

1958

Jane Laraway Miller v. Orrin Towler Miller : Brief of Respondents

Utah Supreme Court

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Regnal W. Garff, Jr.; Attorney for Respondent;

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UTAH

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

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JANE LARAWAY MILLER,
Plaintiff and Respondent,

Supreme Court, Utah

—vs.—

Case No. 8862

ORRIN TOWLER MILLER,
Defendant and Appellant.

BRIEF OF RESPONDENTS

REGNAL W. GARFF, JR.
Attorney for Respondent

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IN THE SUPREME COURT

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STATE OF UTAH

JANE LARAWAY MILLER,
Plaintiff and Respondent,

—vs.—

ORRIN TOWLER MILLER,
Defendant and Appellant.

Case No. 8862

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Although the appellant's statement of facts is basically correct, there are certain omissions which of necessity must be called to the attention of the Court. In actuality, the defendant did not "lose everything," as alleged in appellant's brief. As shown in the Decision of the Court, Rendered January 4, 1957, by the Honorable Judge Joseph G. Jeppson (R. 2), there were other assets possessed by the parties, viz: an automobile, and certain

funds that had been on deposit in the Credit Union, which were withdrawn by the defendant and delivered by him to his mother and brother, in what the Court may have considered as an effort to conceal them. The Court was convinced that the defendant still owned and had effective control over the funds (R. 2), and determined that the parties had a total of \$13,490.00 to be divided (R. ~~288~~ Supplemental Filing). Of this amount, \$5,067.00 was impressed by the Court with a lien to be used for the payment of alimony in the amount of \$75.00 per month for a period of twenty-four months, and for support money in the amount of \$60.00 per month. Thus, it is obvious that the defendant still had substantial assets and did not lose everything. The intent of the Court was to leave the defendant's salary free from any charges for alimony or support money and to ensure the payment of same.

The defendant has frequently and bitterly complained of this decree, but it must be pointed out that the Court, in rendering its decree, had before it both the plaintiff and the defendant and had opportunity, over the period of the trial, which extended over a period of two days, to observe the attitudes of the parties, and the Order and Decree, as issued, was not made without full justification.

It must be further pointed out that the defendant had his remedy by appeal, but no appeal was filed from this decision. Defendant has, at times, throughout this proceeding, appeared as his own attorney, but he has also been adequately represented by able counsel, as an ex-

amination of the record will disclose. Instead of appeal to the Supreme Court, defendant has sought by various motions to have other judges of the District Court set aside and reverse the decision of Judge Jeppson.

A Motion for Amendment of Decree was made by the defendant December 28, 1956 (R. 4). This Motion was filed in behalf of defendant by Keith R. Schofield, Esq. It was heard and denied by the Court January 17, 1957. A second Motion for Amendment was filed on September 16, 1957, on behalf of defendant by Elias L. Day, Esq. This was heard by the Honorable Alden J. Anderson in October, 1957, and the defendant's motion to reduce the amount of support money from \$60.00 per month to \$45.00 per month and to remove the lien from the savings account was again denied. A third motion, to release the funds in the savings account for the use of the defendant, was filed January 15, 1958, by James E. Faust, Esq., as attorney for the defendant. At the time this motion came up for hearing an effort was made to settle the controversy and terminate the litigation which had consumed so much time and effort and caused so much distress over the past year and a half. As a result of the negotiations in the court room of the Honorable Judge Stewart M. Hansen (R. 1-5, Supplemental File), a stipulation was entered into, in open court, whereby the defendant, in order to free himself of any further obligation to support his child, and thereby obtain the release of the balance of the funds on deposit in the savings account, agreed to the adoption of his daughter by the plaintiff's husband, Samuel Clyde Kemp, and in open

court, before Judge Hansen, the defendant signed the Consent to Adoption, which was then filed in the adoption proceedings, Probate No. 40721, in the Third District Court in and for Salt Lake County, State of Utah.

By the stipulation referred to above, the impressed funds on deposit in The Prudential Federal Savings & Loan, were released to defendant and he withdrew those funds, in excess of \$5,000.00. He presently retains these funds and has made no offer to replace them. In addition, by the terms of the stipulation, plaintiff was to reimburse defendant in the sum of \$160.00 for attorneys fees paid by defendant to his attorney, James E. Faust. This sum was remitted to (R. 22) and received by defendant and has been retained by him.

Immediately after accomplishing his primary purpose of removing the lien from the savings account and acquiring control of the impressed funds, the defendant, without offering to restore any benefits received by him through the stipulation, next sought to relieve himself of his obligation under the terms of the stipulation, that of permitting the plaintiff's husband to adopt the child. Prior to obtaining the money, he willingly signed, after being duly apprised of his parental rights and the legal consequences, before Judge Hansen, the Consent to Adoption. It was after he had obtained control of the funds that he filed, in the divorce proceedings, a Motion for Withdrawal of Consent to Adoption. This motion was denied by Judge Hansen, before whom the stipulation had been entered into, and from this order of denial this appeal has been filed.

STATEMENT OF POINT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING TO DEFENDANT PERMISSION TO WITHDRAW HIS CONSENT FOR ADOPTION FOR THE FOLLOWING REASONS:

A. DEFENDANT'S WRITTEN CONSENT WAS GIVEN IN OPEN COURT AS PROVIDED BY SECTION 78-30-8, UTAH CODE ANNOTATED, 1953.

B. DEFENDANT'S WRITTEN CONSENT WAS GIVEN TO CONTRACT AND AGREEMENT.

C. DEFENDANT'S CONSENT TO ADOPTION WAS GIVEN IN CONSIDERATION OF AN ORDER AND DECREE OF COURT AND THE DEFENDANT HAS RETAINED AND NOT TENDERED BACK THE BENEFITS GRANTED TO HIM BY SUCH ORDER AND DECREE.

D. THE BEST INTERESTS OF THE MINOR CHILD WILL BE SERVED BY PERMITTING THE CONSENT OF ADOPTION TO STAND AND THE ADOPTION TO BE FULLY CONSUMATED.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING TO DEFENDANT PERMISSION TO WITHDRAW HIS CONSENT FOR ADOPTION FOR THE FOLLOWING REASONS:

A. DEFENDANT'S WRITTEN CONSENT WAS GIVEN IN OPEN COURT AS PROVIDED BY SECTION 78-30-8, UTAH CODE ANNOTATED, 1953.

The human mind is so constituted that it is not unusual for a person to change his mind; to reverse a previous decision and follow a new course of action. Within certain limits this is necessary, proper, and even desirable. But there comes a point where that is neither desirable nor proper. Frequently persons who enter into a contract have a change of heart and would like to be relieved of the obligations thereof; but after the contract has been entered into and commitments made by both parties, there is no backing out, and proper contracts will be enforced by a decree of specific performance. Quite often, persons marry, and to borrow the language from appellant's brief, "immediately realize the serious consequences of the thing they have done," and wish to repent of the marriage covenant and earnestly and sincerely desire to recant that which has been done; but once the marriage vow has been pronounced there can be no withdrawal of consent.

So, also, in the matter of adoptions, there comes a point where consent, once given, is, and should be, final and irrevocable, not only out of fairness to the parties already committed, but also out of consideration to the child and its future; that it might look forward to a stable, secure home which is not beset with the uncertainties, whims, and caprice of vacillating human emotions and decisions. Associate Justice Miller of the Court of Appeals of the District of Columbia in *In Re Adoption of a Minor*, 79 U.S. App. D.C. 191, 144 F. 2d 644, 648, stated in forceful language as follows:

"It is apparent that if in particular cases the unstable whims and fancies of natural mothers (fathers) were permitted, first, to put in motion all the flow of parental love and expenditure of time, energy and money which is involved in adoption, and then as casually put the whole process in reverse, the major purpose of the statute would be largely defeated. Doctors of medicine and of divinity, potential adoptive parents, and social workers would be stymied in their rehabilitation efforts. A premium would, instead, be put upon the emotional instability which produces illegitimates; to say nothing of the possibilities for racketeering which such an interpretation of the law would put in reach of those who may be criminal in their tendencies as well as lacking in the qualities of parenthood."

Once written consent has been given, in open court, and in the manner prescribed by law, the point of no return has been reached and consent cannot be withdrawn. This is, as the appellant concedes, the modern rule. In *McRae v. Lamb*, 233 S.W. 2d 193, the Texas Supreme Court, in reviewing a prior rule, said:

"From an examination of the reported case it seems that since the decision of the Massachusetts Supreme Judicial Court in *Wyness vs. Crowley*, 1935, 292 Mass. 461, 198 N.E. 758, the rule which does not permit an arbitrary withdrawal of consent has become the majority rule. This is indicated by the annotations appearing in 138 A.L.R. 1038 and 156 A.L.R. 1011, as well as the cases appearing in the pocket parts of 2 C.J.S. Adoption of Children Sec. 21 (4), pg. 386."

For many years the law of Utah has required the consent of the natural parents, but no particular form of

consent was prescribed. The 1953 Legislature amended the law to add sanctity to the consent. No longer was a mere consent before a notary public sufficient. The law, as amended, was designed to make certain that the person giving the consent should be fully advised as to the legal significance of his act. The law, as amended, requires the appearance of the consenting parent before the District Court, and where that cannot be done, then before a commissioner especially appointed for the purpose. The consent, under these circumstances, assumes the sanctity and finality of the marriage vow and is, and should be irrevocable.

That this is the intent and effect of the law is shown in the unanimous decision of the Supreme Court of the State of Utah, where, *In re Adoption of D.....*, 122 Utah 525, 252 P. 2d 223, 230, the Court said:

“No statutory provision specifically prohibits a change of mind and revocation by a parent who consents before a court. It is obviously unnecessary to so provide. These statutory provisions which authorize that consent be given in the presence of and with the approval of the Court certainly contemplate that a consent so executed would be valid and binding.”

In the same case, *In re Adoption of D.....*, *supra*, the Court points out that when written surrender of a child to any licensed child placing society or agency is executed “the release to the agency is intended to be final.” Should a written surrender of custody to a child placing agency have any greater validity and finality

than a consent to adoption executed in open court before a Judge? The D..... case again gives the answer:

“It would be anomalous indeed if, as the appellant contends, signing before an employee of the agency would have greater sanctity than one executed formally before the Court in the adoption proceeding.”

The defendant is an adult person in possession of all of his faculties. The record indicates that he was well apprised of his rights by Judge Hansen before he signed the adoption consent. Certainly he was aware of all the implications and rights involved. It has been suggested that the action of the defendant in signing away his child for a release of the lien on money impounded for the child's benefit is akin to selling away the child. This question was considered by the Supreme Court of New Mexico in *Barwin v. Reidy*, 307 P. 2d 175, 184. The parents sold their child, which action the Court soundly condemned, but added:

“But denouncing the acts of the adults does not settle the question of what happens to the children. Can it be said that natural parents may sell their children, enjoy the proceeds and then come into Court and demand the return of their children? If so, what would there be in law to prevent their selling the children over and over again? The answer is clear—the act of selling children constitutes abandonment of them as a matter of law. In fact, we can think of no more drastic way in which children could be abandoned, unless it be simply to leave them alone and exposed to the elements.”

In the case now before the Court the statutory provisions for obtaining the consent of the father were meticulously followed, and the consent, once given, is irrevocable, and certainly the defendant does not have the right to withdraw his consent as a matter of law.

B. DEFENDANT'S WRITTEN CONSENT WAS GIVEN PURSUANT TO CONTRACT AND AGREEMENT.

Because of the haphazard manner in which this proceeding has been handled, the record before the Court is not as clear as it should be. As is evident from the second paragraph of appellant's Statement of Case, pg. 1 of Appellant's Brief, defendant's motion to set aside the consent was improperly numbered and filed in case No. 106986. To have been effective it should have been numbered and filed in the adoption proceeding. Respondent was not required to and made no effort to present testimony in opposition to appellant's motion. All that respondent was required to do and all that she did do at the hearing on the motion was to show its invalidity, and the Court thereupon denied the motion (R. 20).

It will be noted that the motion of February 19, 1958, on which the order was based from which defendant is now appealing, merely required the plaintiff to "appear . . . within five days to show cause for breach." (R. 18). The plaintiff appeared, showed that there was no breach, and the Court denied the motion. No evidence was called for as to the contract upon which defendant's consent was based.

Hence, there is no record of the underlying agreement which constituted the consideration for the execution of the consent to adoption, save and except the transcription of the stipulation, which was filed in the Supreme Court on June 16, 1958. Nevertheless, it is conceded by appellant that the release of the lien on the impressed money (R. 19) and the payment of appellant's attorney fee in the sum of \$160.00, were "given in consideration of defendant's signing a consent for Samuel Clyde Kemp to adopt his (defendant's) child."

Now note the position in which the minor child will be placed if defendant is permitted, in breach of his agreement, to withdraw his consent. Prior to the signing of the consent for adoption and the release of the lien, the child had the security of a home with its mother and foster father, and also the security of a substantial sum of money, impressed with a lien for the child's benefit. After the signing of the consent and the release of the lien on the funds the child had lost the security of the impounded money, but was in position to receive, instead, the security of a home in which it would have a legal right to support from the adopting father, including rights of inheritance. This right the defendant would deny his child if he is permitted to breach his agreement and withdraw his consent.

That parents may bind themselves by contract to permit the adoption of their children has been decided by the Supreme Court of the State of Utah in the case referred to above, *In re Adoption of D.....*, supra, the syllabus of which reads as follows:

"Contracts for adoption, fairly and voluntarily entered into, are valid as between the parties, but will not be enforced to the detriment of the child. U.C.A. 1953, 55-8-2(c), 55-10-42, 78-30-4, 78-30-8."

This case merely followed a previous Utah decision which has remained unchanged for almost half a century, *Stanford v. Gray*, 42 Utah 228, 129 P. 423, in which the Court decided:

"The great weight of authority however, sustains the position that a parent may by contract legally transfer and surrender his infant child into the custody of another where the interest of the child is not prejudiced by the transaction."

Numerous authorities are then cited by the Court.

C. DEFENDANT'S CONSENT TO ADOPTION WAS GIVEN IN CONSIDERATION OF AN ORDER AND DECREE OF COURT AND THE DEFENDANT HAS RETAINED AND NOT TENDERED BACK THE BENEFITS GRANTED TO HIM BY SUCH ORDER AND DECREE.

As hereinabove set forth, the consent to adoption executed by the defendant was based upon the consideration of the release by the Court of the lien on the savings account on deposit at Prudential Federal Savings and Loan, and the payment by plaintiff to defendant of the attorney fee incurred by him in the amount of \$160.00. The money in the savings account was released upon stipulation of counsel and order of court (R. 19). It is shown by the record (R. 20) that defendant had this stipulation in his possession at the time he appeared in

court on his motion to withdraw consent; denial of which gave rise to this appeal. Defendant withdrew the funds from the savings account. He received (R. 22) payment of the attorneys fee. Thus, he has accepted and retained all of the benefits granted to him by the stipulation and court order. Defendant has not tendered back the benefits which he received; nothing has been restored.

There is an ancient maxim in equity, "He that seeks equity must do equity." This Court in *In re Adoption of D.....*, supra, declared an adoption proceeding to be "equitable in the highest degree." Certainly, upon equitable grounds the defendant is not entitled to the equitable relief of being able to withdraw his consent to adoption.

But there is a further principle in this connection which precludes granting to defendant the relief he seeks. This Court has repeatedly held that where a party accepts the benefits of a decree he waives his right to appeal and will not be heard to complain of those parts of the judgment which he finds objectionable. Thus, in *Cornia v. Cornia*, 80 Utah 486, 15 P. 2d 631, the appellants recognized the validity of a decree by accepting the benefits of the same in their favor. The Court said:

"For these reasons they have waived their right to appeal, and are estopped from claiming the right to have the decree reviewed by this court. The following cases and authorities will be found to sustain the foregoing conclusions: 3 C.J. 665, Sec. 536; *Ottenheimer v. Mountain States Supply*, 56 Utah 190, 188 P. 1117; *Aetna Life Ins. Co. v. Industrial Commission*, 73 Utah 366, 274 P. 139; *Albright v. Oyster* (C.C.A.) 60 F. 644."

Mr. Miller: Yes.

The Court: And is it your desire at this time to sign this consent, consenting that the child be adopted by your former wife's present husband and herself?

Mr. Miller: I do.

The Court: And is anybody forcing you to do this?

Mr. Miller: No. *I will make a statement what the money is for if you would like to hear it.*

The Court: You are doing this though of your own free will and consent?

Mr. Miller: Yes.

It should also be noted that Mr. Miller was sworn by the clerk of the Court before he gave this testimony.

The defendant's interest in money, rather than his child and her welfare, is further illustrated by defendant's petition, through his attorney, Elias L. Day, on September 13, 1957, to have the order for child support reduced from \$60.00 per month to \$45.00 per month (R. 8). This was done in spite of the fact that shortly before that time defendant's salary was increased from \$400.00 per month to \$525.00 per month (R. 10). In the face of this overwhelming evidence showing defendant's callous, materialistic behavior, towards his daughter, the appellant would have the Court believe that it was his love and concern for the child's welfare that prompted him to move to withdraw his consent to adoption. (Appellant's Brief, page 12) "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." What love? What support, other than that ordered by the Court and to which the defendant objected and moved to reduce? What attention from the defendant? Who has supported this child since defendant withdrew the funds from impressed savings account in February of 1958?

For what it may be worth, as an indication of the unstable nature and disposition of the defendant, respondent respectfully calls the Court's attention to the fact that throughout the course of these proceedings the defendant has deemed it necessary to change attorneys at frequent intervals. In addition to other counsel with whom defendant has discussed this matter, the record will show the following attorneys to have appeared for defendant at various times:

Paul E. Reimann, who filed defendant's Answer.
Richards & Bird and Keith Schofield, who represented defendant at the trial.

Elias L. Day, who appeared on motion for amendment of decree.

James E. Faust, who appeared on a similar motion.

David E. West, who filed defendant's appeal brief.

The Court is aware of the ability and integrity of these worthy members of the bar. Although appellant's brief alleges in several places that defendant was without legal counsel, it seems improbable that he suffered from lack of legal assistance. Nevertheless, he has still found it necessary to appear in his own behalf, without legal counsel, at various times, and in particular at the time

of preparation and presentation in court of the motion and order which is the subject of this appeal. At the present time he has discharged his legal counsel, Mr. West, and is again without counsel. One can only conclude from this parade of legal counsel that the defendant refuses to heed the advice of his attorneys, thereby compelling their withdrawal, or he changes his mind so frequently as to be wholly unpredictable. His execution of the adoption consent and then the professed immediate repentance therefrom is further evidence of defendant's instability.

The appellant, in his brief, asserts that there are no "invested rights" in this case.

"In analyzing those cases which have deprived the natural parents 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. Under such circumstances, courts have been reluctant to uproot the child from its environment, or to destroy a new parental relationship which has arisen." (Appellant's Brief, pg. 9.)

Attention is called to the fact that the child has been living with the adopting father since his marriage to the plaintiff July 26, 1957, which is well over a year, and certainly time enough for a strong parental attachment and bond to develop; and such relationship would surely be destroyed if defendant were allowed to prevail in this appeal. Mr. Kemp, the adopting father, is the only father this child has known, for all practical purposes.

What positive contributions to the welfare of this child would be effected if defendant's appeal were denied and the consent of adoption was to stand and the adoption was to be fully consummated? Primarily, and of greatest importance, she would have the security of a real, full-time father who loved her and wanted her to such an extent as to choose her to become his own daughter. Mr. Kemp, the adopting father, is the only real father this child has known. She would have the security of having the same name as her mother as well as her new father. This is important to children. She would be enveloped in the warmth of a stable, secure, mature home and a peaceful, harmonious environment. She would have not only the right to inherit from the defendant, her natural father, but also to inherit from her adopted father, Mr. Kemp. (See *In re Benner's Estate*, 109 Utah 172, 166 P. 2d 257.)

If the defendant prevails in this appeal the child will be caught up in the turmoil of divided loyalties motivated by possible sporadic visits from a stranger who professes to be her father. The very real possibility, yea probability, of open competition between natural mother and natural father for the control of the child, which often results in "parental bribery" of a child's affections with utter disregard for sensible limits and discipline and the child's well-being. A step-father without rights, even though he should be the one to exercise and create the balance in a well adjusted home, because of the necessity of having to compete with another man for the loyalties and respect of his step-daughter. The

confusion of bearing a name different from that of her mother. The emotional upset of knowing that she doesn't really "belong" anywhere. The tension of never knowing when or where her natural father will appear to upset the home once again. It seems impossible, as the District Court records are examined revealing the strife and turmoil of the plaintiff's and defendant's marital relationships, and as the defendant's behavior in the past is reviewed as regarding his instability and lack of interest in his child, to conceive of this child ever achieving a normal, happy, stable and secure life if the defendant's appeal is granted. It would be cruel to the child to subject her to the turmoils that are here evident.

CONCLUSION

This Court has held in *In re Adoption of D....*, supra, "The parents consent to adoption, once voluntarily given and acted upon by adopting parents, cannot be withdrawn without good cause." It is respectfully submitted that the appellant has not shown good cause for such a withdrawal; that it would be for the best interests of the minor child to be adopted, and that the Court should affirm the order of the District Court denying defendant the right to withdraw his consent.

Respectfully submitted,

REGNAL W. GARFF, JR.
Attorney for Respondent