

1954

In the Matter of the Adoption of Diane Deveraux and Gene Deveraux : Respondents' Petition and Brief on Rehearing

Utah Supreme Court

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S. E. Blackham; Attorney for Petitioners;

Recommended Citation

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**In the Supreme Court of the
State of Utah**

FILED

MAY 6 - 1954

**In the Matter of the Adoption of
DIANE DEVERAUX, a Minor,**

v.

**RHEA WALKER BROWN,
Protestant and Appellant,**

and

**In the Matter of the Adoption of
GENE DEVERAUX, a Minor,**

v.

**RHEA WALKER BROWN,
Protestant and Appellant.**

Jerk. Supreme Court, Utah

NO. 8055

NO. 8056

**RESPONDENTS' PETITION AND BRIEF
ON REHEARING**

**S. E. BLACKHAM,
Attorney for Petitioners**

NEW CENTURY PRINTING CO., PROVO, UTAH

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In the Supreme Court of the State of Utah

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RESPONDENTS' PETITION AND BRIEF ON REHEARING

Come now the petitioners, Respondents herein, and move this Honorable Court for a rehearing and reconsideration of its opinion and judgments in the above entitled causes, and for grounds, and as a basis for such motion respondents rely upon the following:

1. The opinion of the Court is contrary to law.
2. The Court erred in holding that the natural mother was not "judicially deprived" of the custody of the children within the meaning of Sec. 78-30-4, U. C. A., 1953, so as to dispense with her consent in these adoption proceedings.
3. The Court erred in failing to recognize that under the provisions of Sec. 55-10-31, U. C. A., there cannot be a "permanent" deprivation of custody of a child that would prevent a parent, who had been so deprived, from proceeding to recover the custody of said child, except only in cases of commitments to (1) the district court or (2) the state industrial school.
4. The Court erred in apparently limiting adoptions of children without the consent of the parents to those cases where the parents have been judicially deprived of custody, the children have been placed with a children's aid society and the Juvenile Court has consented to their adoption.
5. The Court erred in interpolating into Sec. 78-30-4, U. C. A., the words "absolutely and permanently" and in defining said words.
6. The Court erred in construing Sec. 55-10-43, U. C. A., as permitting the consent of the Juvenile Court to be substituted for that of living parents in adoption proceedings.
7. The Court erroneously construed the decree of the Juvenile Court in the custody proceedings and erred in considering matters dehors the record in such construction as well as relying upon the unsupported decision of the Idaho Court in **Jain v. Priest**.
8. That the opinion and judgments of the Court as rendered, predicated upon the erroneous determination of

the foregoing propositions is erroneous and should be vacated and set aside.

Wherefore, Respondents respectfully submit that a rehearing should be had and the decision revised as to both law and fact, and that a miscarriage of justice will occur if these causes are not reversed.

S. E. BLACKHAM,
Attorney for Respondents

ARGUMENT

In the Court's opinion in these cases the "determinative question" is stated as follows: "Did the Juvenile Court when it deprived the parents of the custody of their children for cruelty and neglect and placed them with the State Department of Welfare 'for foster home care, treatment and supervision' under its continuing jurisdiction, divest them absolutely and permanently of all their rights to the children so as to make their consent unnecessary in adoption proceedings?"

The consent of the father to the adoptions having been obtained in these proceedings, it would seem that the question properly posed is only whether the natural mother was judicially deprived of the custody of the children and divested of all rights to them.

A careful examination of the decree of the Juvenile Court will show that no rights of any nature were preserved by it in the natural mother. The decree provided that " * * * the parents of said children be and they are hereby deprived of the custody of said children." (Emphasis ours.) The only part of the decree touching the natural mother, in definite and certain terms deprived her of

the custody of the children. No provision of that decree either preserved in her rights of any nature or imposed upon her any continuing obligations or duties toward them. She was completely and absolutely deprived of the custody and control of the children, had no further authority over them, no rights as to visitation and no right whatever to interfere with them. And this situation would and does continue **absolutely, permanently, irrevocably and forever so long as the decree of the Juvenile Court remains in full force and effect.** In this sense the authorities cited by us in our main brief (pp. 25-26) unquestionably sustain the fact that the decree "permanently" divested the natural mother of all rights to the children.

We can conceive of no rights left in the natural mother by the decree of the Juvenile Court. It is true that she had the right to go back to that court and petition the court to modify or revoke the decree and restore the children to her, but that would seem to be the only right she had, and that right exists not by reason of anything contained in the decree, but by virtue of Sec. 55-10-31, U. C. A., 1953, which provides that "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."

The only judgment or decree that the juvenile court can make in any case, whether it be placing the children with a children's aid society (as suggested by this Court in its opinion) or making any other provision concerning them, that is not subject to modification or revocation and which would "absolutely and permanently" deprive a parent of

custody in the sense these words are obviously used in the opinion, would be to commit them either to the district court or to the state industrial school. Surely this Court does not mean to say that only in such a case are the provisions of Sec. 78-30-4, U. C. A., 1953, dispensing with consent in adoption cases, intended to apply. But this is the inescapable effect of the decision in this case which has the practical effect of saying that no adoptions can be had in this state (except in the very limited cases of commitment to the district court or the industrial school) except with the consent of the natural parents. Certainly Sec. 78-30-4, U. C. A., cannot be construed so narrowly. If this be the construction a death blow will be struck at the policy this Court enunciated in *In re Adoption of D - - -*; 252 P. (2d) 223, as follows:

“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 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.”

It may be argued that this is not necessarily the result because this Court in its opinion said: “If the Juvenile Court had intended to permanently deprive the parents of the custody of their children it could have placed them with a children’s aid society and appointed such society the guardian of such children under the provisions of Sec. 55-10-40, U. C. A., 1953, and that society could, under the provisions

of Sec. 55-10-43, have gotten the consent of the Juvenile Court to place the children for legal adoption into the homes procured for them by the society. This the Juvenile Court did not do." Does this imply that the consent of the Juvenile Court may be substituted for that of the natural parents? This certainly cannot be the case in view of Sec. 78-30-4, U. C. A., 1953, which provides that "A legitimate child cannot be adopted without the consent of the parents, 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; * * *". This statute obviously requires the consent of the living parents in every case except where the parents have been judicially deprived of custody, and in such case obviously the consent of no person is required, not even that of the Juvenile Court. We have searched arduously, but in no case, under statutes similar to those of this state, have we found any authority even remotely suggesting that the consent of a juvenile court may be substituted for that of a natural parent.

If by the quotation the Court intended to imply that had the Juvenile Court done as suggested, the natural mother's rights in the children would have been any more effectively or permanently cut off than they were by the decree entered by that court in this case, we respectfully submit the Court is in error. Had the Juvenile Court done that very thing, the rights of the natural mother would not have, in any respects, been any different than they are or were under the instant decree of that court. She could have done anything under that decree that she could have done under the instant decree and that decree, under the provisions of Sec. 55-10-31, U. C. A., 1953, would have been no more ef-

fective in cutting off her rights "permanently" than the instant decree.

For instance, suppose we change the decree of the Juvenile Court by the insertion of three words, "permanently" and "and adoption" 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 **permanently** 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 adoption**. 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.) (Inserted words in bold face).

Would not the natural mother's rights in the children be exactly the same under such a decree as they are under the instant decree? If not, in what way are they different? Certainly under such a decree she could petition for a modification or revocation of the decree the same as she could have done in the instant case. Where, then, is there any difference of substance between the situation projected by the Court and that of the instant case? Is not the effect then of the Court's opinion logically that no adoptions can be had in this state without the consent of the living parents? It seems that such a rule is what the Protestant

herein seeks to have established. If it is the rule, then of course, Sec. 78-30-4, U. C. A., is for all practical purposes read out of the statutes, for it can then be applied only in those cases where the juvenile court commits the child either to the district court or to the state industrial school. In all other cases the parent can petition the court to modify or revoke the decree and restore custody of the child to him.

In the opinion of the Court in posing the determinative question involved, as quoted at the outset of this brief, the Court has interpolated in Sec. 78-30-4, U. C. A., the words "absolutely and permanently." These words are not in the statute and we submit may not properly be interpolated therein in the connotation of these words as used in the opinion of the Court. The statute requires only that the parents be "judicially deprived" of the custody of the children, not that they be "judicially deprived absolutely and permanently" of such custody. If the word "permanently" is given its proper connotation in such a context, as shown by the authorities cited in our main brief (pp. 25-26) and above referred to, then we think that the statute might be construed so as to require a permanent deprivation of custody as distinguished from a temporary one, but if the connotation of "permanently" is meant in the extreme sense to which it appears to be carried by the Court in its opinion, viz., that the children are placed thereby irrevocably beyond the control of the Juvenile Court, and custody cannot be regained by the parent, then we submit that a proper construction of the statutes does not and cannot require an "absolute and permanent" deprivation.

In its opinion this Court further states "That our statutes do not contemplate that every judicial deprivation of parents to the custody of their children is a permanent dep-

rivation is borne out by Sec. 55-10-41, U. C. A., 1953, which provides for proceedings to return the custody to the parents when circumstances have changed." We have no quarrel with this statement, but if it is the existence of the right to proceed for the return of custody to the parents that stamps the decree of the court as not being a permanent deprivation, then, as we have shown above, there are only two ways in which a permanent deprivation can take place and they are by commitment to the district court or to the state industrial school; consequently, a permanent deprivation could not result by placing the children with a children's aid society as this Court indicates the Juvenile Court might have done under the provisions of Sec. 55-10-40, U. C. A. It seems rather striking that this Court should in one sentence exemplify under Sec. 55-10-40 what it considers would have been a permanent deprivation by placing the children with a children's aid society, and in the same paragraph only five sentences later, citing Sec. 55-10-41, the very next section, would use the same situation* to demonstrate that a deprivation under those same circumstances would not be permanent.

The fact that the Juvenile Court encouraged the Protestant "to believe that when she rehabilitated herself and was capable of taking care of her children they would be returned to her, writing: "Of course your future prospects and conduct will determine the results to the children' ", cannot stamp the decree of the court as not being a permanent deprivation of custody. This was not the action of the Juvenile Court, but that of the Protestant's attorney, who had secured a divorce for her from the other parent.

*Sections 55-10-40; 55-10-41 and 55-10-43 all deal with the situation where the child is placed with a children's aid society.

of the children involved, and from whom she apparently was getting an acknowledgment of final payment for his services and who was volunteering some opinions concerning her and the children. His words that "of course, your future prospects and conduct will determine the results as to the children" were at best merely an expression of what was inherent in the law concerning the case, irrespective of what was written to her and of which the Protestant was undoubtedly familiar as she had previously availed herself of those provisions of the law. Again, if the Juvenile Court had, as suggested by this Court, placed the children with a children's aid society and had authorized it to secure adoption the Protestant's "future prospects and conduct" could, even in such case, "determine the results as to the children" yet if such had been the case the Court's opinion indicates that such a decree would have amounted to a permanent deprivation of custody. The thing that we are trying to say is that, analyzed in its true perspective, the statement quoted as made by the Juvenile Court could have no effect whatsoever in determining whether the court considered that its order depriving the parents of custody of the children was permanent or merely temporary, because he was only expressing what the statutes, irrespective of the decree, already provided.

So long as the decree of the Juvenile Court remains unmodified and unrevoked, the Protestant can have no right to custody of the children or any other rights in them. The decree, therefore, can be nothing else but a permanent deprivation of the custody of the children. True, the Protestant could have sought to modify the decree and possibly may have succeeded upon a proper showing, but the right to seek and obtain such a modification would exist by virtue of the

statutes and not by virtue of anything contained in the decree or by virtue of anything said by the Judge long after he had entered the decree. If the decree were revoked or modified, then the rights of the Protestant in the children would necessarily have to be defined by the new decree and governed thereby. We earnestly submit that tested by any recognized standard of construction or logic, the decree of the Juvenile Court in this case permanently deprives the Protestant of the custody of the children.

We, of course, do not mean to say that the Juvenile Court cannot enter a decree that would be considered as a temporary deprivation of custody and one upon which an adoption without parental consent could not be predicated. An example of such a decree is the modified decree of the Juvenile Court of Sevier County which was before this Court in *State v. Sorensen*, 132 P. (2d) 132, and *Jensen v. Sevy*, 134 P. (2d) 1081. In the proceedings before the Juvenile Court upon the hearing for modification of the original decree, which deprived Fern Jensen, the father of the child, of its custody, the Juvenile Court entered an order out of which both of the above cases grew, vacating all previous orders and providing: "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. * * *" This court, in *Jensen v. Sevy* concerning this order, said, p. 1087:

"The validity or legal effect of that order or writ must therefore be passed upon by the District Court. Petitioner contended that he claimed custody, under and by virtue of the order, not in derogation of it. **But**

the order revealed that the right of petitioner to the custody of his child had not been finally determined by the Juvenile Court. That order which was in its nature interlocutory the court specifically retaining jurisdiction, committed the custody of the child to the defendants in the habeas corpus proceeding until June, 1942, at which time, upon a showing by the petitioner that he had in the meantime deported himself becomingly the court would award him the custody of the child. There is no question as to the power of Juvenile Court to make such an order or as to the validity thereof." (Emphasis supplied).

Thus, by the language of this Court the difference between a permanent deprivation and a temporary or interlocutory deprivation is made crystal clear. In the one case the decree deprives the parent of custody and makes no provision under which the parent is to regain custody and is of indefinite duration (which is the decree in the instant case)—in the other, provision is made for the return of custody of the child to the parent, upon certain conditions, within a limited, temporary and certain period.

In the instant case the Juvenile Court, by its decree, retained no jurisdiction concerning the right of the parents to the custody of the children, but only with respect to the commitment of the children to the Department of Public Welfare for foster home care, treatment and supervision, whereas in the *Jensen* case, *supra*, the Juvenile Court "retains jurisdiction of this matter. . . * . *"; (Emphasis supplied), which is the equivalent of retaining jurisdiction for further orders, both as to the right of the parents to custody as well as to the care of the children in the event the custody be not awarded back to the parents.

In this case, just as in the **Jensen** case, the District Court (Judge Nelson) had to pass on the validity or legal effect of the decree of the Juvenile Court and found as a fact that the decree of the Juvenile Court permanently deprived the natural parents of the custody of the children (R. 17-18) and concluded as a matter of law that the decree judicially and permanently deprives the natural parents of the custody of the said children on account of neglect by said natural parents (R. 19) thus bringing this case squarely within the provisions of Sec. 78-30-4, U. C. A. We submit that in applying correct principles of law with respect to the decree of the Juvenile Court, as we have shown, the District Court was compelled to such finding and conclusion of law, and it should be sustained by this Court.

As an additional ground, however, we submit that this Court is in error in construing the decree of the Juvenile Court in the first place, and in the second place in considering the letters of Judge Alder (either as judge or as attorney for Protestant) in construing the decree. The decree is not ambiguous and needs no construction to determine its meaning, but if it is ambiguous it cannot be interpreted in the light of statements made by the court de hors the record and a long time after the decree was pronounced. It is universally held and is a general rule that where the language of a judgment or decree is clear and unambiguous, neither the pleading or the findings or verdict, nor matters de hors the record, may be resorted to to interpret it and that such a judgment depends upon its own terms and extraneous documents cannot be written into it by inference or reference. **Holingsworth v. Hicks**, (N. Mex.) 258 P. 2d 724; **Hinderlider v. Canon Heights Irr. & Reservoir Co.** (Colo.) 185 P. 2d 325; **Kent v. Smith**, (Nev.) 140 P. 2d 357;

Paxton v. McDonald, (Ariz.) 236 P. 2d 364; **Slavich v. Slavich**, (Cal.) 239 P. 2d 100; **Foster v. City of Augusta**, (Ken.) 256 P. 2d 121.

On the basis of these decisions, to which scores could be added, it would seem to be clear that this Court erred in its opinion in considering the letters of Judge Alder in construing the decree of the Juvenile Court under consideration herein. We call the attention of the Court also to the fact that these letters were received by the District Court over the strenuous objections of Respondents' Counsel (R. 88-91; 112-114).

This Court in its opinion relies strongly upon **Jain v. Priest**, 30 Ida. 273, 164 P. 364, which is not supported by any other decisions, and quotes from that decision in support of the conclusions reached herein. But we respectfully submit that the quotation used is pure dicta with respect to no issue before that court and furthermore is subject to the same criticism as the opinion in this case. To base a decision thereon would be to impose error upon error. Even so, however, that case is readily distinguishable as follows: (1) the order of the Probate Court is not set forth verbatim so that it may be compared with the decree of the Juvenile Court in this case; (2) the order appears (as stated by this Court in its opinion) to have provided for the placement of the children in a children's home "until the parents would reform and become fit to be entitled to the children again." (Emphasis supplied). The decree did not so provide in the instant case; (3) in the **Jain** case "the probate judge, the appellants, the representative of the society at Lewiston, and everyone else concerned understood that the order was not a final order, permanently depriving the parents of the custody of the children, but merely an order temporarily

depriving them of such custody until such time as they should reform and convince the court that they were again entitled to the children." These facts must have been proved in that case otherwise they would not have appeared in the statement of facts in the opinion, and must have been shown to have existed in the minds of the persons mentioned at the time of the entry of the order. There is no such showing in the instant case; (4) in the **Jain** case the court said, p. 368, "In order to authorize the probate court to make an order of adoption without the consent of the parents, it must appear in the record before the court that the case comes within some of the exceptions mentioned in the statute. * * * No such showing was made before the probate court * * ." In the instant case such a showing was made before the District Court who so found, as shown by reference to the specific finding referred to above.

Moreover, in the **Jain** case it is significant that in a much later decision (1943) on habeas corpus the same court denied a writ and upheld an adoption where the parent was given no notice whatever of a prior proceeding determining the child to be an abandoned child, or of the adoption proceedings, merely upon the basis that there was ample evidence to support the court's finding of abandonment in the case itself. **Finn v. Rees**, 141 P. 2d 976.

We submit that this Court erred in its conclusion that the natural mother was not "judicially deprived" of the custody of the children within the meaning of Sec. 78-30-4, U. C. A., 1953, so as to dispense with her consent in these adoption proceedings.

We earnestly and sincerely submit that these are important cases, involving, as they do, serious problems affecting the well being and future welfare of these and per-

haps scores of other children "cast adrift * * * without responsible parental care"; that the Court's opinion is in error and the entire proceedings should be reheard and reconsidered by this Court.

CONCLUSION

Wherefore, petitioners pray that a rehearing and reargument be granted, that the judgment of the District Court be sustained, and that the opinion and judgment of this Court be vacated and set aside.

Respectfully submitted,

S. E. BLACKHAM,
Attorney for Petitioners