

1953

# In the Matter of the Adoption of Diane Deveraux and Gene Deveraux : Brief of Appellant

Utah Supreme Court

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Gustin, Richards & Mattsson; Attorneys for Rhea Walker Brown, Protestant and Appellant;

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Case No. 8055

Case No. 8056

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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In the Matter of the Adoption of  
DIANE DEVERAUX,

a minor,

and

In the Matter of the Adoption of  
GENE DEVERAUX,

a minor.

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**APPELLANT'S BRIEF**

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**Appeal From The District Court Of The Fourth Judicial  
District, In And For Utah County, State Of Utah**

**Honorable Joseph E. Nelson, Judge**

**FILED**

OCT 2 - 1953

**GUSTIN, RICHARDS & MATTSSON,**

**Clerk, Supreme Court of Utah**

**Attorneys for Rhea Walker Brown,  
Protestant and Appellant.**

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# IN THE SUPREME COURT of the STATE OF UTAH

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In the Matter of the Adoption of  
DIANE DEVERAUX,

a minor,

and

In the Matter of the Adoption of  
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Case No. 8055

Case No. 8056

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## APPELLANT'S BRIEF

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## STATEMENT

By order of this Court the appeal in connection with the adoption proceedings of Diane Deveraux and Gene Deveraux have been consolidated. The facts in each case are identical with the exception of a slight difference concerning the nature of the individual children and their reaction in foster homes and with their adopting parents.

## STATEMENT OF FACTS

On the 31st day of August, 1950 the Juvenile Court of the Third Judicial District, in and for Utah County, State of Utah, made and entered its decree declaring that the natural parents, Ellis Deveraux and Rhea Walker Deveraux (Rhea Walker Brown, appellant), were unfit and improper persons to have the care, custody, control and guardianship of said children, committing the children to the Utah State Department of Public Welfare for foster home care, treatment and supervision. The decree, in part, states as follows:

“IT IS FURTHER ORDERED, by the Court that said Larry, Blaine, Gene and Dianne Deveroux be and they (are) hereby declared and adjudged to be dependent, neglected, children within the meaning of the laws of Utah, in such cases made and provided, and that subject to the continuing jurisdiction of the Court, the said: children be committed to the Utah State Department of Public Welfare for foster home care, treatment, and supervision. And it is further ordered by the Court that the father, Ellis Deveroux pay \$100.00 per month for their support and maintenance.” (Tr. 54, 246).

Thereafter the children were placed in the home of Mr. and Mrs. Lindberg (Tr. 134, 196, 214). Later on the children were placed in different foster homes. On the 17th day of January, 1951 Gene Deveraux was placed in the home of Clyde D. Sandgren and Zola M. Sandgren, his wife (Tr. 140), and on the 6th day of February, 1951

Diane Deveraux was placed in the home of Ray Cole Stickney and Dona Merl Stickney, his wife (Tr. 140); that on the 9th day of January, 1951 Rhea Walker Brown, formerly Rhea Deveraux, in the District Court of the Fourth Judicial District, in and for Utah County, State of Utah, obtained a decree of divorce from the said Ellis Deveraux (Tr. 65); that throughout the period of time from when the children were taken from their natural parents appellant, pursuant to the Juvenile Court decree, made payments for their support (Tr. 85), inquired as to their well-being (Tr. 67) and asked to see them but was advised that the Welfare Department thought it would be best for her not to visit with the children (Tr. 78); that F. M. Alder, the Judge of the Juvenile Court for the Third District, who acted as attorney for appellant in her divorce suit, wrote to appellant on the 10th day of February, 1951 the following letter:

“Mrs. Rhea Deveraux,  
Tooele, Utah.

Dear Mrs. Deveraux:

Thank you for the inclosure of the money order, which completes final payment.

It is likely best that you have moved to Tooele, and the other things that you mention regarding your future are also desirable. Let me suggest again, that after you are married, that you AGAIN get married after the six months have expired, so as to make your marriage legal. Under the present conditions you should get mar-

ried as soon as you can conveniently. Of course, your future prospects and conduct will determine the results as to the children.

You surely have my best wishes.

Very truly yours,

(signed) F. M. ALDER" (Tr. 244),

copy of which was submitted in evidence as Exhibit "2" (Tr. 114), and on the 11th day of May, 1951 he again wrote to appellant the following letter:

"Mrs. Rhea Brown  
Tooele  
Utah

Dear Mrs. Brown:

The contents of your letter of May 9th have been read and noted. I am glad that you are married and I wish you every success and all the happiness that can be obtained in your marriage.

As to your children, don't worry about them because the gossip about adoption by July cannot be anything but gossip and you do not need to worry about that as there is no time, within a reasonable time, that such procedure ever occurs. The best advice I can give you at the present time is that you try to make your present marriage a success and let the future take care of itself as it comes along. Your children are in good hands so that you need not worry about their being cared for.

The papers you asked for will have to be kept here by me in my files so that they will be available to me at all times and if you got them, you might lose them.



Wishing you the best that life can afford, I remain,

Sincerely yours,

THIRD JUVENILE DISTRICT  
COURT

(signed) F. M. ALDER

F. M. Alder

Judge" (Tr. 243),

copy of which was admitted in evidence as Exhibit "1" (Tr. 114).

That on April 2, 1952 the District Court of the Fourth Judicial District in and for Utah County, State of Utah, entered a decree of adoption of the minor child Gene Deveraux (Tr. 4-5), and on the 4th day of June, 1952 said court entered a decree of adoption for the child Diane Deveraux (Tr. 6-7). No notice of hearing on the petition for the adoption in either case was given to appellant and, in fact, the first knowledge that the mother of said children had concerning said adoption was a day or two after the adoption orders had been entered (Tr. 65). Thereupon appellant immediately contacted M. Earl Marshall, then a practicing attorney in Tooele, Utah (Tr. 66), and on or about the 8th day of July, 1952 she filed in said District Court for the Fourth Judicial District, in and for Utah County, State of Utah, a complaint seeking a writ of habeas corpus and custody of the said children (Tr. 68, 126). This habeas corpus matter has never been finally determined.

That thereafter appellant was served with notice that the two adoption matters would come up for hearing on a certain day and said matters came on for hearing on February 4, 1953. At the hearing the decrees of adoption heretofore entered by Judge Dunford and Judge Tuckett were vacated (Tr. 30). Testimony was offered on behalf of petitioners concerning the allegations in their petitions for adoption and the father of said children, Ellis E. Deveraux, executed his written consent to the adoption of each child (Tr. 35, 55), and it was stipulated that Mr. and Mrs. Stickney and Mr. and Mrs. Sandgren were fit and proper persons to adopt the respective children (Tr. 44, 56).

Prior to the taking of testimony, and after the testimony above set forth was offered, appellant filed her written motion (Diane Deveraux Tr. 9, Gene Deveraux Tr. 6) and made an oral motion (Tr. 52, 62) to dismiss the petitions for adoption upon the following grounds: (1) there was another action pending; (2) that the Juvenile Court had exclusive jurisdiction; (3) that the consent for adoption had never been given by the natural mother; and (4) that the children had never been placed in a children's aid society pursuant to Section 55-10-40, Utah Code Annotated 1953, nor had the Juvenile Court authorized the adoption pursuant to Section 55-10-43, Utah Code Annotated 1953. These motions were denied (Tr. 63) and further hearing was had in said matter.

The evidence discloses that after appellant had been divorced from her former husband she married her present husband, Henry Brown (Tr. 65), and is living at Stockton, Utah (Tr. 64), and that she had changed her manner of living by stopping her drinking (Tr. 77, 98). It was shown that she was a fit and proper person to have the care and custody of her children (Tr. 94, 102, 108, 109). Mr. Brown, husband of appellant, testified that he made \$5200.00 a year (Tr. 92), that he was perfectly willing to have Mrs. Brown have the children, and that he would take care of them and treat them as his own children (Tr. 94).

Mrs. Eloise Morley, social worker, testified that from a psychological point of view she thought it would be against the interests of the children to have them transferred from their present locations back to their mother (Tr. 200). Mrs. Elsa V. Harris, social worker, testified to the same effect (Tr. 218). Dr. Walter T. Hasler, who specializes in eye, nose and throat (Tr. 180), gave his opinion as to the effect of moving Gene from the Sandgren home (Tr. 183). On cross examination he stated that the manner in which Gene was treated in the future, if his home was changed, would have a great deal of bearing on the matter (Tr. 184A). Mark K. Allen, a psychologist and teacher at the Brigham Young University, gave his opinion that it would be detrimental to move the children (Tr. 228-231). On cross examination he stated that in some cases he thought the State should have control of children and that if there was friction in

the home, or if there was not moral stability and the children would get along a little better if taken out of the home of the natural parents, then the child should be removed (Tr. 231-232).

Numerous other witnesses testified as to the children's behavior since being placed in the home of the adopting parents and as to their care and treatment in said homes. As it has already been stipulated that the adopting parents are proper and fit persons to have the custody and control of said children, we did not deem it necessary or material to set forth in this statement of facts where this testimony might be found.

On the 27th day of May, 1953 the court made and entered its findings of fact, conclusions of law and decree in both of said matters (Diane Deveraux Tr. 17-22, Gene Deveraux Tr. 15-20), granting the adoption of said children by the respective adopting parents.

## STATEMENT OF POINTS

### I. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS.

- A. The Juvenile Court Had Exclusive Jurisdiction of The Care, Custody And Control Of The Minor Children.
- B. The Natural Parents Had Not Been Permanently Deprived Of The Custody Of The Minor Children.
- C. Written Consent For Adoption Is Required From The Natural Mother Or, If Not, From The Juvenile Court Or Children's Aid Society.

II. THE WELFARE OF A CHILD IS NOT THE PARAMOUNT ISSUE AS TO WHETHER THE COURT HAS JURISDICTION OR AUTHORITY TO PERMIT AN ADOPTION.

III. THE COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE AND JUDGMENT OF THE JUVENILE COURT DATED FEBRUARY 13, 1953.

IV. THE COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE WRITTEN REPORT OF THE TOOELE COUNTY WELFARE DEPARTMENT.

V. THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

- A. The Court Erred In Finding That The Juvenile Court Permanently Deprived The Natural Parents Of Custody Of Said Children.
- B. The Court Erred In Making Its Findings Of Fact 10 And 11.
- C. The Court Erred In Making Its Conclusions of Law 1, 2 And 3.
- D. The Court Erred In Failing To Make A Finding As To Whether The Mother Was, Or Was Not, A Fit And Proper Person To Have The Custody Of Her Children.

## ARGUMENT

I. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS.

- A. The Juvenile Court Had Exclusive Jurisdiction of The Care, Custody And Control Of The Minor Children.

The Juvenile Court was the first one to take jurisdiction over the minor children here in question. That court, after proper notice, held that the children were dependent and neglected. This was on August 31, 1950, when it entered its order declaring said children dependent and neglected and provided that, subject to the continuing jurisdiction of the court, the children were to be committed to the Utah State Department of Public Welfare for foster home care, treatment and supervision (Tr. 54, 246). At the time the original petition for adoption was filed with the District Court and at the time of the hearing of this matter and the entry of the findings, conclusions and decree from which this appeal is taken, this decree or order of the Juvenile Court had not been modified, changed or vacated. The Juvenile Court, under such facts, had exclusive jurisdiction of the care, custody and control of said minor children.

Our statute covering jurisdiction of juvenile courts provides, in part, as follows:

“55-10-5. Jurisdiction of juvenile courts.—  
The juvenile court shall have exclusive original jurisdiction in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age, \* \* \* .

(3) When jurisdiction shall have been acquired by the court in the case of any child, such child shall continue for the purposes of such case under the jurisdiction of the court until he becomes twenty-one years of age, unless dis-

charged prior thereto or unless he is committed to the state industrial school or to the district court as hereinafter provided."

*Section 55-10-31, Utah Code Annotated 1953*, provides for the modification of decrees and is as follows:

"55-10-31. Modification during minority.—In-operative after majority.—No judgment or decree of the juvenile court shall operate after the child becomes twenty-one years of age and all orders, judgments and decrees, except commitments to the district court or to the state industrial school, may be modified or revoked by the court at any time before the child becomes twenty-one years of age."

*Section 55-10-41, Utah Code Annotated 1953*, sets forth the proceedings to be followed for the return of custody of the children to their parents and states, in part, as follows:

"55-10-41. Proceedings to return custody to parents.—A parent, guardian or next friend of a child who has been committed to any children's aid society or institution \* \* \* may at any time file with the clerk of the juvenile court a petition \* \* \* asking for the return of such child to its parents or guardian, for the reason that they have reformed or the conditions have changed and that they are fit and proper persons to have its custody and are able to support and educate it."

*Section 55-10-5, Utah Code Annotated 1953*, has been interpreted and held by this court to mean that the Juvenile Court, having taken jurisdiction properly, has

exclusive jurisdiction of the care, custody and control of the children and continues to have such until changed by appeal or by its own order. *Jensen v. Sevy*, 103 Utah 220, 134 Pac. 2d 1081. In this case all of the judges, with the exception of Larson and Moffat, specifically so hold. Justice Wolfe, in his concurring opinion, states:

"The opinion of Judge Hoyt expresses my opinion on the reason and interpretation of the action of the District Court in refusing to take jurisdiction of the question raised by the writ of habeas corpus and the intention of the District Court in dismissing the writ. It also expresses my opinion that where the Juvenile Court has obtained jurisdiction of a child because of neglect, dependency or delinquency, the District Court must dismiss the writ. It is not discretionary. The orders of the Juvenile Court are appealed to this court under Sec. 14-7-33, Utah Code Ann. 1943, and the judgment of the Juvenile Court cannot be overturned by suing out a writ and obtaining a hearing on the very same issue by that method either in the District or the Supreme Court."

Judge Hoyt states:

"I think it reasonably clear that what the court did was to hear the habeas corpus matter and, finding that the child involved had been taken into the custody of the Juvenile Court, because of neglect or misconduct of the father (petitioner) and that the juvenile court had retained jurisdiction of the matter, the district court concluded, and I think rightly, that it had no jurisdiction to take the child from the custody



of the juvenile court or to determine the question of the father's fitness to have his child returned to him."

"In my opinion it was not a matter of discretion. I think the legislature intended to confer exclusive original jurisdiction upon the juvenile court to determine such questions in every case wherein the state had become a party by the juvenile court taking custody of a child because of neglect or delinquency. The provisions of subsection 4 of section 14-7-4 R.S. relating to powers of courts to determine questions of custody in habeas corpus proceedings should not, in my opinion, be construed to apply to cases in which the state has become a party by intervention of the juvenile court. Unless we so construe it we cannot reasonably give effect to the provision of subsection 3 of section 14-7-4 that 'When jurisdiction shall have been acquired by the court in the case of any child, such child shall continue for the purposes of such case under the jurisdiction of the court until he becomes twenty-one years of age, unless discharged prior thereto or unless he is committed to the state industrial school or to the district court as hereinafter provided.'"

The case of *Chatwin v. Terry*, 107 Utah 340, 153 Pac. 2d 941, affirms this decision.

The State of Kansas has gone even further and held that where the District Court obtained original jurisdiction in a divorce case of the custody of children that thereafter, when the Juvenile Court determined that the

child was a dependent and neglected child, the Juvenile Court ousted the District Court of the existing jurisdiction. *Trent v. Bellamy*, (Kan.) 190 Pac. 2d 400:

"It follows that the juvenile court in this case could acquire jurisdiction of the minor child and thereby oust the then existing jurisdiction of the district court in the divorce action. However, this can only be done upon a finding based upon substantial evidence that the child was neglected and dependent within the statutory definition."

This case is affirmed by the case of *Houser v. Houser*, (Kan.) 199 Pac. 2d 497.

In the case of *Ross v. Ross*, (Colo.) 5 Pac. 2d 246, the court held as follows:

"The jurisdiction of the divorce court is exercised as between the husband and the wife; that of the juvenile court 'as between the state, or, so to speak, the child, and the parents of the child.' *State v. McCloskey*, 136 La. 739, 67 So. 813, 814. The two courts may have simultaneous, though not concurrent, jurisdiction concerning the custody of the child. *Id.* But, where both courts have made orders concerning such custody, the operation of the order of the divorce court is suspended during the period, and only during the period, that the order of the juvenile court remains in force."

**B. The Natural Parents Had Not Been Permanently Deprived Of The Custody Of The Minor Children.**

The question arises as to what is the meaning of the words "judicially deprived of the custody of the

child on account of cruelty, neglect or desertion." There can be but one meaning to these words and that is that the parent has been permanently and absolutely deprived of the custody of the child. The decree of the Juvenile Court clearly indicates that this is not the case as it provides for continuing jurisdiction and that the father of the children shall furnish support therefor. The statutes covering Juvenile Courts likewise indicate that proceedings of the nature of the one presented here do not contemplate the permanent or absolute divesting of the custody of a minor child from its parents. *Section 55-10-5 (3), Utah Code Annotated 1953*, provides that the jurisdiction of the court shall continue until the child becomes twenty-one years of age, unless discharged prior thereto or committed to the state industrial school or to the district court. *55-10-32, Utah Code Annotated 1953*, is the section covering the preferred rights of parents to custody of children and *55-10-41, Utah Code Annotated 1953*, is the section covering the procedure to return the custody of children to their parents, based upon the ground that the parents have reformed or that conditions have changed and that they are fit and proper persons to have its custody and are able to support and educate the child.

The Juvenile Court, by ordering that the father of the children pay \$100.00 per month for their support and maintenance, clearly indicated that it did not intend to permanently deprive the parents of custody of said

children. Payments were made by appellant for their support (Tr. 85).

In a good many of the statutes of other states there is a provision, in addition to the one in our statutes, that provides that it shall not be necessary to obtain a consent from the father or mother deprived of civil rights or adjudged guilty of adultery or cruelty and for such cause divorced and deprived of the custody of the child, and by the great weight of authority the courts of these different states have held that such a provision does not do away with the giving of the consent of the parents unless the parent has been absolutely deprived of the custody.

*Onsrud v. Lehman*, (N. Mex.) 243 Pac. 2d 600. In this case the lower court approved a petition to adopt two minor children without the consent of their natural father, where the mother had procured a divorce from such father on the ground of cruelty and she had been awarded custody of such children, with the father being granted the right of visitation at reasonable times. The New Mexico statute was as follows:

“Section 25-207, N. M. S. A., 1941 Comp., reads:

*‘A legitimate child cannot be adopted without the consent of its parents, if living together; and if legally separated, the consent of the parent having legal custody of the child must be obtained. It shall not be necessary to obtain the consent from a father or mother deprived of civil rights or ad-*

*judged guilty of adultery or cruelty, and for such cause divorced and deprived of the custody of the child, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty to, abandonment and neglect of, the child or of infamous conduct.'* (Emphasis supplied.)"

The Appellate court, in reversing the lower court, held as follows:

"The italicized portion of the statute quoted above seems to be a common one in many states. One of the leading cases on the subject is *In re Jackson*, 55 Nev. 174, 28 P. 2d 125, 129, 91 A. L. R. 1381. The statute and facts in that case are almost identical with the statute and facts we have here. It is there stated:

"\* \* \* we are of the opinion that where a divorce is granted for cruelty and the innocent spouse is awarded the custody of the children (as in this case), consent of the guilty spouse can only be dispensed with in a proceeding for adoption of such children when the custody is awarded to the innocent party without reserving any rights whatever in the guilty spouse. The custody must be absolute. To conclude otherwise would be to attribute to the Legislature a very slight regard for the great domestic relation of parent and child. As previously stated, consent lies at the foundation of adoption statutes. It is so with our statute. The order of adoption in this case was void because made without the consent of respondent.'

There, as here, the guilty spouse had been given the right to visit the child at reasonable

times. The case in A. L. R., *supra*, is followed by an annotation beginning at page 1387.

The following cases hold under a similar statute where the custody of the child is given to the innocent spouse with right of visitation to the offending spouse, the consent of the offending spouse is a prerequisite to a valid adoption: *In re Cozza*, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214; *Bell v. Krauss*, 169 Cal. 387, 146 P. 874; *Miller v. Higgins*, 14 Cal. App. 156, 111 P. 403; *In re De Leon*, 70 Cal. App. 1, 232 P. 738; *In re Lease*, 99 Wash. 413, 169 P. 816; *In re Force*, 113 Wash. 151, 193 P. 698; *In re Walker*, 170 Wash. 454, 17 P. 2d 15; *Smith v. Smith*, 67 Idaho 349, 180 P. 2d 853 and *Stone v. Dickerson*, Tex. Civ. App., 138 S. W. 2d 200."

In the case of *Jackson v. Spellman*, (Nev.) 28 Pac. 2d 125, 91 A. L. R. 1381, the court, in passing upon this same question, cites with approval from California, which court held as follows:

"What is meant by this section, and what was intended by the Legislature, it having in mind the natural rights of parents, as also the authority of courts in divorce proceedings to award the custody of children to either spouse, was that when a divorce is granted for cruelty (we are only concerned with this ground here), and the custody of the children is awarded absolutely to the innocent party, the consent of the guilty one will not be required in adoption proceedings. It contemplates that by decree of court in such proceedings the court has deprived the guilty spouse of all right to such custody, and awarded it absolutely to the innocent party. That this is the

proper interpretation of the section we think reasonably appears from the language used in the section in this same connection as to consent and with reference to other proceedings than in divorce, where it is provided that, when the parent has been 'judicially deprived' of the custody of the children on account of cruelty or neglect, the consent of such parent is not necessary. The Legislature, in providing a method for adoption, whereby the legal ties between the parent and the child should be absolutely severed, could not have intended to interfere with the authority of the court in other proceedings involving the custody of the child, or that the decree of a court in a divorce proceeding which awarded such custody to the guilty spouse should be entirely ignored.'

It will be seen that the court in the above case declined to construe the statute literally and held that it did not apply except in a case where the custody of the children had been given absolutely to the innocent spouse."

"More precisely, we are of the opinion that where a divorce is granted for cruelty and the innocent spouse is awarded the custody of the children (as in this case), consent of the guilty spouse can only be dispensed with in a proceeding for adoption of such children when the custody is awarded to the innocent party without reserving any rights whatever in the guilty spouse. The custody must be absolute. To conclude otherwise would be to attribute to the Legislature a very slight regard for the great domestic relation of parent and child. As previously stated, consent lies at the foundation of adoption statutes. It is

so with our statute. The order of adoption in this case was void because made without the consent of respondent."

In the case of *Ronck v. Ronck*, (Okl.) 218 Pac. 2d 902, the court states:

"The theory advanced in support of the first ground is that the decree of adoption, having been entered by a court of competent jurisdiction and being regular on its face, was not open to collateral attack. The theory could be sound only if the decree of adoption were a judicial act. That such is not the case we expressly held in *Re Hughes*, 88 Okl. 257, 213 P. 79, when, in the syllabus, we stated: 'The adoption of a child is essentially a matter of contract between the parties whose consent is required and is not a judicial proceeding, although the sanction of a judicial officer is required for its consummation.'"

"The statute recognizes that the consent of both parents, even though divorced, is necessary to an adoption, unless the divorce was granted upon the ground of cruelty of which the offending parent had been adjudged guilty. It follows that it is not the divorcement but the adjudication of cruelty that is made the basis of rendering the consent unnecessary. It is the unfitness of the one so adjudged guilty and the absence, by reason thereof, of that parental fitness necessary in determining the child's welfare that his or her consent is not required along with that of the unoffending parent. It does not follow, however, that the fact of unfitness so found is one that necessarily continues or that the court is precluded by such adjudication from inquiring therein further where it is in the interest of the



child to do so. And where, upon such further inquiry, the court finds that the offending parent is fit to have the care and custody of such child and makes an award of total or partial custody, the effect thereof should be to destroy the force of the former adjudication on and after such finding and award, and we hold such to be the case. With such restoration of the mother to parental right and competency her consent became necessary to the adoption of the child and since such consent was not had in the proceedings relied on, the court did not err in holding same of no effect."

C. Written Consent For Adoption Is Required From The Natural Mother Or, If Not, From The Juvenile Court Or Children's Aid Society.

Unless the natural mother had been permanently deprived of the custody of her children her written consent was required before a valid adoption could be made. *Section 78-30-4, Utah Code Annotated 1953*, provides that a legitimate child cannot be adopted without consent of its parents, if living, except the consent is not necessary from a father or mother who has been judicially deprived of the custody of a child on account of cruelty, neglect or desertion.

The general rule throughout the majority of states is that an adoption is in derogation of the common law and the adoptive statutes should receive strict construction

and every intendment should be in favor of the claim of the parent. *Westerlund v. Croaff*, (Ariz.) 198 Pac. 2d 842:

“As adoption is in derogation of the common law, generally speaking it may be said that adoptive statutes should receive a strict construction, particularly with respect to the jurisdiction of the court or where the effect of the adoption would be to deprive a natural parent of the possession of his child. \* \* \*

‘Although the courts tend to construe adoption statutes to favor the child, it is also true, due to the respect paid the relationship of parent and child, that every intendment should be in favor of the claim of the parent, and where the statute is open to construction and interpretation, it should be construed in support of a natural parent who does not consent to the adoption.’ 2 C. J. S., Adoption of Children, Sec. 6a.

See also *In re Webb’s Adoption*, 65 Ariz. 176, 177 P. 2d 222; *Ferguson v. Jones*, 17 Or. 204, 20 P. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *In re Newman*, 88 Cal. App. 186, 262 P. 1112; *Matter of Cozza*, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214; *In re Jackson*, 55 Nev. 174, 28 P. 2d 125, 91 A. L. R. 1381; 1 Cal. Jur. 436, Sec. 19.”

*Smith v. Smith*, (Ida.) 180 Pac. 2d 853:

“Adoption statutes open to construction and interpretation should be strictly construed and every intendment taken in favor of the natural parent not consenting to adoption. As was held *In re Jackson*, 55 Nev. 174, 28 P. 2d 125, 129, 91 A. L. R. 1381:

'The custody must be absolute. To conclude otherwise would be to attribute to the Legislature a very slight regard for the great domestic relation of parent and child. As previously stated, consent lies at the foundation of adoption statutes.' "

*Jackson v. Spellman*, (Nev.) 28 Pac. 2d 125, 91 A. L. R. 1381:

"The foregoing cases are illustrative of the strict construction which courts place upon the provisions in adoption statutes which dispense with the consent of a child's parents. The consent of the natural parents lies at the foundation of statutes of adoption. 1 Cal. Juris. p. 436. It ought not to be dispensed with in response to the mere letter of a statute, but only when its letter and spirit conjoin in showing that such was the plain intention of the Legislature.

Every intendment should be in favor of the claim of the parent and where the statute is open to construction and interpretation it should be construed in support of a natural parent. *In re Cozza*, supra; 1 Cal. Juris. p. 437."

The District Court would not have jurisdiction of an adoption proceeding unless the consent of the parents is given, or is not necessary, and the burden of proof is on the party seeking to justify the adoption on the ground that consent is not necessary. *In re Adoption of Strauser*, (Wyo.) 196 Pac. 2d 862. At page 867 the court states:

"Consent lies at the foundation of statutes of adoption. *In re Cozza*, 163 Cal. 514, 126 P. 161,

Ann. Cas. 1914A, 214; In re Lease, 99 Wash. 413, 169 P. 816. Our statutes are especially clear on that point. In the routine case, the parties consent or agree, and the final act of the court or judge is called the 'approval of such agreement and adoption' (Sec. 58-201), or refusal 'to approve such adoption' (Sec. 58-205). The first duty of the judge is to see that the necessary consents are given. If they are not, the proceeding is at an end. There is nothing for the judge to approve. There is seldom any doubt as to the consent of the persons who offer to adopt the children, and the children often, as in the present case, are too young to be consulted. The important requirement is the consent of parents who have not abandoned the children. They speak not only for themselves but also for the children of whom they are the natural guardians.

When a parent refuses to consent, and the matter in controversy is whether he had abandoned the child so as to dispense with the necessity of his consent, the burden of proof is on the party seeking to justify the adoption on that ground, and the courts often say that the evidence to show abandonment must be clear and convincing. See In re Bistany, 209 App. Div. 286, 204 N. Y. S. 599; In re Kelly, 25 Cal. App. 651, 145 P. 156; Petition of Rice, 179 Wis. 531, 192 N. W. 56; Mastrovich v. Mavric, 66 S. D. 577, 287 N. W. 97.

It is important to observe the difference between a proceeding in which the court makes a provisional and temporary order for the custody of an infant, and an adoption proceeding in which the final order of approval will absolutely and permanently sever the natural relation between parent and child. In a custody case the welfare

of the child under the then existing conditions may be controlling. See *Harris v. Muir*, 24 Wyo. 213, 157 P. 26; *Kennison v. Chokie*, 55 Wyo. 421, 100 P. 2d 97. In an adoption proceeding in which it is necessary for the petitioners to prove that a parent has abandoned the child, questions in regard to the fitness of the petitioners (Secs. 58-201, 58-205) and the welfare of the child (Sec. 58-209) are not reached if abandonment is not proved. In *re Cozza*, supra; In *re Lease*, supra; *Matter of Bistany*, 239 N. Y. 19, 145 N. E. 70; *Connelly v. Jones*, 165 Md. 544, 170 A. 174; In *re Anderson*, 189 Minn. 85, 248 N. W. 657; *Platt v. Moore*, Tex. Civ. App., 183 S.W. 2d 682."

*Westerlund v. Croaff*, supra:

"We shall first consider the jurisdiction question which is squarely presented by this record. Is the consent in writing of the living natural parents, or the statutory equivalent of such consent, an essential jurisdictional prerequisite to the exercise of the power of the court in an adoption proceeding? Certain well established principles will be of aid in answering this question:

'As adoption is in derogation of the common law, generally speaking it may be said that adoptive statutes should receive a strict construction, particularly with respect to the jurisdiction of the court or where the effect of the adoption would be to deprive a natural parent of the possession of his child. \* \* \*

'Although the courts tend to construe adoption statutes to favor the child, it is also true, due to the respect paid the relationship of parent and child, that every intendment should be in favor of the claim of the parent, and where the statute

is open to construction and interpretation, it should be construed in support of a natural parent who does not consent to the adoption.' 2 C. J. S., Adoption of Children, Sec. 6a.

See also *In re Webb's Adoption*, 65 Ariz. 176, 177 P. 2d 222; *Furgeson v. Jones*, 17 Or. 204, 20 P. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *In re Newman*, 88 Cal. App. 186, 262 P. 1112; *Matter of Cozza*, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214; *In re Jackson*, 55 Nev. 174, 28 P. 2d 125, 91 A. L. R. 1381; 1 Cal. Jur. 436, Sec. 19."

"The language of the statute being plain and unambiguous, we hold that under our law consent in writing of the living natural parents, or its statutory equivalent, is a jurisdictional prerequisite to a valid adoption. This principle is stated in 2 C. J. S., Adoption of Children, Sec. 18:

'Consent of the parties to an adoption, where required by the statute, is a jurisdictional fact and without it a valid order of adoption cannot be made \* \* \*. See also Sec. 21-a (1) Ibid.

The court in the instant case, there being a lack of consent, by expressly finding an absence of the only alleged statutory equivalent, automatically deprived itself of the right to proceed further with the hearing. Jurisdiction cannot be made to hinge upon a finding as to the 'best interests' of the child. It would be an idle thing for the trial court to proceed to take further testimony in the case on this latter point where the jurisdiction to grant the adoption no longer existed. *Renck v. Superior Court of Maricopa County*, 66 Ariz. 320, 187 P. 2d 656."

In this case the adopting parents certainly have not carried the burden of proof to show that the mother was permanently judicially deprived of the custody of her minor children. The only evidence offered in this connection is the decree of the Juvenile Court which has the continuing jurisdiction provision contained therein, and to refute the question that this was to permanently deprive her of the custody there are the letters written by Judge F. M. Alder, introduced in evidence by appellant as Exhibits "1" and "2", which clearly demonstrate that the Juvenile Court did not intend to permanently deprive the mother of custody of said children. In the letter of February 10, 1951 Mr. Alder made the following statement: "Of course, your future prospects and conduct will determine the results as to the children." (Tr. 244), while in the letter of May 11, 1951, which he signed as Judge of the Juvenile Court, he made the following statements:

"As to your children, don't worry about them because the gossip about adoption by July cannot be anything but gossip and you do not need to worry about that as there is no time, within a reasonable time, that such procedure ever occurs.

The best advice I can give you at the present time is that you try to make your present marriage a success and let the future take care of itself as it comes along. Your children are in good hands so that you need not worry about their being cared for." (Tr. 243).

The evidence also indicates that Mrs. Brown was permitted to see the children on at least one occasion

and was advised not to visit them on other occasions because it would be detrimental to the children (Tr. 78). But never was she informed by the Juvenile Court or by any of the welfare workers that she had been deprived of the right of her children permanently and that she could not again seek custody of the children. In fact, she paid for their support pursuant to the Juvenile Court decree (Tr. 85).

If the court can, by any justification, hold that the consent of the natural mother was not necessary, the District Court still did not have jurisdiction to grant the adoption without obtaining the consent and approval of the Juvenile Court. *Section 55-10-40, Utah Code Annotated 1953*, provides that upon order of the Juvenile Court a child may be committed to a children's aid society or institution, that such society shall be considered the guardian and that such society and institution, under the direction of the court and subject to its approval, may provide suitable homes for such children. *Section 55-10-43, Utah Code Annotated 1953*, then provides that in the event such society or institution secures a suitable home for the legal adoption of children committed to its care it shall report such to the court and the court, after an examination, shall authorize such society or institution to secure for such children legal adoption.

We are of the opinion that the Utah State Department of Public Welfare is not a children's aid society with this power to place children for adoption under our



statute as under *Section 55-10-6, Utah Code Annotated 1953*, a children's aid society "shall mean any duly organized society incorporated under the laws of this state and having among its objects the protection of children from cruelty, and the care and control of delinquent, neglected and dependent children. The articles of incorporation of every such society must specifically provide that any abuse of the rights granted under the provisions of this chapter shall subject such corporation to an action by the attorney-general, under the provisions of chapter 66 of the Code of Civil Procedure." However, if the Utah State Department of Public Welfare can be so classified, in order to perfect an adoption it required the approval of the Juvenile Court, which was not obtained in the case of either of the children under discussion, and therefore the District Court under no circumstances had jurisdiction to even pass upon the question as to whether it was for the best interests of the children to be adopted and to enter its decrees of adoption.

## II. THE WELFARE OF A CHILD IS NOT THE PARAMOUNT ISSUE AS TO WHETHER THE COURT HAS JURISDICTION OR AUTHORITY TO PERMIT AN ADOPTION.

The District Court in these matters clearly indicates by its findings of fact and conclusions of law in each case that it was upon its finding that it would be to the best interests of the children that they be adopted and that the natural mother be deprived of her own children

that it entered its decrees of adoption. This is pointed out in findings 10 and 11 and conclusion 2, which are as follows:

"10. That the health of said minor child would be endangered, physically and mentally, by any change of custody and that it would be a psychological risk and detrimental to the physical, emotional and moral health and stability of the said minor child to return her to her natural mother, who had since remarried and who with her present husband is not now known to said minor child." (Tr. 19).

"11. That the physical, emotional and moral health and stability of said minor child, her security and best interests, will best be promoted by such adoption prayed for in the petition herein." (Tr. 19).

"2. That it would be to the best interests of said minor child that a decree be entered in favor of said petitioners, \* \* \*, for the adoption of said child." (Tr. 19).

No where in the findings or conclusions or decree is it determined that the natural mother of these children was not a fit and proper person to have the care, custody and control of said children. The law is well established that the natural parents have a paramount right to their children if they are fit and proper persons to have such custody. In the case of *Howes v. Cohen*, (Cal.) 255 Pac. 2d 761, the court held:

"It has been held repeatedly that, while the best interests of an illegitimate child is the important factor, the parents of such a child have a

superior claim as against the world to his custody if they are fit and proper. *Armstrong v. Price*, Mo. App., 292 S. W. 447, mother; *Jensen v. Earley*, 63 Utah 604, 228 P. 217, mother; *In re Gille*, supra, 65 Cal. App. 617, 224 P. 784, mother; *Ex parte Wallace*, 26 N. M. 181, 190 P. 1020, father; *Garrett v. Mahaley*, 199 Ala. 606, 75 So. 10, father; *Lewis v. Crowell*, 210 Ala. 199, 97 So. 691, father; *People ex rel. Meredith v. Meredith*, supra, 272 App. Div. 79, 69 N. Y. S. 2d 462, affirmed 297 N. Y. 692, 77 N. E. 2d 8; *State v. Nestaval*, 72 Minn. 415, 75 N. W. 725; *Jackson v. Luckie*, 205 Ga. 100, 52 S. E. 2d 588; *Ex parte Schwartzkopf*, 149 Neb. 460, 31 N. W. 2d 294; *Ex parte Malley*, 131 N. J. Eq. 404, 25 A. 2d 630; *French v. Catholic Community League*, 69 Ohio App. 442, 44 N. E. 2d 113; *Com. ex rel. Hyman v. Hyman*, 164 Pa. Super. 64, 63 A. 2d 447; *Templeton v. Walker*, Tex. Civ. App., 179 S. W. 2d 811; *Henderson v. Henderson*, 187 Va. 121, 46 S. E. 2d 10; *Petition of Dickholtz*, 341 Ill. App. 400, 94 N. E. 2d 89; 7 Am. Jur., Bastards, Secs. 61-66; 10 C. J. S., Bastards, Sec. 17; *Pierce v. Jeffries*, 103 W. Va. 410, 137 S. E. 651, 51 A. L. R. 1507. The same rule has been applied with respect to the custody of legitimate children. *Civ. Code*, Sec. 197; *Roche v. Roche*, 25 Cal. 2d 141, 152 P. 2d 999; *Stever v. Stever*, 6 Cal. 2d 166, 56 P. 2d 1229; cases cited 13 Cal. Jur. 153-5."

"Hence extreme caution must be observed in depriving a parent of the custody of his child. If he is fit, the child should not be taken from him by vague applications of the concept that the best interests of the child come first. Otherwise there is no limit to the extent courts may go. They may base parental deprivation of custody on what they

consider better financial or social standing, educational background, nationality, race, or religion, etc., although the fitness of the parent is apparent. Merely because some other person may be more fit should not be a basis for defeating the parent's natural right. If without finding the parent unfit the general conclusion is reached that the best interests of the child require that a stranger be his custodian, the necessary hypothesis is that although the parent was fit, the court decided someone else was more fit. That means that the state acting through its courts may completely eliminate all parental rights. The next step would be for the state to assume complete and arbitrary power over children contrary to the principles enunciated in the Lerner, Prince and Meyer cases, *supra*. Our conclusion does not mean that the child is a chattel belonging to the parent nor that the state does not have a vital concern in the welfare of the child and the right to make regulations in that field. Rather it gives protection to the parent's right of custody which is founded upon the importance of the family relationship in this country."

*In re Schwab's Adoption*, (Pa.) 50 Atl. 2d 504:

"Judge Keller said, at page 308 of 113 Pa. Super., at page 749 of 173 A.: 'Unless the requisite consents declared by the act of assembly to be necessary are obtained, or there is a specific finding that both the father and the mother of the children have abandoned them, a decree of adoption cannot be entered. The welfare of the children is not sufficient ground for the decree of adoption, unless based on the necessary consent of the parents, or on the distinct finding that the parent or parents not consenting have abandoned

the children. The fact that the adoption asked for may be advantageous to the children and for their material welfare is not to be considered by the court until the necessary prerequisites for such action exist.'

We are therefore required to reverse the decree here appealed from, but expressly withhold any decision as to the custody of the child, a matter not now before us."

*In re Adoption of D.....*, (Utah) 252 Pac. 2d 223:

"Third: The welfare of the child. That parents have the primary and superior right to the custody of their offspring above all others is not open to question; nor is it suggested that anyone may take a child away from a natural parent merely because he can offer the child better advantages than the natural parent could provide. Nevertheless, when questions of child custody arise, the welfare of the child and her chances for a suitable home environment and advantages in nurture, training and education to the end that she may live and be conditioned for a well adjusted, happy and useful life are important factors to consider. In fact, it is often stated that such considerations are of the paramount importance. However, this is modified by the presumption that the welfare of the child will best be subserved by being in the custody of its natural parent."

*In re Adoption of Walton*, (Utah) 259 Pac. 2d 881:

"Courts have not hesitated to build a strong fortress around the parent-child relation, and have stocked it with ammunition in the form of established rules that adds to its impregnability. To sever the relationship successfully, one must

have abandoned the child, and such abandonment must be with a specific intent so to do,—an intent to sever *all* correlative rights and duties incident to the relationship. Such intent must be proved by him who asserts it, by proof that not only preponderates, but which must be clear and satisfactory,—something akin to that degree of proof necessary to establish an offense beyond a reasonable doubt, or, as one authority puts it ‘by clear and indubitable evidence.’ The relationship has been considered a bundle of human rights of such fundamental importance as to lead courts frequently to say that consent is at the foundation of adoption statutes, that evidence pertaining to it must be appraised in a light most favorable to him whose parental right is assaulted, that adoption statutes being in derogation of the common law are to be construed strictly in favor of the parent and the preservation of the relationship, (although not the rule in Utah) and that all doubts are resolved against its destruction. The authorities have gone so far in their protection of these kinship rights as to hold that an abandonment, even though a *fait accompli*, can be the subject of repentance, absent vested rights in others. Oft times it is pointed out that abandonment, within the meaning of adoption statutes, must be conduct evincing ‘a settled purpose to forego all parental duties and relinquish all parental claims to the child.’ In defense of the relationship are authorities which refuse to accept ‘abandonment’ as synonymous with ‘non-support’ under adoption statutes, although non-support may be an important factor in establishing an abandonment. So jealously guarded is the parent-child relation that uniformly it is held that the abandonment or desertion firmly must be established by the type

of proof we mention, before any question as to the best interests or welfare of the child can be the subject of inquiry. The importance of preserving the relationship clearly is pointed up when one considers the well-established concept that custody may be awarded in a proper case, while the courts may have no power to sever the relationship,—accounting for the principle that the welfare of the child is of great importance in custody cases, but quite immaterial in adoption cases until an effective abandonment of parental rights is shown. Were the rule otherwise, and an indiscriminate sanction of the dispossession of parental rights without consent were attempted, serious constitutional impedimenta no doubt would loom large under the due process clause.”

### III. THE COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE AND JUDGMENT OF THE JUVENILE COURT DATED FEBRUARY 13, 1953.

There was offered in evidence the findings of fact, conclusions of law and decree and judgment of the Juvenile Court, which involved a hearing to determine whether the two older children, namely: Larry Deveraux and Blaine Deveraux, should be returned to the custody of their mother or their mother and father. In the findings, conclusions and decree the court found, concluded and decreed that the mother, Rhea Walker Brown, formerly Rhea Walker Deveraux, and the father, Ellis Deveraux, had changed their course of conduct sufficiently for the better to justify the return of said children to them on a trial basis. A portion of the findings is as follows:

"That Mr. Brown is willing to take the said children, Larry Deveraux and Blaine Deveraux, into the Brown home and care and provide for the said children; that the mother, Rhea Brown has changed her course of conduct for the better and her present conduct appears to qualify her to assume the care and custody of said children, \* \* \*." (Tr. 118-122).

The decree, in part, states as follows:

"IT IS THEREFORE ADJUDGED AND DECREED by the Court that the care, control and custody of the said children at the end of this school term, shall be returned to their mother, Rhea Walker Brown, formerly Rhea Walker Deveraux, subject to the continuing jurisdiction of the Court; \* \* \*." (Tr. 123-125).

The Juvenile Court is a court of competent jurisdiction in connection with the care, custody and control of the minor children and its findings and decree as to the fitness of their mother, unless appealed from, become res judicata and binding upon the District Court. The findings, conclusions and judgment and decree of the Juvenile Court were certainly competent, material and relevant evidence in the issues on the adoption proceedings and it was error for the court to refuse their admission in evidence.

#### IV. THE COURT ERRED IN REFUSING TO ADMIT IN EVIDENCE THE WRITTEN REPORT OF THE TOOELE COUNTY WELFARE DEPARTMENT.

The court erred in refusing to admit in evidence the written report on appellant dated December 11, 1952,



from the Tooele County Department of Public Welfare for the reason that said report was made to the Juvenile Court at the time appellant requested the return of her two older children to her. This report contained the following statement:

"No doubt, there was a time in Mrs. Brown's life when she was not a fit mother, and you are better acquainted with these facts than I am. Nevertheless, I can honestly say that since her marriage to Mr. Brown and during the past year, her behavior has been above reproach. She takes excellent care of her home and her baby, as can be verified by anyone in Stockton. I can find no cause to deprive her of the custody of her children at this time." (Tr. 116).

This evidence was clearly material to show that appellant had changed her way of life and was a fit and proper person to have the custody of her minor children.

## V. THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

### A. The Court Erred In Finding That The Juvenile Court Permanently Deprived The Natural Parents Of Custody Of Said Children.

The court erred in entering its finding of fact 2, which is as follows:

"2. That on or about the 31st day of August, 1950, the Juvenile Court of the Third District, in and for Utah County, State of Utah, determined that the said natural parents of said child are unfit and improper persons to have her care, custody and control and signed and entered its Decree and

Judgment declaring and adjudging the said Diane Deveraux to be a dependent and neglected child within the meaning of the laws of Utah and permanently depriving the aforesaid natural parents of the custody of said child and committed said child to the Utah State Department of Public Welfare for foster home care, treatment, and supervision." (Tr. 17),

and particularly the portion 'and permanently depriving the aforesaid natural parents of the custody of said child."

As we have heretofore pointed out under point IB, the evidence conclusively shows that the Juvenile Court did not permanently deprive the parents of the custody of their children, and since the matter has been fully discussed before we will not make any further comments thereon.

**B. The Court Erred In Making Its Findings Of Fact 10 And 11.**

We contend that findings 10 and 11, which are as follows:

"10. That the health of said minor child would be endangered, physically and mentally, by any change of custody and that it would be a psychological risk and detrimental to the physical, emotional and moral health and stability of the said minor child to return her to her natural mother, who has since remarried and who with her present husband is not now known to said minor child." (Tr. 19).

"11. That the physical, emotional and moral health and stability of said minor child, her security and best interests, will best be promoted by such adoption prayed for in the petition herein." (Tr. 19),

are not supported by the evidence. This question has been discussed previously under point II.

The findings completely ignore the presumption that it will be to the best interests of a child to be with its natural parents if they are fit and proper persons and attempt to make the sole issue involved in the adoption proceedings the question of what would be the best interests of the child regardless of parental rights.

#### C. The Court Erred In Making Its Conclusions of Law 1, 2 And 3.

The conclusions of law 1, 2 and 3 are as follows:

"1. That the decree of the Juvenile Court judicially and permanently deprives the natural parents of said minor child of the custody of said child on account of neglect of said natural parents." (Tr. 19).

"2. That it would be to the best interests of said minor child that a decree be entered in favor of said petitioners, \* \* \*, for the adoption of said child." (Tr. 19).

"3. That the prayer of the petition should be granted." (Tr. 20).

We are of the opinion that the error of making these conclusions is fully covered under points IB and II.

- D. The Court Erred In Failing To Make A Finding As To Whether The Mother Was, Or Was Not, A Fit And Proper Person To Have The Custody Of Her Children.

The court should have made a finding on the fitness of the mother to have the care, custody and control of her children, otherwise it should have excluded all evidence relating to that subject and to the question as to the best interests of the child unless some question had been raised that the child would not properly fit into the environment of the adopting parents or that the adopting parents were not fit and proper persons to have the care and custody of said children.

Was notice of the adoption proceedings given to the mother purely for the purpose of protesting that the adopting parents were not proper or that it would not be for the best interests of the children to be adopted by such parties? Was not notice given so that she might present to the court her fitness for the care, custody and control of the children, particularly where she has never given her consent? Or if consent of no one was needed, we cannot see why notice should then be given.

## CONCLUSION

In conclusion we respectfully submit that the District Court did not have jurisdiction to pass upon the adoption of these children for the reason that no consent

was ever given in accordance with the law of this state or otherwise, and this court should set aside, vacate and annul the decrees of adoption heretofore entered and make such other further order as may be proper in the premises.

Respectfully submitted,

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