

1967

Dana Phelps v. Social Service And Child Welfare
Department Of The Relief Society General Board
Association of the Church Of Jesus Christ Of
Latter - Day Saints : Defendant And Respondent's
Petition For Rehearing And Brief In Support Of

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IN THE SUPREME COURT OF THE STATE OF UTAH

D --- P ---,

Plaintiff and Appellant,

vs.

SOCIAL SERVICE AND CHILD WELFARE
FARE DEPARTMENT OF THE
LIEF SOCIETY GENERAL
ASSOCIATION OF THE CHURCH
JESUS CHRIST OF LATTER DAY
SAINTS,

Defendant and Respondent.

DEFENDANT AND RESPONDENT
REHEARING AND BRIEF

Appeal from an order of the District Court
and for Salt Lake County, State of Utah,
Leonard H. Elton, District Judge.

FILED

SEP 14 1967

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

D --- P -----,

Plaintiff and Appellant,

vs.

SOCIAL SERVICE AND CHILD WEL-
FARE DEPARTMENT OF THE RE-
LIEF SOCIETY GENERAL BOARD
ASSOCIATION OF THE CHURCH OF
JESUS CHRIST OF LATTER - DAY
SAINTS,

Defendant and Respondent.

Case No.

10892

DEFENDANT AND RESPONDENT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT OF

This appeal was from an order of the Third Judicial District Court in and for Salt Lake County, State of Utah, The Honorable Leonard H. Elton, District Judge.

PETITION FOR REHEARING

The Respondent Social Service and Child Welfare Department of the Relief Society General Board Association of the Church of Jesus Christ of Latter-day Saints respectfully petitions this court for rehearing in the above entitled cause and alleges that the court in its majority opinion erred on the following points:

POINT ONE

THE MAJORITY OPINION ERRED IN ITS
ANALYSIS OF THE EVIDENCE AND IN RE-
VERSING THE FINDINGS OF FACT OF THE
TRIAL COURT 4

POINT TWO

THIS COURT ERRED IN REVERSING THE
TRIAL COURT IN THE ABSENCE OF CON-
SIDERATION OF THE BEST INTERESTS OF
THE CHILD AND IN ORDERING COMPLI-
ANCE BY PERSONS NOT PARTY TO THIS
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POINT THREE

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SHOULD BE OBTAINED AS SOON AFTER
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THE COURT ERRED IN FAILING TO REC-
OGNIZE ESTABLISHED PUBLIC POLICY,
WHICH POLICY WOULD UPHOLD AGENCY
PLACEMENT UNDER THE FACTS OF THIS
CASE19

Respondent, recognizing the emotional and social consequences of this case further petitions the court, in granting this motion to set the same for argument at an early date.

WHEREFORE, Defendant and Respondent prays that this action be reheard by this Honorable Court, that such rehearing be scheduled for an early setting and that the

foregoing errors of the court be corrected in the interest of law and justice.

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF NATURE OF CASE AND DISPOSITION OF THIS COURT ON ORIGINAL HEARING

This is a case involving an attempted rescission by a natural mother of her consent to an adoption. The proceeding was in Habeas Corpus. The trial court denied the Writ. The Supreme Court by a 3 to 2 decision reversed the Trial Court and ordered a return of the child. Justice Henroid wrote the majority opinion. Justice Tuckett and Justice Callister concurred. Justice Ellett and Chief Justice Crockett dissented.

STATEMENT OF FACTS AND INTRODUCTION

The facts set forth in Respondent's Brief on appeal and in the dissenting opinion of Justice Ellett and Chief Justice Crockett accurately reflect the records and will be referred to in the following arguments:

While it is not the Respondent's intent to ask the Court to merely reconsider those points which have been previously fully considered, the Respondent does not agree with the Court's holding and rationale as expressed in the majority opinion and desires to suggest certain facts which the majority opinion in our judgment seemingly overlooked. It appears to Respondent that the majority failed to treat and apparently failed to consider certain controlling principles urged by Defendants in its original brief herein and certain matters of law which have been binding upon this court under the doctrine of stare decisis.

ARGUMENT

POINT ONE

THE MAJORITY OPINION ERRED IN ITS ANALYSIS OF THE EVIDENCE AND IN REVERSING THE FINDINGS OF FACT OF THE TRIAL COURT.

The trial court's findings were made after hearing sharply conflicting testimony. For example, Dana Phelps testified that Mrs. Stewart told her the consent would be obtained two or three days after birth to assure that the mother was not under the influence of narcotics or anesthesia. (Tr. p. 20). Mrs. Stewart testified that she told Dana Phelps she would ordinarily obtain the consent the day after the delivery. (Tr. p. 69). Dana Phelps testified she did not recall a telephone call from Mrs. Stewart about coming to the hospital for the consent. (Tr. p. 18 and 27). Mrs. Stewart testified that she called Dana Phelps on December

17, 1966, to say that she was coming for the consent on December 18, 1966 and Dana Phelps said "fine." (Tr. p. 63). Dana Phelps testified she did not discuss other counseling services with Mrs. Stewart. (Tr. p. 25-26). Mrs. Stewart testified that Dana Phelps refused counseling. (Tr. 62). Dana Phelps testified that she never intended to place the baby for adoption. (Tr. 24). Mrs. Stewart (Tr. p. 72-73), Mrs. Bridgewater (Tr. p. 112, 118-119), and Dr. Hebertson (Tr. p. 77), testified that Dana Phelps, expressly decided on adoption. Barbara Phelps and William Phelps testified generally that Dana Phelps was crying and not coherent the day following the delivery. Mrs. Stewart, Dr. Hebertson and Mrs. Jerominski testified generally that Dana Phelps was not continually crying and was quite coherent the day after the delivery. Dr. Clark testified generally that Dana Phelps' decision-making capacity was impaired the day following delivery from various factors including sleep deprivation and narcotics. Dr. Hebertson testified Dana Phelps did not have unusual reaction to narcotics and the impact of the small dose was over in two hours; further that she suffered no sleep deprivation and was competent to make a decision the day following the delivery. The point should not be belabored. The evidence was in sharp conflict.

Recognizing the obligation of Utah Constitution, article VIII, sec. 9 and URCP 72(a) to review questions of fact and law in equity cases, this Court's decision is a dramatic departure from the long established principles for appellate review of equity cases. The equity practice of hearing de novo on appeal arose from the English Chancery practice of hearing equity cases on depositions. The shift to the trial to the court on oral evidence, with the consequent advantage

to the trial court in making factual determinations, resulted in a change in the equity practice of review. Pound, *Appellate Procedure in Civil Cases*, pp. 300-302 (1941). The change in practice was reflected early by this Court.

This court has frequently held that even on appeals in equity cases notwithstanding both questions of law and facts are subject to review, the findings of the trial court will not be set aside when the evidence is conflicting, unless the evidence is clearly insufficient. *Wright v. Union Pacific R. Co.* 22 Utah 338, 344-4, 62 P. 317 (1900.)

This principle has been applied time and again by this court. *Beesley v. Boardman* 50 Utah 149,, 166 P. 991 (1917) ; *Stanley v. Stanley* 97 Utah 520, 94 P. 2d 465 (1939) ; *Shaw v. Jeppson* 121 Utah 155, 239 P. 2d 745 (1952) ; *Lawler v. Lawler* 121 Utah 201, 240 P. 2d 271 (1952) and *McMahon v. Tanner* 122 Utah 333, 249 P. 2d 502 (1952) are a few of the many decisions reiterating this principle. It has likewise been applied to cases of the precise kind before this Court. *Walton v. Koffman* 110 Utah 1, 169 P. 2d 97 (1946) and *Wilson v. Pierce* 14 Utah 2d 317, 383 P. 2d 925 (1963).

The majority of this Court has said, "I am not impressed in this case with the rather worn cliché about the trial court being in a better position to determine weight and credibility and that we should not substitute our judgment for his unless we are convinced he made improper findings. There is just as valid a rule to the effect that we must do our own weighing and find our own facts in an equity case like this. . ." The "just as valid a rule" which this Court applies is the old English Chancery rule applicable to cases heard on deposition.

“On a motion for a new trial, supported and resisted, as in the case at bar, on ex Parte affidavits, those making the affidavits are not subject to cross-examination, and not being before the trial judge, his opportunity to judge of their credibility, and the weight of their statements, is not better than the appellate court. In all such cases and *in equity cases where the evidence consists exclusively of depositions*, the reason upon which the decisions quoted are based fails, and the rule established by them has no application to such cases. *Wright v. Union Pacific R. Co.* supra at p. 345 (emphasis supplied).

Where the evidence is in conflict and credibility and demeanor testimony is involved, the appellate court in an equity case will defer the primary inferences to be drawn from demeanor testimony to the trial court. 5 Moore's Federal Practice para. 52.03(1). That principle is now rejected by this Court in favor of a de novo review standard applicable to documentary and non-demeanor testimony but never applied to a trial by oral testimony. This Court has now reduced the equity trial court to a mere fact gatherer. Respondent respectfully urges this Court to withdraw its opinion and continue the sound practice of 100 years.

POINT TWO

THIS COURT ERRED IN REVERSING THE TRIAL COURT IN THE ABSENCE OF CONSIDERATION OF THE BEST INTEREST OF THE CHILD AND IN ORDERING COMPLIANCE BY PERSONS NOT PARTY TO THIS PROCEEDING WHO MAY HAVE THE FOREGOING OR OTHER INDEPENDENT ISSUES TO RAISE AND WHO HAVE NOT HAD “THEIR DAY IN COURT.”

The proceeding before the Court arises on petition for Habeas Corpus to determine custody of an infant. As Justice Crockett points out in his dissenting opinion, and even Appellant urges in her brief (Brief for Appellant pp. 39-40), the paramount concern is the welfare and happiness of the child. It has always been recognized by courts of equity that on questions of custody the interest of the child comes first and the interest of the parent comes second. The principle has reached the status of a truism and elaborate citation would simply be pedantic. 43 CJS Infants sec. 7; 27 Am. Jur. Infants sec. 108. Yet this Court gives virtually no consideration to what is the best interest of the child. This Court simply concludes that Appellant is "presumptively" a "chaste, employed, moral, Christian young woman." The Court apparently accepts the approach of the Appellant (Brief for Appellant p. 40) that in the absence of evidence rebutting the presumption in favor of the natural parent, the issue is resolved that the best interest of the child is to be reared by the natural parent. The question is not simply whether the natural mother is "loose, promiscuous or a lady of the pavements." Previously this Court has said,

"Nevertheless, when questions of child custody arise, the welfare of the child and her chances for a suitable home environment and advantages in nurture, training and education to the end that she may live and be conditioned for a well adjusted, happy and useful life are important factors to consider." In Re Adoption of D - - - 122 Utah 525, 252 P. 2d 223 (1953).

The issue of the child's welfare is too vital to be resolved by the procedural technicalities useful for disputes over chattels or promissory notes.

Dr. Hebertson's opinion that Appellant would be a "competent mother" (Tr. pp. 36, 92) is not an adequate determination of the best interest of the child. This paramount issue can only be determined with the presence and participation of the other parties in interest, the parents who have nurtured the child since birth. Appellant did not include them as parties to her action and made no effort to pursue the issue on trial. Appellant's easy answer (Brief for Appellant pp. 7-8) is that Respondent knows the names of the parents so Respondent should produce them. As this Court knows, however, Respondent is prohibited from disclosure of the names of the parents by regulations of the Utah Department of Welfare which controls Respondent's license. Regulation of the Department of Public Welfare, Private Child Placing Agencies, Licensing and Inspection, secs. 7411-7413. The power of forcing disclosure is not with Respondent, but with the Appellant.

The law as it relates to jurisdiction of parties is fully resolved and need not be belabored. Suffice it to say that no court has jurisdiction over a party unless such party has submitted to such jurisdiction, otherwise waived service of process, or unless process has been served upon him. 20 Am. Jur. 2d 465. It has been held that it is the very essence of due process of law, as guaranteed by the Fourteenth Amendment of the Federal Constitution, that power to hear and determine a controversy in personam is not vested in a court if it has not jurisdiction over the parties. *James H. Rhodes & Co. v. Chansovsky* 137 NJL 459, 60 A. 2d 623.

Our rules of procedure provide the mechanics by which the adopted parents could have been made party hereto. We

respectfully submit that these persons should be afforded their "day in court."

One example of a vital issue neglected in this proceeding is the impact on the child of separation from the only parents it knows. Appellant's only expression on the subject is the euphemistic reference on page 32 of her brief that no "vested rights" have intervened. Consider the recent case of *In Re Adoption of Richardson* 59 Cal. Rotr. 323 (1967) wherein the California Court of Appeals reversed the refusal of the trial court to allow deaf-mute parents to adopt the child in question. The testimony on the impact on the nine month old child of separation from the only parents it knew is significant to this case. Dr. Arthur H. Parmelee, Jr., Director of the Pediatrics Clinic at the University of California at Los Angeles, stated, *supra* p. 329:

"Disruption of the continuity of care of this baby at his present age is critical and could be permanently damaging to him. It is well known that babies manifest their greatest anxiety over separation from their parents in the age period of eight months to two years. This little boy is now being separated from the only parents he knows. He will go into a temporary foster home where he will try to make new attachments. Then he will be placed in a new home and the emotional separation from his foster home will take place. This sequence of events in this age period can be *devastating* to the development of healthy emotional attachments to people for the remainder of this child's life." (Emphasis in original).

The child's pediatrician, Dr. Neil N. Litman stated, *supra* p. 329:

“ . . . ; the child being very sensitive at age nine months has received a *real shock* in being removed from this relationship and if this condition persists, will undoubtedly receive a shock to its nervous and emotional development of a *high order*.” (Emphasis in original).

The consequence of separation from the parents who have nurtured the baby at issue in the case at bar is common knowledge to men of medicine. Anna Freud, *Normality and Pathology in Childhood*, International Univ. Press (1965) ; Winnicott, *The Ordinary Devoted Mother and Her Baby*, Tavistock Publ. (1949) ; James, “Premature Ego Development; Some Observations Upon Disturbances in the First Three Years of Life,” 41 *International Jour. of Psychoanalysis* 228 (1960) ; Anna Freud and D. Burlingham, *War and Children*, International Univ. Press (1943) ; Anna Freud and D. Burlingham, *Infants without Families*, International Univ. Press (1944) ; Bowlby, “A Two Year Old to Hospital” 7 *Psychoanalytic Study of the Child* 82 (1952) ; Spitz, “Anaclitic Depression” 2 *Psychoanalytic Study of the Child* 313 (1946) and Bowlby, “Grief and Mourning in Infancy and Early Childhood” 15 *Psychoanalytic Study of the Child* 9 (1960) ; Robertson, *Young Children in the Hospital*, Tavistock Publ. (1958) ; Spitz, “Hospitalization” 1 *Psychoanalytic Study of the Child* 53 (1945).

General rules of medical experience are still not a substitute for concrete evidence on the emotional development of the particular child in question. Yet legal decisions of the kind before the court cannot be made in ignorance of the learning of other professions intimately involved in the legal issues this Court must decide. The issue of the child's best

interest cannot be made by default where the essential information is missing because the parties necessary to a full determination are within the control of Appellant and beyond the control of Respondent. The gap in evidence cannot be filled in cases of this kind by the breezy presumption that the child's best interest will be served with the natural mother in the absence of evidence to the contrary. Indeed this Court has suggested that the burden is on the natural parents to show that the welfare of the child requires the annulment of a previous transfer and the return of custody to the natural parent. *Stanford v. Gray* 42 Utah 228, 129 P. 423 (1912). In any event, we reiterate such matter cannot be determined without evidence.

Finally, Respondent urges this Court to clarify a present ambiguity in the law of this State regarding the application of the best interest of the child principle. It is clear that in the case at bar, an issue of custody arising on petition for Habeas Corpus, that the best interest of the child is the paramount concern. *Walton v. Koffman* 110 Utah 1, 169 P. 2d 97 (1946) and *Taylor v. Waddoups* 121 Utah 279, 241 P. 2d 157 (1952). What would have been the situations if Appellant's position had been asserted as an objection to an adoption petition as distinguished from a custody dispute as is the case at bar? The law on such a question is unclear. Two prior decisions, *In Re Adoption of Walton*, 123 Utah 380, 259 P. 2d 881 (1953) and *Deveraux' Adoption v. Brown* 2 Utah 2d 30, 268 P. 2d 995 (1954), suggest that in an adoption proceeding, the court cannot consider the best interest of the child until the court has first determined that the natural parent has abandoned the child, as in *Re Adoption of Walton*, or the parental rights have been terminated as

in *Deveraux' Adoption vs. Brown*. Yet in *Wilson v. Pierce* 14 Utah 2d 317, 383 P. 2d 925 (1963), another adoption proceeding where the natural parent claimed no abandonment, this Court indicated that the best interest of the child is the primary concern. And in *Re Adoption of D - - -* 122 Utah 525, 252 P. 2d 229 (1953), wherein the natural mother sought to revoke consent in an adoption proceeding, the Court applies the best interest of the child principle.

The question is not necessary to the determination of the case at bar because it is a custody case on Habeas Corpus where all agree that the best interest of the child is paramount, and not an adoption proceeding. The question is likely to arise in an adoption. The Court's opinion, however, moves on the presumption that the best interests of the child lie in the return of custody to the natural mother with no basis in the record upon which such presumptive determination can be made. Should the trial court hear evidence on the best interest of the child in accord with *Wilson v. Pierce* and in *Re Adoption of D - - -* or reject the evidence as suggested in *In Re Adoption of Walton and Deveraux' Adoption v. Brown*? Respondent urges this Court to resolve the question in favor of the position of *Wilson v. Pierce* and *In Re Adoption of D - - -*. As the case at bar makes clear, failure to do so will result in determination of only part of the issues. Of course the court cannot permit the adoption of a child over the objection of the natural parent simply because some may feel that the child will have a brighter future in some other home. But neither can the court divorce the issue of custody from the adoption proceeding. In *Re Adoption of Walton and Deveraux' Adoption v. Brown*, does just that. The custodial issue of the child's best interest is just as vital a question as the adoption issue of terminating

the natural parent's rights. The approach of *Wilson v. Pierce* and *In Re Adoption of D* - - is the sounder approach as including consideration of all of the issues involved and should be clarified as the law of this jurisdiction.

POINT THREE

THE CONSENT OF THE NATURAL MOTHER SHOULD BE OBTAINED AS SOON AFTER BIRTH AS POSSIBLE.

Mrs. Stewart testified that it was normal agency practice to obtain the consent of the natural mother the day after delivery. (Tr. 69-70). The majority of this Court would characterize this practice as a tawdry attempt to snatch the child from the mother with unreasoning haste. Yet as recently as 1961, this Court faced a claim of duress in consenting to adoption by an unmarried mother where the consent was obtained the day following delivery. The claim was rejected summarily. *Thomas v. Children's Aid Society of Ogden*, 12 Utah 2d 235, 364 P. 2d 1029 (1961).

The customary agency practice reflected in the case at bar is not a hasty and conniving plot to deprive the natural mother of her child while her wits are confused. The practice reflects the agency's experience with the emotional conflicts which plague any mother in the unfortunate position of Appellant. This Court appeals for a reasonable length of time on the apparently logical assumption that time will enable the mother to reach a reasoned rather than an emotional decision. But the decision to give up a child is never emotionally neutral no matter when it is made. By

well-intentioned use of a priori reasoning, this Court has chosen the seemingly logical conclusion that the mother's decision, even if not emotion free, will be more realistic and deliberate if made some time after the pain and emotional turmoil of birth is past. But one of our greatest justices, Oliver Wendell Holmes recognized, "The life of the law has not been logic; it has been experience." Holmes, *The Common Law* 1 (1881). The experience of the experts in social work and psychiatry is that time is the greatest enemy and not the friend of the mother in this predicament. The deliberated decision before birth that the natural mother cannot provide for the full welfare of the child becomes twisted with doubts and conflicts in the emotional turmoil after birth. For example, Dr. Ner Littner, in his discussion of the paper "A Program of Adoptive Placements For Infants Under Three Months" by Fradkin and Krugman, states, 26 *American Journal of Orthopsychiatry* 577, 591 (1956) says:

"The first problem is the ability of the natural mother to relinquish her child completely at birth. The results of the excellent casework reported on in this paper confirm what we already know about natural mothers; namely, that where adoption is indicated, both the mother and her child are far better off emotionally if she gives up her child *as soon after birth as possible*. The best way to help her reach such a firm conclusion is to provide her with active and intensive casework help as early in her pregnancy as possible." (Emphasis in original).

Further, Leontine Young, Professor in Casework, School of Social Administration, Ohio State University, states in her study, *Out of Wedlock — A Study of the Problems of the Unmarried Mother and Her Child*. (New York 1954):

What has not always been seen so clearly is that for many unmarried mothers early surrenders are helpful and often important. No thinking person would assume that this is invariably so or that this should be *ipso facto* a general rule. The fact remains that girls who have had and used help in making a decision and in facing their own feelings about this decision before the birth of the baby are rarely helped and are frequently damaged by a waiting period of any duration in executing that decision after the baby's birth. This is particularly true of the neurotic girl, who has great difficulty in sustaining any decision for long. Frequently the adoption agency and the worker are strange to her; and her ties with the previous worker who has helped her in the past are weakened by the change, by the fact that the adoption agency now has the baby under care and must complete the arrangements directly with her, and by her greater inaccessibility as she returns to active living in the community. Over and over these girls use this waiting period only to review and relive all the questions and problems which had been relieved by their original decision. Again they are harassed by the same doubts and conflicts, grown now even more confusing and difficult, since they are less protected. They are not free to look to the future or to consider their own plans and actions, bound as they are to the treadmill of this imminent decision.

Occasionally it has been mistakenly supposed that this very confusion was proof of their need for more time. That this is not the fact can be seen in the compulsive, phonograph-like repetition of their doubts and fears, which nothing but action can terminate and which nothing but an analysis of their basic personality problems could resolve. It is actually an agonizing and damaging experience for them, as some of the more discerning girls have pointed out directly. Objectively no decision can be said to have been made until it is acted upon. Until girls as in-

ternally divided as this have acted upon a decision, they can never be free of the tortuous questions that went into its making. Most of them in the end return to their original decision, but tragically, a few of them revert to the hopelessly unrealistic plans with which they began. By the time life has taught them just how unrealistic those plans were, it is usually too late to help either girl or baby. On the whole any girl who has made a clear, thoughtful, and realistic decision before the baby is born is helped by an early surrender and is spared unnecessary suffering. One girl who had surrendered her baby directly from the hospital remarked, "I didn't know until I saw other girls who have had to wait how lucky I was and how much I was spared."

. . . This same attitude has also created a good deal of confusion as to the final validity of surrenders. This is primarily a legal question, and there is urgent need of a clear, uniform legal definition of the effectiveness and finality of the surrender itself. Lack of such a definition has resulted in some tragic situations and a lack of security for everyone involved. On the one hand it has left a convenient loophole for the occasional psychopathic girl who wishes to take her baby back because a change in circumstances has indicated a way in which he could be of use to her. In the absence of clear safeguards she can accuse an agency of undue pressure despite the fact that her decision was freely made. The popular appeal of such a situation, where the actual facts are difficult to prove, cannot be underestimated. It can result in disaster for the child and the adoptive parents and in serious trouble for the agency. That same girl may later place her baby privately, but the public rarely knows about that. (P. 161-164)

See also, Heller, "Applications by Married Parents for Adoptive Placement of Their In-Wedlock Children," XLV

Child Welfare 404 (1966) ; Gallagher, "The Professions' Roles In Serving the Unmarried Mother and her Baby" Address to the National Conference of Social Welfare, Chicago, Illinois, May 13, 1958, available through Children's Bureau of the United States Department of Health, Education and Welfare.

Of course Respondent does not urge this Court to abdicate its obligation to determine legal policy to the social workers and psychiatrists. Respondent does urge that this Court consider the accumulated experience of other disciplines as it directly bears upon the legal issues facing this Court. Re-examination of the record in the light of the common knowledge of the social workers and psychiatrists, if uncommon knowledge to lawyers, reveals that what was done in this case was the soundest of social work practice. The Appellant sought counsel and advice was given it. In a more deliberate and realistic state during her pregnancy, Appellant realized that keeping the baby would only be destructive of her own and her baby's future welfare. Having decided to relinquish the child before birth, Appellant was plagued with doubt and conflict about her resolve after birth. Mrs. Stewart, knowing by training and experience that the emotional turmoil of birth would begin to raise doubts and conflicts in the mind of Appellant, sought the formal signing of the consent as soon after birth as possible. This Court has now completely disregarded the findings of the trial court and announced a legal policy that is the very antithesis of the practice advocated by the psychiatrists and the social workers ; the professions who must deal with the mother as a human problem and not an abstract legal issue. This Court now requires that the mother must wait until

she has undoubtedly seen and held her baby before formal consent can be obtained. However reasonable intuitive reasoning may make a waiting time appear, those who must work day-to-day with the unwed mother recognize that nothing could be more destructive of the goal the law seeks to attain, the best interest of the child.

POINT FOUR

THE COURT ERRED IN FAILING TO RECOGNIZE ESTABLISHED POLICY, WHICH POLICY WOULD UPHOLD AGENCY PLACEMENT UNDER THE FACTS OF THIS CASE.

Consider first the words of Justice Henroid in his declaration of policy in the case of *Jacob vs. State by and through Public Welfare Commission*, 7 Utah 2d 304, 322 P. 2d 720:

The policy of the law is . . . "to allay the fears of prospective adoptive parents, and to encourage willing persons to give underprivileged children an opportunity in life through adoption, that they would otherwise be denied,—without a constant fear that the adoption of a child would be fractured."

While the facts in the Jacob case are in a measure dissimilar to those at bar the underlying principles remain the same.

Justice Crockett stated the policy in this fashion:

"Public policy favors the adoption of children who are left without parental refuge. Once a child has

been cast adrift and is without responsible parental care, the policy of the law should be to assist in every way in establishing a satisfactory parent/child and family relationship. Adoptive parents should not be discouraged by a construction of the law which would cause them to fear the consequences of accepting a child because of the knowledge that the fate of their efforts would be at the will of the natural parents." *In Re Adoption of D* - - 122 Utah 525, 252 P. 2d 229.

Justice Ellett in the case at bar in his dissenting opinion states the policy thusly :

"If it be decided that a parent can revoke a consent at any time before final adoption, great mischief will be done to the efforts made by child placing agencies and to parents who wish to adopt children. It is not conducive to a good relationship for parents to be on tenterhooks for a year or more, fearing to bestow their love and affection upon the baby lest they have it all snatched away by a natural parent who may have a change of mind. Such a holding would really open the door to a shakedown in case the adoptive parents let their natural love go to the child, for they would pay any sum possible to retain *their* child. If, on the other hand, they kept the child as a boarder until final adoption was had, the child would not be able to receive the love and affection which it so much needs for its proper development in the beginning of its life." (Emphasis in original)

This policy was restated by the Utah Legislature in its enactment of the provisions of Utah Code Annotated, 1953, Section 55-10-42 which provides :

"No parent or guardian or other person who by instrument in writing surrenders or has surrendered

heretofore the custody of a child to any aid society or institution shall thereafter contrary to the terms of such instrument be entitled to custody or control or authority over or any right to interfere with any such child and the same conditions shall prevail where the child is or has been delivered to a children's aid society or institution by action of any proper court."

The foregoing statute was a declaration of Utah public policy and has been cited numerous times in support of our case law. Its repeal was inadvertent and regrettable, but must not be construed as a repudiation of the established policy of this state. The court will recall that the repeal was a perfunctory act incident to a blanket revision of administrative practices in the Juvenile Court. In 1965 some 62 sections of the Juvenile Court Act were repealed.

In Respondent's brief on appeal we pointed out the amendment in 1965 of Utah Code Annotated, 1953, Section 78-30-4 to establish as irrevokable the consent of a minor mother to an agency placement. This quite obviously evidences the real intent of the legislature to not change, but to strengthen, previously established policy in the law.

We urge upon the court a re-consideration of Respondent's argument as presented in point five of Respondent's brief on appeal but not touched upon in the majority opinion.

CONCLUSION

The issues which were presented to the court on appeal reduce themselves logically to a syllogism with a major and minor premise leading to an apparent conclusion.

1. Major Premise: An unwed natural mother who executes a document of consent to adoption while suffering with such impairment as to make her act involuntary has not in fact legally consented at all.

2. Minor Premise: Dana Phelps did not (or did) in fact consent to the placement of her child with Respondent for purposes of adoption.

3. Conclusion: Dana Phelps can (or cannot) rescind her consent.

In analysing the validity of the foregoing syllogism we invite the Court to re-examine in depth the record of this case. A further careful perusal of the evidence will clearly demonstrate the fact that the minor premise to be supported by the record must uphold the validity of the consent. Obviously Appellant has no quarrel with the major premise and the minor premise and conclusion resolve themselves to questions of fact.

It cannot be overlooked that the testimony of Appellant's witness, Dr. Clark, was based upon a statement of hypothetical facts which the trial court found unsubstantiated. Consider this testimony of Dr. Clark:

Question: Would it have been difficult for Miss Phelps to make a decision such as signing a consent in the state of mind that you feel she was in?

Answer: I can't quite answer your question in terms of would it be difficult for her. (Tr. 49, lines 17 to 21.)

Question: Is the fact, if this is the fact, that there was some organic impairment sufficient for you to conclude that she was completely incompetent to comprehend what she was doing or signing?

Answer: I can't answer regarding the degree of competency that she might have in coping with specific types of problems presented to her. (Tr. 52, line 30, Tr. 53, lines 1 to 6.)

The testimony of Respondent's witnesses, all responsible, professional persons who had opportunity to observe her reactions at the time in question, generally and specifically sustain the fact of competency.

It must be remembered that Dana Phelps came to the agency of her own volition for a specific service. The very qualities ascribed to her, with the possible exception of "chaste," led the agency to believe that she had the wisdom to decide things for herself. She asked specifically for placement of her child and was fully determined in the course she desired to follow. Her confidants were fully supportive of her in her decision and assisted in the mechanics of placement. The visit on December 18, was by prior mutual agree-

ment by telephone and at Dana's request with the expressed wish of having the baby placed before Christmas. Accordingly, the baby was placed December 22, 1966. Early placement—yes. Hasty action—indeed not.

We urge upon the court the singular import of its decision upon the field of Social Welfare Law and the importance of sustaining the declared public policy of this Court in the interest of the child. Social Welfare Law is a rapidly advancing field of endeavor. The time has arrived for the legal profession to create legal policy outside the vacuum of its own discipline, and to look to the accumulated experience and knowledge of the laws allied fields, that of sociology and medicine. The experience of both of those professions teach that mother and child are saved needless anguish by sound counseling during pregnancy, and if a decision is reached to give up the child then, taking the child as soon after birth as possible. A fortiori, the interests of the natural mother are promoted by establishing finality to her decisions and act of consent.

We appeal to the court in the interest of sound legal practice and upon precepts of justice to uphold the sound agency practice evident here, deal squarely with the issue of jurisdiction as it pertains to the adoptive parents, reverse its previous holdings herein, declare anew stated public policy and resolve the ambiguities that permeate this problem.

Respondent, together with other licensed agencies, adoptive applicants, needful children, and applicants for social service view with alarm the impact of the court's prior decision. If no security in placements can be assured

adopting parents, a great disservice will be done to all parties involved.

We respectfully and sincerely request a reconsideration and reversal of the majority opinion as heretofore expressed.

Respectfully submitted,
SPAFFORD & YOUNG
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