

1953

In the Matter of the Adoption of Diane Deveraux and Gene Deveraux : Appellees' Brief

Utah Supreme Court

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In the
Supreme Court of the State of Utah

In the Matter of the Adoption

of

GENE DEVERAUX,

A Minor.

In the Matter of the Adoption

of

DIANE DEVERAUX,

A Minor.

FILED
NOV 12 1953
Clerk, Supreme Court, Utah

**APPELLEES'
BRIEF**

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Attorney for Appellees

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In the Supreme Court of the State of Utah

In the Matter of the Adoption

of

GENE DEVERAUX,

A Minor.

In the Matter of the Adoption

of

DIANE DEVERAUX,

A Minor.

APPELLEES'
BRIEF

STATEMENT

The proceedings relating to the adoption of Diane Deveraux and Gene Deveraux, respectively, have been consolidated by order of this Court.

Except for minor differences as to the nature, condition and reaction of each of said children, the facts in the two cases are the same.

THE FACTS

Deprivation of Custody

By decree made and entered on August 31, 1950, (Tr. 246), the Juvenile Court of the Third Judicial District in and for Utah County determined that Ellis Deveraux and Rhea Walker Deveraux (now Rhea Walker Brown, the appellant herein) are unfit and improper persons to have the care, custody and control of their children. The body of said decree is as follows:

"IT IS THEREFORE ADJUDGED and DECREED by the Court that Ellis Deveraux and Rhea Walker Deveraux, the parents, of said children be and they are hereby deprived of the custody of said children.

"IT IS FURTHER ORDERED, by the Court that said Larry, Blaine, Gene, and Dianne Deveraux Walker Deveraux, the parents, of said children 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 Deveraux pay \$100.00 per month for their support and maintenance" (Tr. 54, 246).

Pursuant to said decree, the children were placed by the Utah State Department of Public Welfare in the home of Mr. and Mrs. Lindberg (Tr. 134, 197, 213) and later were moved to other foster homes (Tr. 133, 139-140, 198, 199).

On January 17, 1951, Gene was placed in the home of Clyde D. Sandgren and Zola M. Sandgren (Tr. 57), and Diane was placed in the home of Ray Cole Stickney and Dona Merl Stickney on February 6, 1951 (Tr. 139-140). Ever since those dates, said children have been and now are in the custody of said foster parents (the respective appellees) (Tr. 40, 48, 57, 60).

Adoption Proceedings

After the children had been in their homes for more than one year, appellees petitioned the Fourth Judicial District Court in and for Utah County, in separate proceedings, for the adoption of said children, relying upon the provisions of Section 78-30-4, Utah Code Annotated, 1953, which eliminates the necessity of obtaining the consent "from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion."

After the decrees of adoption had been entered (Gene, Tr. 4-5; Diane, Tr. 6-7), appellant's attorney was permitted an ex parte examination of the sealed files and appellant filed in said District Court complaints seeking writs of habeas corpus and custody of said children (Tr. 69, 126) upon the ground that she had not received notice of the adoption proceedings and had not consented to such adoptions.

In view of the fact that appellant had, by said ex parte examination of the sealed files, obtained full information as to the whereabouts of the children, appellees had no objection to having the District Court set aside the adoption de-

crees, and hear the adoption matters on notice to the natural parents. Therefore, while the habeas corpus proceedings were pending, formal notice was given to the natural parents and the hearings were held on February 4, 1953. At that time the decrees of adoption theretofore entered were vacated (Tr. 31), testimony was offered by appellees in support of their petitions (Tr. 39-52, 56-62), the natural father of the children consented in writing to the adoption of each child (Tr. 35-6, 55-6), and appellant stipulated that appellees are fit and proper persons to adopt the respective children (Tr. 44, 56).

Before any testimony was taken, appellant filed written motions to dismiss the petitions (Gene, Tr. 6; Diane, Tr. 8) upon the following grounds:

(1) Another action was pending; (2) the Juvenile Court had exclusive jurisdiction; (3) appellant never consented to the adoptions; and (4) the children were never placed in a children's aid society pursuant to Section 55-10-40, Utah Code Annotated, 1953, and the adoptions were never authorized by the Juvenile Court pursuant to Section 55-10-43, Utah Code Annotated, 1953.

After the taking of some testimony, appellant made oral motions. In the case of Diane, said motion was based upon the grounds that neither the natural mother nor the Juvenile Court had consented to the adoption and that there had been no permanent deprivation of custody by the Juvenile Court (Tr. 52). In the case of Gene, the motion was founded upon the contentions that no consent to the adoption had been given by the natural mother or the Juvenile

Court, and that the latter court still had jurisdiction in the matter (Tr. 62). The court denied appellant's motions (Tr. 63).

PERTINENT TESTIMONY

Upon the hearings on the adoption petitions, unfuted testimony was introduced as follows:

Re: Appellant

After the natural parents were deprived of custody by the Juvenile Court, they were divorced (Tr. 64). Said divorce was obtained January 9, 1951 (Tr. 65).

Natural mother (appellant) had sexual relations with Henry Brown prior to divorce from natural father of Gene and Diane (Tr. 75).

Appellant started living with Brown, as his wife, in April, 1951 (Tr. 73), which was four months after the interlocutory decree of divorce was granted.

Appellant's sole reasons for wanting the children returned to her were that (1) she would like to have her family together, (2) the two older boys asked about Gene and Diane, and (3) she could now take care of them (Tr. 87).

Henry Brown is not acquainted with the subject children and they don't know him (Tr. 93, 97-8). His interest in them was a mild interest (Tr. 202). At the time he made a payment to the Welfare Department for the care of appellant's four children, he indicated that his reason for doing so was that "he might as well be paying his money to

the Welfare Department, because if he didn't he'd have to pay it to the Government in income taxes" (Tr. 202).

Prior to commencement of the adoption proceedings, appellant made only inquiries about the children, but took no steps to regain their custody (Tr. 100).

Re: Condition of Children

(1) *At time of placement with appellees:*

At the time the children were placed with appellees, they were both suffering from malnutrition, were pale, bore forlorn and almost hostile expressions (Tr. 132), and were in need of much love and care (Tr. 198).

Diane was very small (Tr. 132, 140, 166, 168, 194), undernourished (Tr. 40), in poor health (Tr. 195), anemic (Tr. 214), had rickets (Tr. 40), craved affection (Tr. 216), lacked security (Tr. 194), had dull hair and eyes (Tr. 140, 194), was knock-kneed or pigeon toed (Tr. 40, 148, 164, 194), appeared to be unhappy (Tr. 140, 162, 194), was exceptionally timid or frightened (Tr. 40, 132, 141, 148, 164, 166, 168), was afraid of other children (Tr. 195), and had no religious training (Tr. 76).

Gene was very thin (Tr. 152, 188, 190), pale (Tr. 180), undernourished (Tr. 180), neurotic (Tr. 211), wet the bed regularly (Tr. 222-3), seemed to be lost and unwanted (Tr. 190), appeared to be timid or frightened (Tr. 132, 152, 155, 171, 178), lacked security (Tr. 178, 216), craved affection (Tr. 216), was resentful, suspicious and on the defensive (Tr. 146, 171, 172), was disobedient (Tr. 223), difficult to manage (Tr. 152, 172, 181, 187, 190, 199, 216), indulged in temper tantrums (Tr. 140),

was frustrated (Tr. 177), anti-social (Tr. 177, 199), refused to participate with others (Tr. 152), resented adult authority (Tr. 177), used bad language (Tr. 223), was cruel to small children (Tr. 207), and had no religious training (Tr. 76).

(2) *After care by appellees:*

Since receiving the love and care of appellees, the general physical condition of both children has improved (Tr. 135, 216-17), and they appear to be happier and more secure (Tr. 135).

Diane is now happy (Tr. 136, 148), her legs are becoming straight (Tr. 41, 149, 164), her color is much better (Tr. 217), she has filled out (Tr. 164, 166), her hair is nice (Tr. 41, 165), she acts like a normal child (Tr. 165), she is no longer afraid of people (Tr. 141, 162, 166, 168, 195), is more secure (Tr. 217), her general health and attitudes are very good (Tr. 195-6), and she has received religious training (Tr. 42, 43, 141, 148, 162).

Gene is now happier (Tr. 143, 186), maturing normally (Tr. 178), has shown a marked improvement in physical condition (Tr. 181, 184, 188), is well-nourished and doesn't catch cold as readily (Tr. 184), has become friendly and has greater trust in people (Tr. 136, 172), exhibits good deportment (Tr. 216-17), is cooperative (Tr. 178, 181), has become well-mannered (Tr. 143, 153, 155, 188), enjoys improved social relationships (Tr. 172, 178, 181, 190), he no longer wets the bed (Tr. 223), or is mean to other children (Tr. 143, 178), and he has received religious training (Tr. 152, 155, 171).

Re: Care of Children

(1) *Neglect by Appellant:*

Appellant's neglect of and lack of interest in the child-rent is shown not only by the Juvenile Court's decree de-

priving her of custody but also by the confidential reports of the State Department of Public Welfare filed in the respective adoption proceedings and referred to at page 242 of the Transcript. Those reports show the following:

“* * * the following behavior may indicate a lack of genuine interest in the children:

“‘Rhea Walker Deveraux was referred to the Juvenile Court on February 14, 1945, for contributing to the neglect of her children, at which time she served forty days in the Utah County Jail. She was again referred on July 2, 1945, for contributing to the neglect of her children and was ordered by the Court to serve eighty days in the Utah County Jail. When the father, who had been in the service, returned the children were allowed to go back into the home.’

“On August 29, 1950, a petition was filed alleging: ‘* * * that the mother conducts herself in a very unladylike manner; that the parents still persist in neglecting their children, to-wit: that they frequent beer parlors and are continuously intoxicated in the presence of said children. That said mother keeps company with men not her husband, and leaves her children alone and unattended for long periods of time, to-wit: that on or about the 2nd day of August, 1950 said mother left her children and did not return until about the 9th day of August’.”

(2) *Care by Appellees:*

On the other hand, the Transcript is replete with testimony concerning appellees' love and care of the children. Special attention is directed to the manner in which the

children have been welcomed into and become a part of the homes and families of appellees, as evidenced by the following testimony:

Diane is a close companion to the adoptive parents-appellees and their world "revolves around her" (Tr. 41); they love and provide good care and attention for her (Tr. 49, 141, 149)—just as much as though she were their natural child (Tr. 166, 168); their respective families have accepted Diane as fully as the others in said families (Tr. 196); and she is living a full and normal life with them (Tr. 149).

There is a very close family companionship and love between Gene, on the one hand, and the adoptive parents-appellees and their other children, on the other (Tr. 143-4, 189, 191)—particularly between Gene and his adoptive father (Tr. 144); the entire family has accepted him in a normal parent-child and brother-sister relationship and this is reciprocated on his part (Tr. 61, 153, 178, 181, 182, 188, 191); Gene is treated in the same manner as the other children in the family (Tr. 153, 182, 189); the adoptive parents-appellees act like they "love" and "worship" Gene (Tr. 153) so that he now "feels like he belongs" (Tr. 191); and they have given him "very constructive training" (Tr. 183).

Re: Consequences of Taking Children from Appellees

Several witnesses testified as to the probable result to the children if they were now to be taken away from appellees:

Dr. Walter T. Hasler (who was identified in appellant's brief as a specialist (Br. 7) but who also engages in general practice (Tr. 180)) expressed fear that Gene, who had now "grown into a happy

youngster," would be "under great disappointment" if he were taken from his adoptive parents (Tr. 185) and that it would "break down his morale" and be "disastrous" (Tr. 185) and "break down his ambitions and desires for the future" (Tr. 184).

Mrs. Eloise Morley, a social worker in the State Department of Public Welfare, is of the opinion that both children would develop fears, insecurities and inability to know where they belong, which would produce conflicts, hostilities and unwholesome behavior, and as a result they would be unhappy children (Tr. 201). She was also apprehensive that appellant's "home is filled with conflicts and uncertainties. It couldn't be predicted at all that it would be a stable, well adjusted home situation" (Tr. 207).

Mrs. Elsa V. Harris, Child Welfare Supervisor for the Department of Public Welfare for Utah County, testified that it is "a delicate operation" to move a child, that each such move "is a traumatic or wounding experience * * * In other words every time you move a child there is regression. You have to start all over again. It's a pretty painful process for both the child and the foster parents you place the child with, because they have to take all the child comes to the home with, his hostility, his need for affection. * * * And if you move a child from that situation into another one you are taking it as if you would from its own parents, and it is an operation that can be quite drastic" (Tr. 219-20).

Mark K. Allen, a teacher of and consultant in psychology having BA and MA degrees, having completed the residence requirements for a PhD. and having broad experience in that field, testified that it is "always traumatic to remove the child and require him to make adjustments to new situations,

where there is a question about whether the child would have an equal amount of emotional security * * * If it interprets it as a place of security—where it gets affection, where it feels wanted, and feels loved and accepted—certainly you would want to be very careful about uprooting that and shifting to a situation where that security might not be thoroughly guaranteed, judging by the previous history” (Tr. 229-30), and that “I think the fundamental psychological consideration on this kind of a problem is the matching up of emotional needs of children with parents, and if a child needs the affection that parents need to give to a child I think that is a very wholesome situation. In setting the one situation over against the other that would be the main consideration, in my judgment, to demonstrate clearly the genuine emotional needs of parents to have the child and of the child to have those parents. In my experience with people who choose to adopt children they usually have a genuine emotional need to have those children. Otherwise they wouldn’t request them. That can’t always be guaranteed with the natural parents. I believe, from the facts stated, that it looks quite clear that the emotional need of these parents for the child and the child for the parents is real in the present situation, and that this child probably has perceived these foster parents as fulfilling his needs in a way that has been constructive in his development, and that it probably would be a psychological risk to destroy that relationship at his age” (Tr. 231-32).

STATEMENT OF POINTS RELIED UPON

POINT I.

THE DISTRICT COURT HAD JURISDICTION
OVER THE SUBJECT MATTER OF THESE

PROCEEDINGS AND THE RIGHT TO PROCEED UNDER THAT JURISDICTION.

POINT II.

THE CONSENT OF THE NATURAL MOTHER WAS NOT NECESSARY TO VALID ADOPTIONS BECAUSE SHE HAD BEEN JUDICIALLY DEPRIVED OF THE CUSTODY OF THE CHILDREN BY THE JUVENILE COURT ON ACCOUNT OF NEGLECT.

POINT III.

THE DISTRICT COURT PROPERLY DECREED THESE ADOPTIONS WITHOUT THE CONSENT OF THE NATURAL MOTHER BY VIRTUE OF HER HAVING BEEN JUDICIALLY DEPRIVED OF THEIR CUSTODY BY THE JUVENILE COURT.

POINT IV.

THE DISTRICT COURT WAS REQUIRED TO CONSIDER AND MAKE FINDINGS AS TO THE BEST INTERESTS OF THE CHILDREN.

POINT V.

THE COURT DID NOT ERR 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, IN THE MAT-
TER OF LARRY AND BLAINE DEVERAUX.

POINT VI.

THE DISTRICT COURT PROPERLY REFUS-
ED TO ADMIT IN EVIDENCE THE WRITTEN
REPORT OF THE TOOELE COUNTY WEL-
FARE DEPARTMENT.

POINT VII.

THE COURT DID NOT ERR IN ITS FINDINGS
OF FACT AND CONCLUSIONS OF LAW.

POINT VIII.

THE BEST INTERESTS OF THE CHILDREN
REQUIRE THEIR ADOPTIONS BY THE AP-
PELLEES.

ARGUMENT

PRELIMINARY STATEMENT

In answering appellant's brief we point out initially that in her statement of facts she has not set forth the full judgment of the Juvenile Court but appears to have studiously avoided in that statement, as well as in the remainder of her brief, any reference to the most significant

part (the real kernel) of that judgment insofar as this appeal is concerned. That provision is as follows:

"IT IS THEREFORE ADJUDGED AND DECREED by the Court that Ellis Deveraux and Rhea Walker Deveraux, the parents of said children be and they are hereby deprived of the custody of said children."

We also desire to correct the misstatements in her brief "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" (p. 3), and that "In fact she paid for their support pursuant to the Juvenile Court decree" (p. 28). Reference to the decree of the Juvenile Court (Ex. A, Tr. 54, 246) will show that (1) there was no obligation imposed upon the appellant to make any payments for the support of the children, but the obligation was imposed upon the father, and (2) while the decree of the Juvenile Court was rendered August 31, 1950, no payment was made by the appellant until January, 1951, and thereafter only three payments of \$100.00, \$60.00 and \$60.00, respectively, were made.

For the convenience of the Court we set forth in the Appendix (infra pp. ii-vii) the applicable statutes.

POINT I.

**THE DISTRICT COURT HAD JURISDICTION
OVER THE SUBJECT MATTER OF THESE
PROCEEDINGS AND THE RIGHT TO PRO-
CEED UNDER THAT JURISDICTION.**

(a) Jurisdiction

Article VIII, Section 7, of the Constitution of the State of Utah provides that "The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; * * *". This provision is carried verbatim into the Judicial Code of this state under the provisions of *Section 78-3-4, U. C. A. 1953*.

District Courts of this state, therefore, are constitutional courts having general jurisdiction in all matters civil and criminal not excepted by the Constitution or prohibited by the laws of the State. *Kramer v. Pixton*, 72 U. 1, 268 P. 1029; *Baker v. Department of Registration*, 78 U. 424, 3 P. (2d) 1082.

This Court early decided that this jurisdiction "covers about everything of a civil or criminal nature not expressly committed to another tribunal." *People v. House*, 4 U. 369, 380, 10 P. 838. And in determining jurisdiction of the District Court, the test is not whether the court has jurisdiction of a particular case, but rather whether the court has jurisdiction of the class of cases to which the particular case belongs. *Kramer v. Pixton*, *supra*.

Under the above provisions and decisions it is clear that original jurisdiction in adoption matters has been committed to the District Courts of this state and that no such jurisdiction (concurrent or otherwise) has been expressly or by implication committed to any other court.

Section 78-30-7 U. C. A. sets forth the specific jurisdiction of the District Court in adoption proceedings and the

method by which such jurisdiction may be properly invoked in any case. It provides that "Adoption proceedings shall be commenced by filing in duplicate a petition with the clerk of the district court of the county where the person adopting resides * * *".

The record shows that the provisions of *Section 78-30-7* were literally and fully complied with in each of the subject cases and thus the court below obtained jurisdiction in these proceedings, unless, as pointed out in *People v. House, supra*, jurisdiction is "expressly committed to another tribunal."

Appellant does not point out wherein jurisdiction in adoption matters has been under any circumstances expressly committed to another tribunal but appears to contend that the District Court did not have jurisdiction because the Juvenile Court had exclusive jurisdiction of the care, custody and control of the minor children. This contention appears to be premised largely upon the decisions of this Court in *Jensen v. Sevy*, 103 U. 220, 134 P. (2d) 1081, and *Chatwin v. Terry*, 107 U. 340, 153 P. (2d) 941, which we shall endeavor to demonstrate do not support it.

In the first place, after reading and rereading many times the decision in *Jensen v. Sevy*, we find no place wherein it is said, as in appellant's brief, that the Juvenile Court had "exclusive jurisdiction of the care, custody and control of minor children" and for that reason the District Court had no jurisdiction in that case.

It will be observed that in the *Sevy* case under the main decision of Justice Larson, it was not held that the District

Court had no jurisdiction to proceed in the habeas corpus action brought in that court by the father but it was held that the lower court "was charged with the duty of determining not merely the custody of a juvenile, based upon questions of its welfare but also the question of the legality of its restraint or detention" and that "This latter duty it could not refer or certify to the Juvenile Court." In passing on this last question, this court said, p. 1087:

"The District Court concluded that since petitioner admitted he had not made a showing to the Juvenile Court as provided in its order, he was not entitled to custody under the order of the Juvenile Court; and since the order itself was valid, he was not entitled to custody in derogation of it. It held therefore that the detention of the child by its grandparents was lawful and under valid legal process."

If, therefore, as argued by appellant, the decision in *Jensen v. Sevy* was to the effect that the District Court had no jurisdiction and was without power to issue a writ of habeas corpus, since jurisdiction of the Juvenile Court was exclusive, *how then could the District Court hold that the detention of the child by the grandparents was lawful?* The answer, of course, is obvious. The District Court did have jurisdiction, as this Court held. Similarly, the District Court had jurisdiction to decree the adoptions in the instant cases.

Considering the *Jensen v. Sevy* case further, suppose that the father had made his showing before the Juvenile Court and that Court had awarded him the children but the grandparents had retained custody and had refused to

let the father have the child. Could it then also be contended that the District Court would have no jurisdiction in a habeas corpus proceeding? The answer is implicit in the above quotation for if in the one case the father was not entitled to custody of the child in derogation of the order of the Juvenile Court, in the other case he would, by the same reasoning, be entitled to custody in conformity with an order of the Juvenile Court awarding him custody.

As mentioned above, this court did not hold in the *Sevy* case that the Juvenile Court had *exclusive jurisdiction of the care, custody and control* of minor children but in the concurring opinions of Justice Wolfe and Judge Hoyt it was pointed out that the Juvenile Court has in the words of the statute itself (Sec. 55-10-5) "exclusive original jurisdiction in all cases relating to the *neglect, dependency and delinquency* of children * * *" (Emphasis supplied).

The Juvenile Courts of this state are statutory courts, established pursuant to Article VIII, Section 1, of the Constitution of the state and were created in 1905 for a special purpose with special and limited jurisdiction. *Salt Lake County v. Salt Lake City*, 42 U. 548. This jurisdiction is derived from *Section 55-10-5 U. C. A. 1953* and its antecedents and is limited to cases relating to the neglect, dependency and delinquency of children. *In re Olson*, 180 P. (2d) 210; *Jensen v. Sevy*, *supra*, *Chatwin v. Terry*, *supra*. When jurisdiction shall have been acquired by the court in the case (neglect, dependency or delinquency) of any child, such child shall continue for the purposes of such case (neglect, dependency or delinquency) under the jurisdiction of the court until the child becomes 21 years

of age, etc. The Juvenile Court may also have jurisdiction in a case relating to the custody of neglected, dependent and delinquent children. But these adoption cases were not, at the time, cases relating to the neglect, dependency and delinquency of the two children involved and the custody of the children was not in question or dispute except as it may have been incidental to the determination of the adoptions, Cf. *In re Olson*, supra, nor could it have been under the *Sevey* case, *because each one of the Appellees had custody over the respective children under and by virtue of the express provisions of the decree of the Juvenile Court and not in derogation thereof.* Cf. *Jensen v. Sevy*, supra.

If the above were insufficient to establish the jurisdiction of the District Court in these cases, *Section 55-10-5 U. C. A.* and its predecessors establish that jurisdiction by retaining in subsection (4) thereof jurisdiction in "other courts of the right to determine the custody of children upon writs of habeas corpus, *or when such custody is incidental to the determination of causes in such courts*" (Emphasis supplied).

The custody of a child is incidental to the determination of adoption. Consequently, the lower court, under the express terms of the statute referred to, unquestionably had complete jurisdiction over the subject matter of these proceedings.

(b) *Right to Proceed*

Jurisdiction of the District Court having been properly invoked as above shown, the next question (and we believe the only real question involved in these appeals) is whether

that court had the right to proceed to decree the adoptions. Cf. *State v. Telford*, 93 U. 228, 72 P. (2d) 626.

Section 78-30-8 U. C. A., 1953, infra, provides as to procedure in adoption cases, as follows:

1. The persons adopting the children and the children adopted and the other persons whose consent is necessary must appear before the court, and
2. The necessary consent must thereupon be signed (by the person whose consent is necessary), and
3. An agreement be executed by the persons adopting to the effect that the children shall be adopted and treated in all respects as their own lawful children.

Have these procedural requirements been met?

The record shows that each of the petitioners adopting the children appeared before the court and signed in open court the agreements required by *Section 78-30-8 U. C. A.* (Tr. 47, 51-52, 58, 62). The record also shows that the children adopted were before the court (Tr. 63). The father of the children was before the court and, although not required to do so, executed his consent to the adoption of both children (Tr. 35-36, 55-56). The mother of the children, the protestant and appellant herein, was also before the court (Diane, Tr. 11-16, Gene, Tr. 9-14) but never signed or gave any consent for the adoption of the children.

Thus it will readily appear that all of the named procedural requirements of *Section 78-30-8 U. C. A.* were complied with except possibly the obtaining of the written con-

sent of the mother but, as we shall hereinafter show, that consent was not required for the reason that *Section 78-30-8* requires the consent of only those persons "*whose consent is necessary*" (Emphasis supplied).

POINT II.

THE CONSENT OF THE NATURAL MOTHER WAS NOT NECESSARY TO VALID ADOPTIONS BECAUSE SHE HAD BEEN JUDICIALLY DEPRIVED OF THE CUSTODY OF THE CHILDREN BY THE JUVENILE COURT ON ACCOUNT OF NEGLECT.

We have shown above that the District Court had jurisdiction of these adoption proceedings and that each of the procedural requirements has been met. However, no consent of the natural mother has been signed or given to the adoptions. This leaves only the question whether the District Court, under the evidence presented and in the absence of consent upon the part of the natural mother, can decree the adoptions. This question, while sometimes loosely referred to as such, we submit, is not a question of jurisdiction but one of proof and a consideration of whether, under the evidence, the lower court could decree the adoptions.

On the 31st day of August, 1950, the Juvenile Court made and entered its decree and judgment wherein it was adjudged that the natural parents, Ellis Deveraux and Rhea Walker Deveraux (Rhea Walker Brown, Appellant), are

unfit and improper persons to have the care, custody, control and guardianship of the said Gene and Diane Deveraux, as well as two other children not herein involved, and decree was entered as follows:

"IT IS THEREFORE ADJUDGED and DECREED by the Court that Ellis Deveraux and Rhea Walker Deveraux, the parents, of said children be and they are hereby deprived of the custody of said children.

"IT IS FURTHER ORDERED, by the Court that said Larry, Blaine, Gene and Dianne Deveraux 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 Deveraux pay \$100.00 per month for their support and maintenance" (Tr. 54, 246).

It is the appellees' contention that the above judgment of the Juvenile Court "judicially deprived" the natural parents of the custody of the children involved "on account of * * * neglect * * *" within the clear language and comprehension of *Section 78-30-4 U. C. A.*, *infra*, the applicable part of which reads as follows: "except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion;" and that consequently the consent of the appellant was not necessary to the adoptions herein.

Appellant contends, however, that there can be but one meaning to the words "judicially deprived of the custody of the child on account of cruelty, neglect or desertion" and that is "that the parent has been *permanently* and *absolutely* deprived of the custody of the child" and she further contends that "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" (emphasis supplied). She contends also that the statutes covering juvenile courts 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 and seems to infer therefrom that one cannot adopt a child who has been theretofore brought before the Juvenile Court, in any case without the consent of its parents. Appellant argues, however, that "unless the natural mother has been permanently deprived of the custody of her children her written consent was required before a valid adoption could be made" (Br. 21), and "The District Court would not have jurisdiction of an adoption proceeding unless the consent of the parents is given, or is not necessary" (Br. 23).

Perhaps our perception is not sufficiently broad to conceive of every way in which a parent may be "judicially deprived of the custody of a child," but we know of only two ways under the statutes and laws of Utah by which this can be done and they are (1) by the Juvenile Court in the manner in which it was done in the instant cases, and (2) by the District Court in divorce proceedings.

If the argument of appellant, that the statutes do not contemplate the permanent or absolute divesting of the custody of minor children because of *Section 55-10-5 (3) U. C. A.*, which continues jurisdiction of the Juvenile Court over the child, is followed to its logical conclusion, then that portion of *Section 78-30-4 U. C. A.* reading "except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion" is a mere nullity and cannot be applied in any situation and the legislature has done a futile act.

Of course, this cannot be the case for, in the first place, as this Court in *Chatwin v. Terry*, supra, in stating the well-known rule of statutory construction and in construing the provisions of *Section 14-7-4 Utah Code Annotated, 1943*, which is now *Section 55-10-5 of Utah Code Annotated, 1953*, said (p. 942) :

"In construing statutes such as here it is the duty of this court to give meaning to each and to reconcile them in such a manner so as to carry out the reasonable and practical intention of the Legislature."

See also *Westerlund v. Croaff*, (Ariz.), 198 P. (2d) 842, 844, also cited by appellant.

In the second place, appellant is in error in her premise that she was not permanently deprived of the custody of the children by the Juvenile Court decree.

It will be noted here that appellant has interpolated into the statute the words "permanently" and "absolutely," neither of which appears therein.

We think it a fair assumption, however, that the legislature, in creating the provision of the statute involved, intended that it should apply only in the case where there has been a permanent deprivation of custody as distinguished from a temporary deprivation and to that extent we go along with appellant's argument. However, we maintain, and hope to establish without question herein, that the decree of the Juvenile Court did permanently deprive the appellant of the custody of the children and was a deprivation to which the above-quoted portion of the statute was intended by the legislature to apply and to which it does, in fact, apply.

The word "permanent" has a well-known obvious meaning, and is in contradistinction to the word "temporary," and is so used in legal enactments as well as contracts, such as insurance policies. *Wetherall v. Equitable Life Assur. Soc. of U. S.*, 263 N. W. 745. It is not equivalent to "perpetual" or "unending" or "lifelong" or "unchangeable." *Soule v. Soule*, 87 P. 205. It does not include the idea of "absolute." *Coleman v. Bennett*, 69 S. W. 734. However, the word "absolute" has been defined to mean unconditional, complete and perfect in itself without relation to or dependence upon other things or persons. *Ketch v. Smith*, 268 P. 715, 717. The word "permanent" does not mean forever, or existing forever. *Western Union Tel. Co. v. Pennsylvania Co.*, 129 F. 849, 867. Ordinances which endure until repealed are deemed to be permanent. *City of El Dorado v. Citizens' Light & Power Co.*, 250 S. W. 882.

"Permanently," as used in the call of the rector of a church, that he be and is elected permanently to the rector-

ship of such church, means an indefinite period. The term "permanently" as used does not mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. It was intended that he should continue to hold the place only until one or the other of the contracting parties should desire to terminate the connection. *Perry v. Wheeler*, 75 Ky. 541, 548.

Where plaintiff was employed at a certain rate per year, with the statement by the employer that he wanted plaintiff to come with the intention of staying permanently, the word "permanently" would be regarded as meaning nothing more than that plaintiff was to hold his position until one or the other of the contracting parties should desire to terminate the connection. *Minter v. Tootle-Campbell Dry Goods Co.*, 173 S. W. 4, 6.

A person is "permanently" employed when he is hired for an indefinite period terminable at will. *Heaman v. E. N. Rowell Co.*, 258 N. Y. S. 138, 140; *Skagerberg v. Blandin Paper Co.*, 266 N. W. 872, 873.

Measured by the above definitions it is clear that the judgment of the Juvenile Court permanently deprived the appellant of the custody of the children. The judgment of deprivation was "unconditional, complete and perfect in itself without relation to or dependence on other things or persons," *Ketch v. Smith*, supra. It would continue indefinitely until someone made a move under the appropriate statutes to terminate it or modify it in some particular and it was not temporary or limited in time.

Let us examine the decree of the Juvenile Court. That decree declared and adjudged the children to be dependent, neglected children within the meaning of the laws of Utah, declared that the natural parents (of whom the appellant was the mother) were unfit and improper persons to have the care, custody, control and guardianship of them and then decreed that they (the parents) "be and they are hereby deprived of the custody of said children." Nothing further was provided in the decree concerning the custody of these children insofar as either parent was concerned. Their rights to custody were effectively and permanently severed by the provisions quoted. Nowhere in the further provisions of the decree are any rights whatever continued or reserved in the parents or either of them. Whatever jurisdiction was retained by the court was not with respect to the deprivation of custody from the parents but with respect to the commitment to the Utah State Department of Public Welfare "for foster home care, treatment, and supervision." This retention was only to insure the placement of the children in a home or homes where they would be properly treated and cared for. And here again, we repeat that the appellees, at the time of filing the adoption petitions, had the custody of the children by virtue of that decree. It is true that liability for certain payments for the support and maintenance of the children was imposed upon the father, but that *liability* neither conferred nor continued any rights in him and is not a factor in determining whether there was a permanent deprivation of custody, as there may be a permanent deprivation of custody and yet a continuing obligation to support the child. Cf. *In re Olson*,

supra. However, this liability was not imposed upon appellant and even though she may have made three payments toward the children's support, these payments were purely voluntary and not by virtue of any obligation imposed upon her by the decree, by statute, or otherwise and neither created nor continued any rights to the children in her.

This being the clear import, it would seem to be manifest without further argument that the decree *permanently* deprived both parents of the custody of the children. We shall, however, proceed further to show that this is the inescapable result.

A comparison of the decree in these cases with that of the Juvenile Court in *Jensen v. Sevy*, *supra*, clearly shows the difference between a decree permanently depriving a parent of custody and one that is interlocutory and in effect continues some interest in the parent to the child. The order in that case vacated all previous orders and provided: "That the Court retains jurisdiction of this matter * * * and in the event said petitioner, Fern Jensen, departs himself becomingly between the date hereof and June 1, 1942, then and in that event said petitioner, Fern Jensen, shall have and enjoy the sole custody of said minor child." Under this order the court, *unlike the court in the instant cases*, retained jurisdiction "of this matter," and placed certain rights in the father "in the event" he departed himself becomingly. In the instant case the Juvenile Court did *not* retain jurisdiction "of this matter," made no reference to future custody but committed the children to the Welfare

Department for foster home care, "subject to the continuing jurisdiction of the Court."

In further confirmation of our premise that the decree permanently deprived the natural parents of the custody of the children let us next examine several of the cases cited and quoted from at length in appellant's brief. These cases are cited in subdivision I, subsection C of the brief (Br. 21-29) in support of the contention that written consent for adoption is required from the natural mother, but we submit that if they stand for anything pertinent to the instant cases, they indisputably confirm that which we have above maintained—that consent of the natural mother in these cases is not necessary to the adoptions because the decree of the Juvenile Court permanently deprived the natural parents of the custody of the children, continuing no rights whatever to the children in either of them.

The cases of *Jackson v. Spellman*, (Nev.) 28 P. (2d) 125, *Smith v. Smith*, (Idaho) 180 P. (2d) 853, *Onsrud v. Lehman*, (N. Mex.) 243 P. (2d) 600, and *Ronck v. Ronck*, (Okla.) 218 P. (2d) 902, all deal with cases of divorce where the custody of a child is awarded to the party securing the divorce on account of cruelty, desertion, neglect, etc., with the right of visitation with the child reserved in or granted to the offending spouse. The decisions hold that in such cases the consent of the latter is a necessary prerequisite to entering of a decree of adoption. The rationale of these cases is as stated in *Jackson v. Spellman*, *supra*, "that where a divorce is granted for cruelty [or desertion or neglect] and the innocent spouse is awarded the custody of the children, 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*" (emphasis supplied).

In other words, if a divorce decree is granted on the grounds of cruelty, desertion or neglect to a spouse who is granted the custody of the children, *without* the right of visitation or other similar right reserved to or granted the offending spouse, the consent of the latter is *not* a necessary prerequisite to the entering of a decree of adoption.

If we examine the decree of the Juvenile Court in the cases at Bar and measure it by the principle set forth in the cases immediately above considered, it becomes readily apparent that that decree, likewise, is one upon which *Section 78-30-4, supra*, is intended to and does operate.

In the first place the phrase "subject to the continuing jurisdiction of the Court" added nothing to the decree that was not already implicit in the decree by virtue of the statutes above set forth, which specifically provide that the jurisdiction of the Juvenile Court shall continue. The continuing jurisdiction of the Juvenile Court is precisely parallel with the continuing jurisdiction of the District Court in divorce matters as provided by *Section 30-3-5 U. C. A., supra*, and in each case the parties can invoke the processes of either court to modify its decrees, regardless of whether the decree reserves that right or not. Consequently, if appellant's argument were followed to its logical conclusions, there could be no decree in the Juvenile Court or in divorce proceedings in the District Court to which

Section 78-30-4, supra, could apply. A divorce decree, particularly as to custody of children, is always subject to modification upon a showing of changed circumstances, regardless of whether one spouse is awarded the custody of children without any reservation of rights in the other spouse or not, and the same is true of a decree of the Juvenile Court, the statute in the latter case providing for the reopening of a decree the same as *Section 30-3-5 U. C. A.* supra, provides for the reopening of a divorce decree.

We think the court in the case of *Ronck v. Ronck*, supra, aptly summed up the applicable rule involved as follows (pp. 904-905) :

“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.”

May we revert to *Jackson v. Spellman*, supra, and to that part of the opinion reading as follows :

“More precisely, we are of the opinion that where a divorce is granted for cruelty and the in-

nocent 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*" (emphasis supplied).

In the light of this rule it is crystal clear that the decree of the Juvenile Court reserved no rights whatever to custody of the children in the natural parents—they were completely and absolutely deprived of any custody whatever. We invite the Court's attention to the fact that the decree is in two parts, each complete in and of itself. In the first part the natural parents were completely and absolutely deprived of custody and if the words "subject to the continuing jurisdiction of the Court" have the significance attached to them by appellant, we think it is of utmost significance that these words do not appear in that part of the decree depriving the parents of custody, but in the following provision committing the children to the Welfare Department . The decree is as complete and absolute with respect to the deprivation of custody and the reasons therefor as it is possible to make it.

Further considering appellant's contentions regarding the decree, let us paraphrase it and assume that, instead of providing as it does, the decree provided as follows: "It is adjudged and decreed by the Court that Rhea Walker Deveraux, one of the parents of said children, be and she is hereby deprived of the custody of said children. It is further ordered by the Court that said children 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 care, custody and control of said children be awarded to Ellis Deveraux, the father of said children." Surely, under such a decree if the cases cited by counsel and above considered have any application whatever to the situation herein (which admittedly they do), they squarely hold that under such circumstances it would be unnecessary to obtain the natural's mother's consent to an adoption. Is there any real difference between the situation in the hypothetical case and in the instant cases? We submit there is not.

We repeat that under the authorities above cited the decree of the Juvenile Court permanently deprived the natural parents of the custody of the children. Consequently, under the clear and certain language of *Section 78-30-4 U. C. A.*, supra, these children may be adopted without the consent of the natural parents.

POINT III.

THE DISTRICT COURT PROPERLY DECREED THESE ADOPTIONS WITHOUT THE CONSENT OF THE NATURAL MOTHER BY VIRTUE OF HER HAVING BEEN JUDICIALLY DEPRIVED OF THEIR CUSTODY BY THE JUVENILE COURT.

We have shown that the natural parents were judicially deprived of the custody of the children involved in these

adoptions and that within the clear and certain language of Section 78-30-4 U. C. A. no consent was necessary from them in the adoption proceedings.

The rule supporting this conclusion, and universally recognized, we believe without exception, is stated in *1 Am. Jur.* p. 642, par. 41, as follows:

“The right of a parent with respect to his child is not an absolute paramount proprietary right or interest in or to the custody of the infant, but is in the nature of a trust reposed in him, which imposes upon him the reciprocal obligation to maintain, care for, and protect the infant, and the law secures him in this right so long as he shall discharge the correlative duties and obligations, and no longer. The state may provide for forfeiture of the parent's natural rights and for the adoption of a child, without the consent of the parents, where, in accordance with such statutory provision, circumstances of misconduct exist which so warrant. And where the custody of a child has been taken from the parents for delinquency by adversary proceedings, their consent to its adoption is no longer necessary.” Cf. *Nugent v. Powell*, (Wyo.), 33 P. 23, 28.

This principle has even been extended to dispense with the necessity for notice of hearing to the parents under such circumstances, and is aptly explained in *1 Am. Jur.* pp. 645-646, as follows:

“The only exception to the general rule that the rights of the parent, however much he may be at fault, cannot be cut off without notice to him and an opportunity to be heard in his own behalf exists in the presence of statutes providing for the divesting of the parent's natural rights in an adversary pro-

ceeding for that purpose, or of which it is an incident. Thus, it will be observed that the exception is apparent rather than real, inasmuch as the parent has, previous to the adoption proceeding, had his day in court and a full determination of his parental rights, so that there is no longer need of their protection at the time of the adoption. Where the custody of a child has been taken from the parents for delinquency, by adversary proceedings, notice of adoption proceedings is unnecessary, since the parents have already been divested of the custody and control of the child."

See annotation 24 A. L. R. 427. Cf. *In re Smith's Estate*, (Cal.) 195 P. (2d) 842, 848-849.

Westerlund v. Croaff, supra, also cited in appellant's Brief, is to the same effect. In that case a writ of prohibition was granted on behalf of the father of a minor daughter, who had become divorced from the mother, prohibiting the superior court from proceeding in an adoption matter in which the mother and her husband were attempting to adopt the child under the claim that the father had wilfully deserted and neglected to provide for the child for one year prior to the filing of the petition. The father appeared in opposition to the petition, showed that he had not given his consent to the adoption and denied that he had deserted or neglected his daughter. The lower court found that he had not deserted and neglected the child and thereupon attempted to proceed to determine the question of whether or not it would be for the welfare of the child and her best interests that the adoption should be made. In this proceeding the court apparently relied upon a provision of an old statute which provided that "an adoption may be decreed without

the consent of the parent, guardian, next of kin or next friend where the interests of the child will be promoted thereby." The court found that this provision had been omitted in the revision of the law by the legislature, that there was no authority to grant an adoption on the basis of "best interests" alone, thus making it mandatory that the natural parent consent to the adoption unless the parent was insane, imprisoned or had been guilty of wilful desertion or neglect. The court said (p. 845):

"None of these statutory equivalents of consent is present in the instant case. There is no contention that the relator is insane or imprisoned, and the court expressly found that he was not guilty of wilful desertion or neglect to provide for the child."

The rationale of this decision clearly is that if any of *the statutory equivalents* mentioned in the above quotation had been present, *as is the case in the instant proceedings*, the court could and would have decreed the adoption without the consent of the father.

In the instant cases *the statutory equivalent of consent* is the decree of the Juvenile Court depriving the natural parents of custody, on account of neglect.

Appellant argues however, that 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 (Br. 28). If this be a question of lack of jurisdiction of the District Court because of the Juvenile Court having exclusive jur-

isdiction, as argued under Point I A of appellant's brief, certainly the consent of the Juvenile Court would not confer jurisdiction. If however, it is a question of the right to proceed and proof, it is immaterial under *Section 78-30-4 U. C. A.* whether the consent of the Juvenile Court is obtained or not. *Section 55-10-30 (5) U. C. A.*, infra, permits the Juvenile Court in the cases of neglect to dispose of the child "in any other way, [with certain exceptions not material] that may in the discretion and judgment of the court under all circumstances be for the best interest of the child * * *." In view of these provisions the method provided by *Sections 55-10-40 and 55-10-43 U. C. A.* is not exclusive, but is merely one of the ways that adoptions may be effected. This method has no bearing whatsoever in the instant proceedings and of course can have no effect upon the jurisdiction of the court below.

POINT IV.

THE DISTRICT COURT WAS REQUIRED TO
CONSIDER AND MAKE FINDINGS AS TO
THE BEST INTERESTS OF THE CHILDREN.

As the heading of Point II of appellant's brief (p. 29) it is stated that "the welfare of a child is not the paramount issue as to whether the court has jurisdiction or authority to permit an adoption."

We have no quarrel with this statement but have difficulty understanding its place in appellant's brief. At no time have these appellees contended that in determining

the jurisdiction or authority of the court below to decree the adoptions the welfare of the children was the paramount issue or any issue. This Court however, has held, as quoted in appellant's brief (p. 33), in *In re Adoption of D - -*, (Utah) 252 P. (2d) 223, that "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 paramount importance. However, this is modified by the presumption¹ that the welfare of the child will best be subserved by being in the custody of its natural parent."

If, as is stated in appellant's brief (pp. 29-30) "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 * * * that it entered its decrees of adoption," *this was precisely what it was re-*

¹ "Presumptions," as said in *Machowik v. Kansas City etc. R. Co.*, (Mo.) 94 S. W. 256, 262, "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." In *Peters v. Lohr*, (S. D.) 124 N. W. 853, 855, this well-recognized principle is aptly stated as follows: "the presumption, where the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated must meet his opponent's prima facie evidence, and not presumptions." "A presumption is not evidence of a fact, but purely a conclusion." As we shall point out later in this brief the evidence is not only overwhelming but in fact uncontroverted, and the fact so found by the court below on such evidence, that the physical, emotional and moral health and stability of the said children, their security and best interests will best be promoted by the adoptions and that the mental and physical health of the children would be endangered and it would be a psychological risk and detrimental to their physical, emotional, and moral health and stability to return them to the appellant.

quired to do. The court, however, did not find or conclude, as set forth in the omitted portion of this quotation above and as inferred by the entire statement, that it would be to the best interests of the children “that the natural mother be deprived of her own children.” It was unnecessary to so find or conclude because this was already an accomplished fact brought about by the decree of the Juvenile Court which under *Jensen v. Sevy*, *supra*, was binding on the District Court.

We do contend, however, that under the provisions of *Section 78-30-9 U. C. A.*, *infra*, the District Court was required to inquire into facts concerning the best interests of the children and, having found and concluded to its satisfaction that the best interests of the children would be promoted thereby, it was *mandatory* that the court decree the adoptions.

Appellant remarks that nowhere in the findings, conclusions or decree is it determined that the natural mother was not a fit and proper person to have the care, custody and control of the children. Here again, it was unnecessary for the court to make any finding in this regard because it had before it the decree of the Juvenile Court establishing that fact. Moreover, nowhere under the statutes relating to adoption is the District Court required to make such a finding. Its right to proceed without consent of the parents is premised upon the Juvenile Court having so found and having consequently deprived the natural parents of custody. Try as she will, the appellant cannot get around the decree of the Juvenile Court—that decree stands as to her fitness as well as to the deprivation of custody.

We have no quarrel with the decisions in *Howes v. Cohen*, (Cal.) 255 P. (2d) 761; *In re Schwab's Adoption*, (Pa.) 50 Atl. (2d) 504; *In re adoption of D - -*, supra, cited and quoted from at length in appellant's brief (pp. 30-35) or with the principles therein established. But these decisions, to the extent quoted, only reiterate the general rule, as stated by appellant, "that the natural parents have a paramount right to their children *if they are fit and proper persons to have such custody*" (emphasis supplied). In the instant cases we have a competent and binding judicial determination by the Juvenile Court, that has never been set aside, that the natural mother is an unfit and improper person to have the custody of said children, and furthermore what is more important under the statute, a judicial deprivation of custody, which as we have heretofore shown, is *the statutory equivalent of consent*.

POINT V.

THE COURT DID NOT ERR 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, IN THE MATTER OF LARRY AND BLAINE DEVERAUX.

The decree of February 13, 1953, grew out of proceedings relating to Larry and Blaine Deveraux and was in nowise related to the two children involved in the instant causes. Consequently, it could have no materiality or binding effect in these causes, and under no rule of law cited

by appellant or stretch of the imagination can the decree in those proceedings, in any respect, become *res judicata* and binding upon the District Court in the instant cases. While we might prolong this brief by endless citations, we believe it to be so elementary that the rule of *res judicata* cannot apply as between the decree in that proceeding and the instant proceedings, if for no other reason than that the parties are not the same, that no further citation is needed.

Appellant states (Br. 36) that "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." If the words "*res judicata* and" were eliminated from this statement and if the "findings and decree" referred to were in relation to a proceeding involving the two children who are the subjects of these adoption proceedings and not to two other children, we would be inclined to agree with it. Furthermore, if such were the case the District Court could not have decreed the adoptions herein. But certainly no rule of law, at least none cited by appellant, or with which we are familiar, would permit the interposition of a decree in a wholly different matter to effect or influence such a result.

If this appellant had included the two children involved herein in her petition before the Juvenile Court for return of custody and had obtained from that court the decree which was entered but which would also have included Diane and Gene, then it would seem that the appellees would have no basis upon which to premise adoptions and the Dis-

strict Court could not so decree². This would seem to be the crux of these proceedings and the statement of appellant above quoted would appear to be a tacit admission of the basic error of her position herein and the correctness of the appellees'.

It is interesting to note that while counsel argues that the District Court erred in not admitting the findings of fact, conclusions of law and decree entered in a case not relating to the two children involved in the instant proceedings, be quite strenuously objected to the admission of any part of the files of the Juvenile Court relating to Diane and Gene other than the decree, and was sustained by the court (Tr. 36-37). Certainly if the findings and conclusions made in the very case involving the subject children were inadmissible, then *a fortiori* findings and conclusions entered in a case *not* involving the subject children would be clearly inadmissible.

We submit that the District Court did not err in refusing to admit the findings of fact, conclusions of law and judgment of the Juvenile Court in the proceedings involving only Larry and Blaine Deveraux.

² We point out, however, that the Juvenile Court only found that the appellant's present conduct "appears" to qualify her to assume the custody of those children and only returned them to her "subject to the continuing jurisdiction" of that court.

POINT VI.

THE DISTRICT COURT PROPERLY REFUSED TO ADMIT IN EVIDENCE THE WRITTEN REPORT OF THE TOOELE COUNTY WELFARE DEPARTMENT.

Appellant complains of the refusal of the District Court to admit the written report of the Tooele County Department of Public Welfare on the ground that this evidence was material to show that appellant had changed her way of life and was a fit and proper person to have custody of her children.

We submit, however, that the court very properly rejected this exhibit. This is a report made by an individual to Judge Alder in connection with the proceedings to restore the custody of *Larry* and *Blaine* to their natural parents—it does not purport to be the report of the State Department of Public Welfare relating to the two children the subject of these adoptions, which report is required in adoption cases. Furthermore, no issue was, or could be, before the District Court as to whether appellant had changed her way of life and was a fit and proper person to have the custody of *Diane* and *Gene*, the two children involved. The decree of the Juvenile Court to the contrary, insofar as it applies to *Diane* and *Gene*, was at that time in full force and effect and binding on the District Court. Consequently, there could be no issue on this question before the District Court and no error in its refusal to admit an exhibit offered for such purpose.

As a matter of fact, if any error was made by the court in its refusal, it was harmless because the person who made the report was before the court as a witness (Tr. 106-111) and testified substantially to the same effect as the report, and it must be assumed that the court took these matters into consideration and weighed them in nevertheless finding as a fact that the interests of the children will best be promoted by the adoptions.

POINT VII.

THE COURT DID NOT ERR IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Appellant complains that the court erred in entering its findings of fact "2", and particularly that portion "and permanently depriving the aforesaid natural parents of said child."

We have heretofore pointed out under Point II that the decree of the Juvenile Court did permanently deprive the natural parents of the custody of the children within the clear and certain language of *Section 78-30-4, U. C. A.*, supra, as well as its intent. Therefore, that finding was properly made by the court.

Appellant also complains about findings "10" and "11" which are the same in both cases. She complains, not on the grounds that they are not supported by the evidence, but on the ground that such findings completely ignore

the presumption³ that it will be to the best interests of a child to be with its natural parents if they are fit and proper persons. They take no issue with findings "6" and "7", which we shall set out in full and refer to later herein, and from which, as inescapable facts, findings "10" and "11" naturally flow, aside from the fact that specific evidence thereon was received by the court from several witnesses, as pointed out in our statement of facts herein.

We submit that these findings are abundantly supported by the record and are inescapable and that the conclusions of law "1", "2" and "3" complained of by appellant naturally and logically flow from such findings and are compelled thereby.

We have also elsewhere in this brief demonstrated that it was not error on the part of the court to fail to make a finding as to the fitness of the natural mother to have custody of the children. This was not an issue before the court.

³ The effect of this presumption has been elsewhere argued at length in this brief and must necessarily be considered to have been completely and thoroughly overcome by the evidence which resulted in the findings complained of. Suffice it to say that there is an abundance of evidence in the record on the part of the appellees to support these findings and there is no evidence to the contrary on the part of the appellant that the children would be better off in her home—as pointed out by this court in *In re Olson*, supra — or in fact that she even loves them, or otherwise. She has not shown any reasons for uprooting the children from the environments and homes in which they now reside as a result of her cruel neglect and to which they have now become attached and in which they have the love, affection and care of devoted parents—something neither of them apparently ever had before coming to the appellees.

POINT VIII.

THE BEST INTERESTS OF THE CHILDREN
REQUIRE THEIR ADOPTIONS BY THE AP-
PELLEES.

We have not heretofore considered the contentions of appellant with respect to the rule of strict construction of adoption statutes. We now point out however that, as stated in *Onsrud v. Lehman*, supra, quoted from by appellant, "the tendency of the courts is away from the narrow and technical construction of adoption statutes appearing in some of the earlier cases." This tendency and its approval are considered and adopted by this Court, in the recent case of *In re adoption of D - -*, a minor, supra, in which the Court stated as follows:

"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 the case of *Walton v. Coffman*, Mr. Justice Wade analyzes the antecedent cases of this court regarding contests over children and cogently sets forth this principle, but recognizes that the right of the natural parent may be surrendered or lost. When a parent has failed to give the child the attention and love normally to be expected, has abandoned its care to others, and by irresponsi-

ble conduct shown an unwillingness or inability to measure up to parental responsibilities, these matters may be taken into consideration by the court in connection with other factors in determining the right to custody.

“Fourth: Public policy favors the adoption of children who are left without parental refuge. Once a child has been cast adrift and is without responsible parental care, the policy of the law should be to assist in every way in establishing a satisfactory parent-child and family relationship. Adoptive parents should not be discouraged by a construction of the law which would cause them to fear the consequences of accepting a child because of the knowledge that the fate of their efforts would be at the will of the natural parent. As Mr. Justice Miller states:

“‘It is apparent that if in particular cases the unstable whims and fancies of natural mothers were permitted, first to put in motion all the flow of parental love and expenditure of time, energy and money which is involved in adoption, and then, as casually, put the whole process in reverse, the major purpose of the statute would be largely defeated.’”

This court also in *In re Olson*, supra, in approving *Ex parte Day*, (Wash.) 65 P. (2d) 1049, held (p. 215): “That in determining whether children should be taken from the home of friends of the highest character who were willing and able to care for them and placed in the custody of the father, the court would not take into consideration the relative degree of comfort or luxury which might surround them, *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" (emphasis supplied).

The District Court made certain findings, which we have heretofore pointed out have not been challenged by the appellant and which are, in the case of Diane, as follows:

"6. That because of her neglect by her natural parents, at the time the said child was placed with petitioners, she was very nervous run-down and sickly; she was suffering from rickets, her legs being misshapen; she had difficulty walking and would frequently step on her own toes; she had dull and stringy hair; she was undernourished and thin; she had a frightened look about her and seemed to have a pronounced feeling of insecurity and appeared to be frightened of people and was in need of special care and attention.

"7. That since entering petitioners' home she has been given special care and attention, and because of their love, devotion and special care of her, her general condition has become normal, although she is still somewhat underweight; she is now well adjusted in her social relationships with children and adults and has confidence in and love and appreciation for other people. She has the love and devotion of the petitioners and of their families and reciprocates the same" (Tr. 18).

And in the case of Gene, as follows:

"6. That because of his neglect by his natural parents, at the time the said child was placed with petitioners he needed special care and attention; he was very nervous, suffered with enuresis, was insecure, rundown and sickly, his teeth were in bad condition and he was poorly adjusted in his social rela-

tionships with children and adults, used profanity frequently, displayed violent temper tantrums and exhibited cruel tendencies toward other children; he seemed to be suspicious of everyone, showed no respect for the rights or property of others and exhibited no love or appreciation toward others.

“7. That since entering petitioners’ home he has been given special care and attention, and because of their love, devotion and special care of him, his general condition has become normal, he is now well adjusted in his social relationships with children and adults, he no longer uses profanity, displays violent temper tantrums or exhibits cruel tendencies toward other children and now has respect for the rights and property of others and has confidence in and love, respect, and appreciation for other people. He has the love and devotion of the petitioners and their other children and reciprocates the same” (Tr. 16-17).

Could any court, faced with these facts and in the absence of proof by the appellant that they would be better off with her, reasonably or in good conscience conclude otherwise than the best interests of the children require their adoption by the appellees? The children are each now properly adjusted in their present environment, subject to wholesome influences; they are happy and loved, and are loved by, their adoptive parents and their families. They now neither recognize nor know their natural mother nor their two other brothers, and to tear them from their loved ones now would, as found by the court, be a psychological risk and detrimental to their physical, emotional and moral health and stability.

The final paragraph in the argument in appellant's brief poses some significant questions. We shall answer them in their converse order.

We, too, cannot see why notice should be given the natural mother, in view of the deprivation of custody by the Juvenile Court. We have pointed out under Point III of this brief, with citations of authority, that notice is not necessary under the circumstances herein and quote from *1 Am. Jur.* pp. 645-646 to that effect. Appellees first proceeded on that basis and secured orders of adoption and we believe the orders were valid but, after appellant filed habeas corpus proceedings and in order to obviate any question of validity of the orders and to eliminate a multiplicity of actions, the cases were reset upon notice to the appellant, the orders of adoption were vacated and trial had herein resulting in the decrees of adoption now under attack by appellant.

Notice was not given or required so that the appellant might present to the court her fitness for the care, custody and control of the children. This could not be an issue so long as the decree of the Juvenile Court remained unchanged.

Notice of the adoption proceedings were not given to the natural 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 them, although we feel that the court might hear her in these matters as well as it might hear any other person in these particulars to the end that the court would not

permit the adoptions against the best interests of the children and to improper persons. The notice to the natural mother, if required in such cases as these, is merely to give her an opportunity to show whether consent is necessary.

CONCLUSION

In conclusion we respectfully submit that the decision and judgment of the District Court is correct and should be sustained.

Respectfully submitted,

S. E. BLACKHAM,
Attorney for Appellees

APPENDIX

STATUTES INVOLVED

The pertinent provisions of Utah Code Annotated, 1953, are as follows:

30-3-5. Disposition of property and children.—When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.

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, except in felony cases as hereinafter provided, and the custody, detention, guardianship of the person, trial and care of such neglected, dependent and delinquent children, and the employment of children as provided by law; and shall also have jurisdiction over adult persons for all misdemeanors committed by them relating to the custody, abuse, detention, guardianship, employment, probation, neglect, dependency, delinquency and care of children who are under eighteen years of age as is now or may be provided for by law.

(1) In any case in which the court shall find a child neglected, dependent or delinquent it may, in the same or in any subsequent proceedings, upon the parents of such child being duly summoned or voluntarily appearing as hereinafter provided, proceed to inquire into the ability of such parents to support

the child or contribute thereto, or into the fitness of such parents to continue in the custody and control of such child. The court may enter such order or decree as shall be according to law and/or equity in the premises, and may enforce the same in any way in which a court of law or equity may enforce its orders or decrees.

* * * * *

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

(4) Nothing herein contained shall deprive other courts of the right to determine the custody of children upon writs of habeas corpus, or when such custody is incidental to the determination of causes in such courts. Such other courts may, however, decline to pass upon questions of custody and may certify the same to the juvenile court for hearing and determination or recommendation.

* * * * *

55-10-30. Judgment in cases of delinquency, dependency or neglect.—At the conclusion of any hearing the court may dismiss the case, or may render a decree and judgment that the child is delinquent, dependent, neglected or otherwise within the provisions of this chapter. If the juvenile is adjudged delinquent, dependent, neglected or otherwise within the provisions of this chapter, the court shall enter in writing the facts constituting such delinquency, dependency, neglect or other offense and may further adjudge and decree as follows:

(1) That the child be placed on probation or under supervision in his own home, or in the custody of a relative or other fit person, upon such terms as the court shall determine;

(2) That the child be committed to the state industrial school or to any suitable institution, children's aid society or other agency incorporated under the laws of this state and authorized to care for children or to place them in family homes, or to any such institution or agency provided by the state or a county;

(3) That the child be required to make restitution for damage or loss caused by his wrongful acts;

(4) That the child be placed under such guardianship or custody as may be warranted by the evidence and for the best interest of the child; provided, however, that in the selection of a guardian the court shall give due consideration to the preference of parents;

(5) That the child be disposed of in any other way, except to commit it to jail or prison, that may, in the discretion and judgment of the court, under all circumstances be for the best interest of the child, to the end that its wayward tendencies shall be corrected and the child be saved to useful citizenship.

55-10-31. Modification during minority.—Inoperative 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.

78-30-4. Consent to adoption.—A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion; provided, that the district court may order the adoption of any child, without notice to or consent in court of the parent or parents thereof, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, acknowledged before any officer authorized to take acknowledgments, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under chapter 8 of Title 55, and such agency consents, in writing, to such adoption.

78-30-7. Jurisdiction of district court.—Adoption proceedings shall be commenced by filing in duplicate a petition with the clerk of the district court of the county where the person adopting resides, and the petition to adopt and all orders, decrees, agreements and notices in the proceedings shall be filed in the office of the clerk of such court.

78-30-8. Procedure—Agreement of adopting parents.—The person adopting a child and the child adopted, and the other persons whose consent is necessary, must appear before the district court of the county where the person adopting resides, and the necessary consent must thereupon be signed and an agreement be executed by the person adopting to the effect that the child shall be adopted and treated in all respects as his own lawful child.

78-30-9. Order of adoption.—The court must examine all persons appearing before it pursuant to the preceding provisions, each separately, and, if

satisfied that the interests of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

78-30-14. Department of public welfare—Served with petition—Duties—Report.—Upon the filing of a petition for the adoption of a minor child, if there is not filed therewith the written consent of a licensed child-placing agency for such adoption, a copy of such petition together with a statement containing the full names and permanent address of the child and the petitioners shall be served by the court receiving the petition within five days, on the state department of public welfare of Utah, by registered mail, with return receipt requested, or personal service. It shall be the duty of the state department of public welfare, through its own field agents, or through such other agencies and institutions licensed by the department for the care and placement of children, or the probation officer of the juvenile court or court of like jurisdiction of the county, under the department's supervision, to verify the allegations of the petition, to make a thorough investigation of the matter and to report its findings in writing to the court within sixty days from service thereof. The report shall show among other things:

- (1) Why the natural parents, if living, desire to be relieved of the care, support, and guardianship of such child:
- (2) Whether the natural parents have abandoned such child or are morally unfit to have its custody:
- (3) Whether the proposed foster parent, or parents, is or are financially able and morally fit to

have the care, supervision, and training of such child:

(4) The physical and also the mental condition of such child insofar as this can be determined, and any other facts and circumstances deemed advisable and necessary by said department to be investigated concerning said child and its welfare. Upon the day so appointed the court shall proceed to full hearing of the petition and the examination of the parties in interest, under oath, with the right of adjourning the hearing and examination from time to time as the nature of the case may require. If the report of the state department of public welfare, or its duly authorized agents, as provided herein, disapprove of the adoption of the child, the court may dismiss the petition. No petition for adoption shall be granted until the child shall have lived for one year in the home of the adopting parents.