IN THE UTAH COURT OF APPEALS

IN THE MATTER OF BABY B.	)	APPELLANT'S BRIEF
	)	
	)	
	)	Appellate Court No. 20090740
	)	Trial Court No. 082900089

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LIST OF ALL PARTIES

ROBERT MANZANARES: Appellant; Intervenor; Birth Father

SCOTT BYINGTON and JULISSA BYINGTON: Appellees; Petitioners; Prospective Adoptive Parents; Maternal Biological Aunt and Uncle of "Baby B".

CARIE TERRY: Intervenor; Birth Mother; Sister/Sister-in-Law to Scott and Julissa Byington.

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JURISDICTION OF THE COURT

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(h).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the Trial Court err in concluding the consent of Robert Manzanares to the adoption of his child is not required?

   Standard of Review: A District Court's interpretation of a statute is reviewed for correctness. A district court's findings of fact are reviewed under a clearly erroneous standard. *H.U.F. v. W.P.E.*, 203 P.3d 943 (2009).

2. Did the Trial Court err in concluding that although Judge Hilder's acceptance of the consent was vacated, it did not vacate or set aside the consent itself or render the consent void *ab initio*.

   Standard of Appellate Review: A District Court's interpretation of a statute is reviewed for correctness. A district court's findings of fact are reviewed under a clearly erroneous standard. *H.U.F. v. W.P.E.*, 203 P.3d 943 (2009).

3. Did the Trial Court err in ruling the consent to an adoption is enforceable or legally valid despite the Court's findings that C.T. and Petitioners colluded to misrepresent or to defraud the Court?

Standard of Appellate Review: A District Court's interpretation of a statute is reviewed for correctness. A district court's findings of fact are reviewed under a clearly erroneous standard. *H.U.F. v. W.P.E.*, 203 P.3d 943 (2009).

DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

The Full Faith and Credit Clause of the United States Constitution, art. IV § 1 as follows,

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

STATEMENT OF THE CASE

This case involves the adoption of a minor child to the birth mother's brother and sister-in-law in Utah which is contested by the birth father, Robert Manzanares who resides in the State of Colorado. The birth Mother, Carie Terry also resided in the State of Colorado. On or about January 13, 2008, over one (1) month prior to the birth of Baby B., Father filed a paternity action in Denver County, State of Colorado and requested to enjoin any adoption proceeding, (R. 26-113; R. 1130 at Page 37). On February 1, 2008 Mother, a Colorado resident, was served with the Verified Petition for Paternity and Enjoin Adoption, (R. 26-113; R. 1130 at Page 37, 38; Exhibit No. 5). Mother filed a Reply to Petition for Paternity on or about February 12, 2008, (R. 26-113; R. 1130 at Page

37, 38; Exhibit No. 7). A hearing was scheduled on the Paternity matter filed in the State of Colorado for February 20, 2008 at 9:00 a.m. of which Mother was notified, (R. 19-20; R. 26-113). On February 14, 2008, Mother traveled to Utah to visit her ill father, (R. 1130 at Page 128; R. 1130 Exhibit No. 8; R. 367). Baby B. was born premature on February 17, 2008 (R. 1130 at Page 131; R. 367). The morning of February 20, 2008, Mother telephoned the Court in Denver County, State of Colorado and stated she would not be at the hearing because she was out of town visiting an ill relative. (R. 1130 at Page 40). On February 20, 2008, just minutes before the Colorado Court was to hold a hearing on Father's paternity action, the Mother executed a document in Utah entitled "C.T.s Consent to Adoption", (R. 12-16). On February 20, 2008, the Honorable Judge Hilder of the Third District Court, Salt Lake County, State of Utah entered an Order of Temporary Custody to Mother's brother and sister-in-law, S.B. and J.B. (R. 17-18). On February 26, 2008 Father filed an Emergency Motion with the Colorado Court. Hearings were set and held on February 27, 2008 and February 29, 2008. On February 29, 2008 the Denver County District Court entered an Order addressing paternity, rights and responsibilities of the Father and jurisdiction, (R. 1130, Exhibit No. 10). An additional hearing was held in the Denver County District Court on March, 3, 2008 and the Court issued a supplemental Order addressing venue and jurisdiction for Father's paternity action, (R. 1130, Exhibit No. 11). During the March 3, 2008 Hearing the Colorado Court conferred on the record

with the Utah Court, specifically the Honorable Robert K. Hilder, Third District Court, Salt Lake County, State of Utah. (R. 1130, Exhibit No. 11, R. 370).

The Mother's brother and sister-in-law filed a Petition for Adoption on February 19, 2008, (R. 1-6). Father filed a Motion and Memorandum to Dismiss Adoption Proceeding on March 10, 2008, (R. 24-113). On July 1, 2008 a hearing was held before the Honorable Robert Faust on Father's Motion to Dismiss Adoption Proceeding and the minor child was ordered to be turned over to her Father, (R. 210-213; R. 1128). On July 3, 2008, S.B. and J.B. filed a Motion to Delay Enforcement of Turn Over Order Pending Decision of Court of Appeals, (R. 214-290). On July 7, 2008, Father submitted an objection to the Motion to Delay Enforcement, (R. 291-293). On July 8, 2008 a telephonic conference was held and the Court vacated its orders of July 1, 2008, (R. 294-296). A two (2) day Evidentiary Hearing was held on July 28, and 29, 2008, (R. 307-309; R. 352-355). On August 20, 2008, the Honorable Robert J. Faust issued a Memorandum Decision, (R. 363-382).

On or about August 29, 2008, Petitioners filed a Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order, Appellate Case No. 20080729-CA. On or about September 12, 2008 R.M. filed an Objection and Response to the Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order. On

September 30, 2008 the Utah Court of Appeals denied the Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order, (R. 582-584).

On October 28, 2008, R.M. filed a Motion for Renewed Motion to Dismiss Petition for Adoption; Motion for Immediate Custody of the Minor child to the Father; Motion to Transfer Custody Determination to Colorado; and Motion for Attorney Fees, (R. 594-596). On October 31, 2008, Birth Mother filed a Motion and Memorandum to Intervene and for Reconsideration, (614-627). On October 31, 2008, Petitioners filed a Motion and Memorandum of Joinder in Birth Mother's Motion for Reconsideration, (R. 628-681). On December 5, 2008 R.M. filed a Motion and Memorandum for Visitation, (R. 708-721). On January 28, 2009, Petitioners filed Rule 63 Motion to Disqualify and Certificate of Good Faith. (R. 738-825). On January 29, 2009, the Trial Court issued a Minute Entry referring the matter to the Associate Presiding Judge for Review and stayed action pending a decision on Petitioners' Motion to Disqualify, (R.826-827). The Presiding Judge Paul G. Maughan issued a Memorandum Decision on February 10, 2009 denying Petitioners' Motion to Disqualify, (R. 866-871). The Trial Court issued a Memorandum Decision dated July 7, 2009, (R.1081-1086). Findings of Fact, Conclusions of Law, and Order Denying Several Motions was prepared by Petitioners' counsel and executed by the Trial Court on August 10, 2009, (R. 1087-1097). Appellant Robert Manzanares filed his Notice of Appeal on September 4, 2009. (R1098-1099).

BACKGROUND

The birth mother, Carie Terry, herein after referred to as "Mother" is a resident of Denver County, State of Colorado, (R. 26-113; R. 1130 Exhibit No. 5 and Exhibit No. 7). The birth father, Robert Manzanares, herein after referred to as "Father" is a resident of Denver County, State of Colorado, (R. 26-113; R. 1130 Exhibit No. 5 and Exhibit No. 7). Mother and Father maintained an intimate relationship one with another in Denver County, State of Colorado and a child was conceived, (R. 26-113; R. 1130 Exhibit No. 5 and Exhibit No. 7). Father engaged in regular communication with Mother regarding the Mother's welfare and the welfare of their unborn child, (R. 26-113; R. 1130, Exhibit No. 2; R. 1130 25-27). Father provided financial support to Mother during her pregnancy and after the birth of their daughter, (R. 26-113; R. 1130 Exhibit No. 3; R. 1130 at Page 28-29). Mother was pushing the issue of adoption upon Father to the extent that in approximately November of 2007 Mother had an Colorado adoption agency contact Father requesting he sign papers allowing the adoption of his child to be accomplished, (R. 1130 at Page 32-33). Father's attorney in Colorado responded to the Colorado adoption agency stating Father would not consent to the adoption of his child, (R. 1130 at Page 32-33).

On January 16, 2008, over one (1) month prior to the birth of Baby B., Father filed a paternity action in Denver County, State of Colorado and requested to enjoin any

adoption proceeding, (R. 26-113; R. 1130 Exhibit No. 5). On February 1, 2008 Mother was served with the Verified Petition, (R. 26-113). Mother filed a Response to Petition for Paternity on or about February 12, 2008, thereby submitting herself to the jurisdiction of the Court in Denver County, State of Colorado, (R. 1130, Exhibit No. 7). In Paragraph seven (7) of Mother's Response, Mother acknowledged Father is the biological father of their unborn child. (R. 26-113; R. 1130, Exhibit No. 7).

On January 11, 2008, Mother E-mailed Father which in pertinent part states,

> "I will be flying to Utah to visit my father in Feb for a week (maybe a little longer, it depends on how he/things are). Then it will be back to work to finish up the club's construction before I take time off at the end of March....in April I will be willing to sit down and talk with you about your reconsideration to consent for adoption otherwise this will be a long process and it will benefit no one, especially this baby," (R. 1130 Exhibit No. 8; R. 26-113).

C.T. never told R.M. she was coming to Utah with the intent to give birth to their child, (R. 1130, at Page 139, Lines 8-16).

A hearing was scheduled on the Paternity matter filed in the State of Colorado for February 20, 2008 at 9:00 a.m. of which Mother was notified. (R. 19-20; R. 26-113). Unbeknownst to Father, Baby B. was born premature on February 17, 2008 while Mother was visiting her ill father in Utah, (R. 1130 at Page 127-130). The morning of February 20, 2008, Mother telephoned the Court in Denver County, State of Colorado and stated she would not be at the hearing because she was out of town, (R. 1130 at Page; R. 26-

113). On February 20, 2008 the Court in Denver County, State of Colorado appointed a Guardian ad Litem, namely, Vivian Burgos, (R. 26-113).

Unbeknownst to Father, on February 20, 2008 Mother executed a document in Utah entitled "C.T.s Consent to Adoption," (R. 12-16). This document was signed just fifteen (15) minutes prior to the February 20, 2008 hearing in the State of Colorado, (R. 12-16). Mother did not make the Utah Court aware of the proceedings in Colorado nor the Colorado Court aware of the fact she had given birth to the child and was giving her consent to adoption before a Utah Court at approximately the same time as the hearing in Colorado was to take place, (R. 1130 at Page 144).

On February 20, 2008, the Third District Court, Salt Lake County, State of Utah entered an Order of Temporary Custody to Mother's brother and sister-in-law, S.B. and J.B, (R. 17-18). Father become aware that his daughter had been born at some time on approximately February 25, 2008 when he learned from one of Mother's co-worker's that his daughter had been born, (R. 1130 at Page 29-30). On February 25, 2008, Father called S.B. and J.B. to ask them if they knew where his child was, (R. 1130 at Page 46-47). S.B. did not inform Father about the adoption Petition having been filed in Utah or the fact that Mother had given her consent to S.B. and J.B. for the adoption of his child, (R. 1130 at Page 46-47). Instead, S.B. indicated that Father would be contacted by counsel. (R. 363-382).

Father was never contacted by counsel for Mother or S.B. and J.B., (R. 26-113). On February 26, 2008 Father filed an Emergency Motion with the Colorado Court requesting an immediate hearing. (R. 26-113). On February 27, and 29, 2008 the Denver County District Court in and for the State of Denver held hearings wherein Father, Father's counsel and Mother were present as well as the Guardian ad Litem. On February 29, 2008 the Denver County District Court entered an Order wherein the Court found the Colorado Court has jurisdiction over the subject matter and persons, specifically, the Mother, Father and child and finds that R.M. is the biological father of the child and has all of the legal rights and responsibilities that he is entitled to by law as to the child, (R. 370, R. 1130, Exhibit No. 10). The February 29, 2008 further dictates Father shall have his name listed as the biological father on the birth certificate when the parties' child is born. (R. 1130, Exhibit No. 10).

An additional hearing was held on March, 3, 2008 wherein the Court issued a supplemental Order, (R. 1130, Exhibit No. 11). Paragraphs one, two and three of the March 3, 2008 Order further found venue and jurisdiction were proper and Utah was not the proper forum for Father's paternity action, (R. 370, R. 1130, Exhibit No. 11). Further, Paragraph 15 of the Order of March 3, 2008 found under Colorado law, a paternity matter may be initiated prior to the child's birth and the paternity matter would remain open and Colorado would retain jurisdiction. (R. 1130, Exhibit No. 11). During

the March 3, 2008 Hearing, the Colorado Court conferred on the record with the Utah Court, specifically the Honorable Robert K. Hilder, Third District Court, in and for Utah wherein Judge Hilder acknowledged Utah will recognize the Colorado Order and place the Father's name on the birth certificate of the parties' minor daughter. (R. 19-20; R. 363-382).

The Petitioners in the adoption proceeding, S.B. and J.B., are the brother and sister-in-law to Mother, (R. 682 at Page 4). Mother and Petitioners concealed the adoption plans and their specific intentions from Father, (R. 371). Mother had a plan to return to Utah in March of 2008 to give birth and Mother intentionally kept this information from Father in order to preclude him from taking definitive action in Utah, (R. 372). Mother regarded the adoption by the Petitioners as a means of remaining involved in her child's life while at the same time precluding Father of that same opportunity, (R. 1130 at Page 149 Lines 1-7, R. 376). On March 10, 2008 Father filed a Motion and Memorandum to Dismiss Adoption Proceeding, (R. 24-113). After the time for response and reply memorandum were filed, specifically from April 3, 2008 into late June, 2008, Father's counsel in Utah, with the assistance of counsel for S.B. and J.B, attempted to obtain an immediate hearing on the Father's Motion to Dismiss by filing a Stipulated Motion for Immediate Hearing, (R. 203-205). However, the matter was not heard by the Court until July 1, 2008, (R. 210-212).

On July 1, 2008 a hearing was held before the Honorable Robert Faust, (R. 210-212; R. 213). The Father was present in person with his counsel and S.B. and J.B. were not present, but represented by counsel, Larry S. Jenkins, (R. 213). At the July 1, 2008 hearing, the Court granted Father's Motion to Dismiss Adoption Proceeding and ordered the minor child be united with her father on or before July 7, 2008, (R. 213). The Court denied S.B. and J.B.'s verbal Motion to Stay turning over the minor child to her Father pending appeal which was represented would be filed by S.B. and J.B.,(R. 213). On July 3, 2008, S.B. and J.B. filed a Motion to Delay Enforcement of Turn Over Order Pending Decision of Court of Appeals, (R. 214-290). On July 7, 2008, Father submitted an objection to the Motion to Delay Enforcement, (R. 291-293). On July 8, 2008 a telephonic conference was held between the Honorable Robert J. Faust, attorney Larry Jenkins, counsel for Petitioners, and attorney Jennifer D. Reyes, counsel for Father wherein the Court vacated its orders of July 1, 2008, (R. 294-296). A two (2) day Evidentiary Hearing was held on July 28, and 29, 2008, (R. 307-309; R. 352-355). At the conclusion of the hearing, the Court took the matter under advisement, (R. 352-355).

On August 20, 2008, the Honorable Robert J. Faust issued a Memorandum Decision entering detailed Findings of Fact and an Order vacating Judge Hilder's acceptance of the Mother's consent and mandating the Father name be immediately placed on the birth certificate of his daughter, (R. 363-382). In addition, the Court found

Mother did not notify Father of the dates of her planned travel to Utah to visit her ill father, (R. 366) Mother failed to inform Judge Hilder there was a Colorado hearing being held at approximately the same time as the consent hearing and was not completely truthful with the Colorado Court, (R. 368), and Mother and Petitioners intentionally made misrepresentations or misrepresentations by omission to Judge Hilder, (R. 369),

On or about August 29, 2008, Petitioners filed a Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order, Appellate Case No. 20080729-CA. On or about September 12, 2008 Father filed an Objection and Response to the Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order. On September 30, 2008 the Utah Court of Appeals denied the Petition for Extraordinary Relief And/Or For Permission to Appeal Interlocutory Order, (R. 582-584).

On October 28, 2008, Father filed a Motion for Renewed Motion to Dismiss Petition for Adoption; Motion for Immediate Custody of the Minor child to the Father; Motion to Transfer Custody Determination to Colorado; and Motion for Attorney Fees, (R. 597-613). On December 5, 2008 R.M. filed a Motion and Memorandum for Visitation, (R. 708-721). On or about January 28, 2009, Petitioners filed Rule 63 Motion to Disqualify and Certificate of Good Faith, (R. 738-825). On January 29, 2009, the Trial Court issued a Minute Entry referring Petitioners' Motion and Memorandum to Disqualify to the Associate Presiding Judge for Review and stayed action pending a

decision on Petitioners' Motion to Disqualify, (R. 826-827). The Presiding Judge Paul G. Maughan issued a Memorandum Decision on February 10, 2009 denying Petitioners' Motion to Disqualify, (R. 866-871). On May 11, 2005 the Court issued a Memorandum Decision directing further briefing on the issue of the effect of vacating the consent of the birth mother and qualifying circumstances, (R. 961-963).

Ultimately, the Trial Court issued a Memorandum Decision dated July 7, 2009 denying the relief sought by the Father and found the Father's consent was not necessary. (R.1081-1086). Petitioners' counsel prepared Findings of Fact, Conclusions of Law, and Order Denying Several Motions which was executed by the Trial Court on August 10, 2009. (R. 1087-1097). Father filed a Notice of Appeal on September 4, 2009, (R. 1098-1099).

SUMMARY OF THE ARGUMENTS

The Trial Court erred in concluding the consent of Robert Manzanares to the adoption of his child is not required. First, Robert Manzanares fully complied with the requirements to establish parental rights in the child and to preserve the right to notice of a proceeding in connection with the adoption of the child, imposed by the State of Colorado. Secondly, the consent of an unmarried biological father is required with respect to an adoptee who is under the age of 18 if the unmarried biological father did not know, and through the exercise of reasonable diligence could not have known, before the

time the mother executed a consent to adoption or relinquishment of the child for adoption, that a qualifying circumstance existed. There are four (4) qualifying circumstances outlined as follows:

> (i) the child or the child's mother resided on a permanent or temporary basis, in the state;
>
> (ii) the mother intended to give birth to the child in the state;
>
> (iii) the child was born in the state; or
>
> (iv) the mother intended to execute a consent to adoption or relinquishment of the child for adoption:
>
> (A) in the state;
>
> (B) under the laws of the state."

None of the four (4) qualifying circumstances exist in this case. Robert Manzanares did not know, and through the exercise of reasonable diligence could not have known, any of the above four (4) qualifying circumstances. Any suspicions Robert Manzanares may have had were alleviated by Carie Terry's denials received in her Reply to Verified Petition to Establish Paternity and Enjoin Adoption, (R. 1130, Exhibit No. 8).

The Trial Court erred in concluding that although Judge Hilder's acceptance of the consent was vacated, it did not vacate or set aside the consent itself or render the consent void *ab initio*. The Trial Court throughout the proceeding "vacated" not only the consent

of Carie Terry, but "vacated" its ruling that the minor child be turned over to her Father on or before July 7, 2008, (R. 213, R. 294-95).

The Trial Court erred in ruling the consent to an adoption is enforceable or legally valid despite the Trial Court's findings that C.T. and Petitioners colluded to misrepresent or to defraud the Court. Allowing Mother and Petitioners to perpetrate fraud upon the Court and against the Father is contrary to public policy and rewards Mother and Petitioners to the extent that is severs Father's parental rights to his daughter.

ARGUMENTS

I. THE TRIAL COURT ERRED IN CONCLUDING THE CONSENT OF ROBERT MANZANARES TO THE ADOPTION OF HIS CHILD IS NOT REQUIRED.

The consent of an unmarried biological father is required with respect to an adoptee who is under the age of 18 if he fully complied with the requirements to establish parental rights in the child and to preserve the right to notice of a proceeding in connection with the adoption of the child, imposed by the last state where the unmarried biological father knew, or through the exercise of reasonable diligence should have known, that the mother resided in before the mother executed the consent to adoption or relinquishment of the child for adoption or the state where the child was conceived. Utah Code Ann. § 78B-6-122(1)(c)(i)(B).

Robert Manzanares fully complied with the requirements to establish parental rights in his daughter and preserved the right to notice of an adoption proceeding and his consent being required by the filing of his Verified Petition for Paternity and Enjoin Adoption which was filed with the Colorado Court on or about January 16, 2008 and served on Carie Terry February 1, 2008, (R.1130 at 37; R. 1130, Exhibit No. 20). The State of Colorado was the last state where Mr. Manzanares knew Carie Terry *resided* before she executed the consent for adoption and was the state where the child was conceived.(R. 1130, Exhibit No. 7).

Utah law concludes a person resides in Utah if that person has his a principal place of residence within Utah and has a present intention to continue residency within Utah permanently or indefinitely. Utah Code Ann. §20A-2-105. Furthermore, the word "reside" has been defined as, "To dwell in a place; to be a resident." Ballentine's Law 1102 (3d ed. 1969). "Dwell" has been defined as, "[t]o inhabit; to have a fixed place of residence." Ballentine's Law 385 (3d ed. 1969). "Resident" has been defined as, "[o]ne who resides in a place. One having either legal residence or domicile." Ballentine's Law 1103 (3d ed. 1969).

In this case Carie Terry came to Utah to *"visit"* her father as evidenced by her own E-mail sent to Robert Manzanares dated January 11, 2008, (R. 1130, Exhibit No. 8; R. 1130 at 127). Carie Terry's principal place of residence is in Colorado as evidenced by

Ms. Terry's own admission in her Reply to the Verified Petition to Establish Paternity and Enjoin Adoption, (R. 1130, Exhibit No. 7), and her testimony given under oath at the consent hearing held on February 20, 2008 wherein the issue of her residence is discussed as follows,

> "Okay, and now I understand that you also live in Denver; is that right?"
> "Correct, I do." (R. 682 at 11, Lines 13-24);

Further, Carie Terry also testified under oath at the July 28, 2008 Utah Evidentiary Hearing stating her permanent residence was in Colorado, (R. 1130 at 126), her principal place of dwelling is in Colorado, (R. 1130 at 149), her driver's license is issued out of Colorado, (R. 1130 at 150). Ms. Terry admitted to only visiting Utah for ten days when her daughter was born, (R. 1130 at 128).

Therefore, the consent of Robert Manzanares is mandated because he fully complied with the requirements to establish parental rights in his daughter in the State of Colorado.

Another way in which the consent of a biological father is required is established if the unmarried biological father did not know, and through the exercise of reasonable diligence could not have known, before the time the mother executed a consent to adoption or relinquishment of the child for adoption, that a qualifying circumstance existed. Utah Code Ann. § 78B-6-122(1)(c)(ii)(A). The time frame for determining if a

qualifying circumstance existed is from the period of time beginning at the conception of the child and ending at the time the mother executed a consent to adoption or relinquishment of the child for adoption. Utah Code Ann. § 78B-6-122(1)(a). There are four (4) qualifying circumstances outlined as follows:

> (i) the child or the child's mother resided on a permanent or temporary basis, in the state;
>
> (ii) the mother intended to give birth to the child in the state;
>
> (iii) the child was born in the state; or
>
> (iv) the mother intended to execute a consent to adoption or relinquishment of the child for adoption:
>
> (A) in the state;
>
> (B) under the laws of the state."

Utah Code Ann. § 78B-6-122(1)(a)(i-iv). None of the four (4) qualifying circumstances exist in this case. Robert Manzanares did not know, and through the exercise of reasonable diligence could not have known, any of the above four (4) qualifying circumstances.

Applying the first qualifying circumstance to the present case, Carie Terry did not *reside* on a permanent or temporary basis in Utah, (R. 1130, Exhibit No. 8, 1130 at 149-51). As addressed above, Utah law concludes a person resides in Utah if that person has

his a principal place of residence within Utah and has a present intention to continue residency within Utah permanently or indefinitely. Utah Code Ann. §20A-2-105. Furthermore, the word "reside" has been defined as, "To dwell in a place; to be a resident." Ballentine's Law 1102 (3d ed. 1969). "Dwell" has been defined as, "[t]o inhabit; to have a fixed place of residence." Ballentine's Law 385 (3d ed. 1969). "Resident" has been defined as, "[o]ne who resides in a place. One having either legal residence or domicile." Ballentine's Law 1103 (3d ed. 1969).

Carie Terry maintained her principal place of residence in Colorado and was back to Colorado within days after she gave birth, (R.1130 at 149, 128). Carie Terry was merely a visitor to Utah to see her father who was ill at the time. In addition, Carie Terry's own statements at the Utah July, 2008 hearing and those contained in Petitioners' Memorandum in Opposition to Motion Dismiss Adoption Proceeding states,

> "The birth mother traveled to Utah in mid-February to *visit* her ailing father as she told Mr. Manzanares she would,"(R. 114-124).

Carie Terry was merely a visitor to Utah and had no principal place of residence within Utah and had no intention to continue residency within Utah permanently or indefinitely, (R. 114-124).

Moreover, Carie Terry sent Robert Manzanares, an E-mail on January 11, 2008 which states in pertinent part as follows:

> "I will be flying to Utah to *visit* my father in Feb for a week (maybe a little longer, it depends on how he/things are). Then it will be back to work to finish up the club's construction before I take time off at the end of March....in April I will be willing to sit down and talk with you about your reconsideration to consent for adoption otherwise this will be a long process and it will benefit no one, especially this baby," (R. 1130, Exhibit No. 8).

Robert Manzanares did not know, and through the exercise of reasonable diligence could not have known Carie Terry resided on a permanent or temporary basis, in the state of Utah as this simply did not occur.

Looking at the second qualifying circumstance, the mother, Carie Terry did not *intend* to give birth to the child in Utah as evidenced in Petitioners' Memorandum in Opposition to Motion to dismiss Adoption Proceeding were it refers to Ms. Terry going into pre-mature labor, (R. 114-124). In addition, the testimony of Carie Terry at the Utah July 28, 2008 Evidentiary Hearing is as follows,

> "When I left Colorado on February 14, no, I did not intent to go into labor"(R. 1130 at 133).

Addressing the third qualifying circumstance, Robert Manzanares did not know nor had any way of knowing his daughter had been born in Utah until the mother, Carie Terry, returned to Colorado no longer bearing his child, (R. 1130 at 29-30).

Applying the fourth qualifying circumstance, Robert Manzanares had no knowledge that Carie Terry intended to execute a consent to adoption in Utah. Carie Terry sent Mr. Manzanares the January 11, 2008 E-mail which stated they would talk in

April, 2008 about their child and Mr. Manzanares reconsidering giving his consent to an adoption. Although the Verified Petition for Paternity and to Enjoin Adoption filed in the State of Colorado alleged Carie Terry may go to Utah to place the child for adoption, (R. 1130 Exhibit No. 5, Paragraph 21) Carie Terry denied she was going to place the child up for adoption in Utah as evidenced in her Reply to the Colorado Paternity Petition, (R. 1130, Exhibit No. 23, Paragraph 21). Carie Terry's affirmative denial that she would flee to Utah to proceed with an adoption alleviated any suspicions Robert Manzanares may have had regarding Utah and adoption. In addition, the E-mail from Carie Terry to Robert Manzanares states she is going to Utah to visit her father, would be coming back to Colorado and taking time off before her due date, and would again speak with Mr. Manzanares about his reconsideration to consent to an adoption, (R. 1130, Exhibit No. 8). During the pregnancy, Carie Terry also visited her family in Utah over Thanksgiving and had plans to go for Christmas, but never made it there, (R. 1130 at Page 136, Lines 10-25; Page 137 Lines 1-18). Moreover, Robert Manzanares did not "*know*" Carie Terry intended to execute a consent to adoption in Utah and the Utah Court found she intentionally kept her plan from Mr. Manzanares in order to preclude him from taking definitive action in Utah, (R. 372 at ¶ 45). Robert Manzanares exercised "*due diligence*" when he alleged his suspicions that Ms. Terry may come to Utah to place the child for adoption in his Verified Petition for Paternity and Enjoin Adoption and Mr. Manzanares'

suspicion was affirmatively denied by Carie Terry in her Reply to the Verified Petition and her January 11, 2008 E-mail. (R. 1130. Exhibit No. 23, Exhibit No. 8). Lastly, the only adoption agency that had contacted Mr. Manzanares was in Colorado and Mr. Manzanares' Colorado attorney wrote a letter informing the agency Mr. Manzanares will not consent to an adoption of his child, (R. 1130, Exhibit 4).

None of the four (4) qualifying circumstances exist and therefore, the consent of Robert Manzanares is required.

Another situation which mandates the consent of a biological father to the adoption of his child is where there has been an adjudication that the father is the child's biological father by a court of competent jurisdiction prior to the mother's execution of consent to adoption or her relinquishment of the child for adoption. Utah Code Ann. § 78B-6-120(d).

Here, the Utah Court vacated the consent of Carie Terry which resulted in the February 29, 2008 Order and March 3, 2008 Order from the Colorado Court being adjudications issued prior to a valid consent of the birth mother, Carie Terry, being executed. The February 29, 2008 Colorado order finds Robert Manzanares is the biological father of the minor child and has all the legal rights and responsibilities that a father is entitled to by law as to the child, (R. 1130 Exhibit No. 11). The March 3, 2008 order among other things, finds Robert Manzanares is the biological father of the parties'

infant daughter, born February 17, 2008, and granted his Petition for Paternity and signed his Final Order for Paternity, (R. 1130 Exhibit No. 11).

Also, there was an *adjudication on the pleadings* prior to the birth mother, Carie Terry, executing her consent which was later vacated. The consent was taken on February 20, 2008, and prior to that time, specifically on or about February 12, 2008, Carie Terry acknowledged in her Reply to Verified Petition for Paternity that Robert Manzanares is the birth father, (R. 1130, Exhibit No. 23, ¶ 3). In addition, Paragraph Seven (7) of the Reply agrees that Mother does not dispute that the child who is the subject of this Petition is the issue of Petitioner Father and Mother and that the parties were living together and were monogamous with each other at the time the child was concieved, (R. 1130, Exhibit No. 16 ¶ 7; Exhibit No. 23, ¶ 7).

In addition to the above situations which require the consent of a biological father, all of which have been complied with by Mr. Manzanares, under both federal and state law, an unwed biological father has an inchoate interest in a parental relationship with his child that acquires full constitutional protection only when he "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." Lehr v. Roberston, 463 U.S. 248 (1983). Further, the Utah Supreme Court has stated the statute was designated to facilitate permanent and secure placement of illegitimate children whose unwed mothers wish to give them up for adoption and

whose unwed fathers take *no steps to officially identify themselves and acknowledge paternity*. Swayne v. LDS Social Servs., 795 P.2d 637, 641 (Utah 1990). Emphasis added. Moreover, the Supreme Court of Utah has stated, "a statute fair upon its face may be shown to be void and unenforceable as applied. Ellis v. Social Services Department of the Church of Jesus Christ of Latter-day Saints, 615 P.2d 1250, 1256 (1980). If a putative father "is successful in showing that the termination of his parental rights was contrary to basic notions of due process, and that he came forward within a reasonable time after the baby's birth, he should be deemed to have complied with the statute." *Id.*

In this case, approximately one month prior to the birth of his daughter, Robert Manzanares filed an action in the state of Colorado, the state which the child was conceived and where the birth mother and father resided. From the time Robert Manzanares learned of the pregnancy of his child, he consistently informed Carie Terry that he wanted to raise the child and would do so alone if she did not want to co-parent with him, (R. 364). Robert Manzanares offered and did pay a fair and reasonable amount of expenses incurred in connection with the pregnancy (R. 1130, Exhibit No. 3, R. 365). Robert Manzanares offered more financial support to Ms. Terry and she declined, (R. 1130 at page 148, Lines 3-8).

Robert Manzanares has continued, since the birth of his daughter, to financially support his child. Specifically, on September 16, 2008 Mr. Manzanares, through Utah

counsel, sent two (2) checks in the total sum of $300.00 payable to Petitioners for the support of his daughter, on January 22, 2009, two (2) checks in the total sum of $1,000.00 payable to Petitioners for the support of his daughter, and on February 24, 2009, one check in the sum of $500.00 payable to Petitioners for the support of his daughter. (Addendum Exhibit No. 1, Addendum Exhibit No. 2, Addendum Exhibit No. 3).

Robert Manzanares took definite steps to officially identify himself as the father and acknowledged paternity prior to his daughter's birth. Mr. Manzanares has demonstrated a full commitment to the responsibilities of parenthood both prior to and after the birth of his daughter by coming forward to attempt to participate in the rearing of his child by way of filing the pre-birth Petition in Colorado, contacting the adoption agency in Colorado to make them aware of his desire to parent his child, providing financial support throughout and after the pregnancy, and coming before the Utah Court incurring substantial indebtedness in an attempt to preserve and assert his parental rights to his daughter.

This matter is liken to the case of In Re: Adoption of Baby Boy Doe, 717, P.2d 686, (1986) wherein the Supreme Court of Utah reversed a trial court's decision which terminated the birth father's parental rights to his child. In Adoption of Baby Boy Doe, the birth occurred outside of the state in which the father resided, father continued to speak with the mother during the pregnancy making it known to the mother and her

relatives of his opposition to adoption and that he desired to rear his child, the mother and her relatives were involved in efforts to prevent father from learning of the birth or from asserting his parental rights and all parties knew the father was seeking to assert his parental rights.

In the instant case, R. M. was not a Utah resident, C. T. told R.M. she was going to Utah in February of 2008 (no specific time given) to visit her ill father and she would speak with him again in April about his reconsideration of consenting to an adoption, (R. 1130, Exhibit No. 8), in C.T.'s Reply filed with the Colorado court which was signed under oath, she affirmatively denied that she was not going to go to Utah to place their child for adoption, (R. 1130 Exhibit 23, ¶ 21), C.T., Petitioners and attorney Larry S. Jenkins, who acted as counsel for both C.T. and Petitioners, were distinctly aware of R.M.'s intent and desire to rear his child, (R. 371 ¶ 40, ¶ 42; R. 372; R. 373) and C.T. and Petitioners deliberately withheld information in order to avoid potential problems with R.M. attempting to obstruct the adoption, (R. 369 ¶ 32; R. 370 ¶ 32; R. 371 ¶ 42).

Due to above mentioned situations, reasons, and the exceptional unique facts of this case, including but not limited to. the dual hearings on February 20, 2008 at essentially the same time, one in the State of Colorado to finalize the paternity matter and the other in the State of Utah to take the consent of C.T., the assertions of C.T. in court pleadings and directly to R.M. which alleviated any concern R.M. might have otherwise

had about an adoption being attempted in Utah, and the fact the adoptive placement is with Mother's relatives and her acknowledgment that she would have unfettered access to the child, although R.M. would not have the same opportunities justifies the Court reversing the judgment of the Trial Court and concluding that the consent of R.M. is necessary to the adoption of his daughter.

II. THE TRIAL COURT ERRED IN DETERMINING ALTHOUGH JUDGE HILDER'S ACCEPTANCE OF THE CONSENT WAS VACATED, IT DID NOT VACATE OR SET ASIDE THE CONSENT ITSELF OR RENDER THE CONSENT VOID *AB INITIO*.

The validity of a consent for adoption is governed by statute, specifically, Utah Code Ann. § 78B-6-124(1)(a),(b), and (c). In order for a consent to be enforceable it must be signed before and accepted by either a judge that has jurisdiction over the adoption proceeding, a person appointed by a judge, or a person authorized by a child placing agency to take consents. *Id.*

In this case, the consent is not enforceable because it has not been signed before and accepted by a judge due to the Court vacating the acceptance of the consent. Allowing the consent to remain enforceable despite the fact the statutory requirements have not been met (acceptance by a judge) would be contrary to the intent of the statutory requirements. In essence, anyone could execute a consent without the approval of a Judge (or other entity as provided in the statue) and claim it is valid defeating the purpose of the statute.

The Court has held only after *acceptance by a judge* of a consent is such a deemed a contract which is enforceable. In particular, "[r]egarding a consent to adoption taken by a judge."**[a]fter acceptance** such a contract is enforceable against the adoption parent and ought to be enforceable by them.". In re Adoption of D, 252 P.2d 223, 229 (1953). Emphasis added.

Additionally, the term "vacate" is defined as, to annul or set aside. Ballentine's Law Dictionary 1331 (3d ed. 1969). The word annul is defined as to nullify; to set at naught; to make void; to reduce to nothing. Ballentine's Law Dictionary 77 (3d ed. 1969).

Here, the Memorandum Decision issued by the above-entitled Court on August 20, 2008 vacated Judge Hilder's acceptance of consent of the birth mother, C.T., (R. 381). The legal ramification of "vacating" the acceptance of the consent of C.T. is that the acceptance of the consent is treated as if it never took place, thereby making the consent unenforceable and invalid.

Due to the vacation of the acceptance of the consent of C.T. not only has R.M. complied with the different requirements under various situations which mandate his consent to his child (previously addressed herein above, but R. M. filed a Notice of the Commencement of Paternity Proceedings of both his Colorado Paternity action and Utah Paternity action with the Utah registrar of vital statistics within the Department of Health after the court vacated the acceptance of the consent of C.T., (R. 385; R. 607). The

filings of the Notice of the Commencement of Paternity Proceedings occurred prior to the consent of C.T. being taken and in accordance with Utah Code Ann. § 78B-6-121(3). Filing the Notice of Commencement of Paternity Proceedings before the Court vacated the acceptance of the consent of C.T. would have been futile as the consent of R.M. was already required due to his compliance with Utah Code Ann. § 78B-6-122(1)(c)(i). The law does not require litigants to do a futile or vain act. Jenkins v. Equip. Ctr., 896 P.2d 1000, 1003 (Utah App. 1994).

The acceptance of the consent of C.T. was properly vacated and the consent is no longer enforceable or legally valid and therefore, void *ab initio*.

III. THE TRIAL COURT ERRED IN RULING THE CONSENT TO AN ADOPTION IS ENFORCEABLE OR LEGALLY VALID DESPITE THE COURT'S FINDINGS THAT C.T. AND PETTTIONERS COLLUDED TO MISREPRESENT OR TO DEFRAUD THE COURT.

The Trial Court found C.T. had a duty to disclose to Judge Hilder at the consent hearing the unique facts of the case, particularly that a parallel action concerning the minor child was pending in Colorado and there were dual hearing, occurring at essentially the same time, pertaining to the minor child.(R. 734). The Trial Court further found the information about the parallel action was material and had a direct bearing on the validity of the Consent, (R. 735). Moreover, the Court found C.T.'s failure to disclose the information worked a fraud upon the court and undermined the legal validity of the Consent accepted by Judge Hilder (R. 735). The Trial Court also found C.T. and

Petitioners intentionally made misrepresentations or misrepresentations by omission to Judge Hilder, (R. 369). The Trial Court stated due to C.T. and Petitioners actions it would be a gross injustice and a miscarriage of justice to allow C.T. and Petitioners' to defeat R.M.'s legitimate claim to his child and challenge the adoption, (R. 380-81).

Due to the above findings, it was an err for the Trial Court to then ultimately rule that the Consent was enforceable and legally valid. In essence, the Trial Court has rewarded C.T. and Petitioners for their fraudulent actions which were found and articulated by the Trial Court. The language contained in Utah Code Ann. § 78B-6-106 basically excuses actions of misrepresentation and fraud as it pertains to adoption matters and by doing so actually encourages the use of misrepresentation and fraud as it relates to adoption proceedings. To allow fraud and misrepresentation to be utilized in adoption proceedings where the ramifications are so severe (terminating parental rights of biological fathers) is contrary to public policy.

Here, Robert Manzanares was never notified that Carie Terry was intending to give birth to their daughter in Utah, in fact, Ms. Terry, in her Response to the Colorado Petition denies she intents to go to Utah to place the child for adoption, (R. 1130, Exhibit 23). Ms. Terry went on to state to Mr. Manzanares that she was only going to visit her ill father in Utah and she would sit down with him in April and discuss him reconsidering consenting to the adoption of their child. (R. 1130, Exhibit 8).

C.T. and Petitioners should not be rewarded for their misrepresentations and fraud committed against the Court and Mr. Manzanares and as such the consent of R.M. should be required.

IV. UTAH CODE ANN. §78b-6-121(3) IS UNCONSTITUTIONAL BECAUSE IN ESSENCE, IT NEGATES GIVING FULL FAITH AND CREDIT TO PATERNITY ACTIONS INITIATED OUTSIDE OF THE STATE OF UTAH.

Appellant asserts the grounds for addressing the issue of the constitutionality of Utah Code Ann. § 78B-6-121(3) are the fact numerous telephone conferences were held between the Colorado Court and the Utah Court whereby issues of jurisdiction and recognition of the Colorado Orders by the Utah Court were addressed, (R. 19-20; R. 1129; R. 1132). The preliminary conference between the Court occurred prior to the Appellant, R.M. intervening in the adoption proceeding. Wherefore, Appellant respectfully submits the above issue and requests the Court of Appeals issue a determination.

The Full Faith and Credit Clause of the United States Constitution, art. IV § 1 as follows,

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

"Pursuant to the United States Constitution, 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. Mori v Mori 931 P.2d 854, 856 (Utah 1997). In particular, full faith and credit will be given to a declaration of paternity effective in another state if the declaration or denial has been signed and is otherwise in compliance with the law of the other state. Utah Code Ann. § 78B-15-310.

However, in the instant matter, despite the fact a paternity action was filed in the State of Colorado prior to the birth of the minor child and the mother, in her responsive pleadings admits R.M. is the biological father of the child, it is argued by Petitioners R.M. was required to again initiate a second paternity proceeding in a state where neither the mother nor father reside and where the child was born despite the fact the father was not placed on notice of the fact the mother would be giving birth to the child in Utah.

The impact of implementing Utah Code Ann. § 78B-6-121(3) in situations where out of state fathers have initiated paternity proceedings prior to the birth of their child is to ignore all efforts made by a father unless it is done in Utah despite the reality the father may have no knowledge of the birth of his child in Utah.

Therefore, the Court should find Utah Code Ann. § 78B-6-121 unconstitutional as it fails to give full faith and credit order issued out of sister states.

CONCLUSION

The trial court erred in concluding the consent of Robert Manzanares to the adoption of his child is not required and that the acceptance of the Mother's consent, once vacated, did not affect the validity of the consent itself. Further, the Court's findings that the Mother and Petitioners misrepresented and committed fraud upon the Court should not be rewarded or allowed to severe the parental rights of Robert Manzanares and such is contrary to public policy. Lastly, the Court should find Utah Code Ann. § 78B-6-121 unconstitutional as it fails to give full faith and credit order issued out of sister states.

RESPECTFULLY SUBMITTED, this 11th day of February, 2010.

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