

1958

## State of Utah v. Bailey : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY UTAH

MAY 6 1958

STATE OF UTAH

In the Interest of

KARL BAILEY

Alleged dependent and  
neglected child.

LAW LIBRARY

Case  
No. 8722

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## APPELLANT'S BRIEF

*Submitted by J. GORDON BAILEY, Father of the  
Alleged Dependent and Neglected Child.*

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*Attorney for Appellant*

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	11
ARGUMENT .....	13
POINTS:	
I. THE TRIAL COURT ERRED IN FAILING TO FIND KARL BERNETT BAILEY TO BE THE LEGITI- MATE SON OF J. GORDON BAILEY.....	13
II. KARL BERNETT BAILEY IS NOT A NEGLECTED CHILD WITHIN THE PURVIEW OF THE LAW AND THEREFORE THE COURT WAS WITHOUT POWER TO DEPRIVE J. GORDON BAILEY OF THE CUS- TODY OF HIS SON.....	19
III. THE COURT ERRED IN ADMITTING AND IN CON- SIDERING IN ITS DECISION EVIDENCE CON- CERNING ALLEGED ADOPTIVE PARENTS.....	33
IV. THE ORDER PURPORTING TO DEPRIVE J. GOR- DON BAILEY PERMANENTLY OF ALL RIGHTS TO CUSTODY OF HIS SON AND TO AUTHORIZE HIS ADOPTION IS VOID BECAUSE IT IS UNSUPPOR- TED BY THE FINDINGS AND CONTRARY TO LAW..	39
V. EVEN ASSUMING THE JUVENILE COURT TO HAVE HAD THE POWER TO TEMPORARILY DE- PRIVE J. GORDON BAILEY OF THE CUSTODY OF HIS SON, TO DO SO WAS AN ABUSE OF DISCRE- TION AND CONTRARY TO LAW.....	43
VI. THE JUDGMENT MUST FAIL BECAUSE THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW DO NOT SUPPORT IT.....	46
CONCLUSION .....	48

## CASES CITED

Allison v. Bryan, 21 Okla. 557, 97 P. 282, 18 L.R.A. (n.s.) 931 (1908) .....	14
In re Baird's Estate, 173 Cal. 617, 160 P. 1078 (1916).....	15
Baldwin v. Nielson, 110 Utah 172, 170 P. 2d 179 (1946).....	43
In re Bennett, 77 Utah 247, 293 P. 963 (1930).....	20
Blythe v. Ayres, 96 Cal. 32, 31 P. 915 (1892).....	14
In re Bradley, 109 Utah 538, 167 P. 2d 978 (1946).....	20, 43, 45
In re Bryan, 48 Nev. 352, 232 P. 776, 37 A.L.R. 527 (1925).....	45
In re Buffington's Estate, 169 Okla. 487, 38 P. 2d 22 (1934).....	17
Carrera v. Kelley, 283 P. 2d 162 (Colo. 1955).....	29, 36
In re adoption of D., 252 P. 2d 223 (Utah 1953).....	38
Devereaux v. Brown, 2 Utah 2d 30, 268 P. 2d 995 (1954).....	43
Fisher v. Bylund, 97 Utah 463, 93 P. 2d 737 (1940).....	42

	Page
In re Flood's Estate, 217 Cal. 763, 21 P. 2d 579 (1933).....	15
Ford v. State, 104 N.E. 2d 406 (Ind. App. 1952).....	29, 37
In re Garr, 31 Utah 57, 86 P. 757 (1906).....	15, 16
In re Gathings' Estate, 199 Okla. 460, 187 P. 2d 981 (1947).....	15, 16
In re Gird's Estate, 157 Cal. 534, 108 P. 499 (1910).....	15, 18
In re Graham, 110 Utah 159, 170 P. 2d 172 (1946).....	20
Estate of Heaton, 139 Cal. 237, 73 P. 186 (1903).....	18
In re Hudson, 126 P. 2d 765 (Wash. 1942).....	32
Interstate Circuit, Inc., v. U. S. 304 U. S. 55, 58 S. Ct. 768, 82 L. Ed. 1146 (1938).....	47
Jensen v. Earley, 63 Utah 604, 228 P. 217 (1924).....	22
In re Johnson, 110 Utah 500, 175 P. 2d 486 (1946).....	20, 29, 31, 45
In re Jones' Estate, 166 Cal. 108, 135 P. 288 (1913).....	16, 18
Re Kessler's Estate, 74 N.W. 2d 599 (S.D. 1956).....	18
In re Knight, 212 La. 357, 31 So. 2d 825 (1947).....	29, 31
In re McGrew, 183 Cal. 177, 190 P. 804 (1920).....	16
Re McNamara, 181 Cal. 82, 183 P. 552, 19 L.R.A. 40 (1919).....	14, 16
In re Miller, 242 P. 2d 1016 (Wash. 1952).....	44
Re Navarro, 77 Cal. App. 2d 500, 175 P. 2d 896 (1946).....	14
People v. Hinton, 330 Ill. App. 130, 70 N.E. 2d 261 (1946).....	29, 37
Pettit v. Engelking, 260 S.W. 2d 613 (Tex. Civ. App. 1953).....	29, 31, 44
Pfeiffer v. Wright, 41 F. 2d 464, 73 A.L.R. 932 (1930).....	14
In re Rinker, 117 A. 2d 780 (Pa. Sup. 1955).....	29, 30, 31
In re Skinner's Estate, 65 Cal. App. 2d 528, 151 P. 2d 31 (1944)....	15
State v. Black, 3 Utah 2d 315, 283 P. 2d 887 (1955).....	45
State v. Pogue, 282 S.W. 2d (Springfield Ct. of App. 1955).....	29
U. S. v. Seminole Nations, 299 U. S. 417, 57 S. Ct. 283 81 L. Ed. 216 (1937) .....	48
In re Walton, 123 Utah 380, 259 P. 2d 881 (1953).....	22
In re Warren, 243 P. 2d 632 (Wash. 1952).....	29, 36, 46
In re Young, 180 Ore. 187, 174 P. 2d 189 (1946).....	29
In re Zerick, 129 N.E. 2d 661 (Ohio Juv. 1955).....	45

## STATUTES CITED

Utah Code Ann. 1953, 55-10-5 .....	19, 20
Utah Code Ann. 1953, 55-10-6 .....	20, 21
Utah Code Ann. 1953, 55-10-30 .....	37, 40, 46
Utah Code Ann. 1953, 55-10-31 .....	37, 41
Utah Code Ann. 1953, 55-10-32 .....	37, 39, 44
Utah Code Ann. 1953, 55-10-41 .....	37, 41
Utah Code Ann. 1953, 55-10-43 .....	37, 41
Utah Code Ann. 1953, 78-30-4 .....	41
Utah Code Ann. 1953, 78-30-12 .....	10, 13

## AUTHORITIES CITED

35 A.L.R. 2d 663 .....	22
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## APPELLANT'S BRIEF

*Submitted by J. GORDON BAILEY, Father of the  
Alleged Dependent and Neglected Child.*

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### STATEMENT OF FACTS

On April 30, 1957, Virginia Lee Bennett, Executive Secretary of the Children's Service Society of Utah, filed a petition (R. 10) in the Juvenile Court of the Second Juvenile District in and for Salt Lake County alleging Karl Bailey, the son of J. Gordon Bailey, Appellant herein and frequently referred to as Gordon, to be a neglected and dependent child within the purview of Utah law. The Children's Service Society of Utah will be referred to herein as the Society, and since the uncon-

tradicted evidence is that the child was named Karl Bennett Bailey, he will be referred to by that name, or simply as Karl. May 8, 1957, Gordon filed his cross petition (R. 11), and after a rather lengthy hearing in the matter the Court made findings of fact and conclusions of law (R. 22) and entered its Decree and Judgment (R. 25), adjudging Karl to be a neglected child within the purview of Utah law, depriving Gordon of all rights to the custody of his son and authorizing the Society to arrange for his adoption by unidentified foster parents in whose care he had been previously placed by the Society.

Gordon, presently employed as a caretaker at a duck club and an artist by profession, was reared and educated in Utah. After completing high school and prior to his induction into the United States Army Air Corps in June of 1943 (R. 214) he was employed in California (R. 212, 213). While serving as a member of the Air Corps he became very interested in the study of art (R. 214) and after his return to civilian life, in January, 1946, he undertook the study of art at various schools, utilizing his service-earned benefits under the G. I. Bill for this purpose (R. 215). He has sold paintings and has participated in numerous art exhibits throughout the country (R. 215, 216, Ex. 14).

On November 19, 1951, Gordon married one Martha Bander Singer in Mexico (R. 95), which marriage was dissolved by a decree of annulment April 5, 1952 (R. 96), although the Juvenile Court found such annulment to have been on September 24, 1953. This point will be covered in the argument following.

In the latter part of 1952, or the early part of 1953, Gordon met Margaret Susan Willis (now Mrs. Jesse Sharp and called both Margaret and Susan in the record, and referred to herein as Susan) at an art exhibit banquet (R. 276). Susan had been born in Canada and raised in England (R. 275). While in England Susan conceived an illegitimate child (R. 275) which was born after Susan and her family had migrated to the United States (R. 275), and was placed for adoption out of state (R. 275). Susan returned to Utah where she resided with her parents in Provo and later in Salt Lake City (R. 275, 276).

Shortly after she met Gordon, Susan asked him if she could go live with him at Logan, Utah, where he was attending college (R. 278). There is conflict in the evidence as to the nature of their relationship prior to this point. In any event Gordon and Susan lived together as man and wife, but without the benefit of a formal marriage, from this time in 1953 until the end of October, 1955 (R. 22, Finding No. 2). There is a substantial conflict in the evidence as to why they were not formally married, each contending that he desired so to do but that the other refused, insisting such a formality to be unnecessary.

During the first part of this time they traveled about the country, Gordon pursuing his study of art at various schools (R. 280-284). They held themselves out to others as being married (R. 89). Susan's family did not know that they were not married until after Susan left Gordon in October, 1955 (R. 40, 41, 176).



At one time Susan became pregnant, but this pregnancy was terminated by a miscarriage at Santa Rosa, California (R. 285).

In the spring of 1954 Susan became pregnant again. In the fall of 1954 Gordon and Susan obtained employment as caretakers at a duck club near Salt Lake City, Utah (R. 35, 292). On January 7, 1955, their child was born at the duck club (R. 220, 221, 222, Ex. 7). Gordon and Susan were alone and the child was delivered without the aid of a doctor and without serious complications though Susan testified that the child had some trouble, breathing as though it had a cold (R. 304, 305). Gordon prepared, signed and filed a birth certificate (Ex. 7) naming himself as the father and Susan as the mother.

As with many of the occurrences in this case, the reasons for the natural childbirth, who desired it, and similar matters are in conflict.

Gordon notified Susan's mother of the birth of her grandchild (R. 39). Susan's father named the child Karl Bennett Bailey (R. 174), Bennett being the middle name of a deceased brother of Gordon (R. 151).

Gordon, Susan and Karl lived at the club as a family unit from the birth of the child in January until the end of October of the same year, during which time Gordon held Karl out as his son, admitting publicly the paternity of the child — never denying it — and treating the child in all respects as his son (R. 44, 89, 108, 112, 113, 121, 122, 130, 133, 134, 137, 140, 164, 222). Friends, relatives and neighbors testified at the hearing that the child



appeared exceptionally healthy and that Gordon was very fond of it (R. 108, 112, 113, 114, 121, 122, 130, 134, 141, 142), although Susan and members of her family testified that the child suffered from colds, jaundice and diarrhea (R. 39, 46, 305).

Near the end of October, 1955, about ten months after Karl's birth, one Jesse Sharp, formerly a close friend of Gordon, and referred to herein as Sharp, visited for about three days at the club (R. 309). The day after he left Susan went into Salt Lake City where she met Sharp (R. 311). They returned to the club and informed Gordon that they desired to be together (R. 313). They packed some of Susan's things and, taking Karl with them, left the club (R. 313). Gordon drove them into Salt Lake City (R. 314). He testified that he did so, under strain, rather than risk trouble should their departure be delayed (R. 224). The following day Susan and Sharp left Utah for Sacramento, California, and were married in Reno, Nevada, enroute (R. 314).

Immediately after Susan, Sharp and Karl left the club, Gordon and Susan's parents attempted to find her, but their efforts were futile (R. 40, 145, 163, 174, 175, 181, 226, 227, 228, 229, 230, 231). By a letter dated November 10, 1955, and bearing only a general delivery, Sacramento, California, return address, Susan notified Gordon that she and Sharp were married (Ex. 8).

This marriage was not a happy one and in December of that same year, Susan returned with Karl to her parents' home in Salt Lake City. She testified that she

thought that if her parents would care for Karl for two or three weeks so that she and Sharp could spend a little time together their marriage might improve (R. 315, 318). Gordon saw Susan at this time, but the unplanned meeting was not a friendly one (R. 236, 316). Gordon's subsequent attempts to communicate with Susan were terminated by a letter from Sharp to Gordon, postmarked February 2, 1956, Salt Lake City, Utah, but without any further return address, addressed to Gordon, who at the time was working at Moab, Utah, curtly informing him that any further letters would be returned to him unopened (Ex. 11).

Unsuccessful in her attempt to get someone to care for Karl, and without contacting Gordon or any member of his family, Susan approached the Children's Service Society of Utah on February 7, 1956, to arrange for temporarily leaving Karl with the Society (R. 317). On behalf of the Society, evidence was offered that Susan told them that the father of the child was Joe Bailey to whom she was not married, and that the child was born in December, 1954 (R. 56, 70). Within a day or two Karl was left with the Society. Susan did not return for him and apparently her only contact with the Society between such time and November 21, 1956, consisted of two short phone calls (R. 58).

In the summer of 1956, Gordon met Lee Deffebach Hanson (also referred to in the record as Helen Hortense Lee Deffebach Hanson), known to her acquaintances as Lee and so referred to herein (R. 195).

Lee, a graduate from the University of Utah with a B.A. degree in Art (R. 187) had married one Mr. Hanson and shortly thereafter the two of them went to Europe. Lee had been awarded a Fullbright scholarship for the study of art in Europe. This marriage was not successful, terminating in Mr. Hanson's suing for divorce in June, 1956. Lee did not contest the action (R. 207). The decree became final December 12, 1956. Lee went to live with Gordon at the club about the end of August, and upon the expiration of the time for the prior decree to become final they were married. This was December 14, 1956 (R. 23, 196).

Gordon testified that from the December meeting with Susan to the commencement of this action he had no knowledge of the whereabouts of Susan or Karl.

On December 7, 1956, a petition was filed in the Juvenile Court in Salt Lake City alleging Karl to be a dependent and neglected child (R. 4). Gordon received no notice of this action and was not a party thereto (R. 30). On December 10, 1956, the petition filed three days earlier was modified to show the father's name to be J. Gordon Bailey and the date of birth to be January 7, 1955 (R. 4). At a hearing on December 12, 1956, Susan and a Mrs. Alice Olson of the Society were present (R. 1). Findings of fact, conclusions of law and an order of continuance were made (R. 7).

Without breaking the sequence of fact, it should be here noted that Lee Deffebach Bailey had been an acquaintance of Virginia Lee Bennett, petitioner in the instant case and Executive Secreary of the Children's Serv-

ice Society of Utah, since about 1948 (R. 79, 80, 84). Virginia Lee Bennett testified that she had contacted Lee during the summer of 1956, having been informed by Lee's parents that she could contact Lee by calling the phone number of the club, which she did (R. 80). She also testified that she had received in December, 1956, an announcement of Gordon's and Lee's marriage. Virginia Lee Bennett testified that it was not until the hearing on December 10, 1956 (R. 4) that the Society knew that J. Gordon Bailey was the father of Karl and his consent necessary for adoption (R. 87, 88, 89).

Virginia Lee Bennett testified that two or three days after Christmas in that same month she had a conversation with Lee and that Lee told her that she and Gordon were going to take a trip to California (R. 81). At no time did Virginia Lee Bennett inform Lee that the Society had custody of Gordon's child (R. 85). During the time that Gordon and Lee were out of the state, Susan appeared before the Juvenile Court and relinquished all of her rights to Karl (R. 8). The Court made its order placing Karl with the Society for placement for adoption (R. 9, 86). This was January 16, 1957 (R. 1, 8, 9). No effort was made by Virginia Lee Bennett, or the Society, to contact Gordon or to inform him in any manner that the Society had custody of his child until three months after Susan had relinquished her rights (R. 86). On April 19, 1957, Gordon was contacted by the Society. On April 22, he was asked to release Karl so that he could be placed for adoption (R. 59, 60, 86).

At no time since the Society first obtained custody of Karl has Gordon been allowed or requested to take care of his son (R. 70, 86).

According to Virginia Lee Bennett and to Mrs. Olson, Gordon said at the interview of April 22, 1956, that he would never consent to the adoption of his child, that he would not fight any proceedings, but that he hoped that the outcome of the interview would be the return of Karl to him (R. 62, 71, 81). At about this time Virginia Lee Bennett informed Gordon in response to his inquiry that Karl had not been placed for adoption as of that time (R. 346).

On April 30, 1957, the case at bar was initiated by a petition filed by Virginia Lee Bennett alleging Karl to be a neglected and dependent child on the following grounds: (1) that Gordon had abandoned the child, (2) that the child lacked proper parental care because of the faults and habits of Gordon, (3) that Gordon has refused and neglected to provide proper care and necessary subsistence, medical and other care, and (4) that the child was in a situation dangerous to its health and morals by reason of the foregoing and the irresponsible and immoral conduct of Gordon. The petition alleged that for the above reasons, Karl became a neglected and dependent child on the 30th day of April, 1957 (R. 10). The Society had had Karl in its custody from about February 9 of the previous year (R. 4).

By a cross petition filed May 8, 1957, Gordon denied the allegations of dependency and neglect and alleged,

inter alia, that the child was his legitimate son by virtue of compliance with the provisions of Utah Code Ann. 1953, 78-30-12; that because he did not know and had not been informed of the whereabouts of his son he had not been able to care for him; that he and his wife desired the return of the child; that they are competent and capable persons to have the custody and care of the child; that his wife desires to adopt the child as her own; and that the Society refused to return the child to him (R. 11-15).

In the course of the hearing that ensued, the petitioner introduced evidence concerning the events preceding the placing of the child with the Society and subsequent thereto, including testimony concerning medical treatment, religion, philosophy of life, alleged sexual deviations, unfitness of the home at the club and numerous diverse matters.

At the end of the petitioner's evidence in chief, a motion to dismiss the petition was denied (R. 107).

Gordon introduced testimony in his own behalf rebutting that of the petitioner, and showing his version of the matters raised by the petitioner.

The greatest part of the 321 pages of testimony are concerned with events prior to Gordon's marriage to Lee in December, 1956, and include the fullest scope of inquiry imaginable. To recite in detail this testimony would unduly lengthen this brief.

After the close of the evidence in chief for Gordon, the petitioner offered and the Court admitted, over objection, evidence to the effect that unidentified foster par-



## POINT II.

KARL BERNETT BAILEY IS NOT A NEGLECTED CHILD WITHIN THE PURVIEW OF THE LAW AND THEREFORE THE COURT WAS WITHOUT POWER TO DEPRIVE J. GORDON BAILEY OF THE CUSTODY OF HIS SON.

## POINT III.

THE COURT ERRED IN ADMITTING AND IN CONSIDERING IN ITS DECISION EVIDENCE CONCERNING ALLEGED ADOPTIVE PARENTS.

## POINT IV.

THE ORDER PURPORTING TO DEPRIVE J. GORDON BAILEY PERMANENTLY OF ALL RIGHTS TO THE CUSTODY OF HIS SON AND TO AUTHORIZE HIS ADOPTION IS VOID BECAUSE IT IS UNSUPPORTED BY THE FINDINGS AND IS CONTRARY TO LAW.

## POINT V.

EVEN ASSUMING THE JUVENILE COURT TO HAVE HAD THE POWER TO TEMPORARILY DEPRIVE J. GORDON BAILEY OF THE CUSTODY OF HIS SON, TO DO SO WAS AN ABUSE OF DISCRETION AND CONTRARY TO LAW.

## POINT VI.

THE JUDGMENT MUST FAIL BECAUSE THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW DO NOT SUPPORT IT.

## ARGUMENT

### POINT I.

#### THE TRIAL COURT ERRED IN FAILING TO FIND KARL BERNETT BAILEY TO BE THE LE- GITIMATE SON OF J. GORDON BAILEY.

Although the court says in its conclusions of law (R. 24) that “the child may be considered a legitimate child because of the recognition of said child as his son by J. Gordon Bailey,” from the entire treatment of the case, from the pleadings before Gordon was made a party to the suit through to the summary order that because of Gordon’s faults and habits and manner of living Karl was to be permanently denied the privilege of knowing his father, it is apparent that the meaning of the clause above quoted is in effect a denial of a finding of legitimacy.

Susan has voluntarily left the picture. Half of Karl’s natural family has abandoned him. Only his father remains loyal to his child. The treatment accorded Gordon in this case and the principles applied to its determination are not consistent with the status of parent and legitimate child, but are consonant with the cruel legal principles reserved as a social punishment for those cases wherein a father of an illegitimate child attempts to obtain its custody from an adverse party having an equal or superior right.

By a long-standing provision in our law, borrowed from the California Civil Code, Utah Code Ann. 1953, 78-30-12, provides:

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth.

The term “adoption” in this statute means and is used in the sense of “legitimation.”

*Blythe v. Ayres*, 96 Cal. 32, 31 P. 915; (1892);

*Re McNamara*, 181 Cal. 82, 183 P. 552, 19 L.R.A. 40 (1919);

*Re Navarro*, 77 Cal. App. 2d 500, 175 P. 2d 896 (1946).

The effect of such legitimation by acknowledgment, in the absence of any provision in the law to the contrary, is to confer upon the child and the parent the same rights and status as though the child had been born in lawful wedlock, according to each the reciprocal rights and duties of and the same as all legitimate children and their parents. The wording of the statute in this regard is quite clear: “and such child is thereupon deemed for all purposes legitimate from the time of its birth.”

*Pfeiffer v. Wright*, 41 F. 2d 464, 73 A.L.R. 932 (1930);

*Allison v. Bryan*, 21 Okla. 557, 97 P. 282, 18 L.R.A. (n. s.) 931 (1908).

By the expression, “publicly acknowledging it as his own,” is meant the disclosure of the fact of paternity, without concealment, to relatives, friends, acquaintances, and others.

*In re Skinner's Estate*, 65 Cal. App. 2d 528, 151 P. 2d 31 (1944);

*In re Gathings' Estate*, 199 Okla. 460, 187 P. 2d 981 (1947);

*In re Flood's Estate*, 217 Cal. 763, 21 P. 2d 579 (1933);

*In re Baird's Estate*, 173 Cal. 617, 160 P. 1078 (1916);

*In re Garr*, 31 Utah 57, 86 P. 757 (1906);

*In re Gird's Estate*, 157 Cal. 534, 108 P. 499 (1910).

Gordon publicly acknowledged that he was Karl's father by filling out and filing the certificate of birth describing himself as the father (Ex. 11). In *Estate of Mc-Namara* the court said that there could be no more public acknowledgment than the act of the father in signing the child's birth certificate describing himself as the father.

Immediately following Karl's birth, Gordon notified Susan's mother (R. 39). Susan's father named the child, giving it the middle name of Bernett which is the middle name of a brother of Gordon, now deceased (R. 174, 151). Gordon publicly acknowledged that Karl was his son to all with whom he came into contact (R. 44, 89, 108, 112, 113, 121, 122, 130, 133, 134, 137, 140, 164, 222). Witnesses for the petitioner are among this group. The record is abundantly filled with evidence to this effect; it is absolutely devoid of any denial of paternity or inference of any denial of paternity. Acknowledgment of paternity has been made to the petitioner (R. 91), in open court (R. 92), to friends (R. 155) and to acquaintances (R. 164, 273).

The household of a bachelor constitutes a “family” as also does the household of the father even though he may be living in an unlawful relationship with the child’s mother.

*In re Garr*, 31 Utah 57, 86 P. 757 (1906) ;

*In re Jones’ Estate*, 166 Cal. 108, 135 P. 288 (1913) ;

*In re Gathings’ Estate*, 199 Okla. 460, 187 P. 2d 981 (1947) ;

*Estate of McNamara*, 181 Cal. 82, 183 P. 552, 7 A.L.R. 131 (1919) ;

*In Re McGrew*, 183 Cal. 177, 190 P. 804 (1920).

The father was a bachelor in the *Garr* case. In the *McNamara* case the father lived with the child’s mother who was the lawful wife of another. In the *McGrew* case the parents lived without the benefit of the marriage ceremony as man and wife. To hold otherwise would defeat the obvious purpose and the plain meaning of the statute.

Gordon, Susan and Karl lived together as a family unit until Susan’s departure with Sharp (R. 44, 45, 89, 113, 121). Susan had so testified, according to the record, in the earlier proceedings (R. 6). The court specifically found that Gordon and Susan lived together as man and wife from February 21, 1953, to October 30, 1955 (R. 22, No. 2).

Gordon’s previous marriage cannot affect the application of the legitimation statute, for that marriage was

terminated prior to Karl's birth. The Court erred somewhat in its finding that Gordon was married to one Martha Dander Singer from June 22, 1952, to September 24, 1953. The translation of the document (R. 95) and the document itself (Ex. 1) show that Gordon was married to one Martha Bander Singer on November 19, 1951, and that the date of the annulment is April 5, 1952. A careful reading of either the translation or the original shows that September 24, 1953, is the date borne by the copy in evidence, which is a combination of the marriage and the annulment records. Error or not, Gordon was not married to another at the time he lived with Susan, and the evidence is clear that he had not been married to Singer for over two and one-half years prior to Karl's birth.

That Karl was "received" into Gordon's family cannot be seriously questioned. Receiving is accomplished by a physical acceptance or being of the child, even though for a short length of time in the household of the father. In this instance the time was not short, it was over nine months.

The *Jones*, *Gathings*, *McGrew*, and *McNamara* cases, previously cited, support this proposition. So also does *In re Buffington's Estate*, 169 Oka 487, 38 P. 2d 22 (1934). In the *Jones* case two months sufficed; in the *Gathings* case visits to the father's abode were held sufficient.

As to the "otherwise treating it as if it were a legitimate child" portion of the statute the result is equally clear. The standard set is the treatment which the par-



ticular father in question would have given to a legitimate child under the same circumstances, not what he should give, nor what the majority of men would give, to such a child.

*Re Kessler's Estate*, 74 N.W. 2d 599 (S. Dak. 1956).

*Estate of Heaton*, 139 Cal. 237, 73 P. 186 (1903);

*In re Gird's Estate*, 157 Cal. 534, 108 P. 499; (1910);

*In re Jones' Estate*, 166 Cal. 108, 135 P. 288 (1913);

The record shows that Gordon took good care of his child, despite the concerted attempts of the petitioner's witnesses to show illness. The conclusion to be drawn from the evidence is that Gordon was very fond of his son, and was proud of him. He was taken with him to visit neighbors. He was treated as if he were legitimate.

The evidence is not controverted with regard to the legitimation of Karl. One wonders if the cumulative effect of the prior proceedings wherein the attempt by parties present to brand Karl as illegitimate was consistently made (note, for example, the statement to such effect in the Appearance, Waiver and Consent for Adoption appearing on court stationery (R. 8)) and the previous actions of the court taken upon such a premise of illegitimacy may not have served to construct too high a hurdle for the full appreciation of the legal significance of the facts presented to the court in the hearing.

Were the failure of the court to find Karl legitimate merely an error of form, there would be little ground for complaint. The error, however, was more than one of hol-

low form — it was very substantial. Failure to consider Karl to be the legitimate son of Gordon, from the beginning of this series of actions, undoubtedly contributed greatly to the treatment of this case as though it were a habeas corpus proceeding.

There is a material difference between a habeas corpus proceeding and a statutory action such as this. The first is usually a contest between persons each having a similar or nearly equal interest in the child. The latter is an action brought in the name of the state in a court of limited jurisdiction and power, not to determine relative rights of custody, but initially at least, to determine whether the conditions existing at the time of the petition and hearing are such as to require the intervention of the state in the interest of the child, and if so, then to apply the power of the state, pursuant to the law, for that purpose. That purpose is the interest of the child, not the interest of an adoption agency with a waiting list.

## POINT II.

**KARL BERNETT BAILEY IS NOT A NEGLECTED CHILD WITHIN THE PURVIEW OF THE LAW AND THEREFORE THE COURT WAS WITHOUT POWER TO DEPRIVE J. GORDON BAILEY OF THE CUSTODY OF HIS SON.**

The Juvenile Courts of the State of Utah are specially created courts of limited jurisdiction. The source of their jurisdiction is Utah Code Ann. 1953, 55-10-5, which provides with reference to the issues on this appeal:

The juvenile court shall have the exclusive original jurisdiction in all cases relating to the neglect, dependency, and delinquency of children who are under eighteen years of age, . . . and the custody, detention, guardianship of the person, trial and care of such neglected, dependent and delinquent children. . . .

Prior cases in this court have affirmed the rule that unless the facts of the controversy bring the case within the scope of the jurisdiction of the juvenile court, such court does not have the power to interfere or act in the matter. And in order to make a determination with reference to the child and a parent, such parent must also be before the court.

*In re Bennett*, 77 Utah 247, 293 P. 963 (1930);

*In re Graham*, 110 Utah 159, 170 P. 2d 172 (1946);

*In re Johnson*, 110 Utah 500, 175 P. 2d 486 (1946);

*In re Bradley*, 109 Utah 538, 167 P. 2d 978 (1946).

Although alleged to be both a dependent and neglected child in the petition filed by Virginia Lee Bennett April 30, 1957, the court's failure to find with reference to dependency eliminates that aspect of the case. Neglect, as concerns our controversy, is statutorily defined and limited by Utah Code Ann. 1953, 55-10-6:

The words "neglected child" include:

A child who is abandoned by his parents, guardian or custodian.

A child who lacks proper parental care by reason of the fault or habits of the parent, guardian or custodian.

A child whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care or other care necessary for his health, morals or well-being.

A child whose parent, guardian or custodian neglects or refuses to provide the special care made necessary by his mental condition.

A child who is found in a disreputable place or who associates with vagrant, vicious or immoral persons.

A child who engages in an occupation or is in a situation dangerous to the life or limb or injurious to the health or morals of himself or others.

This court in the *Johnson* case stated, at page 489, with reference to dependency, “the law contemplates a then existing condition of dependency that requires the intervention of the juvenile court.” The definitions of a “dependent child” in this same section of the statute, Utah Code Ann. 1953, 55-10-6, are also in the present tense. The *Johnson* case rule is applicable with equal vigor for the prevention of unwarranted court action in an alleged “neglected child” case as well as in a “dependent child” case.

It would be an anomalous situation and undoubtedly a deprivation of due process to confer upon the juvenile court jurisdiction of a child because one parent fails in its duties when the other parent has not and allow the court to deprive the non-erring parent of the custody of his child permanently by virtue of the default of the other.

There is authority for the proposition that even the petition is void if it fails to include the essential elements required for jurisdiction. This court's holding in the *Johnson* case is applicable here.

A realization by the juvenile court that the Society's failure to attempt to locate Gordon, their refusal to return Karl to Gordon and their exclusive custody of the child had effectively foreclosed any opportunity for Gordon to care for his child during the entire period commencing February 9, 1956, and continuing unbroken to the time of the hearing should have limited the court's inquiry, if any, to the question of whether Gordon had abandoned his child.

Abandonment was alleged in the petition; it was not found by the court. Not stopping a mother from taking her nine-month-old nursing child with her hardly constitutes abandonment by the father.

*In re Walton*, 123 Utah 380, 259 P. 2d 881 (1953) ;

*Jensen v. Earley*, 63 Utah 604, 228 P. 217 (1924) ;

35 A.L.R. 2d 663 contains a comprehensive collection of recent cases.

The second allegation is that because of the faults and habits of the father, the child lacks proper parental care. The facts alleged relate to the previous relationship between Gordon and Susan and a non-specific general allegation of "other faults and habits."

That the court erred to the substantial prejudicial error of the child and his father when the court decreed

“that J. Gordon Bailey, because of his faults and habits and manner of living should not have the custody of his child returned to him and is hereby deprived of his rights to the custody of said child,” is self-evident upon a comparison of the findings of the juvenile court with the evidence before it. Substantially three-fourths of the court’s findings are based on Susan’s testimony, or consist not of findings of fact at all, but of mere recitals of Susan’s statements. Her testimony is, in the main, unsubstantiated by any of the other twenty-one witnesses in the case.

For example (R. 22, Para. 2) “. . . Susan Willis Sharp met J. Gordon Bailey at an art exhibit and kept company for a short time engaging in sexual intercourse without marriage . . .” is unsupported by any evidence except the statement of Susan herself, which is contradicted by Gordon (R. 258).

In paragraph 4, “. . . while in California Susan Willis had a miscarriage and was given no medical care by her husband; that she testified that she asked Mr. Bailey for medical attention but was refused . . .”; the testimony of lack of medical care is supported only by Susan’s testimony (R. 260, 261) and refuted by Gordon (R. 269).

Also in paragraph 4, “. . . . the mother testified that J. Gordon Bailey in refusing to give her medical attention said that birth was a natural thing; that animals did not have doctors in giving birth to their offspring and that doctors infected people with cancer so that they could continue getting money from their patients.” Again this



testimony from the mother who has abandoned two children to adoption agencies is refuted by the father who wants to raise his own child himself (R. 265).

In paragraph 5, the court says that Susan further testified as to Gordon's forcing her to participate in unnatural sex practices and that he engaged in unnatural sex practices with her brother, age 12. No other evidence supports this statement, which even the court did not find as a fact, but merely repeated. One wonders why the boy was not brought before the court.

Also, in paragraph 5, repeating evidence, but not finding facts, the court made reference to Susan's testimony that Gordon suggested she become a prostitute and the suggestion that she have a girl friend come live with them so they could have sex relations as a trio. Later, with reference to the girl friend, Susan contradicted her prior testimony and admitted that she might have made the suggestion herself (R. 320). What weight is to be accorded to this woman's contradictory evidence?

And in Paragraph 8 (R. 23), the court recited "that Susan testified that just prior to her leaving, J. Gordon Bailey said "he hoped he could dump the baby and her."

This non-finding of fact recital of hearsay testimony has been blown out of proportion even by being inserted in the findings, for Susan said that Sharp told her this (R. 283). Is this the evidence upon which a parent-child relationship, already partially dismembered, is to be completely extinguished?

The finding (R. 23, Para. 11) “. . . that his only effort for the custody of the child was after he was contacted by the Children’s Service Society and he then learned that the child was being considered for adoption, . . .” is equally clearly contrary to the overwhelming weight of the evidence, even that supplied by the petitioner’s case, as far as the inference that Gordon made no attempt to find his son prior to being notified the Society had him. Susan’s mother testified that Gordon was upset when Susan left (R. 40); that Gordon tried to locate the child (R. 44). Alice Olsen testified that Gordon contacted Susan and the child during the first three months after Susan’s departure (R. 70). Sharp’s sister testified that Gordon asked her where Susan was (R. 163). Testimony by Susan’s father indicated Gordon wanted Susan to return (R. 163). Gordon testified the child was taken only over his objection (R. 226). At this time, Gordon contacted the Willis’s, Sharp’s sister, and others (R. 225, 226, 229, 231). He visited Sharp’s mother (R. 163). He wrote to Susan (R. 236, 237) asking their return. He and Susan’s parents traveled to Goldhill, Nevada, in search of Susan and Karl (R. 174). Gordon communicated with Sharp’s brother (R. 234), and testified he checked with the bus and train stations (R. 231).

The determination that Gordon’s manner of living is such that he should not have the child is totally unsupported by any competent evidence. Only Susan, her mother, and Alice Olsen testified adversely to his living conditions, while Mr. Johnson, and Karyl J. Lamont, people with no axe to grind, indicated quite to the contrary (R.

171, 172, 186). Mr. Johnson's testimony (starting at R. 170) should be given the credence and weight it deserves. He raised a family in the same house.

As to the care of the child, only Susan and Susan's sister intimate any mistreatment of the child, while numerous other witnesses indicated to the contrary and that the child was happy and exceptionally healthy (R. 109, 113, 121, 130, 131, 134, 141, 142). The only testimony of illness is from Susan and her mother. Gordon's boss for the past four years indicated Gordon to be a good worker, and at times to work too hard (R. 128).

The evidence as to sexual deviation is so suspect that it deserves no weight. The basic source of this testimony is the woman who on one hand says Gordon forced her to have unnatural sexual intercourse while at the same time testifying that while living with him for three years she wanted to marry him, begged him to marry her in fact. Which story is true? It is suggested that each suggests mendacity in the other. Even Susan's sister, who testified about advances toward her by Gordon, was a frequent visitor at Gordon's home nonetheless. Is her story to be given any substantial weight? The proper conclusion is that no improper advances were made (R. 71-78).

Witnesses testified that they would prefer Gordon to raise their children should they be unable to (R. 109, 131, 135, 138).

The only real evidence of neglect of the child is the child's condition when Susan turned it over to the Society, after having had it in her care for over three months.

The petitioner's evidence is that at that time the child suffered from allergies, a rash and a bronchial condition. Who refused the child medical care? Even the court found it apparently healthy while in Gordon's home (R. 23, Para. 8).

Susan's mother was accepted by the court as a medical expert. Surely she or Susan would have obtained aid before bringing the child to the Society. But it is clear they did not. Now they come in and complain about Gordon. Much ado is made about Gordon's failure to have the child immunized against various diseases. It is clear that at the time Susan or her mother could have done so without Gordon's alleged resistance, that they did not (R. 56).

It is common knowledge that many children are conceived and born out of wedlock and that a majority of these children are taken from their natural parents and placed for adoption through the services of state licensed agencies. The increased tendency to juvenile delinquency in unnatural parent-child units is well known. In this instance there is the wonderful opportunity to reunite a father and a son. Must "business as usual" be so immune to obvious merits of a natural parent-child relationship as to deny this child the right to know his father in order that the orderly procedures of the Society be not disrupted.

Actually the greater part of the 321 pages of the transcript of the oral testimony concerned itself with what the Appellant submits to be immaterial and irrelevant matters intended to prove that because of past conduct

the child was neglected. It is impossible to consider all of the evidence in the limited scope of this brief. The Appellant respectfully submits that this Court's responsibility extends to a careful study of the evidence and the record.

The conclusion is inescapable that the question of "neglect" as defined by Utah law was shunted aside and the case determined by rules which are applicable to a different set of facts. In a contest as to custody between two persons each having a natural or legal right to a child, it may not be improper to weigh carefully in the scales of justice the various factors which the court considers to affect the interests of the child. This is not improper because regardless of which person gets the child, it is a person with a right to the child in the first instance. Such is not the case here. The petitioner and the Society have no rights to Karl save such as might be attributable to the order of the Juvenile Court in the matter. Their only interest otherwise is that interest prompted by the nature of the Society's activity — placing of children for adoption with people not even parties to the contest. Instead of concerning itself with the question of "neglect" it is apparent that the petitioner's position that she would not place a child in Gordon's home for adoption set for the court the minimum standard with regard to whether Gordon would ever see his child again and controlled the court's determination of the matter. One question whether our society is so socialized that a father must gain the permission of an adoption agency before he can enjoy the love and companionship of his own son.

The law is well settled that the decisive issue in a proceeding of this nature is the initial determination, free from other factors, of whether the child is a "neglected child." If not, it follows that the court is without jurisdiction to interfere with a parent's rights to its child.

*In re Young*, 180 Ore. 187, 174 P. 2d 189 (1946) ;

*In re Johnson*, 110 Utah 500, 175 P. 2d 486 (1946) ;

*State v. Pogue*, 282 S.W. 2d (Springfield Ct. of App. 1955) ;

*In re Warren*, 243 P. 2d 632 (Wash. 1952) ;

*In re Rinker*, 117 A. 2d 780 (Pa. Sup. 1955) ;

*Pettit v. Engelking*, 260 S.W. 2d 613 (Tex. Civ. App. 1953).

Custody controversies of this nature do not arise in vacuo, but because someone either desires to impress their standards of conduct upon the parent or child, or desires to avail themselves of the juvenile court as an adoption court, or both.

*Ford v. State*, 104 N.E. 2d 406 (Ind. App. 1952) ;

*In re Knight*, 212 La. 357, 31 So. 2d 825 (1947) ;

*People v. Hinton*, 330 Ill. App. 130, 70 N.E. 2d 261 (1946) ;

*Carrera v. Kelly*, 283 P. 2d 162 (Colo. 1955).

The Washington Supreme Court in the *Warren* case said, at page 633, in reference to their statute :



The juvenile court has no jurisdiction over a minor unless it is proved that the minor is either (a) delinquent or (b) a dependent child. In *re Miller*, Wash., 242 P. 2d 1016. The concept that all children are wards of the state, and that the state and its agencies have an *unhampered* right to determine "what is best for the child," is not a recent or an advanced idea. It belongs to a repudiated, political and moral philosophy foreign and repugnant to American institutions. Stated more specifically, the mere fact that certain individuals invoke the aid of our courts to litigate the question of who shall have the custody and control of a minor, does not, *ipso facto*, vest our courts with jurisdiction to decide the issues presented. The court must first find the child either delinquent or dependent.

The philosophy expressed in the *Rinker* case is particularly apropos the present controversy. There the court said, at page 783:

A child cannot be declared "neglected" merely because his condition might be improved by changing his parents. The welfare of many children might be served by taking them from their homes and placing them in what the officials may consider a better home. But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.

The power of the juvenile court is not to adjudicate what is for the best interests of a child, but to adjudicate whether or not the child is neglected.

.....

That past conditions and conduct are not sufficient to bring a child within the purview of the "neglected child" provisions of statutes such as ours is well established.

*In re Johnson*, 110 Utah 500, 175 P. 2d 486 (1946);

*In re Knight*, 212 La. 357, 31 So. 2d 825 (1947);

*Pettit v. Engelking*, 260 S.W. 2d 613 (Tex. Civ. App. 1953);

*In re Rinker*, 117 A. 2d 780 (Pa. Sup. 1955).

The rule of law which the petitioner asks to be applied in this case is that upon a showing of evidence of past nonconformity on the part of a parent, that parent's child shall be declared a ward of the juvenile court and immediately adopted by strangers to the court. This rule allows no locus poenitentiae. It is an innovation to our law. No authority for this rule has been found. And it is submitted that such a rule as now espoused by the petitioner shocks the human conscience, is repugnant to a sense of fair play and is contrary to minimum standards of human dignity.

Under these circumstances, the decision of counsel not to prolong a hearing by introducing rebuttal evidence against what is submitted is immaterial evidence and upon which the petitioner has the strong and clear burden of persuasion cannot be construed as a judicial admission. Considering the factors and circumstances of the case this evidence is not even competent to show past neglect.

Even taking the evidence in the light least favorable to Gordon, there is insufficient competent evidence on

the record to sustain a finding of present neglect. It must be here noted that most of the evidence introduced by the petitioner in this regard was not found to be fact by the court. The court made certain specific findings of fact as required by statute. As to other matters the court only recited that certain witnesses had testified as to certain matters. This does not meet the requirement for specific findings.

The third allegation that Gordon has neglected and refused to provide subsistence, medical care, etc., is equally without merit in this proceeding. The arguments previously enumerated concerning the necessity of present neglect are incorporated herein by reference.

A divergence of views as to the adequacy of past medical care is not present neglect. Unless the child is in present danger of an extreme degree the court will not impose its views in these matters upon a parent, and even then such action is taken with greatest reluctance and only to the minimum extent necessary.

*In re Hudson*, 126 P. 2d 765 (Wash. 1942).

Even strong dissatisfaction with a parent's past treatment of his child is not grounds in law for summarily ordering that such child be adopted by unknown persons. Justice may be blind, but must it be cruel also?

If, within the scope of this third allegation, Karl is a neglected child, we need but look to Susan and the Society to pinpoint responsibility.

If the judgment of the lower court is to be sustained, it can only be sustained if the following question would be answered in the affirmative by this court: Assuming Gordon's wife to be now pregnant or to become so in the future, would this court, upon the record now before it in this case, be justified in depriving Gordon of the custody of such a child in the event something untoward happened to the mother?

If Gordon is the unfit creature which the petitioner would have us believe he is, why has not the Society suggested any of the many steps possible to effect a rehabilitation so that he and his son may be reunited? One wonders if the failure so to do is not an indication that there never was either an intention or desire to do otherwise than dispose of Karl through the placement facilities of the Society.

The fourth allegation is that the child is in a situation dangerous to his health and morals.

The arguments set forth with reference to the other three allegations are in point here, and are hereby incorporated by reference. The court did not find on this allegation and therefore the finding to be inferred is against the petitioner.

### POINT III.

#### THE COURT ERRED IN ADMITTING AND IN CONSIDERING IN ITS DECISION EVIDENCE CONCERNING ALLEGED ADOPTIVE PARENTS.

The testimony of witnesses for the petitioner, and particularly Virginia Lee Bennett herself support the

conclusion that she and the Society connived to keep Karl from his father.

On February 7, 1956, Susan contacted the Children's Service Society about placing her and Gordon's child there (R. 55). Virginia Lee Bennett admits that no attempt was made to search for either the birth certificate of the child or for the name of the father (R. 85). She notarized the authorization to take the child (R. 85) and on February 9, 1956, the Society took custody of the child from Susan (R. 55). Virginia Lee Bennett now asserts that Susan gave her the wrong birthdate and name of the father, and that, therefore, a search could not be made (R. 85). No reference is ever made by her that she ever tried to get more detailed information from Susan in order to locate the father. The conclusion is inescapable that there was no desire to know this information — a predetermined conclusion, arrived at without a proper investigation or hearing, that the father ought to be deprived of his rights to the child (R. 90).

On November 21, 1956, Susan had already told the Society that she no longer wanted the child (R. 58). On December 12, 1956, without attempting to locate the father (R. 86), a hearing was held in which the court found the child to be dependent and neglected. The true name of the father and the true birthdate of the child were known prior to this hearing (R. 1, 84).

On January 19, 1957, eleven months after the Society took custody of Karl, the Society was advised that a hearing ought to be held to deprive the father of his rights (R. 59, 88). This was before any attempts had been



made to locate the father or any investigation made concerning him or his rights.

In August or September, 1956, Virginia Lee Bennett knew Lee (R. 80) and that Lee knew J. Gordon Bailey, father of Karl (R. 80) and in December she received personal knowledge of their wedding (R. 81). Even so, no mention was made to Lee, nor to Gordon, about the child (R. 85, 86). Shortly after Christmas, in the month of December, 1956, Lee informed her that she and Gordon were going to take a trip to California (R. 81). Even at this time no mention was made to Lee about Gordon's child or the proceedings which were in progress (R. 86). It is equally obvious that during the several occasions when Virginia Lee Bennett called the parents of Lee, that she did not tell them about Gordon's child or its predicament (R. 80).

Not until April 19, 1957, fourteen months after the Society obtained possession of Karl, was Gordon called and asked to come in concerning the boy (R. 60). Gordon kept this appointment (R. 60), but was offered no information about the boy, offered no assistance in regaining him, instead he was then and there asked to sign his child away (R. 86).

Gordon refused, informing the Society he wanted to keep the child (R. 71, 81).

Gordon and counsel visited Virginia Lee Bennett shortly thereafter and were told that the child had not been placed for adoption (R. 346), yet even while making that statement, if we are to place credence in the rest of

her testimony, she knew that the child had been placed in a foster home for fourteen and one-half months, that the foster home parents had applied for adoption, and that the Society had approved their qualification (R. 349, 350).

Immediately following all these futile efforts by Gordon to see and regain custody of his only child, Virginia Lee Bennett filed the present petition alleging that Gordon had neglected and abandoned his child. The sequence of events suggest the possibility of a long-range pre-conceived plan to see that Gordon did not regain his son. Plan or no plan the evidence about the foster parents is immaterial to any issue then before the court in this statutory neglect proceeding, but was materially persuasive according to the finding, conclusion and judgment.

*In re Warren*, 243 P. 2d 632 (Wash. 1952).

Adoption agencies who hire foster parents to temporarily care for children in their custody are usually careful not to mislead such foster home parents into believing that they have any rights to the children in their care.

It is a perversion of the legitimate use of the juvenile court that it be used to facilitate adoption proceedings which cannot otherwise be accomplished because a parent will not willingly relinquish his own child into the permanent future care and custody of strangers.

The repugnance felt at the use of this type of proceeding is expressed without reservation in *Carrera v. Kelley*, 283 P. 2d 162 (Colo. 1955). Perhaps the author of that opinion is a father.



It is unfortunate that the abstract only was published in *People v. Hinton*, 330 Ill. App. 130, 70 N.E. 2d 261 (1946), for though there are undoubtedly differences in the statutes and in the nature of the misuse, the published abstract well conveys the judicial dislike of abuse of actions of this type. Part reads:

To permit neglected child proceedings instigated by paternal grandfather against mother to be prosecuted in interest of grandfather by special counsel hired by grandfather, and to allow the case to be used as an opening wedge for divorce, was not an exercise of county court's sound discretion, and was error requiring reversal of order depriving mother of custody of child.

There is no justification for ignoring Utah Code Ann. 1953, 55-10-30, which limits the power of the court in the matter of its judgment, or Utah Code Ann. 1953, 55-10-31, which contemplates a retention of continuing jurisdiction as long as the child is a ward of the court, or the preferred rights of parents guaranteed by Utah Code Ann. 1953, 55-10-32, or the rights of a parent to regain custody of his child given him by Utah Code Ann. 1953, 55-10-41, and for summarily acting in the capacity of an adoption court. Even Utah Code Ann. 1953, 55-10-43, which purports to authorize the court's approval of adoptions cannot be construed to bypass the plain import of the law and the protections afforded a parent and child. This provision must be construed in the light of the other provisions and the court decisions construing them.

In *Ford v. State*, 104 N.E. 2d 406, 407 (Ind. App. 1952) the court said:

with a minimum of disruption is to be denied the inalienable right of all children to grow to maturity in the home of their natural parent because an adoption agency so desires.

#### POINT IV.

THE ORDER PURPORTING TO DEPRIVE J. GORDON BAILEY PERMANENTLY OF ALL RIGHTS TO THE CUSTODY OF HIS SON AND TO AUTHORIZE HIS ADOPTION IS VOID BECAUSE IT IS UNSUPPORTED BY THE FINDINGS AND IS CONTRARY TO LAW.

Even if the court's finding of neglect should stand, its order permanently depriving Gordon of his son is void.

Utah Code Ann. 1953, 55-10-32, provides, for our purposes :

No child . . . shall be taken from the custody of its parents . . . unless the court shall find from the evidence introduced in the case that such parent . . . has knowingly failed and neglected to provide for such child the proper maintenance, care, training, and education contemplated and required by both law and morals, . . . or unless the court shall find from all the circumstances of the case that public welfare or the welfare of the child requires that his custody be taken from its parents . . .

One searches the findings in vain for a statement that Gordon has either "knowingly failed and neglected to provide . . . " or "that the public welfare or the welfare of the child requires" that Gordon be deprived of his cus-

tody. What the court did conclude is that in its opinion it would be best for Karl to remain with those unidentified persons whom the Society assert desire to adopt Karl. Such a finding does not meet the requirements of the law for it is vastly different from either of the findings required to validly deprive a parent of his child, even temporarily.

Nor does the evidence support either ground, for the only conclusions to be drawn from the evidence are that Karl was as healthy, at least, as the average child and that he was not deprived of care necessary for his well being. Though Gordon's income at the time of the hearing may have been modest it was sufficient. He is debt free, owns a car and a truck, lives in a home which boasts all the modern conveniences, and he is ready, willing, and able to support his child. Surely the fight he is now waging for the return of his child is indicative of his determination to care for his child himself.

The point now under debate is whether the juvenile court has the power in a proceeding such as this to permanently deprive a parent of the rights to his child, without any further limitation on the court's power than that it find the child neglected. The better reasoning compels a negative answer, although no direct authority in point has been found.

Utah Code Ann. 1943, 55-10-30, enumerates the permissible judgments in a neglect action. This section is devoid of any authority for a complete severance of the parent-child relationship. It expressly provides that the

preference of parents shall be given due consideration. The last portion of this section is limited by the phrase “to the end that its wayward tendencies shall be corrected and the child saved to useful citizenship” which clearly limits this provision to delinquency cases.

Utah Code Ann. 1953, 55-10-31, expressly provides for continuing jurisdiction of the juvenile court.

Utah Code Ann. 1953, 55-10-41, provides a means for the parent to regain his child upon a showing of changed circumstances at any time.

It is not to be seriously contended that Utah Code Ann. 1953, 55-10-43, allows a permanent deprivation of all rights any time there is evidence of persons who desire to adopt a child in the custody of the court. If so, why has the legislature not openly bestowed adoption jurisdiction upon the juvenile court?

Only the district court has power to effect an adoption, and limits are placed upon its power. The power of the juvenile court to authorize an adoption must be within the limits of the district court to effect one.

Utah Code Ann. 78-30-4, apparently considerably longer a part of Utah law than the present definition of “neglected child,” covers, for the purpose of the case at bar, only instances when the parent has been judicially deprived of the custody of his child on account of “cruelty, neglect or desertion.”

There is no authority nor basis in logic to assume that “neglect” in the one provision means the same as

“neglected child” in the other. One is for the purpose of foregoing the necessity of parental consent in an adoption proceeding; the other is for the purpose of defining the jurisdiction of the juvenile court. To construe “neglect” in the adoption statute to be synonymous with “neglected child” in the juvenile court law would undoubtedly be unconstitutional for it would result in the possibility of a parent’s losing his child forever upon any finding of neglect. Such a construction would run contrary to the many provisions in the law designed to preserve the integrity of the family unit.

There may be instances in which the juvenile court might find such cruelty, neglect or desertion as would justify the district court, upon an examination of the record from the juvenile court, in proceeding with an adoption. There is no such finding in this case and since the district court could not validly order an adoption neither can the juvenile court validly authorize it.

In addition, the minimum requirements of procedural due process require that a person be given notice of the cause of action alleged against him and some indication of the relief demanded. The petition is silent in regard to adoption of Karl by others. The issue of adoption was not tried with the consent of the parties — Gordon properly objected. In such a situation as this a judgment exceeding the scope of the petition is invalid.

*Fisher v. Bylund*, 97 Utah 463, 93 P. 2d 737 (1940).



## POINT V.

EVEN ASSUMING THE JUVENILE COURT TO HAVE HAD THE POWER TO TEMPORARILY DEPRIVE J. GORDON BAILEY OF THE CUSTODY OF HIS SON, TO DO SO WAS AN ABUSE OF DISCRETION AND CONTRARY TO LAW.

The previous argument concerning the failure of the Court to find that the welfare of the child or of society required depriving Gordon of the custody of his son, is hereby incorporated by reference.

Whether gauged against the statutory enactments of the juvenile court law or against the judicially formed precedents in habeas corpus custody proceedings there is no justification for not returning Karl to his father.

*In re Bradley*, 109 Utah 538, 167 P. 2d 978 (1946) ;

*Baldwin v. Nielson*, 110 Utah 172, 170 P. 2d 179 (1946) ;

*Deveraux v. Brown*, 2 Utah 2d 30, 268 P. 2d 995 (1954) ;

When it has been felt necessary to separate a child from his parents, extreme judicial restraint has been exercised to protect the right of the parent to the future custody of his child and the right of the child to his parent.

In the *Bradley* case this court affirmed the lower court's finding that the child was neglected. The mother had intentionally left the child with others. She knowingly failed and neglected to provide for it. This court affirmed a temporary deprivation of custody on the ground that under then presently existing conditions the

welfare of the child required that it be not immediately returned to its mother. But in so doing, this court said, at page 985:

This does not mean that Barbara will be forever barred from obtaining the custody of her baby, the child remains a ward of the juvenile court, and the custody of the child may be changed when justified by the surrounding facts and circumstances.

In the instant case there is no competent evidence whatsoever to sustain even a temporary deprivation of custody. The court did not find Gordon unfit. It did not find his wife unfit. The court felt that because of Gordon's "faults and habits and manner of living" the child would be better off with its present custodians. This does not meet the requirements set in the law for depriving a parent of his child.

Utah Code Ann. 1953, 55-10-32.

Even proof of past immorality or misconduct can only deprive a parent of the present right to his child when there is an inescapable conclusion that such misconduct will have a present effect upon the child, and even then a child will not be placed upon the auction block without giving the parent an opportunity to reform. It is the present conditions under which the child will live, not the past conduct of the parent, that is decisive.

*In re Miller*, 242 P. 2d 1016 (Wash. 1952) ;

*Pettit v. Engelking*, 260 S.W. 2d 613 (Tex. Civ. App. 1953) ;



*In re Bradley*, 109 Utah 538, 167 P.2d 978 (1946) ;

*In re Johnson*, 110 Utah 500, 175 P. 2d 486 (1946) ;

*In re Zerick*, 129 N.E. 2d 661 (Ohio Juv. 1955) ;

*In re Bryan*, 48 Nev. 352, 232 P. 776, 37 A.L.R. 527 (1925) ;

In the *Zerick* case the court said at page 665:

Even where the state compels the parental surrender of a child because of unfavorable circumstances clearly detrimental to the welfare of the child, it will not order permanent surrender of the parental rights and duties if effective control over the child can be established through the awarding of temporary guardianship and legal custody without ending for all time these final rights and duties. Ordinarily a parent though declared unfit will be permitted to reclaim the child when the circumstances change for the better. Any other policy would be harsh and cruel to the parent, a denial to the child of its natural birthright and contrary to public policy.

In *State v. Black*, 3 Utah 2d 135, 283 P. 2d 887 (1955), is the statement that “unless the polygamous relationship and the unlawful cohabitation between Leonard Black and Vera Black cease, *and completely*, that the Juvenile Court should take the children from the *appellants permanently*.” Unless wrenched out of context, this statement cannot be offered to support the proposition that a child should be withheld from its parent because of past, now terminated, misconduct. The holding in the *Black* case is not authority for the present controversy because of obvious factual differences. At the time of the petition in

the *Black* case the children were living with their parents and their parents were openly violating the criminal law of the state of Utah and teaching their children to do likewise.

If the court's reference to the "faults and habits and manner of living" is based on relative material affluence, such a comparison is insufficient to support a deprivation of custody.

*In re Warren*, 243 P. 2d 632 (Wash. 1952).

It is also contrary to the evidence. There was no evidence introduced to the effect that Gordon could not presently support his child. All the evidence is to the contrary. Gordon is healthy, willing and able to care for his child. His wife, though a divorced woman who has never raised any children, is a refined, educated person. She is a good cook, an excellent seamstress, and most important of all, she desires to care for Karl and to adopt him as her own.

## POINT VI.

### THE JUDGMENT MUST FAIL BECAUSE THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW DO NOT SUPPORT IT.

This argument is essentially a resume of the previous arguments, which for the sake of brevity will not be here repeated.

Utah Code Ann. 1953, 55-10-30, requires that the juvenile court "shall enter in writing the facts constituting such . . . neglect . . ."

Point II of this argument shows that the judgment of neglect is not supported by the findings of fact. Points IV and V concern the validity of the judgment permanently depriving Gordon of his child, or even of temporarily depriving Gordon of his child, and show that the judgment of the court exceeds the findings of fact. These arguments are hereby incorporated by reference.

The statutes of this state have established those conditions under which the juvenile court may act. They also have established the requirements for the various actions within the scope of the court's power.

These facts must be found by the court or its judgment cannot stand. A discussion of part of the evidence and the court's reasoning as to why it arrived at its decision do not constitute the required findings.

*Interstate Circuit, Inc., v. U. S.*, 304 U. S. 55, 58 S. Ct. 768, 82 L. Ed. 1146 (1938).

The court's recital that certain witnesses testified as to certain matters does not constitute a finding that the matters so testified to were true. The deliberate stating that he found certain facts to be true and the equally deliberate stating that certain matters were testified to negatives any inference that the court found both categories to be true.

A judgment not supported by the findings of fact must fail.

## CONCLUSION

For the reasons set forth in this brief, the Appellant submits that the judgment of the juvenile court is erroneous, and that upon the thorough examination of the record, which is this court's responsibility, that this court will concur that the judgment of the juvenile court must be reversed.

It is respectfully submitted that the juvenile court erred in not finding Karl Bernett Bailey to be the legitimate son of J. Gordon Bailey and in not granting the prayer in Appellant's cross petition. It is further submitted that the juvenile court erred in finding Karl Bernett Bailey to be a neglected child, in entering its order permanently depriving J. Gordon Bailey of all rights to the custody of his son and in simultaneously authorizing the adoption of Karl Bernett Bailey by strangers.

The Appellant prays that this court enter its order finding Karl Bernett Bailey to be the legitimate son of J. Gordon Bailey, Appellant, reversing the finding of neglect and restoring to the Appellant the custody and care of his son without the continued jurisdiction of the juvenile court.

But if this court declines to grant in its entirety the above prayer of the Appellant, the Appellant prays that

this Court take such action upon such terms as it deems just to the end that the Appellant may with a minimum of unnecessary delay have the custody and care of his son restored to him.

Respectfully submitted,

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