott's Petition for Adoption and entered a Decree of Adoption. (Facts set forth in the Juvenile Court's October 24, 2000 findings JCR 520-525).

20. The Decree of Adoption is filed as case number: 968282-001; however, the Juvenile Court has assigned the adoption action case number of: 986074. (Decree set forth in Addendum 3).

21. File 986074 is a sealed Adoption File. No Motion has been made to un-seal the file and the file has not been reopened. (Court's Findings of Fact Denying Motion to Quash, JCR 520-525).

22. The Decree of Adoption does not provide for visitation. (Decree set forth in Addendum 3 Findings of Judge Wilson dated October 24, 2000 JCR 507-511).

23. On June 27, 2000, a Notice of the Termination of Parental Rights and the Entry of Custody and Guardianship Order were filed in the Juvenile Court and the District Court cases. (JCR 347-348, District Court Docket).

24. The Hardingers filed a Motion for Order to Show Cause in Case 968282-001 on August 11, 2000. The Hardingers claimed that visitation was terminated during July 2000. The Order was issued August 21, 2000. (JCR 360-364).

25. On August 25, 2000, the Scotts filed a Memorandum and Motion to Quash the Order requiring them to appear in case 968282-001. (JCR 366-389).

26. On August 31, 2000, a Motion to re-instate the Guardian Ad Litem was filed. (JCR 391-392).

27. On September 6, 2000, a hearing was held on the Motion to Quash and on the Order to Show Cause. The Court entered an Oral ruling denying the Motion to Quash and entered an Order of visitation. (JCR 467-468 Clerk's Minute Sheet. – The Appellant requested a Transcript from this hearing. However, the Juvenile Court's recording equipment was not working on the 6th and the reporter is unable to prepare an intelligible transcript. The Juvenile Court clerk filed a Minute Entry of the proceedings and the minute entry will be cited to.)

28. The Scotts, through their attorney of record, requested and were denied the opportunity to give testimony in response to the Order to Show Cause. (JCR 467-468 Clerk's Minute Sheet and Court's written Findings and Order.)

29. The Scott's Oral Motion to Certify the Case to the District Court was denied. (Court's Findings of Fact Denying Motion to Quash, JCR 520-525, Clerk's Minute Sheet on 9/6/00 hrg. 467-468).

30. The Scott's Motion to Stay Visitation pending Appeal was denied. (Court's Findings of Fact Denying Motion to Quash, JCR 520-525, Clerk's Minute Sheet on 9/6/00 hrg. 467-468).

31. On October 24, 2000, over the Scott's objection the Juvenile Court entered an award of \$2,795.17 in attorney's fees to the Hardingers. (JCR 517-519 and 487-499 & 514-516).

32. On November 1, 2000, the Scotts filed a Notice of Appeal. (JCR 528-530).

33. On November 1, 2000, under protest and pending resolution of the Appeal, the Scotts filed a Petition to Modify the Visitation Portion of the Custody and Guardianship Order. (JCR 535-538).

SUMMARY OF ARGUMENT

The Court of Appeals correctly viewed this case as a determination of subject matter jurisdiction. This case hinges on the interrelation of different aspects of statutorily created law and a court of limited jurisdiction. The case began as a case in the District Court dealing with the dissolution of a marital contract. The case progressed to the Juvenile Court because of the parents neglecting the child. Finally, the case was completed as an adoption wherein a legal birth occurred and, in the eyes of the law, a new child was created. The petitioners ask this court to allow them to turn a blind eye to the adoption and enforce the visitation provided for in the guardianship order.

The Hardingers never filed a Petition for Grandparent Visitation. This is not a grandparent visitation case and it can't become one because the Hardingers are not legal grandparents of Baylie. This case is not a contract case about a chattel. This case is about a child and the child's best interest. The parents have a constitutionally protected interest in making decisions for this child without the state interjecting itself into the home. In Utah, adoptions are creatures of statute. The legislation is clear, unambiguous and distinct from contract law. The Juvenile Court is a court of equity created by statute and has limited jurisdiction. Until there is a post adoption reason to create jurisdiction, there is no new basis for the Juvenile Court to act. The Scotts agree that the Juvenile Court retains jurisdiction to enforce valid orders. That is not the issue before this court. The issue is whether the juvenile court can enforce an order that is vacated by the Decree of Adoption.

The Notice of Appeal adequately identified the issues to be reviewed. Because the Juvenile Court did not have subject matter jurisdiction or personal jurisdiction to require the Scotts to appear at the Order to Show Cause Hearing, the Juvenile Court was incorrect in awarding attorney fees against the Scotts. The Court of Appeals was correct in reversing the award of attorney's fees. The notice

of appeal is to be construed liberally and was sufficient to notify the litigants of the issues to be reviewed.

**ARGUMENT
POINT I
THE UNDERLYING ORDER WAS FINAL AND APPEALABLE**

The Hardinger's basic premise is correct, "An Appeal as of right may be taken only from a final Order. A final Order is one which 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" If the juvenile court not erroneously asserted jurisdiction the case would be over. The granting of the Motion to Quash certainly would be a final order. If court enforced visitation would have ended, voluntary visitation would have commenced and judicial insertion into this family would be withdrawn.

It is difficult to determine when juvenile court orders are final. In many cases the juvenile court is required by statute to make a series of orders. The order in this case is similar to an adjudication order wherein the juvenile court makes a finding of jurisdiction, grants relief, and then schedules review hearings. See, In re M.W., 2000 UT 79, ¶26, 12 P.3d 80. In fact, the Court of Appeals relied on this language to determine that in the juvenile court, the denial of the motion to quash is a final order.

It would be an error to adopt the argument of the petitioners and to treat this as an on going dispute and that the Order is not final. The child in this matter will be seven years old on July 29, 2003. If this court adopts the argument of petitioners it will be at least eleven more years before any final Order issues. The Hardingers realize that their ability to force visitation with Baylie is at stake. If a final order has not issued, the Hardingers will have a great incentive to prevent final orders from ever issuing. Given the nature of the proceedings in this case, the Order denying the Motion to Quash is a final Order. The issues not decided at the time of the hearing are distinct from the jurisdictional issue addressed by the motion to quash. The juvenile court asserted jurisdiction and then entered on going orders based on the assertion. In a district court case, the issue of jurisdiction might be more amenable to later resolution. The Juvenile Court is a court of limited jurisdiction. The issue of whether the parties should be in juvenile court in the first place must be decided before the parties spend a child's childhood litigating visitation.

The Decree of Adoption was entered on June 6, 2000. (TR 520-525). The Order to appear before the Juvenile Court was signed by Judge Wilson on August 21, 2000. (TR 364-365) The Order to Show Cause Hearing was held on

September 6, 2000. (TR 467-468) The hearing was to be a bifurcated hearing. The first segment of the hearing was on the Motion to Quash and the Juvenile Court jurisdictional issues. After the Juvenile Court ruled on the Motion to Quash, the Scott's notified the Juvenile Court of their intent to Appeal. The Scott's motioned the Juvenile Court to stay the proceedings pending the appeal. (TR 00467) The Juvenile Court denied the motion. (TR 00467) Over the Scott's objection, the Juvenile Court proceeded to act on its assertion of jurisdiction. The juvenile court required ongoing visitation and ordered an investigation into the suspected sexual abuse by the grandfather.

The Scott's presented the Juvenile Court with an Order denying the Motion. That Order separated the jurisdiction issue from the ongoing visitation and custody related issues. The Juvenile Court refused to sign the Order Denying the Motion to Quash. (TR 507-511) Instead, the Juvenile Court directed the parties to prepare Findings of Fact, Conclusions of Law and an Order. The parties did so and jointly submitted the documents to the Court. The court declined to sign the jointly proposed order. (TR 520-525) The Court prepared its own Findings, Conclusions and Order. The Court's Order inappropriately mixes the resolved jurisdiction issue with the ongoing visitation and custody issues.

The Hardingers' brief to the Court of Appeals agreed that the parties need resolution, but that jurisdiction can't be conferred on the appellate courts by stipulation. Judge Wilson stated on the record that the issues in this case need appellate direction. Prior to the decision by the Court of Appeals, the Juvenile Court entered an Order staying all proceedings in Juvenile Court until resolution of the Appeal. Since the Court of Appeals' decision, no actions have been taken in the Juvenile Court because the Juvenile Court does not have jurisdiction.

The Hardingers cite, Little v. Mitchell, 604 P.2d 918, 919 (Utah 1979) as controlling authority that the issue is not ripe for appeal. However, Little was before the Court in a procedurally different context. The Little case was before the Court on an appeal based on the Trial Court's Rule 54(b) certification. In that case, there were multiple claims brought by Plaintiffs against the State of Utah. The State moved to dismiss on the grounds of Sovereign Immunity. A claim of Sovereign Immunity requires factual findings and the case was not ready for appeal. However, in this case, the factual findings have been made. By affirming the Court of Appeal's reversal of the Juvenile Court's assertion of jurisdiction this case will be resolved. In Little there was no final judgment. The case should not

have been before the Court of Appeals. Therefore, in this matter, In re: B.B., there is a final judgment which is ripe for review.

The Hardingers cite, R.H.D. v. S.F. (In re Baby K), 967 P.2d 947, 950 (Utah Ct. App. 1998). In R.H.D. the Appellant sought to appeal a denial of his Motion to Dismiss and his Motion to Reconsider. In R.H.D. the Juvenile Court had not entered an adoption. There was not a final order to be appealed from and the Court of Appeals was correct to strike the appeal and send it back to the lower court for resolution.

The Hardinger's also cite A.J. Mackay co. v. Oakland Construction Company, 817 P.2d 323 (Utah 1991) as controlling authority for dismissal of the Appeal. A.J. Mackay is also not on point. In A.J Mackay the parties took an appeal while an underlying counterclaims were still pending. However, in the present case, there is no counter-claim to the Motion to Quash. The Juvenile Court has improperly asserted jurisdiction.

The Hardingers declare that resolution is necessary on one hand but continue to contest jurisdiction on the other hand. The Hardingers refuse to take action to

clear up the jurisdictional issues.¹ The Hardingers allege there are remaining issues of on going visitation, make up visitation and costs. Resolution of these all hinge on whether the Juvenile Court has jurisdiction.

A. THE COURT COULD TREAT THIS AS AN INTERLOCUTORY APPEAL

In Williams v. State, 716 P.2d 806 (Utah 1986) this court stated that, “In extraordinary cases, we may choose to treat a purported [appellate rule 3 appeal of right] as an interlocutory appeal under [appellate rule 5].” At 808. Although no reported cases since Williams have taken this course of action, it would be appropriate in this case.

If the Juvenile Court would have entered a final order pursuant to 54(b) or granted a motion for an interlocutory appeal pursuant to Rule 5, the issues before the Court of Appeals and this Court would be the same. The Findings and Order appealed from would have been the same. The Statement of Facts would have been the same. The Question of Law would have been the same. The issues raised would have been the same. The need for an immediate appeal would have been

¹ While Hardingers argument is correct that the parties cannot agree to jurisdiction, the Hardingers could agree to dismiss, without prejudice the pending matters in the juvenile court. If this court finds jurisdiction, the pending issues can be re-filed with the juvenile court. If this court finds no jurisdiction, the matter is resolved.

An Appeal could be taken and the dispute between the parties resolved.

the same. The parties needed direction from the Court of Appeals whether to drop all litigation in the Juvenile Court or to continue litigating. The Hardingers maintain the following issues are remaining: make up visitation; a change of custody²; more specific orders relating to phone visitation, and; re-imbursement for counseling costs. These determinations hinge on whether the juvenile court has jurisdiction. The jurisdictional issue should now be decided.

Had the Scotts felt the issue was not ripe or had the Court of Appeals dismissed the case on the Hardinger's Rule 10 Motion for Summary Disposition it is likely the Court of Appeals would have granted a Petition for Interlocutory Appeal or the Juvenile Court would have granted a URCP 54(b) Motion for a final judgment.

The issues raised now are no different than the issues that will be raised. While the Scotts appealed this Juvenile Court's Order, the Hardingers continued relying on the Orders. The Hardingers exercised visitation pursuant to the Juvenile Court's Order until the Court of Appeals correctly reversed the Order. Since then,

² The Scotts maintain that a change of custody would not be allowed as the parties are no longer the same. An Order related to the custody of Baylie Blundell would be of no effect as in the eyes of the law she no longer exists. If the Court could change custody, the Hardingers now have to overcome the parental presumption afforded the Scotts.

the Scotts have been allowing visitation, as they believe it to be in Baylie's best interest.

The necessity for immediate resolution is clear. Baylie is almost seven years old. She has been at the heart of litigation since she was less than two. If the appeal is dismissed for lack of a final judgment to appeal from, the parties will return to Juvenile Court. The requests made by the Hardingers will be granted or denied. The matter will then be brought before the Court of Appeals for another decision.

POINT II
THE SCOTT'S EFFECTIVELY APPEALED FROM THE AWARD OF
ATTORNEY'S FEES

A. NOTICES OF APPEAL ARE TO BE LIBERALLY CONSTRUED

The Notice of Appeal in this case was filed within 30 days of Judge Wilson issuing a decision. The Notice of Appeal notified the Hardingers of the Scotts intent to appeal. This notice should be liberally construed to include the assertion of jurisdiction and the award of attorney's fees based on that assertion. See, Roberson v. Draney, 54 Utah 525, 182 P 212, 213 (1919). Notice had been given to the Hardingers in open court, before the entry of the judgment for attorney's fees. A court without jurisdiction in the first place certainly has no jurisdiction to

enter an award of attorney's fees. The Court of Appeals was correct in reaching this issue. Even if the Notice of Appeal was not a model of clarity, the Hardingers did not rely on the notice to their detriment.³

**B. THE JUVENILE COURT VIOLATED DUE PROCESS BY
AWARDING ATTORNEY FEES**

On October 24, 2000 the Juvenile Court entered an award of attorney's fees in favor of the Hardingers against the Scotts in the amount of \$2,795.17. The Order does not make Findings of Fact or reach Conclusions of Law upon which the Order and Judgment are granted. For the Juvenile Courts failure to make appropriate Findings of Fact alone, the Order and Judgment the Court of Appeals was correct in reversing the award.

The Juvenile Court did not take evidence and could not have made sufficient findings to support the Order and Judgment. The Juvenile Court's Findings of Fact, Conclusions of Law and Order dated October 24, 2000, fail as a matter of law.

³ They did attempt to execute on the attorney fee judgment. Judge Wilson denied their attempt and issued a stay of all proceedings pending resolution by the Court of Appeals.

Civil contempt of Court is a serious matter. Contempt of Court in the United States is based on English Common Law. For some types of contempt the legislature has enacted statutes. Contempt of Court is either direct when committed in the presence of the Court or indirect when committed outside the presence of the Court. Indirect contempt is at issue in the case on review.

In Von Hake v. Thomas, 759 P.2d 1162 (Utah 1988) this court established the standard for contempt:

Indirect contempt, in contrast to direct contempt, can properly be adjudged only in a proceeding more tightly hedged about with procedural protections. The due process provision of the federal constitution requires that in a prosecution for a contempt not committed in the presence of the court, "the person charged be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf." Burgers v. Maiben, 652 P.2d at 1322; *see* U.S. Const. amend. XIV; cf. Robinson v. City Court ex rel. City of Ogden, 112 Utah at 42, 185 P.2d at 259 (applying Utah Const. art. I, §12 to criminal contempt proceedings). These protections are amplified upon in the Code, which requires, *inter alia*, that in a case of indirect contempt, an affidavit must be presented to the court reciting the facts constituting the contempt in order to ensure that the court and the person charged are informed of the conduct alleged to be contemptuous. Utah Code Ann. §78-23-3 (1987); Robinson, 112 Utah at 41, 185 P.2d at 258." VonHake v. Thomas, 759 P.2d 1162 (Utah 1988).

The Juvenile Court failed to provide the Scotts procedural due process. The Scotts were not allowed to call witnesses. The Scotts were not allowed to testify. The Scotts were not allowed to examine the witnesses against them. The Scotts requested all of the above to preserve the error for review by both the Court of Appeals and now this Court.

POINT III
THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE
JUVENILE COURT LACKED JURISDICTION TO ENTER POST
ADOPTION ORDERS

The child, Baylie, first came within the jurisdiction of the juvenile court in February of 1999 when the Baylie was only two years old and in diapers. Baylie is now in first grade and learning to read. The juvenile court obtained jurisdiction because Baylie's biological parents were neglecting her. Nick and Jenifer Blundell were spending more time in jail than out of jail. Baylie couldn't wait for her parents to get their lives straightened out. Neither could society. The Guardian Ad Litem realized this and sought termination of parental rights to assure that Baylie had permanency. Now Baylie has stable parents who love her very much and care for her. Her adoptive parents seek to do what is best for Baylie. That includes some on going contact with Susan and Garth Hardinger. That does not mean

midweek visits every week, every other weekend, every other holiday and over half of the vacation days from school. The parties do not even live in close geographical proximity anymore. It is time to end the litigation and allow Baylie a chance to thrive in her new family at the direction of her parents.⁴

The juvenile court's jurisdiction was warranted and appropriately provided for Baylie's needs. The juvenile court's jurisdiction ended upon entry of the Decree of Adoption. The Adoption has not been modified, appealed, set aside or even re-opened. The parties are in post adoption roles and have post adoption rights. Baylie's former aunt and uncle are now her legal parents. Baylies's former grandparents are replaced with new grandparents.⁵ The court has Decreed that the Scotts are Baylie's parents and now this Court should support the Scott's as parents.

The Court of Appeals decision in this matter is a correct statement of the law:

⁴ A majority in Troxel v. Granville (which will be discussed in detail infra.) noted that prolonged litigation over a visitation petition may become an unacceptable burden on the parent's right to make decisions for his/her children. (See plurality and Kennedy opinions, 530 U.S. at 75, 101, 120 S.Ct. at 2065, 2079.) Specifically, when such litigation becomes "disruptive of the parent-child relationship," it may violate constitutional protections. Presumably other disruptions of the parent-child relationship also violate these protections. The Scotts submit that the circumstances of this litigation fit this pattern. Thus even if the court finds the visitation order was enforceable when entered, it may no longer be enforceable on its face in light of the Troxel decision.

⁵ While legally the Hardingers are no longer Baylie's grandparents, The Scotts recognize Baylie should have on going contact with them because they are important to Baylie.

“Hence, the dispositive issue is whether a decree of adoption is an "order of the court" that terminates the juvenile court's jurisdiction. To resolve this issue, we turn first to the plain language of Utah's juvenile court statutes and adoption statutes. See State v. Fixel, 945 P.2d 149, 151 n.2 (Utah Ct. App. 1997) ("[T]he primary consideration in statutory construction is 'to give effect to the legislature's intent. To discover that intent, this court looks first to the plain language of the statute.'" (Citation omitted.)); see also Lyon v. Burton, 2000 UT 19, ¶17, 5 P.3d 616 ("The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and 'with other statutes under the same and related chapters.'" (Citation omitted.)).

¶12 Utah's juvenile courts are creatures of statute, and thus are courts of limited jurisdiction. See In re adoption of Trimble, 16 Utah 2d 188, 398 P.2d 25, 26 (1965); In re S.L., 1999 UT App 390, ¶52, 995 P.2d 17 (Wilkins, P.J., concurring). Because they are courts of limited jurisdiction, juvenile courts are allowed to do only what the legislature has expressly authorized. See In re S.L., 1999 UT App 390 at ¶52 (stating juvenile court "powers are necessarily limited"). Utah Code Ann. § 78-3a-104 describes the bases for the juvenile court's original jurisdiction. In this case, the juvenile court acquired jurisdiction over B.B. because she was allegedly abused and neglected. See id. § 78-3a-104(1)(c). The juvenile court ultimately granted the guardian ad litem's petition to terminate the parental rights of B.B.'s biological parents. See id. § 78-3a-411. At that point, B.B. had no legal parents and the juvenile court had jurisdiction until a permanent custody order or adoption was achieved. See id. § 78-3a-104(1)(c). Once the juvenile court granted the Parents' petition for adoption, the original basis for jurisdiction over B.B. ceased to exist because B.B. was no longer an abused or neglected child and permanency had been achieved. See generally Utah Code Ann. §§ 78-3a-312 to -313 (Supp. 2001).

¶13 Based on the above statutory provisions, this court has held that visitation rights of both biological parents and grandparents end upon termination of parental rights. See In re A.B., 1999 UT

App 315, ¶21, 991 P.2d 70 ("Grandmother's visitation rights were extinguished by operation of law when the court terminated her child's parental rights."); Kasper v. Nordfelt, 815 P.2d 747, 751 (Utah Ct. App. 1991) ("[W]here a child has been released [for adoption] any visitation rights of the child's natural family end with the initiation of such adoption proceedings.").

The Hardingers assert that this is a case about the juvenile court's retained authority to enforce valid orders.⁶ As noted in a footnote of the Court of Appeals decision, the Hardingers cited Cramer v. Petrie, 637 N.E.2d 882 (Ohio 1994), for the proposition that allowing the Parents to disregard the Pre-adoption Visitation Order encourages disobedience of juvenile court orders. Cramer was appropriately distinguished because in Cramer the party sought enforcement of a child support order that was violated prior to the child's emancipation, although the enforcement action commenced after emancipation. See id. at 883. Unlike in this case, there was

⁶ In light of the *Troxel* decision, the prior order that grants visitation to Hardingers may not be enforceable. The U.S. Supreme Court itself has now indicated that Troxel is by no means limited to Washington State or to statutes as broad as Washington's former statute. In Dodge v. Graville, 150 L.Ed.2d 745, Cause No. 00-1300, by order issued June 29, 2001, the Court granted certiorari and summarily vacated and remanded an Arizona order, requiring that the order be reconsidered in light of *Troxel*. The order in question had applied to the grandparent visitation context one or more Arizona statutes normally used in post-divorce situations when one parent has alienated the child's affections from the other parent. By vacating and remanding the trial court's order, with specific instructions for the Arizona Court of Appeal to apply *Troxel*, the U.S. Supreme Court has indicated that *Troxel* applies to orders other than initial grandparent visitation orders and in states where the statutory requirements for obtaining a grandparent visitation order are significantly greater than in *Troxel* itself.

not a later order that effectively vacated the prior order. So long as new orders do not issue, the juvenile court retains jurisdiction to enforce its valid orders. This case is not about retained jurisdiction to enforce valid orders. This case is about the effect of a Decree of Adoption on a prior order that was valid when entered.

The law creating the court's authority to enter a Decree of Adoption is clear. Specifically, U.C.A. §78-30-9, which states:

“The court shall examine each person appearing before it in accordance with this chapter, separately, and, if satisfied that the interests of the child will be promoted by the adoption, it shall enter a final decree of adoption declaring that the child is adopted by the adoptive parent or parents and *shall be regarded and treated in all respects as the child of the adoptive parent or parents.*” (emphasis added)

Adoptions establish finality in the best interest of a child. An adoption may not be contested after the final decree of adoption is entered. U.C.A. §78-30-4.16(3). The Hardingers can't contest the adoption so instead they seek to ignore the adoption and continue enforcing the guardianship order.

The Court of Appeals relied on appropriate precedent. Kasper v. Nordfelt, 815 P.2d 747 (Utah App. 1991). In Kasper a young unmarried mother gave birth to a child. The mother then gave the child to LDS Social Services so the child could be adopted. LDS Social Services placed the child with prospective adoptive

parents who filed for adoption. The Grandparents sought to intervene in the process and filed a competing Petition for Adoption or in the alternative Guardianship. The Grandparents were granted temporary custody. During the proceedings the temporary custody was transferred to the foster parents who ultimately adopted the child. The grandparents appealed the denial of their visitation and adoption petitions. The appellate court held regarding the Grandparents' petition for visitation or custody:

“Although ... under some circumstances family relationships might be of such a nature that their application to adopt should be given consideration, we do not find such a circumstance here, where the only living parent of the child *deliberately and thoughtfully decided to place the child for adoption with an agency, and not with the paternal grandparents*. We think the integrity of such a decision, involving a critically important parental right, must be preserved, not only for the stability and well being of the child, but also for the protection for the adoption process and its purposes. As the *Wilson* court pointed out: (emphasis added)

If the law recognized any right of custody beyond the parents, the number of potential protestants, such as grandparents, brothers and sisters of the parents (aunts and uncles of the child), or immediate relatives, would create a situation so fraught with possibilities for troubles as to make the placement of children difficult if not entirely impractical, a result which we agree should be avoided. Wilson v. Family Servs. Div., 554 P.2d 227, 229 (Utah 1976).”

Having established the basic tenants of the concept of adoption, the Kasper court further discusses the proper application of finality when a party seeks visitation post-adoption. Kasper specifically addresses this problem:

[The] Grandparent visitation statute [is] not intended to indirectly liberalize the strictly worded adoption statute; *Mitchell v. Doe*, 41 Wn.App. 846, 706 P.2d 1100, 1102-03 (1985) (the legislature did not intend that the statute regarding visitation rights of noncustodial parents or others to alter the protection afforded adopted children and their new families from disturbances by the child's natural family). For other examples, see *L.F.M. v. Department of Social Services*, 67 Md.App. 379, 507 A.2d 1151, 1154, 1156-57 (1986);

In addition, *the adoption statute suggests that grandparent visitation cannot carry over into an adoption where all other rights of the natural family have been extinguished*. Utah Code Ann. §78-30-9 (Supp. 1991) (after adoption, "child shall be regarded and treated in all respects as the child of the adoptive parent or parents."); Utah Code Ann. §78-30-10 (Supp. 1991) ("After that decree of adoption is entered, the adoptive parent or parents and the child shall sustain the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." (Emphasis added))

In the case of In Re Adoption of A.B., 991 P.2d 70,76 (1999), the case Kasper is revisited. The termination of the natural parents' parental rights also terminated the grandmother's rights to exercise grandparent visitation. Id. Additionally, the A.B. court adds in a footnote that "[v]isitation between grandmother and the children is now at the discretion of the adoptive parents." Id. This footnote is directly on point in the case under review. The former

grandparents do not have a legally enforceable right to visit. Here the Scotts, as parents, have and likely will continue to allow visitation. The Scotts are seeking protection of their parental rights.

A.B. points out in footnote one, *supra*, that the visitation of the children and the grandparent in that case was to be left to the parents discretion. Parents are expected to exercise discretion. Society goes to great lengths to protect fundamental parental rights. Significant procedural safeguards are in place to protect these rights. Once those rights are terminated, new rights need to be created. In the case under review, the Scott's parental rights recognized by the Court of Appeals and those rights should also be affirmed by this Court.

It is the law of Utah that an adoption terminates the rights of previous, natural, family members. The logic behind this law is beyond reproach, and yet the petitioners want to force Baylie Scott to accept a duality. In essence, the law has legally cloned her and placed Baylie Scott/Blundell in a position where she lives in two different periods of time. Baylie Blundell as the first person, a pre-adoptive individual, has been ordered by this court to associate with and to maintain a relationship with her biological mother and with her biological

grandparents. Yet Baylie Scott is supposed to integrate into her new family and be a sibling to Tausha and Zachary Scott.

Not only is this a confusing set of facts frustrating to a young child, but the adoptive parents, Kenneth and Kimberly Scott, are forced to endure a similar duality. At one point the Scotts were asked, by the Juvenile Court, if they would accept Baylie as their own child. The Scotts were asked to treat her in all respects as their natural daughter. They were asked to provide for Baylie, to care for Baylie, and to be Baylie's parents. If the Scotts were to divorce, Kenneth would be required to pay child support; the Hardingers would not. In 1991 Kenneth made a jump into parenthood the first time by adopting his step children, Tausha and Zachary Scott. In that adoption, the natural parents and grandparents do not have rights to visitation.

The Scotts are required by law to accept the rights and responsibilities of adoptive parents. While being required to make the psychological jump into parenthood, the Scotts are at the same time expected to be "non-parents" according to a prearranged visitation schedule. Thus, these adoptive parents are being required to comply with a visitation order and turn their daughter over to the Hardingers for visitation without their rights to determine if said visitation is

appropriate for their child. This is not a situation that any non-divorced natural parent would be forced to endure. The Juvenile Court has created an unworkable situation where parents have been created, yet the Guardians have not been terminated.

In this case Kenneth and Kimberly Scott, by law have all of the rights, powers, and privileges of a natural parents except on every other weekend, every other birthday, every other Fourth of July, every other Thanksgiving, and every other Christmas. Essentially then, every other important event in Baylie's family life is not spent with her new legally recognized family. This duality cannot continue. Either Kenneth and Kimberly Scott must be allowed to be parents-in-fact and not just quasi parents-in-law, or the concepts of adoption law will be re-written by this Court.

A. The United States Supreme Court's opinion in Troxel v. Granville is controlling

The United States Supreme Court has addressed the issue of parental rights versus third parties be they grandparents or not. So long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's

children. Troxel v. Granville, 530 U.S. 57, 68-69, 120 S. Ct. 2054, 2061 (2000).

As parents, the Scotts have made a decision to limit the amount of time that Baylie spends with the Hardingers. Moreover, Troxel acknowledged that the desirability of any grandparent-grandchild contact is for the parent to judge:

In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination. 530 U.S. at 68-69, 120 S. Ct. at 2062, emphasis added.

The Scotts have the right to make this determination. Even if they made a different determination before becoming Baylie's parents, they have that right now as her parents to decide what is in her best interest. Raising a child is not a static event. It requires flexibility and responsiveness to a child's needs. The courts are not equipped to make these daily decisions. A child's concept of time does not allow for studied review by a court. The court presumes the parental decision is correct and has a fundamental right to make decisions concerning the care, custody and control of their children. Id., See, Meyer v. Nebraska, 262 U.S. 390, 399, 401,

43 S.Ct. 625 (1923); Pierce v. Society of Sisters, 268 U.S. 745, 753, 102 S.Ct. 1388 (1982), In re S.A. v. State, 2001 Utah Ct.App. 307, 37 P.3d 1166.

In Parham, et al. v. J.R., et al., 442 U.S. 584, at 602-603, (1979) the U.S. Supreme Court summarized in the clearest terms the bedrock legal principle that parents are presumed to act in their children's best interests.

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . . That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."

Similarly, in Hodgson v. Minnesota, 497 U.S. 446, at 450, 110 S.Ct. 2926 (1990), the United States Supreme Court noted that "the State has no legitimate interest in questioning one parent's judgment . . . or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child."⁷ Troxel v. Granville, as discussed above, is the

⁷ *Hodgson* reaffirmed "the parental right ... to assess independently, for their minor child, what will serve that child's best interest." *Id.* at 453. *See also Smith, et al. v. Organization of Foster*

latest U.S. Supreme Court case to reaffirm these principles, though the first to apply them in the nonparent visitation context.

It takes only a little thought to see that this deference to parental decision-making is a necessity. How many decisions must a parent make every day, every week, every year, in raising a child? Who can count how many of those decisions will change a child's life for good or ill, and to how great an extent those decisions will make? If state governments are to begin second-guessing these decisions, where shall they begin? And where will it end?⁸

[L]aw does not have the capacity to supervise the delicately complex interpersonal bonds between parent and child. As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential to its well being. Even if the law were not so incapacitated, there is no basis for assuming that the judgments of its decision makers about a

Families [hereinafter *OFFER*], 431 U.S. 816, 841, n. 44 (1977), noting that child's interests are usually represented in litigation by parents or guardians; *Santosky v Kramer*, *supra*, 455 U.S. at 760: ". . . the State cannot presume that a child and his parents are adversaries."

⁸ See *Noll v. Noll*, 98 N.Y.S.2d 938, 940 (App.Div. 1950), warning of the difficulties should judges "tell parents how to bring up their children." It should be noted that *Noll* involved a single parent (widow).

particular child's needs would be any better than (or indeed as good as) the judgment of his parents.⁹

A parent's decision to cut off or restrict contact with a grandparent is the last act in a years-long drama. In Parham's words, "neither state officials nor federal courts are equipped to review such parental decisions." Supra, 442 U.S. at 604. For this reason, only the clearest and most exceptional evidence can properly rebut the presumption in favor of the parent's decision. "Clearly, forced, extensive unsupervised visitation cannot be ordered absent compelling circumstances which suggest something near unfitness of the custodial parents." Stacy v. Ross, No. 1999-CA-00579-SCT (Miss. 10/31/2001).

In this matter, upon the entry of the Decree of Adoption, a new child was born in the eyes of the law. A new birth certificate was issued. A new social security card and number were issued. For all purposes the Scotts became Baylie's parents. With that new mantle placed upon them came new responsibilities and the Scotts had a paradigm shift. The Scott's began treating Baylie like their child and acting as her parents. There is no going back to the way it was before the adoption.

⁹ Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 Yale L. J. 645, 650 (1977).

This Court should affirm the opinion of the Court of Appeals that effectuates The Decree of Adoption that has been in place for almost three years. No appeal has been taken from the adoption nor may it now be set aside.

B. UTAH STATUTES AND PUBLIC POLICY DO NOT SUPPORT OPEN ADOPTIONS

Open adoptions may be appropriate and may be allowed in other jurisdictions. Utah does not have open adoptions. Open Adoptions are the province of the legislature. If the legislature decides to create open adoptions, those rights can be tested at an appropriate time. Utah has enacted a modified grandparent visitation statute that purports to allow grandparent visitation post adoption. When the grandparent statute is reviewed it may or may not withstand judicial scrutiny. However, this is not a grandparent visitation case.¹⁰ Courts in Alabama, Florida, Ohio and Illinois have struck down grandparent visitation all during year 2001¹¹ after the United State's Supreme Court decision in Troxel v.

¹⁰ Now is not the time and this is not the case to determine the constitutionality of the Utah grandparent statute. If the Court determines this issue is before the Court, the Scott's request leave to file a brief on that issue and to request friend of the court briefs to be filed. The issue of the constitutionality of grandparent visitation will take more pages to brief than are allotted by the Rules of appellate procedure.

¹¹ Langman v. Langman, ___ Ill. App.3d ___ (2001) www.loislaw.com Case Number 3-00-0684, State of Kansas, Dept. of Social and Rehabilitation Services V. Paillet, ___

Granville, 530 U.S. 57, 120 S.Ct. 2054 (US 2000). The Langman case is especially illustrative of the Scott's position as the case has many factual similarities to the case at bar. In Langman the dispute was between adoptive parents and grandparents who had raised the child for part of the child's life. The Court held the statute unconstitutional and provided as follows:

“In contrast to parental rights, a grandparent's right to visitation is a recent statutory creation and is not a fundamental right on an equal footing with the right of a parent. This statute does not require a showing that the child will be harmed if grandparent visitation is not granted. The statute provides no factors for the court to consider in its analysis and no mandate that the court make findings of fact. There is no presumption in favor of the fit parents' decision. “The Due Process Clause does not permit a State to infringe on the fundamental rights to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.” Troxel, 530 U.S. at 72-73, 120 S.Ct. at 2064. With the goal of adoption being to create new, presumably more stable, familial bonds, a statute infringing upon the new parents' rights must be narrowly tailored in a manner least restrictive of the parents' rights. Although the statute in Troxel was broader than § 26—IOA-30, in that it allowed “any person” to ask for visitation, the Supreme Court's holding was not based on the fact that “any person” could petition for visitation, but, rather, was based on grandparents' visitation rights. In other words, the statute was not held facially unconstitutional, but was held

Kan. ____, 16 P.3d 962 (KS 2001), J.S. v. D.W., __ So.2d __, (Ala.Civ. App. 5-4-2001) Lois Law Number: 2990431, Blair v. Drew, 776 So.2d 1105 (Fla.App. 5 Dist. 2001). These cases cite to numerous decisions upholding and striking down grandparent visitation. There is not room in this brief to fully address the issue.

unconstitutional as applied. In the present case, § 26-10A-30, as applied, is unconstitutional, because it infringes upon J.S. and E.S. 's fundamental right to parent.”

Utah adoption policy is the province of the legislature. Interpretation and enforcement of the policy as enacted into law is the province of the judiciary. The Hardingers cite In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) for the proposition that the Utah Supreme Court has articulated a policy in favor of open adoptions. In fact, the language quoted by the Hardinger’s supports the Scott’s position as well as the Court of Appeals ruling. This court in Halloway stated in *footnote* 11 to the majority opinion:

[fn11] An innovative approach to adoption called an open adoption, is gaining increased recognition among professionals in the adoption field and may be suited to this case. A fundamental concept of an open adoption is to allow some communication between adoptive and natural parents and, when appropriate, to permit communication between the natural parent and the child as the child grows up. *See generally* S. Arms, *To Love and Let Go* (1973). This approach presents some creative possibilities in the instant case: an arrangement might be reached which would allow Jeremiah to remain with his adoptive parents but also would permit the tribe to teach the child about his Indian heritage. We make this statement as an observation only, recognizing that the matter is not ours to decide.” [Emphasis Added].

Given Utah’s closed adoption paradigm, the appellate courts have gone to great lengths to find ways around closed adoptions. The Court in T.S. v. L.F. 2001

Utah Ct. App Adv. Rpt. 183 found the adoption was not final so the father's parental rights were not terminated. T.S. is distinguished from Baylie's case because in this matter all parties entitled to notice were given notice. The Decree of Adoption has been in place for almost three years.

The Hardingers ask this Court to find the Court of Appeals was wrong and then take the next step and enter a decision with far reaching ramifications. This Court addresses questions in the process of settling specific controversies between parties. More important than the outcome of this case for the litigants are the broader effects of the legal rules that will result from this court's opinion. If this Court accepts the position of the Hardingers, a new form of judicially created adoptions will be created. Rather than the legislatively created closed adoptions, open adoption will then be allowed. Parents who are contemplating giving up their child for adoption or are facing termination of parental rights may require of the adopting parents a "pre-adoption contract." This contract could require the adoptive parents to provide post adoption visitation to the birth parents. These "pre-adoption contracts" are not currently allowed in Utah. The legislature has not made a provision for open adoptions. The legislature relies on the adoptive parents to make decisions in the best interest of the child. Once the adoptive parents come

before the court and the court finds that, “the best interest of the child will be promoted by the adoption, a final decree of adoption enters declaring that the child is adopted by the adoptive parent or parents and shall be regarded and treated in all respects as the child of the adoptive parent or parents.”

The Juvenile Court chose adoption for Baylie. The Juvenile Court could have entered an order of permanent guardianship with rights of visitation to the Hardingers but that course of action comes with a risk of instability for the child. Utah Code Ann. §78-3a-118(2)(y)(i). The Juvenile Court decided upon adoption. Upon creation of a new parent child relationship, new rights are conferred and old rights are terminated. In this case, the Scotts became parents. The Scott’s paradigm shifted. The Hardinger’s visitation rights were vacated. The agreement entered into between the Scotts, as aunt and uncle, and the Hardingers was no longer enforceable.¹² Rather than acting as guardians, the Scotts were now required by the Court to treat Baylie in all respects as a natural born child and act as

¹² If this court decide that the agreement is enforceable, the Scotts will proceed on their allegations that the Hardingers have not supported the Scotts in the adoption. Some of these allegations are already on file with the juvenile court. (JCR 454-466).

her parents. Since the entry of the Decree of Adoption, no new grounds for juvenile court jurisdiction have occurred.

C. THIS IS NOT A CONTRACT DISPUTE

The Court of Appeals correctly rejected the Hardinger's assertions that this case is about contract law. This is a case about the state invading the sanctity of the family. There is no doubt that a parent's right to make decisions relating to the child and whom the child visits with is a constitutionally protected fundamental liberty interest. In re S.A. v. State, 2001 UT App 307, 37 P.3d 1166 see also In re J.D.M., 808 P.2d 1122, 1126 (Utah Ct.App. 1991) ("There is no dispute that the parent-child relationship is accorded constitutional protection."); In re M.A.V., 736 P.2d 1031, 1033 n. 2 (Utah Ct.App. 1987) ("Of course, parents have a fundamental liberty interest in maintaining family relationships with their children."). In sum, father's "right to raise [his child] is a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution." Campbell v. Campbell, 896 P.2d 635, 641 (Utah Ct.App. 1995).

Hardingers assert this case is a simple contract case. Hardingers assert that a bargain was made and should be enforced. Assuming *arguendo* that the Hardinger's analogy is applicable, the analogy fails. The asserted contract is void

abinitio. The argument is that the parties contracted into an agreement for post adoption visitation. Utah Statutes provide that adoptions create new parental rights and are final. In this case, those new parental rights create a new child and vest in the Scott's parental rights. By virtue of the abuse and or neglect Petition, filed in this case, the Juvenile Court had authority to enter the Order granting custody and guardianship to the Scotts. The Juvenile Court also had authority to enter a Decree of Adoption. What the Juvenile Court does not have authority to do is to enforce the pre-adoption visitation Order after the adoption nor is the party's agreement enforceable.

The parties entered an agreement for Custody/Guardianship with visitation and the Hardinger's support for the Scott's to adopt. The parties voluntarily entered into this agreement and it was enforceable up to the point of the entry of the Decree of Adoption. A contract for post adoption visitation is comparable to a contract to enforce a gambling debt. In many jurisdictions, contracts to enforce gambling debts are against public policy and thus not enforceable. Resorts International, Inc. v. Zonis, 577 F. Supp. 876 (Dist. Ct. N.D. Ill. 1984) Boardwalk

Regency v. Travelers Exp, 745 F. Supp. 1266 (E.D. Mich. 1990).¹³ In Utah, agreements for post adoption visitation are against the policy of the adoption statute and not enforceable.

Secondly, even if the parties could enter the agreement, the Hardingers have not lived up to their end of the bargain. A failure of consideration argument goes both ways in this case. The Scotts allowed visitation post adoption. The post-adoption visitation is what gave rise to the allegations that caused the visitation to be suspended. If the Court agrees this is a case of contract and the matter is returned to the Juvenile Court, evidence will be submitted showing the Hardinger's failure to "support the adoption."

D. This Court Has Inherent Equity Power to Grant Appropriate Relief in This Situation

Assuming the Hardinger's argument is correct, this is merely a contract case and they are entitled to the benefit of their bargain. The Juvenile Court, sitting as a court of equity has the inherent power to modify a judgment when changed circumstances make its prospective application inequitable. The visitation Order could be modified as appropriate, given the change in circumstances that has made

¹³ In both cases, the Courts relied on statutes to ascertain public policy. The public policy in this case is clearly set forth in the adoption statutes. Adoptions may not be contested after becoming final. U.C.A. §78-30-4.16(3)

its prospective application both inequitable and contrary to law. Under the current judgment and orders based thereon, the Scotts bear the burden of visitation ordered without regard for the presumption that their decisions are in Baylie's best interest. No trial court bearing the Troxel opinions in mind may impose such an order on any other parents. It would be utterly inequitable to enforce this order on the Scotts while other parents, throughout Utah enjoy their full constitutional protections.

At a minimum, it would be appropriate for this Court to review the findings and evidence submitted, and apply to those facts the principles newly explicated by a majority of the Justices of the U.S. Supreme Court. Those principles, applied to those facts, would not leave the current visitation scheme untouched.

The governing law has changed. It would be unconscionable to subject Baylie's family to prospective application, without reexamination, of a judgment that the Troxel decision calls into question. See In re T.J.K., No. 06-00-00163-CV (Tex. App. Dist.6 11/15/2001)(holding that parent's participation in agreed order did not waive constitutional issue as to non-parent visitation); Crafton v. Gibson, supra, 752 N.E.2d 78; Linder v. Linder, supra, Arkansas Supreme Court.

POINT IV
THE SCOTTS SHOULD BE AWARDED ATTORNEY FEES

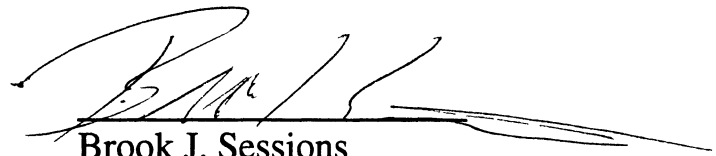
The juvenile court committed error by asserting jurisdiction. The Scotts have been fighting this legal battle for almost three years the since Decree of Adoption was entered. The Hardingers have paid nothing towards the support of Baylie. The legal fees paid by the Scotts could otherwise have been used to provide for Baylie. The Court of Appeals did not award either side attorney fees. The Scotts request this Court award them their attorney fees on appeal. Utah Dep't. of Social Servs. V. Adams, 806 P.2d 1193 Utah Ct. App 1991).

CONCLUSION

The Court of Appeals correctly found that Juvenile Court's Order was final and appealable. The Notice of Appeal was sufficient to encompass the attorney fees award. The Juvenile Court retains jurisdiction to enforce its own valid orders. The order awarding the Hardinger's visitation is no longer enforceable. The

decision of the Court of Appeals reversing the Juvenile Court's erroneous assertion of jurisdiction and vacating the award of attorney fees should be sustained.

DATED this 15 day of January, 2003.



Brook J. Sessions
Attorney the parents

ADDENDUM:
CONTROLLING RULES

Rule> <3. Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) Joint or consolidated appeals. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) Designation of parties. The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) Content of notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) Service of notice of appeal. The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address. A certificate evidencing such service shall be filed with the notice of appeal. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(f) Filing fee[s] in civil appeals. At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall not accept a notice of appeal unless the filing fee is paid.

(g) Docketing of appeal. Upon the filing of the notice of appeal and payment of the required fee, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a copy of the bond required by Rule 6 or a certification by the clerk that the bond has been filed, to the clerk of the appellate court. Upon receipt

of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Rule 5. Discretionary appeals from interlocutory orders.

(a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54 (b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(1) The petition shall contain:

(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal Appellant may

then set forth in the petition a concise statement why the Supreme Court should decide the case in light of the relevant factors listed in Rule 9(c)(7).

(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion.

(d) Answer. Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5 (c)(5). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the answer on the petitioner. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders.

(Amended effective October 1, 1992; July 1, 1994; April 1, 1996; November 1, 1999.)

Rule > <54. Judgments; costs.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment upon multiple claims and/or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

ADDENDUM:
CONTROLLING STATUTES

78>-<3a>-<104. Jurisdiction of juvenile court - Original - Exclusive.

(1) Except as otherwise provided by law, the juvenile court has exclusive original jurisdiction in proceedings concerning:

(a) a minor who has violated any federal, state, or local law or municipal ordinance or a person younger than 21 years of age who has violated any law or ordinance before becoming 18 years of age, regardless

of where the violation occurred, excluding traffic laws and boating and ordinances;

(b) a person 21 years of age or older who has failed or refused to comply with an order of the juvenile court to pay a fine or restitution, if the order was imposed prior to the person's 21st birthday; however, the continuing jurisdiction is limited to causing compliance with existing orders;

(c) a minor who is an abused child, neglected child, or dependent child, as those terms are defined in Section 78-3a-103;

(d) a protective order for a minor who is alleged to be an abused child or neglected child, except as provided in Section 78-3a-105, and unless the petition is filed by a natural parent or stepparent of the minor against a natural parent or stepparent of the minor;

(e) the determination of the custody of a minor or to appoint a guardian of the person or other guardian of a minor who comes within the court's jurisdiction under other provisions of this section;

(f) the termination of the legal parent-child relationship in accordance with Part 4, Termination of Parental Rights Act, including termination of residual parental rights and duties;

(g) the treatment or commitment of a mentally retarded minor;

(h) a minor who is a habitual truant from school;

(i) the judicial consent to the marriage of a minor under age 16 upon a determination of voluntariness or where otherwise required by law, employment, or enlistment of a minor when consent is required by law;

(j) any parent or parents of a minor committed to a secure youth corrections facility, to order, at the discretion of the court and on the recommendation of a secure youth corrections facility, the parent or parents of a minor committed to a secure youth corrections facility for a custodial term, to undergo group rehabilitation therapy under the direction of a secure youth corrections facility therapist, who has supervision of that parent's or parents' minor, or any other therapist the court may direct, for a period directed by the court as recommended by a secure youth corrections facility;

(k) a minor under Title 55, Chapter 12, Interstate Compact on Juveniles;

(l) the treatment or commitment of a mentally ill child. The court may commit a child to the physical custody of a local mental health authority or to the legal custody of the Division of Substance Abuse and Mental Health in accordance with the procedures and requirements of Title 62A, Chapter 15, Part 7, Commitment of Persons Under Age 18 to

Division of Substance Abuse and Mental Health. The court may not commit a child directly to the Utah State Hospital;

- (m) the commitment of a minor in accordance with Section 62A-15-301;
- (n) de novo review of final agency actions resulting from an informal adjudicative proceeding as provided in Section 63-46b-15; and
- (o) adoptions conducted in accordance with the procedures described in Title 78, Chapter 30, Adoption, when the juvenile court has previously entered an order terminating the rights of a parent and finds that adoption is in the best interest of the minor.

(2) In addition to the provisions of Subsection (1)(a) the juvenile court has exclusive jurisdiction over any traffic or boating offense committed by a minor under 16 years of age and concurrent jurisdiction over all other traffic or boating offenses committed by a minor 16 years of age or older, except that the court shall have exclusive jurisdiction over the following offenses committed by a minor under 18 years of age:

- (a) Section 76-5-207, automobile homicide;
- (b) Section 41-6-44, operating a vehicle while under the influence of alcohol or drugs;
- (c) Section 41-6-45, reckless driving or Section 73-18-12, reckless operation;

- (d) Section 41-1a-1314, unauthorized control over a motor vehicle, trailer, or semitrailer for an extended period of time; and

- (e) Section 41-6-13.5 or 73-18-20, fleeing a peace officer.

(3) The court also has jurisdiction over traffic and boating offenses that are part of a single criminal episode filed in a petition that contains an offense over which the court has jurisdiction.

(4) The juvenile court has jurisdiction over questions of custody, support, parent-time, and visitation certified to it by the district court pursuant to Section 78-3a-105.

(5) The juvenile court has jurisdiction over an ungovernable or runaway minor who is referred to it by the Division of Child and Family Services or by public or private agencies that contract with the division

to provide services to that minor where, despite earnest and persistent efforts by the division or agency, the minor has demonstrated that he:

- (a) is beyond the control of his parent, guardian, lawful custodian, or school authorities to the extent that his behavior or condition endangers his own welfare or the welfare of others; or

- (b) has run away from home.

(6) This section does not restrict the right of access to the juvenile court by private agencies or other persons.

(7) The juvenile court has jurisdiction of all magistrate functions relative to cases arising under Section 78-3a-602.

(8) The juvenile court has jurisdiction to make a finding of substantiated, unsubstantiated, or without merit, in accordance with Section 78-3a-320.

**78-3a-118. Adjudication of jurisdiction of juvenile court -
Disposition of cases - Enumeration of possible court orders -
Considerations of court - Obtaining DNA sample.**

(1) (a) When a minor is found to come within the provisions of Section 78-3a-104, the court shall so adjudicate. The court shall make a finding of the facts upon which it bases its jurisdiction over the

minor. However, in cases within the provisions of Subsection 78-3a-104(1), findings of fact are not necessary.

(b) If the court adjudicates a minor for a crime of violence or an offense in violation of Title 76, Chapter 10, Part 5, Weapons, it shall order that notice of the adjudication be provided to the school superintendent of the district in which the minor resides or attends school. Notice shall be made to the district superintendent within three days of the adjudication and shall include the specific offenses for which the minor was adjudicated.

(2) Upon adjudication the court may make the following dispositions by court order:

(a) (i) The court may place the minor on probation or under protective supervision in the minor's own home and upon conditions determined by the court, including compensatory service as provided in Section 78-11-20.7.

(ii) The court may place the minor in state supervision with the probation department of the court, under the legal custody of:

(A) his parent or guardian;

(B) the Division of Youth Corrections; or

(C) the Division of Child and Family Services.

(iii) If the court orders probation or state supervision, the court shall direct that notice of its order be provided to designated persons in the local law enforcement agency and the school or transferee school, if applicable, which the minor attends. The designated persons may receive the information for purposes of the minor's supervision and student safety.

(iv) Any employee of the local law enforcement agency and the school which the minor attends who discloses the court's order of probation is not:

(A) civilly liable except when the disclosure constitutes fraud or malice as provided in Section 63-30-4; and

(B) civilly or criminally liable except when the disclosure constitutes a knowing violation of Section 63-2-801.

(b) The court may place the minor in the legal custody of a relative or other suitable person, with or without probation or protective supervision, but the juvenile court may not assume the function of developing foster home services.

(c) (i) The court may:

(A) vest legal custody of the minor in the Division of Child and Family Services, Division of Youth Corrections, or the Division of Substance Abuse and Mental Health; and

(B) order the Department of Human Services to provide dispositional recommendations and services.

(ii) For minors who may qualify for services from two or more divisions within the Department of Human Services, the court may vest legal custody with the department.

(iii) (A) Minors who are committed to the custody of the Division of Child and Family Services on grounds other than abuse or neglect are subject to the provisions of Title 78, Chapter 3a, Part 3A, Minors in Custody on Grounds Other Than Abuse or Neglect, and Title 62A, Chapter 4a, Part 2A, Minors in Custody on Grounds Other Than Abuse or Neglect.

(B) Prior to the court entering an order to place a minor in the custody of the Division of Child and Family Services on grounds other than abuse or neglect, the court shall provide the division with notice of the hearing no later than five days before the time specified for the hearing so the division may attend the hearing.

(C) Prior to committing a minor to the custody of the Division of Child and Family Services, the court shall make a finding as to what reasonable efforts have been attempted to prevent the minor's removal from his home.

(d) (i) The court may commit the minor to the Division of Youth Corrections for secure confinement.

(ii) A minor under the jurisdiction of the court solely on the ground of abuse, neglect, or dependency under Subsection 78-3a-104(1)(c) may not be committed to the Division of Youth Corrections.

(e) The court may commit the minor, subject to the court retaining continuing jurisdiction over him, to the temporary custody of the Division of Youth Corrections for observation and evaluation for a period not to exceed 45 days, which period may be extended up to 15 days at the request of the director of the Division of Youth Corrections.

(f) (i) The court may commit the minor to a place of detention or an alternative to detention for a period not to exceed 30 days subject to the court retaining continuing jurisdiction over the minor. This commitment may be stayed or suspended upon conditions ordered by the court.

(ii) This Subsection (2)(f) applies only to those minors adjudicated for:

(A) an act which if committed by an adult would be a criminal offense; or

(B) contempt of court under Section 78-3a-901.

(g) The court may vest legal custody of an abused, neglected, or dependent minor in the Division of Child and Family Services or any other

appropriate person in accordance with the requirements and procedures of Title 78, Chapter 3a, Part 3, Abuse, Neglect, and Dependency Proceedings.

(h) The court may place the minor on a ranch or forestry camp, or similar facility for care and also for work, if possible, if the person, agency, or association operating the facility has been approved or has otherwise complied with all applicable state and local laws. A minor placed in a forestry camp or similar facility may be required to work on fire prevention, forestation and reforestation, recreational works, forest roads, and on other works on or off the grounds of the facility and may be paid wages, subject to the approval of and under conditions set by the court.

(i) The court may order the minor to repair, replace, or otherwise make restitution for damage or loss caused by the minor's wrongful act, including costs of treatment as stated in Section 78-3a-318 and impose fines in limited amounts. If a minor has been returned to this state under the Interstate Compact on Juveniles, the court may order the minor to make restitution for costs expended by any governmental entity for the return.

(j) The court may issue orders necessary for the collection of restitution and fines ordered by the court, including garnishments, wage withholdings, and executions.

(k) (i) The court may through its probation department encourage the development of employment or work programs to enable minors to fulfill their obligations under Subsection (2)(i) and for other purposes considered desirable by the court.

(ii) Consistent with the order of the court, the probation officer may permit the minor found to be within the jurisdiction of the court

to participate in a program of work restitution or compensatory service in lieu of paying part or all of the fine imposed by the court.

(1) (i) In violations of traffic laws within the court's jurisdiction, the court may, in addition to any other disposition authorized by this section:

(A) restrain the minor from driving for periods of time the court considers necessary; and

(B) take possession of the minor's driver license.

(ii) The court may enter any other disposition under Subsection (2)(1)(i); however, the suspension of driving privileges for an offense under Section 78-3a-506 are governed only by Section 78-3a-506.

(m) (i) When a minor is found within the jurisdiction of the juvenile court under Section 78-3a-104 because of violating Section 58-37-8, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or Title 58, Chapter 37b, Imitation Controlled Substances Act, the court shall, in addition to any fines or fees otherwise imposed, order that the minor perform a minimum of 20 hours, but no more than 100 hours, of compensatory service. Satisfactory completion of an approved substance abuse prevention or treatment program may be credited by the court as compensatory service hours.

(ii) When a minor is found within the jurisdiction of the juvenile court under Section 78-3a-104 because of a violation of Section 32A-12-209 or Subsection 76-9-701(1), the court may, upon the first adjudication, and shall, upon a second or subsequent adjudication, order that the minor perform a minimum of 20 hours, but no more than 100 hours of compensatory service, in addition to any fines or fees otherwise imposed. Satisfactory completion of an approved substance abuse prevention or treatment program may be credited by the court as compensatory service hours.

(n) The court may order that the minor be examined or treated by a physician, surgeon, psychiatrist, or psychologist or that he receive other special care. For these purposes the court may place the minor in a hospital or other suitable facility.

(o) (i) The court may appoint a guardian for the minor if it appears necessary in the interest of the minor, and may appoint as guardian a public or private institution or agency in which legal custody of the minor is vested.

(ii) In placing a minor under the guardianship or legal custody of an individual or of a private agency or institution, the court shall give primary consideration to the welfare of the minor. When practicable, the court may take into consideration the religious preferences of the minor and of the minor's parents.

(p) (i) In support of a decree under Section 78-3a-104, the court may order reasonable conditions to be complied with by the parents or guardian, the minor, the minor's custodian, or any other person who has been made a party to the proceedings. Conditions may include:

(A) parent-time by the parents or one parent;

(B) restrictions on the minor's associates;

(C) restrictions on the minor's occupation and other activities; and

(D) requirements to be observed by the parents or custodian.

(ii) A minor whose parents or guardians successfully complete a family or other counseling program may be credited by the court for detention, confinement, or probation time.

(q) The court may order the minor to be placed in the legal custody of the Division of Substance Abuse and Mental Health or committed to the physical custody of a local mental health authority, in accordance with the procedures and requirements of Title 62A, Chapter 15, Part 7,

Commitment of Persons Under Age 18 to Division of Substance Abuse and Mental Health.

(r) (i) The court may make an order committing a minor within its jurisdiction to the Utah State Developmental Center if the minor has mental retardation in accordance with the provisions of Title 62A, Chapter 5, Part 3, Admission to Mental Retardation Facility.

(ii) The court shall follow the procedure applicable in the district courts with respect to judicial commitments to the Utah State Developmental Center when ordering a commitment under Subsection (2) (r) (i).

(s) The court may terminate all parental rights upon a finding of compliance with the provisions of Title 78, Chapter 3a, Part 4, Termination of Parental Rights Act.

(t) The court may make any other reasonable orders for the best interest of the minor or as required for the protection of the public, except that a person younger than 18 years of age may not be committed to jail or prison.

(u) The court may combine the dispositions listed in this section if they are compatible.

(v) Before depriving any parent of custody, the court shall give due consideration to the rights of parents concerning their minor. The court may transfer custody of a minor to another person, agency, or institution in accordance with the requirements and procedures of Title 78, Chapter 3a, Part 3, Abuse, Neglect, and Dependency Proceedings.

(w) Except as provided in Subsection (2) (y) (i), an order under this section for probation or placement of a minor with an individual or an agency shall include a date certain for a review of the case by the court. A new date shall be set upon each review.

(x) In reviewing foster home placements, special attention shall be given to making adoptable minors available for adoption without delay.

(y) (i) The juvenile court may enter an order of permanent custody and guardianship with a relative or individual of a minor where the court has previously acquired jurisdiction as a result of an adjudication of abuse, neglect, or dependency, excluding cases arising under Subsection 78-3a-105(4).

(ii) Orders under Subsection (2) (y) (i):

(A) shall remain in effect until the minor reaches majority;

(B) are not subject to review under Section 78-3a-119; and

(C) may be modified by petition or motion as provided in Section 78-3a-903.

(iii) Orders permanently terminating the rights of a parent, guardian, or custodian and permanent orders of custody and guardianship do not expire with a termination of jurisdiction of the juvenile court.

(3) In addition to the dispositions described in Subsection (2), when a minor comes within the court's jurisdiction he may be given a choice by the court to serve in the National Guard in lieu of other sanctions, provided:

(a) the minor meets the current entrance qualifications for service in the National Guard as determined by a recruiter, whose determination is final;

(b) the minor is not under the jurisdiction of the court for any act that:

(i) would be a felony if committed by an adult;

(ii) is a violation of Title 58, Chapter 37, Utah Controlled Substances Act; or

(iii) was committed with a weapon; and

termination of parental rights shall be made within 18 months from the date of the child's removal.

78-30-4.16. Contested adoptions - Rights of parties - Determination of custody.

(1) Whenever any party contests an adoption, the court shall first determine whether the provisions of this chapter have been complied with. If a party who was entitled to notice and consent under the provisions of this chapter, was denied that right, and did not otherwise waive or forfeit that right under the terms of this chapter, the court may:

(a) enjoin the adoption, or dismiss the adoption petition, and proceed in accordance with Subsection (2); or

(b) determine whether proper grounds for termination of that parent's rights exist and, if so, order that the parent's rights be terminated in accordance with the provisions of this chapter or Title 78, Chapter 3a, Part 4, Termination of Parental Rights Act.

(2) (a) In any case, and under any circumstance, if a court determines that a petition for adoption may not be granted, the court may not automatically grant custody of a child to a challenging biological parent, but shall conduct an evidentiary hearing in each case, in order to determine who should have custody of the child, in accordance with the child's best interest.

(b) Evidence considered at that hearing may include, but is not limited to, evidence of psychological or emotional bonds that the child had formed with third parties and any detriment that a change in custody may cause to the child. The fact that a person relinquished a child to a licensed child placing agency or executed a consent for adoption may not be considered by the court as evidence of neglect or abandonment.

(c) Any custody order entered pursuant to this section may also include provisions for parent-time by a biological parent or visitation by an interested third party, and provide for the financial support of the child.

(3) An adoption may not be contested after the final decree of adoption is entered.

78-30-10. Name and status of adopted child.

When a final decree of adoption is entered under Section 78-30-9, a child may take the family name of the adoptive parent or parents. After that decree of adoption is entered, the adoptive parent or parents and the child shall sustain the legal relationship of parent and child, and have all the rights and be subject to all the duties of that relationship.

final plan for the child, taking into account the child's primary permanency goal established by the court pursuant to Section 78-3a-311. If the Division of Child and Family Services documents to the court that there is a compelling reason that adoption, reunification, guardianship, and kinship placement are not in the child's best interest, the court may order another planned permanent living arrangement, in accordance with federal law. If the child clearly desires contact with the parent, the court shall take the child's desire into consideration in determining the final plan. In addition, the court shall establish a concurrent plan that identifies the second most appropriate final plan for the child.

(b) The court may not extend reunification services beyond 12 months from the date the child was initially removed from the child's home, in accordance with the provisions of Section 78-3a-311, except that the court may extend reunification services for no more than 90 days if it finds that there has been substantial compliance with the treatment plan, that reunification is probable within that 90 day period, and that the extension is in the best interest of the child. In no event may any reunification services extend beyond 15 months from the date the child was initially removed from the child's home. Delay or failure of a parent to establish paternity or seek custody does not provide a basis for the court to extend services for that parent beyond that 12-month period.

(c) The court may, in its discretion, enter any additional order that it determines to be in the best interest of the child, so long as that order does not conflict with the requirements and provisions of Subsections (3)(a) and (b). The court may order the division to provide protective supervision or other services to a child and the child's family after the division's custody of a child has been terminated.

(4) If the final plan for the child is to proceed toward termination of parental rights, the petition for termination of parental rights shall be filed, and a pretrial held, within 45 calendar days after the permanency hearing.

(5) Any party to an action may, at any time, petition the court for an expedited permanency hearing on the basis that continuation of reunification efforts are inconsistent with the permanency needs of the child. If the court so determines, it shall order, in accordance with federal law, that the child be placed in accordance with the permanency plan, and that whatever steps are necessary to finalize the permanent placement of the child be completed as quickly as possible.

(6) Nothing in this section may be construed to:

(a) entitle any parent to reunification services for any specified period of time;

(b) limit a court's ability to terminate reunification services at any time prior to a permanency hearing; or

(c) limit or prohibit the filing of a petition for termination of parental rights by any party, or a hearing on termination of parental rights, at any time prior to a permanency hearing. If a petition for termination of parental rights is filed prior to the date scheduled for a permanency hearing, the court may consolidate the hearing on termination of parental rights with the permanency hearing. If the court consolidates the hearing on termination of parental rights with the permanency hearing, it shall first make a finding whether reasonable efforts have been made by the Division of Child and Family Services to finalize the permanency goal for the child, and any reunification services shall be terminated in accordance with the time lines described in Section 78-3a-311. A decision on the petition for

(c) the court retains jurisdiction over the minor under conditions set by the court and agreed upon by the recruiter or the unit commander to which the minor is eventually assigned.

(4) (a) A DNA specimen shall be obtained from a minor who is under the jurisdiction of the court as described in Subsection 53-10-403(3). The specimen shall be obtained by designated employees of the court or, if the minor is in the legal custody of the Division of Youth Corrections, then by designated employees of the division under Subsection 53-10-404(5) (b).

(b) The responsible agency shall ensure that employees designated to collect the saliva DNA specimens receive appropriate training and that the specimens are obtained in accordance with accepted protocol.

(c) Reimbursements paid under Subsection 53-10-404(2) (a) shall be placed in the DNA Specimen Restricted Account created in Section 53-10-407.

(d) Payment of the reimbursement is second in priority to payments the minor is ordered to make for restitution under this section and treatment under Section 78-3a-318.

78-3a-312. Permanency hearing - Final plan - Petition for termination of parental rights filed - Hearing on termination of parental rights.

(1) (a) When reunification services have been ordered in accordance with Section 78-3a-311, with regard to a child who is in the custody of the Division of Child and Family Services, a permanency hearing shall be held by the court no later than 12 months after the original removal of the child.

(b) When no reunification services were ordered at the dispositional hearing, a permanency hearing shall be held within 30 days from the date of the dispositional hearing.

(2) (a) If reunification services were ordered by the court in accordance with Section 78-3a-311, the court shall, at the permanency hearing, determine whether the child may safely be returned to the custody of the child's parent. If the court finds, by a preponderance of the evidence, that return of the child would create a substantial risk of detriment to the child's physical or emotional well-being, the child may not be returned to the custody of the child's parent. The failure of a parent or guardian to participate in, comply with, in whole or in part, or to meet the goals of a court approved treatment plan constitutes prima facie evidence that return of the child to that parent would create a substantial risk of detriment.

(b) In making a determination under this Subsection (2), the court shall review the report prepared by the Division of Child and Family Services, any admissible evidence offered by the child's guardian ad litem, any report prepared by a foster care citizen review board pursuant to Section 78-3g-103, any evidence regarding the efforts or progress demonstrated by the parent, and the extent to which the parent cooperated and availed himself of services provided.

(3) (a) With regard to a case where reunification services were ordered by the court, if a child is not returned to the child's parent or guardian at the permanency hearing, the court shall order termination of reunification services to the parent, and make a final determination regarding whether termination of parental rights, adoption, or permanent custody and guardianship is the most appropriate

78-30-10. Name and status of adopted child.

When a final decree of adoption is entered under Section 78-30-9, a child may take the family name of the adoptive parent or parents. After that decree of adoption is entered, the adoptive parent or parents and the child shall sustain the legal relationship of parent and child, and have all the rights and be subject to all the duties of that relationship.

CLERK'S MINUTE SHEET

NAME(S): Baylie Blundell

CASE #'S: 968282

DATE: September 6, 2000

TYPE OF CASE: DEPENDENCY

TYPE OF HEARING: Order to Show Cause

TAPE & COUNTER # W813 0 -

PRESENT: GUARDIAN AD LITEM: Kelly Frye
DEFENSE ATTORNEY: Dana Burrows
CO-COUNSEL: Brook Sessions
CASEWORKER:

#3
#4
and W980 c

CHILD: MOTHER:

FATHER:

OTHERS: Liz Dalton, Special Master; Lorraine Warren, paternal grandmother;
Mr & Mrs Hardinger, grandparents; Ken and Kimberly Scott; Justin Heideman,
legal aide to Mr Sessions.

MINUTES: The Court addresses jurisdictional issues raised by Mr & Mrs Scott. The Court determines that there are two separate files and will remain as two separate files.

Mr Sessions makes motion that the file be certified back to District Court. States that the file needs a formal Finding of Facts and Conclusions so that an appeal on the denied motion can take place.

The Court proceeds to the issues of visitation. The Special Master was appointed to help work out details in visitation in conjunction with Ms Frye with all family members except Mr Hardinger.

Dr Jenson to perform the evaluation and to give recommendations as to visitation with Mr Hardinger.

All family members begin immediately with therapy with Paul Jenkins, have independent evaluator pursue sex abuse allegations (this will be Dr Jay Jenson). Costs to be split by all parties. It is recommended to begin within the next 10 days.

No order is made regarding make-up visitation. All parties restrained from discussing sex abuse charges with Baylie.

Special master - the agreed upon calendar to start today. Mr Hardinger agrees not to be present for the weekend visit this weekend.

Testimony from the Scotts is denied after discussion of purpose.

FINDINGS:

ORDER: Motion to certify back is denied. Motion to quash is denied. A psycho-sexual evaluation is to take place on Mr Hardinger. Request for stay pending appeal is denied.

ATTORNEY TO DO ORDER: Attorney General

NEXT HEARING: Monday December 11, 2000 @ 9:00 a.m.

~~00467~~

Mr. BROOK J. SESSIONS (6136)
HARRIS & CARTER, a L.L.C.
Attorney for PETITIONER
3325 N. University Ave., Ste. 200
Jamestown Square, Clocktower Bldg.
Provo, Utah 84604

FILED

JUN 05 2000

Juvenile Court
Fourth District

Telephone: 375-9801

IN THE FOURTH JUDICIAL DISTRICT JUVENILE COURT
PROVO DEPARTMENT
IN AND FOR UTAH COUNTY, STATE OF UTAH

In the Interest of:

**DECREE OF
ADOPTION****BLUNDELL, BAYLIE (07/29/96)**

Case: 968282

A Person under (18) years of age.

Judge: JERIL B. WILSON

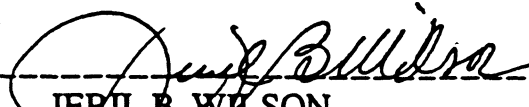
This matter having come on regularly for hearing this 5th day of June 2000, for the purpose of hearing the matter of the adoption of BAYLIE BLUNDELL, a minor. The Court having entered its Findings of Fact and having found that the Petitioners have complied with all applicable laws and are fit and proper persons to adopt the minor child and the Court being fully advised in the premises therefore finds that:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

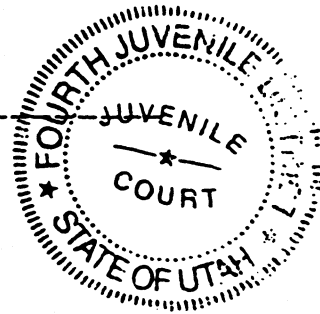
1. That BAYLIE BLUNDELL, a minor, is hereby declared adopted by KENNETH SCOTT and KIMBERLY SCOTT, and the said child shall henceforth be regarded and treated in all respects as the natural child of KENNETH SCOTT AND KIMBERLY SCOTT, and they shall have the legal relationship of parent and child and have all rights and privileges and be subject to all of the duties of that relationship..
2. The name of said child shall henceforth be known as BAYLIE NICOLE SCOTT, by which name she shall legally and lawfully be known.
3. It is further ordered that the Court file in this matter be sealed except for the purposes of the petitioners and their counsel procuring certified copies of the Decree of Adoption for legal purposes, and that said procurement be

accomplished within the next 10 days; that thereafter the
file be opened only upon petition and order of the Court.

DATED AND SIGNED this 5TH day of June, 2000.



JERIL B. WILSON
JUVENILE COURT JUDGE



MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the Appellant's Brief on this 15 day of March, 2001, by first-class, U.S. Mail, postage prepaid to the following:

Original and seven copies filed with the Court of Appeals.

Two copies to the following:

Ms. Martha Pierce
Office of the Guardian Ad Litem's Office
450 S. State Street, Second Floor
Salt Lake City UT 84114
Phone: 578-3962 Fax: 578-3965

Carol L. Verdoia
Assistant Attorney General
160 E. 300 S., 6th Floor
Salt Lake City, Utah 84114

Dana Burrows
Attorney at Law
1149 West Center Street
Orem, UT 84057

A handwritten signature in black ink, appearing to read "Paul E.", written over a horizontal line.

Secretary

MAILING CERTIFICATE

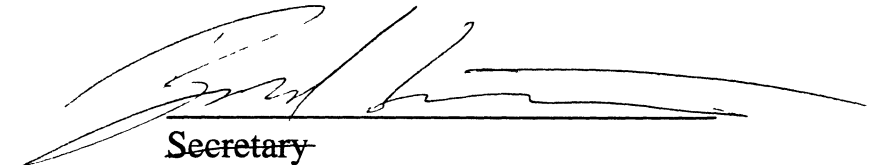
I HEREBY CERTIFY that I personally mailed a true and correct copy of the Appellant's Brief on this 15 day of January, 2003, by first-class, U.S. Mail, postage prepaid to the following:

Original and seven copies filed with the Utah Supreme Court.

Two copies to the following:

Martha Pierce,
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450 S. State, Second Floor
PO Box 140403
SLC UT 84114-0403

Mr. Leslie Slauch
Howard, Lewis & Peterson
120 E. 300 N.
PO Box 1248
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Secretary