

1958

# Jane Laraway Miller v. Orrin Towler Miller : Brief of Appellant

Utah Supreme Court

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David E. West; Attorney for Appellant;

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IN THE SUPREME COURT OF  
THE STATE OF UTAH

FILED

DEC 26 1958

JANE LARAWAY MILLER,

Clerk, Supreme Court, Utah

*Plaintiff & Respondent,*

—vs.—

Case No.

8862

ORRIN TOWLER MILLER,

*Defendant & Appellant*

APPELLANT'S BRIEF

DAVID E. WEST

*Attorney for Appellant*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JANE LARAWAY MILLER

*Plaintiff & Respondent,*

—vs.—

ORRIN TOWLER MILLER,

*Defendant & Appellant*

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Case No.

8862

## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

The sole question before this court is whether the defendant, Orrin T. Miller, the natural father of Jane Ann Miller, may effectively withdraw his consent to adoption, which he had previously given.

At the outset, it should be mentioned that defendant was not represented by counsel in the lower court; consequently there is some confusion in the record. Defendant's motion to set aside the consent (R. 18) was improperly numbered and filed in the case of Miller vs. Miller (No.

106986), which was the divorce case between the parents of the child in question. Likewise was the order denying defendant's motion improperly filed (R. 20). For this reason it has been necessary to designate portions of both records; however, it should be kept in mind that this appeal is concerned with the adoption case, and the order which should have been filed therein.

### STATEMENT OF FACTS

The facts upon which this appeal is based can best be explained in their chronological sequence.

Plaintiff, Jane Larraway Miller, and defendant, Orrin Towler Miller, were legally divorced from each other on January 4, 1957. Plaintiff was awarded the care and custody of their one child, Jane Ann Miller, who is the subject of the adoption in the case presently before the court.

In the decree of divorce, the court in making a property settlement awarded plaintiff all the property she owned prior to the marriage, including corporate stocks, life insurance, and wedding gifts; cash in the lump sum of \$2,808.00 which was to come from government bonds which the court ordered to be sold; \$75.00 per month alimony; \$60.00 per month child support; and \$300 attorney's fees (R. 1-3). The remainder of the proceeds from the sale of the government bonds, plus some other funds totalling approximately \$5,067.00 was then awarded to defendant; however, after reciting that this property was to be awarded defendant, the court impressed the funds with a lien to secure the payment of alimony and support, and defendant was restrained from ever withdrawing or using said funds (R. 1-3). Thus, defendant in effect lost everything.

22 days after the divorce became final, plaintiff remarried Samuel Clyde Kemp, who was later to become the petitioner for adoption in the instant case (R. 9 & 29). At that time defendant petitioned the court for a modification of the decree (R. 7). When the matter came on for hearing, defendant made a motion for a continuance which was denied by the court (R. 12). The case was heard and the decree was modified to eliminate further payments of alimony; however, with respect to the removal of the lien no change was made (R. 12 & 13).

Subsequently, on January 17, 1958 defendant again petitioned the court for modification, asking that the lien be removed on his funds (R. 14). Defendant's petition alleged that he was a graduate engineer and well able to provide the monthly support payments, but that he needed the funds on deposit to complete the construction of a building in his electronics business (R. 14 & 15). This petition was never heard by the court as the record shows that on February 11, 1958 a stipulation was filed whereby both parties agreed to release the lien (R. 19). Although the record is silent, counsel will admit that this stipulation of release of lien, along with plaintiff's promise to pay a \$160.00 attorney's fee, was given in consideration of defendant's signing a consent for Samuel Clyde Kemp to adopt his child. The consent for adoption was signed by defendant on February 10, 1958 and was filed along with the petition of adoption on that same day (R. 29).

Almost immediately following his giving of consent, defendant realized the serious consequences of the thing that he had done, and promptly petitioned to the court to set aside the consent for adoption. Grasping at any reason, defendant based his petition primarily on the

ground that the payment of the \$160.00 attorney's fee and the removal of the lien were not done within 5 days pursuant to their agreement (R. 18). Defendant was not represented by counsel when this motion was made or presented to the court (R. 20). Based upon the fact that a bona fide dispute existed as to the time when payment of the \$160.00 was to take place and when the lien would be released, Judge Stewart M. Hanson of the Third District Court entered an order denying defendant's motion to set aside the consent. It is from this order that defendant appeals.

## STATEMENT OF POINT

### Point I

THE TRIAL COURT ERRED IN NOT PERMITTING DEFENDANT TO WITHDRAW HIS CONSENT FOR ADOPTION.

- A. WHETHER A CONSENT FOR ADOPTION CAN BE EFFECTIVELY WITHDRAWN DEPENDS UPON ALL THE CIRCUMSTANCES OF THE PARTICULAR CASE.
- B. THE CIRCUMSTANCES OF THIS CASE REQUIRE A REVERSAL OF THE TRIAL COURT'S ORDER DENYING DEFENDANT THE RIGHT TO WITHDRAW HIS CONSENT.
- C. IN THE EVENT THE COURT DENIES DEFENDANT THE RIGHT TO WITHDRAW HIS CONSENT FOR ADOPTION, THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

## ARGUMENT

## Point I

THE TRIAL COURT ERRED IN NOT PERMITTING DEFENDANT TO WITHDRAW HIS CONSENT FOR ADOPTION.

A. WHETHER A CONSENT FOR ADOPTION CAN BE EFFECTIVELY WITHDRAWN DEPENDS UPON ALL THE CIRCUMSTANCES OF THE PARTICULAR CASE.

The extent to which a natural parent has the right to withdraw a previously given consent for adoption, is a subject upon which authorities are not in agreement.

Many jurisdictions have taken the position that the natural parent may effectively withdraw or revoke the consent any time before the adoption has been finally approved or decreed by the court. This rule is stated in the 1957 Am. Jur. Supplement, (Adoption of Children, § 37.1) to be the rule in the great majority of jurisdictions wherein the question has arisen. It likewise has been applied in many recent cases. See e.g. *In re Thompson's Adoption*, 283 P.2d 493 (Kansas 1955); *In re Bilyeau's Adoption*, 310 P.2d 305 (Ore. 1957); *Wilde vs. Buchanan*, 303 S.W.2d 518 (Texas 1957); *Kozok vs. Lutheran Children's Aid Society*, 124 N.E.2d 168 (Ohio 1955); *In re Byrd*, 75 So.2d 331 (La. 1954).

The other viewpoint, which text writers announce to be the more modern trend (Annotation, 156 A.L.R. 1011; Am. Jur., Adoption of Children, § 37.1, 1957 Supp.), is that a consent once given cannot arbitrarily be withdrawn in all instances. These authorities hold that the question



whether a natural parent may effectively revoke previously given consent so as to bar the granting of an adoption decree depends upon all the circumstances of the particular case. It is this latter position which was recently declared to be the law of the jurisdiction of Utah.

The leading case is *In re Adoption of D.....*, 122 • Utah 525, 252 P.2d 223, which involved the adoption of a two year old girl. The facts of that case are as follows: Prior to the adoption the child since its birth had lived with her grandmother, rather than her mother. Because the grandmother was in poor health and physically unable to care for the child, it was arranged that she be placed with adopting parents. The new parents took the child into their home and provided for her needs which included a great deal of specialized medical attention. Because of a delay in locating the child's natural father to get his consent, the adoption proceedings were not completed in the usual one year period. Some 14 months after the placement, the child's natural mother decided to change her mind and revoke the consent. It was held that under circumstances where the adoptive parents have accepted the child, kept it in their home for a considerable period of time so that mutual affections have developed, gone to trouble and expense in providing care and in making a home for said child, and in all respects satisfied the requirements of the law as to adoptive parents, the natural parent would not be permitted to revoke a previously given consent.

Prior to the D..... case, the same question was before this court in the case of *Taylor vs. Waddoups*, 121 Utah 279, 241 P.2d 157. In that case the court reversed the decision of the trial court and allowed a natural mother

to set aside an adoption decree. While the *Taylor* case was decided primarily on the ground that the consent was invalid because it had not been signed in court, Justice Wade and Justice Henriod preferred to rest their concurrences on the ground that the consent had been effectively revoked prior to the adoption. In the later *D.....* case, *supra*, the court was careful not to disturb the reasoning of the *Taylor* case declaring that cases of this type must each depend on their particular facts. It was stated:

“Reading of many cases on this subject teaches that each depends upon its own facts: The circumstances of the placement of the child; those under which the consent was given; the length of time the adopting parents have had the child; any ‘vested rights’ that have intervened; the welfare of the child; the conduct, as well as the character and ability of the respective claimants; these and the particular governing statute are all given consideration in determining whether the consent may be revoked.”

In reading the trial court’s decision in the instant case (R. 20), it is clear that all of the above factors were not taken into consideration. Rather, the decision was made to depend upon the results of a dispute as to when certain acts relating to the payment of an attorney’s fee had been performed. It is defendant’s contention on appeal that his rights do not depend upon this technicality, because under the particular facts as they here exist, defendant had a right to withdraw his consent as a matter of law.

B. THE CIRCUMSTANCES OF THIS CASE REQUIRE A REVERSAL OF THE TRIAL COURT’S ORDER DENYING DEFENDANT THE RIGHT TO WITHDRAW HIS CONSENT.

In approaching the problem at hand it is well to keep in mind that the right of natural parents to the custody of their children has always been regarded as one of the highest of natural rights. See *In re Gerald Fusco*, 127 A.2d 468 (Del. 1956). This principle was acknowledged by the Missouri Court (which incidentally follows the Utah rule on the question of withdrawal of consent) in the very recent case of *Adoption of McKinze*, 275 S.W.2d 365 which affirmed a ruling of a trial court dismissing a petition for adoption where the natural mother had revoked her consent. There the court stated:

“It must always be born in mind that the rights of natural parents to the custody and possession of their children are among the highest of natural rights, and, being so, are not to be interfered with by the state except where it clearly appears that the natural parents have forfeited their rights by their own misconduct and the child’s best interests will be served by allowing it to be adopted by some one else. Consequently, it is uniformly held as a simple matter of natural justice that adoption statutes are to be construed in favor of the rights of natural parents, and that when controversy arises between natural parents and those who seek to destroy their parental status, every reasonable intendment is made in favor of the formers’ claims.”

The above general principle should serve as a guide in analyzing the facts of the instant case. These facts, show beyond question that:

- (1) This case does not involve the destruction of any intervening “vested rights”.
- (2) In this case defendant attempted to withdraw consent almost immediately after it was given.

(3) The circumstances under which the consent was given favor its withdrawal.

(4) The best interests of the child would be served by allowing the consent to be withdrawn.

These factors will be discussed separately in the order mentioned above.

(1) *This case does not involve the destruction of any intervening "vested rights".*

In analyzing those cases which have deprived the natural parent the right to withdraw a consent, it is particularly noted that they invariably involve a situation where the child has been placed in a new home for a substantial period of time and the bonds of affection have been forged between the new parents and the child. See Annotation, 156 A.L.R. 1011; *In re Adoption of D.....*, 122 Utah 525, 252 P.2d 223; *In re Adoption of Cannon*, 53 N.W.2d 877. Under such circumstances, courts have been reluctant to uproot the child from its environment, or to destroy a new parental relationship which has arisen.

Such a factor, however, does not exist in the case before the court. The child, Jane Ann Miller, has resided with her mother and stepfather since the time of their marriage. She will continue to live in such home no matter how this appeal is decided, because her mother was awarded custody at the time of her divorce from defendant. Should appellant prevail in this appeal, there is no reason why the child cannot continue to have a very happy and satisfactory relationship with her stepfather. On the other hand, to uphold the decision of the trial court is to forever deprive this father of his little girl whom he but

naturally loves and cherishes, and who is entitled to this love of a natural father. Such a consequence is way out of proportion to the mistake defendant made of signing a consent for adoption in a moment of thoughtlessness.

(2) *In this case defendant attempted to withdraw consent almost immediately after it was given.*

The length of time elapsing between the giving of consent and the attempted withdrawal is one of the factors to consider in determining whether to allow withdrawal of said consent. See Annotation, 156 A.L.R. 1011. It will be noted here that the consent was given on February 10, 1958, and defendant's motion for withdrawal was dated February 19, 1958. Thus only nine days elapsed between these two events. From this, it can be assumed that defendant realized his mistake and almost immediately took steps to rectify the same. This is but another factor supporting an effective withdrawal.

(3) *The circumstances under which the consent was given favor its withdrawal.*

The record in this case in no way indicates that the defendant signed the consent because of any lack of love for his daughter. Nor does it in any way imply that he is unwilling or unable to measure up to parental responsibilities. On the contrary, it can be shown from various portions of the record (R. 18, 19, 20, 22, 24) that the consent was actually bargained for at a time when defendant felt a pressing need for financial resources. The inducement for such consent was plaintiff's releasing the lien on defendant's funds which had been placed there under the terms of a burdensome and unequitable divorce decree, plus payment of a \$160.00 attorney's fee.

Had defendant been represented by counsel in the lower court and correctly advised as to his rights (See argument under Point III of this brief) he alleges that circumstances could have been brought out which would render invalid the entire agreement. However, even as skimpy as the facts appear in the record, it is apparent that the agreement reeked with illegality, and was contrary to public policy. It approaches the crime of child selling, which is so repugnant to the people of this state that it has been made a felony by the legislature (See 76-15-3 U.C.A. 1953). Obviously such an agreement can not be the basis for a valid consent for adoption, and the whole agreement should be declared void (as to the effect of illegality see *McCormick vs. Life Insurance Co. of America*, 6 Utah 2d 170, 308 P.2d 949).

Defendant does not deny his part in the agreement. However, the child's mother and stepfather participated to an equal, if not greater extent. Defendant attempted to immediately repent after coming to a realization of what transpired; yet they insist on holding him to this illegal agreement. It would be unequitable and unfair to both the natural father and the child to allow them to do so.

(4) *The best interests of the child would be served by allowing the consent to be withdrawn.*

There is nothing in the record to show how this adoption could possibly be for the best interests of the child. Under such circumstances, there is no choice but to apply the well recognized presumption that the welfare of the child will best be subserved by being in the custody of its natural parents. In re Adoption of D....., 122 Utah 525, 252 P.2d 223; *Walton vs. Coffman*, 110 Utah 1, 169 P.2d 97.

Plaintiff has alleged that defendant earns a very adequate monthly salary (R. 10), which defendant readily admits. He is perfectly competent and capable of supporting his child and desires to do so.

Concerning defendant's love for his child, the record shows two separate occasions when he petitioned the court to protect his rights of visitation (R. 7 & 14). Also the trouble and expense of bringing this appeal is another indication of his sincerity.

Certainly the child's welfare cannot be enhanced by depriving her of this love, support, and attention to which she is entitled under the law.

C. IN THE EVENT THE COURT DENIES DEFENDANT THE RIGHT TO WITHDRAW HIS CONSENT FOR ADOPTION, THE MATTER SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

Rule 76 (a), Utah Rules of Civil Procedure, provides as follows:

"The Supreme Court may reverse, affirm, or modify any order or judgment appealed from . . . or may direct a new trial in any case, *or further proceedings to be had.*

Under such a rule, it is generally conceded that when the record is in such shape that the appellate court cannot in justice determine what final judgment should be rendered, the case will be remanded for such further proceedings as the interests of justice may require. See Am. Jur., Appeal & Error, § § 1210, 1211.

If there is any one thing in this appeal that stands out above all others, it is the manner in which the case was mishandled in the trial court. When defendant pre-

sented his motion to set aside the consent for adoption, there were many relevant factors which should have been presented to the court. Among these were the circumstances surrounding his giving of consent; his reasons for so doing; the coherisions that were brought to bear upon him; his conduct toward the child prior to the adoption; his feelings toward the child; his religious beliefs concerning the child; his ability to provide and the advantages he could afford the child; the manner in which he was misinformed as to his legal rights at the time of the consent; and other material evidence.

Indeed, since defendant was acting without counsel, the trial court was not briefed as to the law, and the matter was presented, argued, and decided primarily on a technical point which actually should have had little or no relevance to the decision.

In light of the extreme importance of the question involved, and the high nature of the parental right, the interests of justice would at the very least require that defendant be afforded the opportunity of having a full and adequate hearing of his case.

### CONCLUSION

It is respectfully submitted that the facts as they appear in this case require a reversal of the trial court's order denying defendant the right to withdraw his consent for adoption. However, in the event defendant is not granted the relief he seeks, the matter should be remanded to the lower court for further proceedings.

Respectfully submitted,

DAVID E. WEST

*Attorney for Appellant*