

COPY

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IN THE FIRST DISTRICT COURT, IN AND FOR
CACHE COUNTY, STATE OF UTAH

<p>IN THE MATTER OF THE ADOPTION OF:</p> <p>AMELYA KIRKPATRICK aka FU TONG BAO,</p> <p>a child under the age of 18.</p>	<p>MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT OR ORDER, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL</p> <p>Judge Stanton B. Taylor</p> <p>Case No. 062100046</p>
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Roger F. Baron, as Guardian ad Litem, for the above named minor child, submits the following Memorandum in Support of his Motion to Alter or Amend Judgment or Order, or in the Alternative, his Motion for New Trial.

MEMORANDUM

This Motion is made pursuant to Rule 59 of the Utah Rules of Civil Procedure and in particular upon the basis of the discovery of previously unknown evidence. This evidence is relevant to the court's determination of this case in several respects as set out more fully below.

Rule 59 of the Utah Rules of Civil Procedures allows, as an alternative to granting a Motion for a New Trial, the court to in effect reopen the case and consider new evidence and arguments. That portion of the rule states: "... on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions,

and direct the entry of a new judgment." In the event the court does not feel inclined to open the judgment as requested, the Guardian ad Litem feels that the newly discovered evidence is sufficient for the court to grant a new trial in this matter. The arguments and reasoning for the opening of the judgment or the granting of a new trial are as follows:

I - PARENTAL COMPETENCY

1. At the trial in this matter, Mr. and Mrs. Banks portrayed themselves as highly competent and caring parents who were willing and able to adopt Amelya into their family and properly care for her and they represented that they had other children they had previously adopted. Specifically, the Banks represented to the court that they had adopted a child with cerebral palsy by the name of Greg Banks. Their testimony was that they had taken good care of Greg until his condition and his size made him too difficult for them to care for in their home. They told the court that they had reluctantly sent him to an institution in Utah County so that he could receive the care they could not provide in a home setting.

2. As set forth in the Affidavit of Heather Mons, those representations regarding Greg were not truthful. The true facts were very different from what the court heard at trial. The truth as to Greg and his condition is as set forth in the attached affidavit of Heather Mons, Greg's teacher. A few of the points raised in the affidavit are as follows:

a. The affidavit clearly shows that while Greg does have cerebral palsy, he was a small child who was easily managed and cared for. In contrast, the Banks represented that he was too large for them to care for.

b. The Banks represented or implied that Greg's cerebral palsy condition was so severe that he needed specialized nursing care. As shown in the affidavit of Greg's teacher, Greg could feed himself, could walk by himself with the aid of a walker and use a wheelchair, he could communicate his needs and he had a friendly and happy disposition. School personnel

had no difficulty properly caring for him while he was in school.

c. The testimony at trial presented by the Banks was that Mrs. Banks was the person primarily caring for Greg and that she could no longer lift him and care for him. The Affidavit of Ms. Mons makes it clear that Mrs. Banks was not Greg's primary caregiver, that she knew little about his needs and acted uncaring and unconcerned about filling his needs.

d. The Banks would also have the court believe that they are financially able to provide for all of Amelia's needs. Yet Greg had obviously decayed and rotten teeth that at times made it difficult for him to eat to the point where the teachers would see him crying while trying to eat. Mr. and Mrs. Banks failed to take care of Greg's teeth, either because of a financial inability to do so or because they simply didn't care enough about him to take care of it. Either way, it is a significant discrepancy from what the court had been led to believe.

II - CREDIBILITY AND MORAL FITNESS

3. The false statements made by Mr. And Mrs. Banks concerning Greg certainly call into question whether the remainder of their testimony is to be believed. This is consistent with the fact that they are accused of numerous federal court charges, some of which appear to involve dishonesty. After hearing further testimony on this matter, the court may wish to reevaluate whether to believe the Banks of the Kirkpatricks when their testimony was in conflict.

4. In determining whether to grant an adoption, the court may consider the moral fitness and example the proposed adoptive parents will set for the child. The false statements of the Banks would certainly tend to lead one to believe that their moral standards are not what they should be and also that they lead double lives as good, religious members of the community. As indicated in the affidavit, they appear to be extremely concerned about how things appear to the community, i.e. when they refused to allow Heather Mons to adopt Greg

because people may see him with her and realize they gave him up.

WHEREFORE, the Guardian ad Litem requests the court to alter or amend its previous judgment or order to allow for the admission and consideration of the newly discovered evidence referred to above or in the alternative set the matter for a new trial and allow the newly discovered evidence to be introduced at the new trial along with any other evidence that may be developed or discovered as a result of the production of this new information. In view of the nature and content of the newly discovered evidence, the Guardian ad Litem further requests the court to alter or amend its' previous judgment or order to add an order for further psychological evaluations and testing to be conducted of Mr. and Mrs. Banks and also Mr. and Mrs. Kirkpatrick. The Guardian ad Litem asks that the court allow further discovery to be conducted with regard to the new evidence referred to above.

DATED this 8th day of April, 2008.

Roger F. Baron

ROGER F. BARON
GUARDIAN AD LITEM

CERTIFICATE OF MAILING

I hereby give notice that I mailed a true and correct copy of the foregoing to the below named individuals on the 8th day of April, 2008.

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