

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH

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IN THE MATTER OF THE )  
ADOPTION OF: )  
 )  
 ) Case No. 082900089 FS  
 )  
BABY B, )  
----- )

Telephone Conference  
Electronically Recorded on  
September 8, 2008

BEFORE: THE HONORABLE ROBERT FAUST  
Third District Court Judge

APPEARANCES

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P R O C E E D I N G S

(Electronically recorded on September 8, 2008)

THE COURT: Thank you.

JUDGE WOODS: Can you hear us?

THE COURT: Yes, we can, Judge. I also have Mr. Byington and Mr. Jenkins in my courtroom here as well, and we're on the record.

COURT CLERK: Okay, just a moment; let me get Ms. Reyes on the phone.

JUDGE WOODS: I observed, just so you know -- hi. Good morning. This is Judge Woods. I can hardly hear you.

THE COURT: All right. Mr. Jenkins, if you want to come over closer, you are welcome to. That way everybody can hear. Is that a little better?

JUDGE WOODS: That's better. We'll make the other call here, try to get a hold of this other attorney, and we'll be right with you. It will be just a moment.

THE COURT: Great. Thank you.

COURT CLERK: Judge Faust?

THE COURT: Yes.

COURT CLERK: Ms. Reyes?

MS. REYES: Yes, I'm here. Thank you.

COURT CLERK: Okay.

THE COURT: And we also have Mr. Jenkins here and Mr. Byington.

1           JUDGE WOODS: Great. Well, good morning, Judge.  
2 It's nice to meet you. Here in Denver we have Ms. Terry  
3 and Mr. Manzanares is here, along with his attorney. Also  
4 the guardian ad litem and I -- or the Magistrate (inaudible)  
5 appointed for the child, Ms. Vivienne Virgo.

6           THE COURT: Thank you.

7           JUDGE WOODS: Thank you for agreeing to take my call  
8 here today. I was requested to call you by Counsel for  
9 Mr. Manzanares to consult with you, as is called for by the  
10 Uniform Child Custody Jurisdiction and Enforcement Act. I  
11 understand there is still an adoption matter pending in Utah,  
12 and that particular law does not apply to adoption cases.  
13 Nonetheless, it applies in our paternity case, and so that is  
14 the reason for the call.

15           I just had some questions, and I would be happy to  
16 answer any questions that you have as well. I guess do you  
17 have an update on what the status is of the Utah adoption at  
18 this point?

19           THE COURT: My understanding of it is, is that there  
20 has been a request for our Court of Appeals to take an inter-  
21 locutory appeal on my decision to set aside the consent of the  
22 natural mother. I don't know what the status any further than  
23 that is. Maybe Mr. Jenkins could address that, if he has any  
24 other information.

25           MR. JENKINS: I don't have any further information.

1 The time to respond to -- it was actually a petition for both,  
2 the extraordinary writ and the -- for permission to appeal the  
3 interlocutory order. The time for response has not come yet.  
4 So, you know, I doubt we'll see anything from the Court of  
5 Appeals at least for the next few days, until the response time  
6 has passed.

7 JUDGE WOODS: When -- does anyone know when -- and of  
8 course we can never guess what the Court of Appeals is going  
9 to do, but when they would typically decide if they're going  
10 to take this case or not, and the decision be pretty quick, I  
11 would expect?

12 MR. JENKINS: My experience with interlocutory appeals  
13 is that they do rule fairly quickly, within a week or so after  
14 the res -- all the -- all the briefing is in on the issue.  
15 They typically rule quite quickly. I had one this last year,  
16 and they ruled within -- within a few days after the time  
17 expired.

18 JUDGE WOODS: Okay, thank you. Judge, my understanding  
19 is that you vacated the natural mother's consent. So that has  
20 been set aside at this point. Who has -- is there a legal  
21 custody order for the child in Utah at this time?

22 THE COURT: Yes, we let the temporary custody order  
23 that was issued in place with the child remaining with the  
24 potential adopting parents.

25 JUDGE WOODS: Okay, and I guess -- and maybe it's

1 getting a little bit ahead of ourselves, but what happens if  
2 this becomes a failed adoption? What would you be doing then  
3 next?

4 THE COURT: Well, as I understand it, under Utah law  
5 there is a portion of our section that indicates that if an  
6 adoption petition is not approved, then the Utah Court has  
7 a determination to make as to what's in the best interest  
8 of the child, and enters in orders with respect to custody  
9 determinations between the two natural parents.

10 I don't know if that solely relates to parents who  
11 are Utah residents, or what the impact of that statute is  
12 as it would relate in this case with both parents, natural  
13 parents, being residents of Colorado and so forth.

14 I think Mr. Jenkins' position is when we've spoken  
15 previously on that -- and I'll let him change his -- if I  
16 misrepresent something inaccurately. I think Mr. Jenkins  
17 advocated or was arguing that the Utah Courts must go ahead  
18 in that case and still make a determination of what is in the  
19 best interest of the child, rather than deferring the matter  
20 back over to the Colorado Courts.

21 Mr. Jenkins, is that an accurate summary?

22 MR. JENKINS: I believe so, your Honor. Our Supreme  
23 Court has modified the statute just slightly in that in the  
24 case of a failed adoption, that best interest determination  
25 that's made by the Court after that is that it's a temporary

1 custody decision. So in that kind of a case that is what --  
2 what would happen, would be simply a temporary custody order  
3 that the Court would enter.

4 Then I'm assuming-- I don't know; I haven't researched  
5 this -- but I'm assuming then at that point then as far as the  
6 permanent custody decision, that could go back to Colorado.  
7 The way the statute reads, there is a temporary decision that  
8 needs to be made.

9 JUDGE WOODS: Okay, and I did a little bit of research  
10 and found that -- and I don't have it in front of me or the  
11 name, but I found some Utah Supreme Court case that seemed to  
12 go along with what you just said, Mr. Jenkins.

13 Let me ask Judge Faust, do you have any questions you  
14 want to ask me?

15 THE COURT: No, I believe I am just fine.

16 JUDGE WOODS: Okay. Here's where I'm trying to figure  
17 out things. I mean, it seems fairly clear to me under the  
18 uniform act that Utah would be the home state of this child;  
19 and that's just the plain language of the act.

20 Having said that, there are some -- there are two  
21 ways that Utah could decline jurisdiction under the uniform  
22 act. One would be to determine that Utah is an inconvenient  
23 forum; and the second would be to determine that there had  
24 been unjustifiable conduct. In this case that would have been  
25 unjustifiable conduct by the natural mother.

1           Based on I think what I know the state of the evidence  
2 is in the record, and we've taken very little evidence here in  
3 Colorado, but based on the state of the case right now, there  
4 would be a basis for a Utah Court to decline jurisdiction on  
5 either grounds, inconvenient forum or unjustifiable conduct.

6           At least my understanding of the Act is, is that is  
7 Utah's call to make. In other words, sort of goes right of  
8 first refusal, if you will. If Utah makes that decision, then  
9 it could come back to me; but until Utah makes that decision,  
10 I think the matter is in Utah. Judge Faust, do you have any  
11 thoughts on that?

12           THE COURT: Well, I think you're right in that regard;  
13 and that's what I was raising in the first issue, is is I don't  
14 know if I need to go through and make that temporary custody  
15 order determination first, and then apply the statute so that  
16 all subsequent jurisdictional issues beyond the temporary  
17 custody order that Mr. Jenkins and I spoke of or handled in  
18 Colorado, or whether I'm permitted to go ahead and make a  
19 ruling under the statute prior to making that best interest  
20 test as the statute says that I need to do. I simply don't  
21 know the answer at this point in time.

22           So, to me, the direction that I was going to go was to  
23 simply to wait to see what the Court of Appeals does, and then  
24 that would determine exactly whether the next proceeding would  
25 be in my Court, or whether we need to continue to stay on hold.

1 So --

2 JUDGE WOODS: Just let me ask you this, Judge. Would  
3 you be the Judge that makes that determination in terms of  
4 either an inconvenient forum or unjustifiable conduct, or would  
5 that be someone else?

6 THE COURT: I believe it's me. Mr. Jenkins, do you  
7 have any different opinion of that?

8 MR. JENKINS: I don't know the answer to that. To be  
9 honest, I haven't thought that.

10 JUDGE WOODS: Judge, I --

11 THE COURT: And I would take a look at the statute as  
12 well, and maybe change your mind; but my understanding is I  
13 guess I'm the one with the custody of the child temporarily --

14 JUDGE WOODS: Okay.

15 THE COURT: -- here, so --

16 JUDGE WOODS: And the only reason I ask that is, again,  
17 the Uniform Child Custody Act does not apply to adoptions.  
18 However, it does apply to my case.

19 THE COURT: Right.

20 JUDGE WOODS: But I also understand that there's a  
21 custody issue as well in Utah. So I guess that's ultimately  
22 your decision.

23 THE COURT: All right.

24 JUDGE WOODS: I can tell you what I've been thinking of  
25 doing, and then I'm happy to hear any comments; but my thinking

1 was that I was going to be directing the parties here in  
2 Colorado to seek an answer from Utah as to whether Utah is  
3 going to exercise home state jurisdiction or not.

4           If Utah decides to exercise home state jurisdiction,  
5 as far as I can tell, I'm done; but if Utah decides not to  
6 exercise home state jurisdiction because of either inconvenient  
7 in forum or unjustifiable conduct, then I'm not done. So I'm  
8 just going to direct our parties here to seek that answer from  
9 Utah.

10           The second thing that I was contemplating doing is  
11 ordering the guardian ad litem that I have appointed to the  
12 minor child in this case to investigate the natural parents  
13 here in Colorado, and to the extent that she can investigate  
14 the parents or the potential adoptive parents in Utah. So that  
15 if I need to have a hearing, I have someone who was prepared to  
16 make recommendations to me.

17           She can make her recommendations either as an officer  
18 of the Court, or she may be called to testify, is my under-  
19 standing in Colorado. The parties would have to figure that  
20 out. I would probably set some type of an evidentiary hearing.

21           Whether I would actually hold it or not depends on what  
22 happens in Utah; but at least I would have a day set aside, and  
23 you know, if it comes that I need to do something, that I can  
24 do it. If not, I can not do it, or I can just continue to  
25 wait. Judge Faust, what does that -- how does that sound to

1 you?

2 THE COURT: Well, I think from your position, I think  
3 those are two reasonable options for you to go ahead and  
4 exercise. I do -- I do think ultimately the determinations  
5 of some of these issues have to be made by this Court.

6 JUDGE WOODS: Correct, and then I could not agree more.  
7 I want to be very clear. I am not trying to step on the toes  
8 of my sister jurisdiction in Utah.

9 THE COURT: No, I'm --

10 JUDGE WOODS: As I said, based on my understanding,  
11 it's now your call, and you have the right of first refusal,  
12 for lack of a better way of putting it.

13 THE COURT: Right, and I think before, obviously, I'm  
14 going to be doing anything, we're going to wait and see what  
15 the Court of Appeals does on this interlocutory appeal; and  
16 then I'm in a position to know whether we have the green light  
17 to go forward or if we need to hold pending the appeal.

18 JUDGE WOODS: Correct. Okay, well, and I guess the  
19 other thing, and I could probably go ahead and make this  
20 finding, and I'll do this after we hang up; but certainly  
21 based on the order that you had written as the order, that --  
22 and the course of proceedings that happened here in Colorado,  
23 I think there's certainly a preliminary finding that I can  
24 make that the mother's conduct, at least here in Colorado, was  
25 also unjustifiable based on really the undisputed evidence that

1 was in the record that no one has disputed here, which is that  
2 when she contacted the Colorado Court for the continuance in  
3 February, she didn't let us know that she had already given  
4 birth to the child. She didn't let us know that she was moments  
5 away from signing the consent and so on. I don't think anybody  
6 disagrees with that. So with that, I'll probably enter that  
7 type of finding as well.

8 THE COURT: Well --

9 JUDGE WOODS: I think that's about all I can do at this  
10 point.

11 THE COURT: All right. Well, thank you. I appreciate  
12 it very much. Yeah, if you want to have the parties, you know,  
13 direct them to make a request from the Court, I'll -- as far  
14 as whether or not we're going to exercise home state control,  
15 we'll have you just look at that issue and have it briefed, and  
16 we'll decide it.

17 JUDGE WOODS: All right, and again, thank you for  
18 talking to me; and any questions for me, or anything at all?

19 THE COURT: I don't have anything. Thank you very much.

20 Ms. Reyes --

21 JUDGE WOODS: Thank you, Judge.

22 THE COURT: -- Ms. Reyes, you're on the phone.

23 JUDGE WOODS: We're going to hang up at this point.

24 THE COURT: All right, thank you.

25 JUDGE WOODS: All right.

1           THE COURT: We're still on the record. I don't know  
2 -- I don't know. I'm happy to speak with -- I wanted to speak  
3 with Mr. Jenkins on something as well. Mr. Jenkins, I wanted  
4 to clarify -- we're still on the record, right, Pat?

5           COURT CLERK: Yes.

6           THE COURT: Thank you. My understanding of this file  
7 is that it's under seal.

8           MR. JENKINS: Okay.

9           THE COURT: My understanding also is, is that no one  
10 has access; you, your clients, anybody, without Court order.  
11 So the reason for the denial of copies of the proceedings --

12          MR. JENKINS: Okay.

13          THE COURT: -- was because this file is sealed, and  
14 there's no Court order releasing it. I'm happy to entertain  
15 at any point in time any motion from any party to release or  
16 consider releasing a portion of the file, or access to the  
17 other things that are going on.

18                 For your information, if my memory serves me correct,  
19 we had a similar request from the other side, and they were  
20 denied as well, because they had not sought a Court order to  
21 access a sealed file.

22          MR. JENKINS: Okay.

23          THE COURT: All right. Now, I don't know if you want  
24 to do this on your own, Mr. Jenkins, but maybe we ought to  
25 consider maybe also talking with Ms. Reyes about it, because

1 she needs to be involved.

2 COURT CLERK: She's not on.

3 THE COURT: No, she was -- yeah, she hung up, but --

4 MR. JENKINS: Okay.

5 THE COURT: -- I'm considering thinking of trying to  
6 get the interplay between the UCCJ Act and our custody adoption  
7 statutes, how they interrelate or they don't at all, because I  
8 think we're all in new territory. At least I am. So anything  
9 further that you would like to put on the record today?

10 MR. JENKINS: I don't think so, your Honor, and I  
11 appreciate the explanation.

12 THE COURT: Okay.

13 MR. JENKINS: The statute has some ambiguity about  
14 whether the file is sealed at the entry of an adoption decree  
15 or prior to that. We're actually trying to clarify that with  
16 the Legislature right now, but I understand -- I understand  
17 that position.

18 THE COURT: All right. Well, thank you.

19 MR. JENKINS: Thank you.

20 THE COURT: We'll go off the record.

21 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                                  ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

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That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

\_\_\_\_\_  
Wendy Haws  
Certified Court Transcriber

WITNESS MY HAND AND SEAL this 5<sup>th</sup> day of October 2009.

My commission expires:  
February 24, 2012

\_\_\_\_\_  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County