

1975

Utah v. Marilyn Baker : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Golden W. Robbins; Attorney Floyd Roger Hales.

Vernon B. Romney; Attorney General .

Recommended Citation

Brief of Appellant, *Utah v. Baker*, No. 13918.00 (Utah Supreme Court, 1975).

https://digitalcommons.law.byu.edu/byu_sc1/132

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT
OF THE STATE OF UTAH

RECEIVED
LAW LIBRARY

04 DEC 1975

STATE OF UTAH, In the interest of
HALES, FLOYD ROGER (06-24-65)
a person under eighteen years of age

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

FLOYD ROGER HALE, by his next
of kin and friends and custodians
JOSE LUJAN AND MAGGIE
LUJAN,

Plaintiff and Appellant.

Case No.
13918

vs.

MARILYN BAKER, CHRIS V.
SAIZ AND MRS. CHRIS V. SAIZ,
his wife, *Defendants and Respondents.*

BRIEF OF PLAINTIFF AND APPELLANTS

APPEAL FROM THE DISTRICT JUVENILE
COURT FOR SALT LAKE COUNTY,
STATE OF UTAH,
HONORABLE JUDITH F. WHITMER

GOLDEN W. ROBBINS
*Attorney for Floyd Roger Hales
by his next of kin and friends
and custodians Jose Lujan
and Maggie Lujan.*

705 Newhouse Building
Salt Lake City, Utah

VERNON B. ROMNEY
Attorney General

236 State Capitol

Salt Lake City, Utah

FILED

INDEX

	Page
STATEMENT OF NATURE OF CASE	1-3
DISPOSITION IN THE LOWER COURT.....	4
RELIEF SOUGHT ON APPEAL	4
STATEMENT OF FACT	4-8
ARGUMENT	8-20

POINT I

THAT THE COURT ERRED IN CHANGING THE HEADING OF THE CASE FROM THE DISTRICT COURT CASE, PETITION FOR WRIT OF HABEAS CORPUS, TO A JUVE- NILE COURT CASE, STATE OF UTAH IN THE INTEREST OF HALES, FLOYD ROGER. THE CASE, HABEAS CORPUS, WAS CERTIFIED FROM THE DISTRICT COURT TO THE JUVENILE COURT AND THE CASE HEADING AND PROCEEDINGS SHOULD HAVE ALWAYS BEEN IN THE HABEAS CORPUS CASE	8-9
--	-----

POINT II

THAT WITHOUT ANY EVIDENCE THE COURT DENIED THE WRIT OF HABEAS CORPUS AND THEREBY DENIED THE APPELLANTS AND ROGER OF THEIR DAY IN COURT	9-11
--	------

POINT III

JUVENILE COURT HAD NO JURISDIC-
TION OVER THE LUJANS. THEY WERE
NEVER A PARTY TO THE LAWSUIT. THE
JUVENILE COURT HAD NO JURISDIC-

INDEX (Continued)

	Page
TION OVER ROGER, HE NEVER WAS AND IS NOT NOW A DEPENDENT OR NEG- LECTED CHILD	11-16
POINT IV	
THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN REFERRED BACK TO THE DISTRICT COURT FOR HEARING WITH THE JUVENILE COURTS RECOMMENDA- TIONS	17-20
CONCLUSION	20-21

AUTHORITIES CITED

CASES

Eugene A. Anderson vs. Kathleen D. Anderson, 416 P.2d 308, 18 U.2d 89	13-15, 18-19
Hardy vs. Olsen, 180 P.2d 210	15
In re Bradley et al vs. Miller et ux, 167 P.2d 978.....	10
In re State in the Interest of Graham, et al, 170 P.2d 172	12-13
State of Utah, in the Interest of Rae Lynn Thornton, 422 P.2d 199, 18 U. 2d 297	13-17-18
In re State in the Interest of Valdez, 504 P.2d 1372	10, 16, 19-20

INDEX TO TEXT AND STATUTES

Section 55-10-78	5, 9
Utah Constitution Article VIII Section 7	8-9

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, In the interest of
HALES, FLOYD ROGER (06-24-65)
a person under eighteen years of age

FLOYD ROGER HALE, by his next
of kin and friends and custodians
JOSE LUJAN AND MAGGIE
LUJAN,
Plaintiff and Appellant.

Case No.
13918

vs.

MARILYN BAKER, CHRIS V.
SAIZ AND MRS. CHRIS V. SAIZ,
his wife, *Defendants and Respondents.*

BRIEF OF PLAINTIFF AND APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This case involves the custody of Floyd Roger Hales, who has been in the custody and control and home of Jose Lujan and Maggie Lujan since his birth. He will be ten years old in June, 1975 and that there has been a very close and affectionate association develop between the Lujans, the Lujans' family and Roger.

The Lujans filed a Petition for a Writ of Habeas Corpus. The Judgment purports to dispose of the Writ of Habeas Corpus, but is entitled in the case of State of Utah, in the interest of Hales, Floyd Roger.

The file, (record on Appeal), is not in chronological order nor does the file reflect one case, but it reflects two separate cases and papers which really constitute a hybrid of the two cases. The papers in the file at page 40, 41, 42, and 43 pertain to the Petition for Writ of Habeas Corpus and the Writ. The pleadings pertaining to the Writ of Habeas Corpus should not be intermingled with the papers in the case of State of Utah, in the interest of Hales, Floyd Roger.

The papers pertaining to the case of State of Utah, in the interest of Hales, Floyd Roger, are the Affidavit and Order to Show Cause at page 32 and 33 and a Motion that the Order to Show Cause not be heard until the Petition for Extraordinary Writ has been referred to the Juvenile Court and heard (R. 34) and Answer to the Affidavit and Order to Show Cause, (R. 35, 36, 37). This matter was never heard by the Court and no Order entered on the Order to Show Cause.

The two cases should not have been mixed because they are two separate and distinct cases.

A Petition for Extraordinary Writ of Habeas Corpus was filed in the District Court of Salt Lake County on September 9, 1974, (R. 40, 41, 42). Based on that Petition, A Writ of Habeas Corpus was issued by the Court on September 9, 1974. (R. 43).

Said Petition for Writ of Habeas Corpus came on for hearing on September 25, 1974, and an Order by Judge Banks of the District Court was made: "It is

hereby certified to the Second District Juvenile Court of the State of Utah based upon Utah Code Annotated 55-10-78.”

That the hearing of said case and Petition for Extraordinary Writ was Floyd Roger Hale, by his next of kin and friends and customers. *Jose Lujan and Maggie Lujan vs. Marilyn Baker, Chris V. Saiz and Mrs. V. Saiz, his wife.*

That was the last time the heading of the case was used, notwithstanding the Petition and the Writ of Habeas Corpus was heard on October 15, 1974. We quote from page 4 of the Juvenile Court transcript where the Court says:

JUDGE WHITMER: “Alright, the matter is before the Court, then, on a Writ of Habeas Corpus which was certified over by the District Court. Let’s see — for hearing in this court.

GOLDEN ROBBINS: Right.

JUDGE WHITMER: Alright, you may proceed.”

The Order disposing of the Case was entitled State of Utah, in the interest of Hales, Floyd Roger, a person under 18 years of age, which Order was duly objected to, but which Order stated “Petition for Extraordinary Writ is denied.”

That the Court assumed certain facts which were not in evidence or offered in evidence.

DISPOSITION IN THE LOWER COURT

The Amended Order disposing of the case was entitled, "State of Utah, in the Interest of Floyd Roger Hales," but the Amended Order provided that the Petition for Extraordinary Writ is denied.

RELIEF SOUGHT ON APPEAL

Plaintiff asks that the Amended Order be reversed or stricken and that the Plaintiffs be given a hearing on the Petition for Extraordinary Writ of Habeas Corpus and that the Juvenile Court be directed to make recommendations to the District Court in those proceedings and the proceedings be remanded to the District Court of Salt Lake County.

STATEMENT OF FACT

That the Petition for Extraordinary Writ (Habeas Corpus) recites that Jose and Maggie Lujan are the great uncle and great aunt of Floyd Roger Hales, and that they are the godfather and godmother of Floyd Roger Hales. That Floyd Roger Hales has been in their care and custody and under their control since ten days after his birth and that in the almost ten years that the Lujans have taken care of him, there has been a close friendly affectionate association develop.

That Jose and Maggie Lujan have not been deprived of his custody by any legal proceedings. That the petitioners own their own home, that Roger's mother is mentally ill and in the Utah State Mental Hospital, and

that the father of Floyd Roger Hales gave the custody of the child to the petitioners and they have maintained and cared for him since his birth. That Floyd Roger Hales was illegally taken and restrained of his liberty by Marilyn Baker and Mr. and Mrs. Chris V. Saiz without a hearing on his rights or the rights of Jose and Maggie Lujan. That in the Petition for Writ of Habeas Corpus, it is alleged that the legality of petitioners restraint has not heretofore been adjudicated and no other application for relief has been made and no other speedy or adequate remedy exists.

That after the Writ was filed, an Order was made setting it for hearing on September 25, 1974, at which time the District Court made an Order transferring the case to the Second District Juvenile Court by virtue of Section 55-10-78 part of which is as follows:

“A district court may at any time decline to pass upon a question of custody and may certify that question to the juvenile court for a determination or recommendation.”

That after the filing of the Writ of Habeas Corpus, an Order to Show Cause was issued by the Juvenile Court in the case of the State of Utah, in the interest of Hales, Floyd Roger, and was served upon Jose and Maggie Lujan. That Jose and Maggie Lujan filed a Motion that the case not be heard until after the hearing on the Writ of Habeas Corpus and that an Answer was filed to the Order to Show Cause, setting out that since the time that Floyd Roger Hales was two weeks old, he has been in the care, custody and control of Jose Lujan

and Maggie Lujan and that they are entitled to the custody and control of Floyd Roger Hales. It further alleges that the Writ of Habeas Corpus provided for Roger should be in the custody of Mr. and Mrs. Lujan, but notwithstanding said Order, Marilyn Baker with officers arrested Floyd Roger Hales and held him in the Shelter Home.

That upon a hearing before Richard Birrell, the hearing Officer, an Order was made that Jose Lujan and Maggie Lujan continue with the custody of Floyd Roger Hales until a hearing on the Petition for Writ of Habeas Corpus and that Jose Lujan and Maggie Lujan have never had a hearing in regard to their rights as to the care, custody and control of Floyd Roger Hales.

That no further proceedings have been taken in that case and no order entered pertaining thereto.

The hearing on the Writ of Habeas Corpus was continued until the 24th day of October, 1974, at which time the Court stated: Page No. 4 of the Juvenile Court transcript:

“JUDGE WHITMER: Alright, it’s a District Court matter. Alright, I have that.

GOLDEN ROBBINS: Right and it’s been referred to your Honor by Judge Banks.

JUDGE WHITMER: Yes, I’ve got that.

GOLDEN ROBBINS: There should be an Order in the file.

JUDGE WHITMER: Yes, there is. * * * Alright, the matter is before the Court, then on a

Writ of Habeas Corpus which was certified over by the District Court. Let's see — for hearing in this Court.

GOLDEN ROBBINS: Right."

That Mr. Lujan was called as a witness and a Motion to Dismiss was made by Michael Stead, Juvenile Court transcript Page 4, and that no evidence was introduced in Habeas Corpus case.

None of the file in the case of State of Utah, in the interest of Hales, Floyd Roger was introduced into evidence.

That an Order was entered in the case, (R. 47 and 48). Objections to the Order was made (R. 50, 51). An Amended Order was filed on the 12th day of November, 1974, (R. 52, 53), adjudging that Petition for Extraordinary Writ is denied.

That in the transcript, the Court has made certain statements and referred to certain instruments which were not introduced in evidence or even offered in evidence.

After filing the Notice of Appeal, (R. 54) on the same day there was a Certificate that a Transcript had been Ordered (R. 57), which transcript was sent to the Juvenile Court showing it was filed on January 15, 1975, in the Juvenile Court, but someone attached a note stating: "This volume is not certified as part of the record in Case No. 13918 — State in the interest of Floyd Roger Hales." The Juvenile Court prepared a tran-

script which was filed on March 3, 1975. Both of these transcripts are numbered separately and are not numbered as part of the record on appeal. Reference to the transcript is being described as the Juvenile Court Transcript and the court reporter's transcript. Neither of the transcripts purport to report any testimony or evidence, but merely the statement of counsel and the Court.

ARGUMENT

POINT I

THAT THE COURT ERRED IN CHANGING THE HEADING OF THE CASE FROM THE DISTRICT COURT CASE, PETITION FOR WRIT OF HABEAS CORPUS, TO A JUVENILE COURT CASE, STATE OF UTAH IN THE INTEREST OF HALES, FLOYD ROGER. THE CASE, HABEAS CORPUS, WAS CERTIFIED FROM THE DISTRICT COURT TO THE JUVENILE COURT AND THE CASE HEADING AND PROCEEDINGS SHOULD HAVE ALWAYS BEEN IN THE HABEAS CORPUS CASE.

That the Writ of Habeas Corpus has always been used in the State of Utah for the purpose of determining the custody of children. That the Lujans are entitled to their day in court. They are entitled to a full and complete hearing on the Writ of Habeas Corpus pertaining to their rights to the custody of Roger and Roger is entitled to a hearing on his rights as to who is to have custody of him.

The Writ of Habeas Corpus guaranteed by the Utah Constitution, Article VIII, Section 7, which states:

“The District court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; * * * The District courts or any judge thereof, shall have power to issue writs of habeas corpus.”

Section 55-10-78 provides:

“Nothing contained in this act shall deprive the district courts of jurisdiction to appoint a guardian for a child nor of jurisdiction to determine the custody of a child upon writ of habeas corpus.”

If Marilyn Baker and Mr. and Mrs. Saiz or the Juvenile Court wanted to raise the question of jurisdiction, they should have done it by appropriate pleadings and evidence. No answer or pleading was filed as to the allegations contained in the petition for Writ of Habeas Corpus and no evidence was introduced.

We submit that the Juvenile Court had no right not to hear the Writ of Habeas Corpus.

POINT II

THAT WITHOUT ANY EVIDENCE THE COURT DENIED THE WRIT OF HABEAS CORPUS AND THEREBY DENIED THE APPELLANTS AND ROGER OF THEIR DAY IN COURT.

Neither Respondent or the Court or the Appellant introduced any evidence. There was talk, but no evidence.

Appellant should have been allowed to introduce evidence supporting the allegations set out in the Writ of Habeas Corpus. We submit that the allegations set out in the Writ of Habeas Corpus state facts upon which relief could have been granted. The appellants were deprived of the privilege of showing that the Juvenile Court never had jurisdiction and to show the fact that Roger was never a neglected or dependent child. The Court and counsel for defendant stated that from a moral obligation that the Lujans were entitled to Roger. The following cases hold that a child is not dependent or neglected when he is being taken care of by a third party.

In the case of *In re State in the Interest of Valdez*, 504 P.2d 1372, page 1375 paragraph the Court says:

“The fact that the child is being provided for in the home of someone who is not the child’s parent does not show dependency or neglect. For the parent has the right to determine where and with whom a child shall live.”

In the case of *In Re Bradley et al v. Miller et ux*, 167 P. 2d 978, on page 985, in the concurring opinion Justice Wolfe states:

“Where a parent makes arrangements for someone else adequately to care for the child by some proper and responsible person, such parent may be, through others, caring for the child.”

We have heretofore cited under Point I the Constitution and the statute which would give the Lujans the right for a hearing under a Writ of Habeas Corpus.

Under Point III we discuss that the Juvenile Court did not have jurisdiction of the appellant or Roger.

The appellants were denied the right to introduce evidence and to question the jurisdiction of the Juvenile Court.

POINT III

JUVENILE COURT HAD NO JURISDICTION OVER THE LUJANS. THEY WERE NEVER A PARTY TO THE LAWSUIT. THE JUVENILE COURT HAD NO JURISDICTION OVER ROGER, HE NEVER WAS AND IS NOT NOW A DEPENDENT OR NEGLECTED CHILD.

There is erroneously in the records of the Juvenile Court an Affidavit and Order to show Cause in the Juvenile Court case and the Answer to Affidavit and Order to Show Cause by the Lujans. The Order to Show Cause and the Answer to Affidavit and Order to Show Cause were never heard and the only reason that I can think that they are in the record is because they were served after the Writ of Habeas Corpus was issued.

In the Answer of the Lujans, they allege that they had never had a hearing in regards to their rights to the care, custody and control of Floyd Roger Hales and there is no evidence in the case that the Juvenile Court has obtained jurisdiction over Mr. and Mrs. Lujan. If there had been any part of the Juvenile Court record put in evidence, the appellants would have contested the jurisdiction of the Juvenile Court in the case of State of Utah,

in the interest of Hales, Floyd Roger and as part of their authority, would have based their contest on the case of *in re State in the Interest of Graham, et al*, 170 P.2d 172, in which case the Court sets out that the petitioners must show that he was a neglected or dependent child or the Court would never have acquired jurisdiction, and we quote from Page 175, 1st column as follows:

“A petition must be filed as required by Section 14-7-13. Said petition to invoke the jurisdiction of the court must allege facts which would make the children either “Neglected”, “Dependent”, or “delinquent” as defined by the Legislature in Section 14-7-5. The facts found by the court must be such as to show that the children were “neglected”, “dependent” or “delinquent” as defined by the Legislature; otherwise, the juvenile court is divested of jurisdiction to make any order in reference to said children except to dismiss the case, and to revoke all previous orders made therein.”

And the court further states on page 175 at the bottom of the first column, quote:

“It is fundamental that a juvenile court may make no valid orders in reference to a child unless and until that court obtains jurisdiction of that child by complying with the statutory requirements therefor. It is just as fundamental that a parent’s right to the custody of his child cannot be determined so as to bind that parent unless and until the court obtains jurisdiction of that parent.”

And in the second column page 175, the court further states:

“This court on appeal will not presume jurisdiction of the juvenile court but will closely examine the record to see that the legislatively specified actions have been taken and the necessary facts are alleged and found to give said court jurisdiction in the particular case.”

The Lujans were never made a party to any proceedings in the Juvenile Court and we contend that the Juvenile Court never had jurisdiction over Roger and it must affirmative appear in the juvenile proceedings which have never been offered in evidence in the Writ of Habeas Corpus case.

In the Graham case, Justice Wolfe calls attention to the careless way in which the record was kept in the Juvenile Court case. We have called to the Court's attention the disregard for the continuity of any case and of the trying of the case within the rules of evidence.

In the case of State of Utah, in the interest of Rae Lynn Thornton, 422 P.2d 199, 18 Ut. 2d 297, in a custody case, the court on the bottom of the second column page 200 and the top of the first column page 201 says:

“In is the opinion of this Court further that the District Court, being a court of original jurisdiction, pursuant to the Constitution of the State of Utah, cannot delegate and cannot divest its jurisdiction to the Juvenile Court in a case such as this.”

In the case of *Eugene A. Anderson vs. Kathleen D. Anderson*, 416 P.2d 308, 18 U.2d 89, it involves the question of when the District Court has granted a divorce and awarded custody of children and support

money, and the Juvenile Court in a proceedings in the interest of the children, makes a different Order, does its Order supersede the judgment of the District Court. The Court in answer to this question on page 310 states:

“To accept plaintiff’s contention that the Juvenile court has exclusive jurisdiction precluding any further action by the District Court would have the effect of permitting the Juvenile Court to become a court of review which could modify or nullify the judgment and orders of the District Court. This would be neither essential to nor consistent with the purpose of the new statute, Secs. 15 and 16, Chapter 165 S.L.U. 1965 (Code identification, Secs. 55-10-77, 78 U.C.A. 1953). It is apparent that that purpose was to confer concurrent jurisdiction on the Juvenile Court to act in the interest of children in various kinds of troubled, circumstances set forth in Sec. 77.”

Further at the bottom of page 310, 1st column the Court says:

“The District Courts are created by our constitution as courts of general jurisdiction having authority in all cases both civil and criminal. This includes divorce and all matters relating thereto, including custody and support money. Whereas, the Juvenile Court is created by statute and has jurisdiction only in the cases specified therein.

[3] Upon our consideration of the Juvenile Court Act hereinabove referred to, it is our opinion that it does not and could not limit or curtail the authority of the District Court. When that court has taken jurisdiction, the jurisdiction of the Juvenile Court may be invoked and it may act in the interest of the children in the cases specified therein, but its action must be regarded

as supplementary to the action of the District Court; and it may not make orders in direct conflict with those of the District Court nor does its authority supersede or divest the District Court of jurisdiction.”

In this case, the Juvenile Court assumes jurisdiction but there was no evidence introduced as to what the proceedings had been in the Juvenile Court and in what respect those proceedings affected the Lujans.

The Court should have allowed a hearing and should have allowed evidence to be taken as to the conditions Roger lived under and as to whether or not he had any preference.

In the case of *Hardy vs. Olsen*, 180 P. 2d 210, the child is almost ten years of age and the Supreme Court held that the Court should inquire of the child and take into consideration the child's desire regarding further custody, and in the case of *Hardy vs. Olson*, page 215, first column, the Court says:

“but would consider where the child would receive the greater degree of affection and discriminating care which would tend to best fit them to take their places in the active affairs of life.”

And on page 215 top of second column:

“What is for the best interests of the child? See *Walton vs. Coffman*, Utah, 169, P.2d 97, and *Baldwin vs. Nelson*, Utah, 170, P.2d 179 on rehearing 174 P.2d 437. Presumptions must yield to evidence that the interests of a child require it to be in the custody of another. The undisputed evidence is that the father, in this case

neglected to support Judith or to provide for her welfare except by some infrequent gift of an article of clothing and permitted bonds of affection to develop between Judith and those who did provide for her well-being until she reached such age that her choice as to her custody became material in determining the issue."

In the instant case the boy had been in the home for nearly 10 years. There have been marked bonds of affection between him and the Lujans and in the event of their death, he would be taken care of by other members of the family, which he feels he is a part of.

In the case of *In re State in the interest of Valdez*, 504 P.2d 1372, Valdez is accused of murdering his wife and a petition was filed in the Juvenile Court and it concluded that the children, as defined by the statute, were dependent children. The Supreme Court held on page 1374, as follows:

"(1, 2) The Juvenile Court was created by statute and has jurisdiction only in the cases specified therein. Its jurisdiction concerning custody and guardianship matters is strictly confined to those situations where its jurisdiction is invoked under Section 55-10-77; otherwise all disputes concerning custody and guardianship are within the jurisdiction of the district court, which cannot delegate or divest itself of jurisdiction to the Juvenile Court.

And on Page 1375, the Court says:

"In addition to such inherent jurisdiction, the district courts have specific statutory jurisdiction in custody matters, e.g. separation and divorce (Section 30-3-10), *Habeas corpus* proceedings..."

POINT IV

THE WRIT OF HABEAS CORPUS SHOULD HAVE BEEN REFERRED BACK TO THE DISTRICT COURT FOR HEARING WITH THE JUVENILE COURTS RECOMMENDA- TIONS.

In the case of the State of Utah in the interest of Rae Lyn Thornton, 422 P.2d 199, 18 U. 2d 297, is a custody case, the Court on Page 200 says :

“This case was referred by the Third District Court of the State of Utah to the Juvenile Court pursuant to Section 55-10-78, as amended, and particularly to the provisions stated therein as follows :

‘A district court may at any time decline to pass upon a question of custody and may certify that question to the juvenile court for determination or recommendation.’ ”

The Court states in the third paragraph, second column, page 200, and we quote :

“The Juvenile Court assumed jurisdiction over the subject matter after the same had been referred to it by the District Court. The sole question to be decided is the interpretation of the section hereinbefore referred to, and particularly the words: “* * * may certify that question to the juvenile court for determination or recommendation.”

And the Court on the bottom of the second column, page 200 and the top of the first column page 201 says :

“It is the opinion of this Court that the District Court, being a court of original jurisdiction, pur-

suant to the Constitution of the State of Utah, cannot delegate and cannot divest its jurisdiction to the Juvenile Court in a case such as this.”

And we quote from page 201, first column, paragraph [2, 3] as follows:

We feel that the proper interpretation that should be placed upon section 55-10-77, subsection (4), is this:

That if and when the District Court avails itself of such a referral to the Juvenile Court, it is only for the purpose of having the agencies of the Juvenile Court with the assistance of the Judge, to make an evaluation, determination or recommendation. That this having been done by the Juvenile Court, the Juvenile Court in turn should make such findings and recommendations pursuant to the information which it has received for evaluation and consideration affecting the custody of the minor children, and refer the matter again to the District Court for its final determination. We think to do otherwise would in reality distort and make unrealistic the duties and obligations vested in the District Courts of the State.”

In the case of *Eugene A. Anderson vs. Kathleen D. Anderson*, 416 P.2d 308, 18 U.2d 89 it involves the question of when the District Court has granted a divorce and awarded custody of children and support money, and the Juvenile Court in a proceeding in the interest of the children, makes a different Order, does its order supersede the judgment of the District Court. The Court in answer to this question on Page 310 states:

“To accept plaintiff’s contention that the Juvenile Court has exclusive jurisdiction precluding any further action by the District Court would have the effect of permitting the Juvenile Court to become a court of review which could modify or nullify the judgments and orders of the District Court. This would be neither essential to nor consistent with the purpose of the new statute, Secs. 15 and 16, Chapter 165 S.L.U. 1965 (Code identification, Secs. 55-10-77, 78 U.C.A. 1953). It is apparent that that purpose was to confer concurrent jurisdiction on the Juvenile Court to act in the interest of Children in various kinds of troubled circumstances set forth in Sec. 77.”

In the case of *In Re State in the interest of Valdez*, 504 P.2d 1372, the Supreme Court held on Page 1374 paragraph No. 3 as follows:

“Since a proceeding is commenced in the Juvenile Court by filing a petition, Section 55-10-83(1) in the instant action, the case was pending at the time the petition for a writ of habeas corpus was filed. Under such circumstances, under the provisions of Section 55-10-78, the district court may certify the question of custody to the Juvenile Court for the purpose of evaluation. When this process is completed and the Juvenile Court has made findings and a recommendation, the matter should again be referred to the district for final determination.”

And on Page 1376, the end of the opinion states:

“The instant case is, in fact, a conventional custody dispute between the maternal and paternal relatives and is within the jurisdiction of the district court. The juvenile court erred in its deter-

mination that it had exclusive jurisdiction, and its order granting temporary custody to the Division of Family Services is null and void. This case is remanded to the Juvenile Court for its determination concerning the custody of the children, before reference back to the district court for final determination in the habeas corpus proceedings.”

CONCLUSION

We submit that Roger had been with the Lujans for almost ten years and a close bond of love and affection has developed, and we submit that he should not have been taken away from the Lujans without a full and proper hearing.

The Juvenile Court should never have changed the heading of the case, and all of the proceedings in the matter should have been in the case pertaining to the Petition for Writ of Habeas Corpus. The Court should have allowed evidence to be introduced as to the allegations contained in the Petition for Writ of Habeas Corpus.

It is appellants’ contention that if appellants would have been able to proceed in the matter, they could have introduced evidence and facts which would have shown that the Juvenile Court did not have jurisdiction over the Lujans nor over Roger. In any event, the Juvenile Court should have heard the matter, made its recommendations and the matter should have been referred back to Judge Banks of the District Court.

We submit that the Order should be reversed or stricken, that a proper hearing be ordered and that the matter be referred back to the District Court for its final determination.

Respectfully submitted:

GOLDEN W. ROBBINS

*Attorney for Floyd Roger Hales
by his next of kin and friends
and custodians Jose Lujan
and Maggie Lujan*

705 Newhouse Building
Salt Lake City, Utah

**RECEIVED
LAW LIBRARY**

04 DEC 1975

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**