

1958

State of Utah v. Bailey : Brief of Respondent Children's Service Society of Utah

Utah Supreme Court

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UNIVERSITY UTAH

IN THE SUPREME COURT

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STATE OF UTAH

In the Interest of

KARL BAILEY

Alleged dependent and
neglected child.

Clerk, Supreme Court, Utah

Civil No. 8722

BRIEF OF RESPONDENT
CHILDREN'S SERVICE SOCIETY OF UTAH

McBROOM & HANNI,
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Children's Service Society of Utah

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IN THE SUPREME COURT
of the
STATE OF UTAH

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In the Interest of

KARL BAILEY

Alleged dependent and
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Civil No. 8722

BRIEF OF RESPONDENT
CHILDREN'S SERVICE SOCIETY OF UTAH

STATEMENT OF FACTS

We do not agree with appellant's statement of facts.

On the 10th day of June, 1957, the Juvenile Court of the Second Juvenile District in and for Salt Lake County, State of Utah, after extensive hearings held on May 14, 16 and 24, 1957, (R. 1-2) found the minor child, Karl Bailey, born out of wedlock on January 7, 1955, to Margaret Susan Willis, now Sharp, and J. Gordon Bailey (Ex. 7, R. 221-222), to be a neglected child and the child's

natural father, J. Gordon Bailey, to be an unfit and improper person to have the care, custody and control of the child (R. 22-24). The court entered a decree and judgment by which it terminated all parental rights of Bailey as natural father of the child and granted custody of the child to the Children's Service Society of Utah with authorization to place the child for adoption (R. 25).

The natural mother, Margaret Susan Willis Sharp, hereinafter referred to as Susan, had theretofore on January 16, 1957, executed in the juvenile court a permanent relinquishment of her parental rights in the child and authorized placement of the child for adoption (R. 8). The juvenile court had on January 16, 1957, found the child to be an illegitimate and neglected child and entered a decree permanently depriving Susan of custody of the child and granting custody of the child to the Children's Service Society of Utah with right of adoption placement (R. 9).

From the judgment and decree entered by the juvenile court on the 10th day of June, 1957, finding the child to be a neglected child and the natural father, J. Gordon Bailey, to be an unfit and improper person to have its custody and control and granting custody to the Children's Service Society of Utah with authorization to place the child for adoption, J. Gordon Bailey appeals (R. 27).

STATEMENT OF POINTS

POINT I.

THE UNCONTROVERTED EVIDENCE AND ADMITTED FACTS CONCLUSIVELY SHOW THE CHILD TO BE A NEGLECTED CHILD AND APPELLANT TO BE AN UNFIT AND IMPROPER PERSON TO HAVE ITS CUSTODY WITHIN THE MEANING OF SECTIONS 55-10-6 AND 55-10-32, U.C.A., 1953.

POINT II.

THE ORDER PERMANENTLY DEPRIVING APPELLANT OF CUSTODY OF THE CHILD AND AUTHORIZING PLACEMENT OF THE CHILD FOR ADOPTION IS SUPPORTED BY THE FINDINGS. THE JUVENILE COURT FOUND THE CHILD TO BE A NEGLECTED CHILD WITHIN THE MEANING OF SECTIONS 55-10-6 AND 55-10-32, U.C.A., 1953, AND THAT THE WELFARE OF THE CHILD REQUIRED THAT HIS CUSTODY BE TAKEN FROM APPELLANT.

POINT III.

THE JUVENILE COURT FOUND THE CHILD TO BE THE LEGITIMATE CHILD OF APPELLANT BY VIRTUE OF PUBLIC ACKNOWLEDGMENT PURSUANT TO THE PROVISIONS OF SECTION 78-30-12, U.C.A., 1953.

POINT IV.

THE JUVENILE COURT DID NOT ERR IN ADMITTING EVIDENCE CONCERNING THE PROSPECTIVE ADOPTING PARENTS IN THE INTEREST OF THE CHILD.

STATEMENT OF EVIDENCE

The evidence and proceedings before the juvenile court on the hearing for the determination of Bailey's rights in the child were as follows.

Bailey was born on December 9, 1921. He was thirty-five years of age at the time of the hearing. (R. 211.) He served in the United States Army as a private for approximately three years from June of 1943 to January of 1946 (R. 214, 245). Thereafter he studied art on the G. I. Bill intermittently for approximately two and one-half years (R. 245).

Bailey married a Mrs. Martha Bander Singer in Mexico City, Mexico, on November 19, 1951. Mrs. Singer was divorced from her previous husband. (R. 92-97, Ex. 1.) Mrs. Singer had a fifteen year old son from her prior marriage (R. 99, 293). Bailey testified that he lived with her approximately eight months (R. 92). They came to the United States (R. 293). Mrs. Singer separated from Bailey and returned to Mexico under the following circumstances. Bailey did not support her in the manner in which she was accustomed (R. 99, 293). When she came to the United States, she had a substantial amount of money. When she separated from Bailey, she had to work to obtain the money for her and her son to return to Mexico. (R. 293.) The son by the prior marriage could not adjust to Bailey (R. 293-294). Thereafter, unbeknown to Bailey, Mrs. Singer procured a legal termination of her marriage to Bailey in a Mexican court on April 5, 1952, (R. 93-97, Ex. 1). Bailey did not know that the marriage had been legally terminated until a year and one-

half later, sometime after January 4, 1954, when he received a certified copy of the decree of the Mexican court terminating the marriage, which certificate was dated January 4, 1954, (R. 93-97, 101, 251-252, 279-280). The decree of the Mexican court received in evidence was written in Spanish and translated by a Mexican interpreter who testified that he was not familiar with Mexican law and did not know whether the document constituted, under Mexican law, a decree of divorce or of nullification of the marriage (R. 97-98).

Margaret Susan Willis, now Sharp, the mother of the child, Karl Bailey, was born in Canada and raised in England (R. 275). She attended the University of London as a student (R. 320-321). While she was there, she conceived a child out of wedlock under unfortunate circumstances from a professor at the university (R. 275). After conception of the child, her family came to the United States in November of 1951. They resided first at Provo, Utah, and thereafter in Salt Lake City. Susan gave birth to that child and placed it for adoption in Denver, Colorado, with a Red Feather Agency. (R. 32, 275.)

Thereafter Susan met Bailey at an artist's banquet in Salt Lake City in December of 1952 (R. 276). A month later Bailey called on Susan, took her to his mother's home to have dinner with his mother, then told her that he wanted to show her

some paintings in another room, took her into his bedroom and kept her there all night. Bailey had illicit sexual intercourse with Susan on that occasion. The following morning they had breakfast with Bailey's mother at the mother's home. (R. 276-277.) The following weekend Susan visited Bailey at Logan, where Bailey was attending school on the G. I. Bill. Bailey had illicit sexual intercourse with Susan on that occasion. (R. 227-228.)

Susan at the time was having difficulty with her parents. She told Bailey that she would like to live with him. Bailey immediately accepted the proposal. Bailey told Susan that he was then married to Martha Bander Singer, but that as soon as the previous marriage was legally terminated he would marry Susan. Thereafter in February of 1953 Susan went to live with Bailey at Logan, Utah, in what, so far as Bailey knew, was an illegal and adulterous relationship. (R. 278-279.) Bailey admitted on the witness stand that he did not receive notice of termination of his prior marriage to Martha Bander Singer until some twelve months after he commenced living with Susan, when he received the certified copy of the decree of the Mexican court dated January 4, 1954, (R. 97, 101, 251-252, Ex. 1). Susan's parents, Mr. and Mrs. David R. Willis, knew Susan was with Bailey. They thought she was married to him. (R. 33-34, 180-183, 40-41, 337-338.) Upon

receipt in 1954 of notice of termination of the prior marriage, Susan requested that Bailey marry her. Bailey replied that it was entirely unnecessary, that marriage was an unimportant function and that people should be free of the institution of marriage so they could come and go promiscuously according to their desires. He therefore refused to marry Susan. (R. 279-280.) Susan's testimony to this effect was corroborated by her father (R. 180-183), her mother (R. 40-41, 337-338), her sister (R. 75-76), and her brother-in-law (R. 50).

Susan and Bailey lived in Logan for two or three months until April of 1953. Bailey was a student on the G. I. Bill. (R. 280.) Thereafter from April of 1953 to June of 1954 they lived a vagrant and itinerant life, in Salt Lake City for three weeks; in Santa Fe, New Mexico, for four and one-half months; back in Salt Lake City for three weeks; in Santa Rosa, California, for three months; and, in San Francisco, California, for six months. During the entire thirteen month period Bailey was a student on the G. I. Bill for approximately two and one-half months while they were in Santa Fe. Otherwise he was unemployed and did nothing. Due to their destitute circumstances Susan obtained employment as an operating room assistant in a hospital in Santa Fe and as an office clerk in San Francisco. She supported both herself and Bailey through-

out the period. While they were in Santa Rosa, Susan conceived a child and requested that Bailey procure medical assistance. Bailey stated that it was unnecessary and refused. Thereafter Susan had a miscarriage. Following the miscarriage Susan hemorrhaged for approximately six weeks. She requested medical attention, but Bailey refused. (R. 281-288, 36, 261-262.)

Susan and Bailey left San Francisco in May of 1954 and returned to Salt Lake City in June of 1954. They stayed with Bailey's mother for approximately five weeks until Mrs. Bailey forced them to leave. Thereafter they stayed with Susan's parents in Salt Lake City for approximately three weeks. (R. 289-290.) In the meantime Susan had conceived the child, Karl, who is the subject of this proceeding, in April of 1954 (R. 290). Susan requested medical care. They had no money and could not afford it. Bailey refused to provide medical care for Susan and the child during the period of conception and birth on the following grounds: that medical care during child birth is unnecessary; that animals have their young without medical attention; that he distrusted the medical profession because doctors intentionally infect women with cancer in order to increase their business income; and, that the latter is the reason so few women are able to nurse their children. (R. 290-291.) Bailey admitted on the wit-

ness stand that he provided no medical care, was evasive as to his reasons and explained that "if you have faith you can move mountains" (R. 263-267). Susan and Bailey were destitute at the time they were in Salt Lake City in June and July of 1954. Susan was ill and pregnant with the child, Karl. Susan, because of their destitute circumstances, at that time procured a job as a night waitress in an A & W Root Beer stand in Salt Lake City. Bailey was unemployed and did nothing. (R. 34-35, 289, 291.) Susan at the time was disturbed about her physical condition, the fact that she could not continue her employment and the coming birth of the child. She asked Bailey what his intentions were. Bailey proposed that they travel in a truck, pick up odd farm jobs along the way, and that the child could be born in the truck. (R. 291.)

After conception of the child, Karl, Susan pleaded with Bailey to marry her so that the child would not be illegitimate. Bailey refused stating that it was unnecessary because no child is, "illegitimate before God". (R. 292.)

In August or September of 1954 Susan and Bailey procured a job as caretakers at the Burnham Duck Club, at Bountiful, Utah, (R. 292, 298). The child was born at the duck club on January 7, 1955, (R. 221-222, 298-299). They remained there for approximately ten months thereafter, until October

30, 1955, when Susan terminated the illicit relationship with Bailey and left with the child, Karl, under the circumstances hereinafter set forth (R. 309-312). Bailey is still employed as caretaker at the duck club. He works three months a year during the duck season from October through December. Otherwise he is unemployed. His total cash income is \$800.00 per year. Quarters at the duck club are furnished to the caretaker free of charge. (R. 240-241, 63-67.) The home in which Susan and Bailey and the child, after its birth, lived at the duck club is a small unpainted house, poorly insulated, exposed to the outside elements, with meager furnishings, no wallpaper and insects all over the area (R. 37, 63-64).

The following evidence in the record as to Bailey's homosexual and sodomous relationships and general sexual depravity is uncontroverted. Susan's testimony as to the facts is corroborated by the testimony of her sister (R. 75-76), brother-in-law (R. 50-51), and her own mother (R. 41-43).

During the time that Bailey was living with his first wife, Martha Bander Singer, Mrs. Singer's fifteen year old son by a prior marriage lived with them. Bailey insisted, over the boy's objection, in having sexual intercourse with the boy's mother in the boy's presence. Bailey told the mother that the boy had an overdeveloped affection for her, which

Bailey called an "Oedipus Complex". Bailey told the mother that she should have sexual intercourse with the boy, her own son, in order to cure this. The mother and son could not adjust to Bailey. As a result they separated. (R. 293-294.)

During the period that Bailey was living with Susan he habitually, over her objection, by the use of physical force made her submit to sexual intercourse by use of the mouth (R. 294-295). During the period that Susan and Bailey were staying with Bailey's sister, Josephine Booth Elliott, in San Francisco, Bailey engaged in masturbation with his sister's thirteen year old daughter and boasted about it (R. 295). While Susan and Bailey were living at the duck club Bailey indulged in masturbation with Susan's twelve year old brother. Susan sent the brother home. (R. 295-296.) Susan's mother, Mrs. David R. Willis, required that her children keep the doors of the Willis home locked and specifically instructed them not to let Bailey in her home because of his sexual depravity (R. 42-43). Bailey persistently committed sexual indiscretions upon Susan's married sister and Susan's seven year old sister (R. 296, 41-43, 50-51, 76). Bailey on more than one occasion suggested, that in order to provide income for him and Susan, Susan ~~became~~^{became} a prostitute and he would act as the panderer and get the business (R. 297). Susan at one time discussed with

Bailey having one of her friends from the University of London come to live with them. Bailey suggested that she do so so that the three of them could have sexual relations as a trio. (R. 298.) Bailey indulged in masturbation of the infant, Karl, who is the subject of this proceeding, while the child was living with him to a point where he caused sexual stimulus in the infant and then boasted of having done so (R. 309). All of the above evidence is positive, direct and uncontroverted. Bailey did not deny it.

Bailey openly rejected marriage as an institution expressly on the ground that people should be permitted to freely indulge in promiscuity whenever and with whomever they desire (R. 50, 75-76, 296-297). Bailey rejected religious institutions and churches on the ground that they are purely man made. Bailey does not attend any church. (R. 297, 249-250.)

The child, Karl, was to be born in January of 1955. Susan requested medical care and hospitalization for herself and the child when she expected it to arrive. Bailey refused and stated that it was unnecessary. (R. 298.) Susan requested baby clothing in preparation for the coming child. Bailey stated that there was no point in buying things for something that did not exist. Therefore, Susan surreptitiously held out money that she acquired from cleaning ducks for members of the duck club, bought

clothing for the child and hid it from Bailey. (R. 298-299.) Just prior to birth of the child Susan suggested that they sterilize the things with which the child would come in contact. Bailey replied that sterilization was unnecessary because, if people (in this case the child that is the subject of this proceeding) are not strong enough to deal with germs, they should die. (R. 299.)

The child was born at the duck club with only Susan and Bailey present (R. 221-222, 263, 299-300). Susan was in labor from 5:00 a.m. to 11:00 a.m. Bailey became impatient. (R. 299.) Susan had sterilized some handkerchiefs and a pair of scissors for the purpose of severing the umbilical cord. When the child was born, Susan asked Bailey to unwrap the scissors from the handkerchief and hand them to her. Bailey, because of his impatience, picked up an unsterile pair of scissors and used that for the purpose of severing the umbilical cord. Susan asked Bailey to hand her the sterile handkerchiefs for the purpose of cleaning the baby. Bailey refused, pulled an unclean handkerchief out of his pocket and wiped the baby with it. (R. 299-300.) After birth of the child Susan asked Bailey to hand her the baby clothing that she had surreptitiously purchased and hidden in a chest of drawers because she was too weak to get the clothing herself. Bailey refused, stated that it was unnecessary, and that she should keep

the child warm as animals do with her body. Susan did just that because she was too weak to do otherwise. (R. 300-302.)

Susan requested silver nitrate for the child's eyes and explained to Bailey that the state law requires that silver nitrate be administered at birth in order to prevent blindness. Bailey refused and gave his reason that the administration of silver nitrate causes weakness in children's eyes and is responsible for so many children having to wear glasses. As a result no silver nitrate was administered to the child at birth. (R. 302-303.)

There was no respirator present at the birth of the child to remove the mucus from his nose and lungs. As a result the child suffered from prolonged respiratory difficulty and stopped breathing. Susan requested medical help. Bailey refused and gave as his reason that animals or organs that are born imperfect should be left to die if they are going to die and that the fault of the medical profession is that they keep alive imperfect human beings and that is why there is so much illness in the world. (R. 304-305.)

There was no ergotrate present at birth of the child for the purpose of contracting the mother's uterus (R. 303). After birth of the child, Bailey kept the placenta in the house for three days and told Susan that she must eat it, as animals do, in

order to restore hormones to her body that had been lost during the birth. (R. 303-304.)

After birth of the child it suffered from a jaundice condition over a long period of time. Susan requested medical help because she was concerned over the possibility that this condition would cause brain damage to the child. Bailey, with knowledge that prolonged periods of jaundice may cause brain damage in infants, refused medical care. (R. 305-306.)

The baby suffered from chronic diarrhea for a period of two months with intermittent fevers. Susan requested medical help. Bailey replied that she could get medical care if she could get one of the doctors who was a member of the duck club to administer it so that he would not have to pay for the care. Susan attempted to contact three doctors. The first two were out of town. Bailey refused to permit her to contact the third doctor. Susan again attempted to contact a doctor, and Bailey told her to seek medical advice through her sister, who was using a doctor, so that he, Bailey, would not have to pay for it. (R. 306-307.)

Bailey refused to provide vaccination and immunization for the child. He explained that disease is to be either survived, or not, without medical care. (R. 308.)

Bailey refused to provide cod-liver oil and vita-

min supplements for the child as a therapeutic measure. Susan's family provided them. (R. 308.)

Susan's testimony as to Bailey's wilful failure to provide the child with medical care and his intentional exposure of the child to the dangers inherent in such neglect is corroborated by the testimony of Susan's mother (R. 38-40, 39-43), sister (R. 72-75), and brother-in-law (R. 45-46, 49). That this conduct illegally and dangerously exposed the child to illness and death, see the expert testimony of Mrs. David R. Willis (R. 339-343), who has been a registered nurse in both England and the United States for over thirty years (R. 43).

After birth of the child Susan again asked Bailey to marry her in order to legitimate the child. Bailey refused and stated that it was unnecessary. (R. 305).

After birth of the child, due to the destitute circumstances, Susan begged for old rags, made rag rugs from them and exchanged the rugs for used clothing for herself. Her family provided the clothing for the child. (R. 307-308.)

Between January of 1955 and October of 1955 Bailey was unemployed. He did not work and remained around the house all the time. During the period he became physically violent, beat Susan with his fists, kicked her and physically abused the child during periods of impatience to a point where Susan

became afraid and did not leave the child alone with him. (R. 308-309.) Susan's testimony as to Bailey's physical abuse of the child was corroborated by her sister (R. 74).

Bailey had a friend named Jesse Sharp, whom Bailey had known for ten years (R. 223).

On Saturday, apparently October 22, 1955, Sharp came to visit Bailey and stayed at the duck club with Bailey and Susan through Tuesday or Wednesday, October 25 or October 26, 1955. The day after Sharp left Susan commented to Bailey that she had enjoyed Sharp's visit. Bailey then suggested that, if Susan wanted to be with Sharp, she should go and live with him. Susan was surprised and taken back because she thought her relationship with Bailey was permanent. Sharp was planning to leave for Cuba. On Saturday, October 29, 1955, Susan met Sharp in town. Sharp asked Susan if she were married to Bailey. Sharp then informed Susan that Bailey had stated that his principal objective was, on the first opportunity, to dump Susan and the baby because he, Bailey, was tired of the responsibility. Sharp then asked Susan to marry him and suggested that she leave Bailey, go live with her parents, and, when Sharp returned from his trip to Cuba, they would be married. (R. 309-312.)

Susan and Sharp then returned to the duck club and told Bailey that they planned to be married.

Bailey specifically suggested that they take the child, Karl, with them and asked them about their plans. They told Bailey of the plan for Susan to live with her parents for about three months and then get married. Bailey suggested that there was nothing to prevent them from leaving at that time and getting married immediately. Thereafter Bailey loaned Susan and Sharp his suitcase for the purpose of travelling and took them and the child to the bus station in Salt Lake City so that the three of them could depart. Susan and Sharp left with the child the following day and went to Sacramento, California. They were married in Reno, Nevada, on the way. (R. 313-314.)

Susan and Sharp had told Bailey that they were going to Sacramento at the time of their departure. Ten days later, after they arrived in Sacramento, they informed Bailey by letter dated November 9, 1955, and told him that he could reach them by addressing them care of General Delivery in Sacramento. (Ex. 8, R. 231-232, 314.) They stayed in Sacramento about a month and then went to San Francisco. Sharp had difficulty adjusting to the child, Karl, so Susan returned to her family in Salt Lake City two weeks later for the purpose of getting them to care for the child for a short time while she and Sharp were becoming adjusted. (R. 314-315.)

In the meantime by letter, dated November 9, 1955, Susan informed her parents, Mr. and Mrs. Willis, for the first time that she was not married to Bailey because, at first, Bailey stated that he had a prior marriage that had not been terminated and, later, because after termination of the prior marriage, Bailey refused to marry her (R. 180-183, 315-316, 337-338). Mrs. Willis confronted Bailey with the contents of the letter. Bailey did not deny it. (R. 337-338.) At the same time Mr. Willis learned that Bailey had actively assisted Susan and Sharp in departing and that Bailey knew of their whereabouts after their departure (R. 178).

Susan returned to the home of her parents in Salt Lake City in December of 1955. Bailey met Susan there. Susan in front of her parents confronted Bailey with the fact that he had not maintained her, that he had never worked during the time that she had known him and that, although she had asked him to marry her on many occasions, he had persistently refused to do so. Bailey did not deny the accusations. See the testimony of Susan (R. 316-317), Mr. Willis (R. 182-183), and Mrs. Willis (R. 337-338).

In the middle of January of 1956, Susan and the child left the Willis home and moved into an apartment preparatory to the return of Sharp from California (R. 316-317). Thereafter Bailey wrote

a letter to Susan and Sharp and requested of Susan a reconciliation even though Bailey knew that in the meantime Susan had married Sharp. Sharp replied by letter postmarked February 2, 1956, (Ex. 11) and told Bailey to quit bothering them. (R. 236-238.) Bailey testified that, after receipt of this letter from Sharp, he did not make any further inquiries concerning, or attempts to learn of the whereabouts of, the child Karl (R. 240).

The record shows conclusively that during the period from October 29, 1955, when Susan and the child left with Sharp down to February of 1956, Bailey knew the whereabouts of Susan and the child or facts from which he could have ascertained their whereabouts. He did not at any time during the period contribute to the support of the child. (R. 316-317.) Bailey told Sharp's sister that he consented that Susan leave with Sharp because Sharp was in a better position to care for the child than Bailey (R. 168-169). Bailey told Mrs. Alice Olson, case worker for the Children's Service Society of Utah, in a conversation three weeks prior to the date of the hearing in this matter that he had not contributed to the support of the child because he knew Sharp had \$800.00 at the time Susan and the child left, was employed, and was able to care for the child (R. 57-58). The record shows conclusively that from the time of receipt of the letter from

Sharp, postmarked February 2, 1956, telling Bailey to quit bothering them down to the time of the hearing in this matter, Bailey made no further inquiries concerning the child, or attempts to learn of its whereabouts, and that he did not support it (R. 57-58, 168-169, 240, 317).

On February 9, 1956, Susan placed the child in the care of the Children's Service Society of Utah on a temporary basis pending adjustment of her marriage with Sharp (R. 55, 85, 318). She was prompted to do so because Sharp could not adjust to the child, Karl, they were not getting along, she was desperate and felt that it was necessary in the child's best interest (R. 318). At the time of the placement Susan informed the Children's Service Society that the child was born of a previous illicit relationship (R. 85). She misrepresented both the date of birth and the identity of the natural father, J. Gordon Bailey. She did so because she was afraid of Bailey and expressed concern to the representatives of the Children's Service Society over any possibility that the child would come in contact with, or under the influence of, its father because of the father's sexual depravity. (R. 55-56, 69-70, 347-349.) The Children's Service Society at the time of the placement in February of 1956 made an investigation of the records of the Bureau of Vital Statistics of the State Health Department to ascertain

the correct birth date of the child and the identity of the father, but was unable to obtain the information because Susan had misrepresented both the birth date and the father's identity (R. 69-70).

At the time of the placement the child was suffering from a severe allergy and respiratory infection. The Children's Service Society immediately placed the child in the care of Dr. Fishler, pediatrician for the society. The child, then over one year old, received his first medical care. (R. 56-57, 78-79.)

Thereafter Susan went with Sharp to California. She did not contact the Children's Service Society again, except for two short telephone conversations, until some ten months later on November 21, 1956. (R. 58.) In the meantime the Children's Service Society placed the child with excellent foster home parents (R. 327-330, 349-350). On November 21, 1956, Susan came to the Children's Service Society and had a conference with Mrs. Virginia Lee Bennett and Mrs. Alice Olson, executive secretary and case worker respectively, for the society. In the conference she explained that her husband, Sharp, from whom she had in the meantime had another child, could not despite her efforts adjust to the child, Karl, and that for that reason she did not want the child. (R. 58.)

Thereafter on December 7, 1956, proceedings

were commenced in the Juvenile Court of Salt Lake County for the purpose of terminating Susan's parental rights and procuring authorization to place the child, Karl, for adoption (R. 4-5, 58). A hearing was held in the matter on December 10, 1956, (R. 5, 58-59, 87-88). Susan appeared at the hearing and testified that the child was born out of wedlock and, for the first time, disclosed the true birth date of the child, January 7, 1955, and the identity of the natural father, J. Gordon Bailey, (R. 6, 59, 87-88). Susan at the hearing stated that she desired an opportunity to adjust her affairs and to determine whether or not she could possibly provide care for the child and requested that the court give her a little time in which to determine whether or not she could do so (R. 6, 30). The court, therefore, found the child to be a neglected child and ordered the case continued to January 16, 1957, (R. 6-7, 30). Susan appeared in the juvenile court on January 16, 1957, and executed a voluntary relinquishment of her parental rights in the child, advised the court that the child was born out of wedlock and illegitimate, and consented to placement of the child for adoption (R. 8, 30). The court thereupon entered a decree by which it adjudicated the child to be the illegitimate child of Susan, terminated Susan's parental rights, and granted custody of the child to the Children's Service Society of Utah with authorization to place the child for adoption (R. 9, 30).

Three days later on January 19, 1957, the Children's Service Society was advised by its counsel that, in view of the fact that Bailey had lived with Susan and the child at the duck club for some time after its birth and in view of the provisions of Section 78-30-12, U.C.A., 1953, pertaining to legitimation of children by public acknowledgment, proceedings should be commenced against Bailey in the juvenile court for the purpose of determining Bailey's rights, if any, in the child and for the purpose of terminating any parental rights that Bailey might have in the child on grounds of neglect (R. 59, 88). Bailey at that time was in California and was not due to return to the duck club at Bountiful, Utah, until sometime in March of 1957 (R. 59, 88). Bailey it will be recalled had last been in contact with Susan and the child a year before in February of 1956 (R. 236-238). In the interval Bailey had made no inquiries concerning the welfare of the child, had not attempted to determine its whereabouts and had not supported it (R. 68, 240, 316-317).

Bailey in the meantime had met a Mrs. Lee Deffebach Hanson sometime in May of 1956 (R. 195). About a month and a half later, sometime in July or August of 1956, Bailey and Lee Deffebach commenced living openly in an illicit and adulterous relationship at the Burnham Duck Club at Bountiful, Utah, (R. 104-106, 196, 206). Lee Deffebach

had met her husband, Glade Ballard Hanson, apparently sometime in 1955. One month later she married him. Thereafter she and Hanson went to Europe where Lee Deffebach Hanson was an art student on a Fulbright scholarship. They separated in Europe, and Hanson returned to the United States. (R. 190-191.) Thereafter Lee Deffebach Hanson returned to New York City where she was a charity patient for sometime in a New York hospital (R. 192, 208). Thereafter Mrs. Hanson returned to Salt Lake City in May of 1956. She met J. Gordon Bailey at that time. (R. 195.) Approximately one month later Glade Ballard Hanson sued Mrs. Hanson for, and was awarded an, interlocutory decree of divorce on June 12, 1956. Mrs. Hanson did not contest the proceedings. (R. 106, 191.) She explained that the reason her marriage to Hanson was not successful was because Hanson was homosexual (R. 192). She testified, as did Susan in Susan's case (R. 278), that she entered into the adulterous relationship with Bailey because, on her returning home and getting the divorce, she was having difficulty with her parents (R. 196). Bailey admitted on the witness stand that he lived with Susan in what so far as he knew was an adulterous relationship from 1953 to 1954 (R. 251-252) and in an illicit relationship from 1954 through October of 1955, and that thereafter he lived with Lee Deffebach in an adulterous

relationship from July or August of 1956 through December of 1956 (R. 251-255). Bailey was a man thirty-five years of age at the time of the hearing (R. 211). His explanation was that he lived with both women in adulterous and illicit relationships, over his own objection, but that he finally gave in and lived with Susan because of her insistence and with Lee Deffebach because "he considered it very important to her health" that he do so. (R. 251-255.)

Lee Deffebach's divorce from Hanson became final on December 12, 1956, (R. 106, 191). She and Bailey were married on December 14, 1956, (R. 197).

Mrs. Virginia Lee Bennett had known Lee Deffebach since 1945 as a childhood acquaintance of one of the wards of the Children's Service Society (R. 201-202). Mrs. Bennett knew that Lee Deffebach was staying at a place known as the Burnham Duck Club in the summer of 1956 because Mrs. Bennett contacted her there by telephone (R. 80). Mrs. Bennett did not know at the time that Lee Deffebach was living in an adulterous relationship with J. Gordon Bailey (R. 78-91), and Mrs. Bennett did not know that J. Gordon Bailey was the father of the child, Karl, until after the hearing in the juvenile court on December 10, 1956, when Susan disclosed the fact (R. 84-87). On December 13 or 14, 1956, Mrs. Bennett received an announcement

that Lee Deffebach and Bailey were married. On December 27 or 28, 1956, Lee Deffebach informed Mrs. Bennett that she and Bailey were leaving for California and that they would not return for two or three months. (R. 81.) On January 19, 1957, after Susan's parental rights in the child had been terminated, the Children's Service Society of Utah was advised by its counsel that a hearing should be held for the purpose of terminating any rights that Bailey might have in the child on grounds of neglect (R. 59, 88).

Bailey returned from California in March of 1957 (R. 59, 88). In April of 1957, the Children's Service Society contacted Bailey for the purpose of procuring a release of any rights that he might have in the child and his consent to its adoption (R. 59-60, 88). Thereafter Bailey had a conversation with Mrs. Virginia Lee Bennett and Mrs. Alice Olson at the Children's Service Society on April 22, 1957, and a subsequent conversation with Mrs. Olson on May 7, 1957, (R. 60, 64-65).

In the conversations Bailey expressed open ap-^{R.A.M}proval of his illicit relationship with Susan (R. 60-61, 82). He stated that he learned about human beings from his observations of, and his deductions from, the actions of animals particularly cattle. He explained Susan's difficulties in the following language. That Susan was like a cow that has been de-

prived of a calf. That such a cow, which he called a "leppy", becomes very promiscuous and will not take care of its young. That Susan's parents had forced her to give up her first child conceived in England. That as a result Susan had become very promiscuous and in consequence thereof had lived in a promiscuous relationship with him, Bailey, and thereafter left Bailey to be with Sharp. (R. 60-61, 82.)

From 1943 to 1957 Bailey has engaged in no steady gainful employment except three years in the army as a private and his employment for three three years as caretaker at the duck club at which he works three months a year (R. 66-67, 245-248). In the conversations he told Mrs. Olson that he did not believe in providing for the child's future security (R. 325). He stated that he actively assisted Susan and the child in leaving with Sharp and that he did not thereafter support the child (R. 57-58, 68). He stated that he was still in love with Susan, even though he had since married Lee Deffebach (R. 61-62, 83), and suggested that, if the child were returned to him, he and Susan would be reunited. He did not explain what he intended to do with Lee Deffebach, whom he had in the meantime married, or what should be done with Sharp, to whom Susan had become married, and Susan's and Sharp's child (R. 65-66). Bailey stated that he would not volun-

tarily consent to the adoption of the child, but that he would not resist any legal proceedings (R. 62, 81).

The child had been placed in a foster home fifteen months prior to this time. The foster home parents, with whom the child has over the period established mutual ties of love and affection and whose financial, moral and other qualifications are without question, had applied to the Children's Service Society for adoption of the child. The Children's Service Society has approved the foster home parents as adoptive applicants for the child. It has not, of course, given final approval for adoption of the child by them. (R. 327-330, 334, 349-350.)

On April 30, 1957, a petition was filed in the Juvenile Court of Salt Lake County for the purpose of determining Bailey's rights, if any, in the child as its natural father, terminating all parental rights of J. Gordon Bailey on grounds of neglect and obtaining authorization for the Children's Service Society to place the child for adoption. The petition alleged as grounds of neglect the following: that J. Gordon Bailey had abandoned the child; that the child lacked proper parental care by reason of the fault, habits and immoral conduct of J. Gordon Bailey; that Bailey had neglected and failed to provide the child with subsistence, medical and other care necessary to the child's health, morals and well-

being; that the child was in a dangerous situation to its health and morals by reason of the conduct of J. Gordon Bailey. (R. 10.) Summons and notice expressly stating that the hearing was for the purpose of permanently depriving Bailey of his rights, if any, in the child and for the purpose of granting custody of the child to the Children's Service Society of Utah with authorization to place the child for adoption was served on Bailey twelve days prior to the date of the hearing (R. 17). Extensive hearings were held in the matter on May 14, May 16, and May 24, 1957, (R. 1-2). On June 10, 1957, the juvenile court entered its findings of fact, conclusions of law and decree in the matter. It expressly found the child to be a neglected child, J. Gordon Bailey to be an unfit and improper person to have its custody and control and that the best interest of the child required that its custody be taken from J. Gordon Bailey because of his fault, habits and manner of living. The court by its decree terminated all parental rights of J. Gordon Bailey and granted custody of the child to the Children's Service Society of Utah with authorization to place the child for adoption and authority to complete adoption of the child by the prospective adopting parents. (R. 22-25.) The court, in finding the child to be a neglected child, expressly found facts showing the following. (1) That Bailey had abandoned and know-

ingly neglected the child in that he had voluntarily assisted Susan and the child in leaving with Sharp because he no longer wanted responsibility for the child and that he did not thereafter contribute to the support of the child, although he knew of the whereabouts of the child or facts from which he could have ascertained its whereabouts from the approximate time that Susan and the child separated from him on October 30, 1955, to February of 1956, and that thereafter he did not make any effort to determine the whereabouts of the child and did not contribute to its support. (2) That Bailey knowingly and intentionally failed to provide the child with subsistence, medical and other care necessary to the child's health, morals and well-being in that Bailey knowingly and intentionally failed to provide necessary medical and other care for the child during the pregnancy, birth and post confinement and during prolonged periods that the child suffered from diarrhea accompanied by fever, jaundice and bronchial difficulty thereafter. (3) That the child lacked proper parental care and was in a situation dangerous to its health and morals by reason of the fault, habits, conduct and manner of living of J. Gordon Bailey. (R. 22-25.)

ARGUMENT

POINT I.

THE UNCONTROVERTED EVIDENCE AND ADMITTED FACTS CONCLUSIVELY SHOW THE CHILD TO BE A NEGLECTED CHILD AND APPELLANT TO BE AN UNFIT AND IMPROPER PERSON TO HAVE ITS CUSTODY WITHIN THE MEANING OF SECTIONS 55-10-6 AND 55-10-32, U.C.A., 1953.

Section 55-10-6, U.C.A., 1953, defines the words "neglected child" to include the following:

"A child who is abandoned by his parent, * * * .

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

"A child whose parent * * * 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 * * * who associates with vagrant, vicious or immoral persons.

"A child who * * * is in a situation * * * injurious to the health or morals of himself or others."

Section 55-10-32, U.C.A., 1953, provides as follows:

"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 knowing-

ly 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 in the case that * * * the welfare of a child requires that his custody be taken from its parents * * *.”

(1) The uncontroverted evidence shows the following. That Bailey persistently indulged in sodomous and homosexual relationships, is guilty of general sexual depravity and that this conduct was visited on three children, ages 12, 13 and 15 respectively, and on the child that is the subject of this proceeding during the period that it was living with Bailey. That Bailey lived openly in what, so far as he knew, was an adulterous and in an illicit relationship with Susan and as a result this child was born. That eight months after the relationship with Susan was terminated, Bailey openly entered into an adulterous and illegal relationship with Lee Defebach. Bailey did not deny the sodomous and homosexual relationships and the general sexual depravity and offered no evidence that his traits in these respects have changed. Bailey did not deny the illicit and adulterous relationships and offered as his only excuse that he did so, in the case of one woman, because of her insistence, and, in the case of the other, because he “considered it very important to her health” that he do so. Whether or not these women

consented to live with Bailey in these relationships is immaterial to the proceeding before this court, except to the extent that it shows Bailey's lack of character as a proper custodian for this child by virtue of his association with them. Susan's testimony that Bailey openly rejected marriage as an institution because he believed that people should be free to come and go promiscuously according to their desires and to the effect that he persistently refused to marry her, in spite of her pleadings for the legitimacy of the child, is corroborated by four witnesses (R. 75-76, 50, 180-183, 279-280). It is submitted that by virtue of the foregoing the child is a neglected child within the meaning of the second, third, fourth and fifth paragraphs above quoted from Section 55-10-6, U.C.A., 1953, in that (1) the child lacks proper parental care by reason of the fault and habits of J. Gordon Bailey, (2) J. Gordon Bailey has neglected and refused to provide the child with care necessary to the child's health, morals and well-being, (3) the child, to the extent that Bailey claims any interest in it as its natural father, is, within the literal wording of the statute, associated with a vagrant, vicious and immoral person and (4) is in a situation dangerous and injurious to the child's health and morals.

That evidence of illicit relationships and immoral habits and conduct, coupled with neglect and

failure to provide a child with proper subsistence, medical and other care for the child's health, morals and well-being, does support a finding that the child is a neglected child and that the parent is unfit to have its custody, within the meaning of Sections 55-10-6 and 55-10-32, U.C.A., 1953, see, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, and, *In re Olson* (1947) 111 U. 365, 180 P.2d. 210. That open profession of belief in illegal and adulterous relationships and exposure of a child to such relationships does constitute the child a neglected child and the parent unfit, see, *In re State in Interest of Black* (1955) 3 U.2d 315, 283 P.2d 887. That exposure of a child to brutal and sadistic treatment does constitute the child a neglected child and support a finding that the parent is unfit, see, *In re Miller* (1952) 40 Wash.2d 319, 242 P.2d 1016.

(2) The admitted facts show the following. That Bailey knowingly and intentionally neglected to provide the child with proper and necessary medical care during the period of conception, at birth and thereafter down to the date of the hearing in this matter. Bailey's only excuse was that he claimed that Susan consented to this course of conduct during the period that she lived with him. Susan's positive testimony to the effect that she requested necessary medical care during the period of conception and at birth and during the periods of prolonged

and serious illness of the child thereafter and as to Bailey's diabolical reasons for refusing such care is corroborated by the testimony of three witnesses (R. 38-40, 39-43, 72-75, 45-46, 49). Again, whether or not Susan consented to this course of conduct is not material to this proceeding except to the extent that it shows Bailey's lack of character as a fit custodian for this child by virtue of his association with her. Furthermore, Susan's testimony as to Bailey's personal conduct in wilfully exposing the child to dangers of disease, illness and death during the period of conception, at birth and thereafter, of itself, supports a finding that the child is a neglected child. Bailey's only excuse for failing to provide medical care for the child after his illicit relationship with Susan and the child was terminated and down to the date of the hearing in this matter was that he did not know the whereabouts of the child. The positive evidence shows that Bailey knew the whereabouts of the child during the first four months after Susan and the child left with his assistance and that, thereafter, Bailey did not inquire as to the child's whereabouts or welfare. It is submitted that the admitted facts as to failure to provide this child with proper and necessary medical care constitute the child a neglected child within the meaning of the third paragraph of Section 55-10-6, U.C.A., 1953, above set forth.

That failure to provide a child with proper and necessary medical care, coupled with other evidence of irresponsible conduct, does support a finding that the child is a neglected child within the meaning of Sections 55-10-6 and 55-10-32, U.C.A., 1953, see, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, in which the evidence of medical neglect did not approach the flagrance of that in the case before this court.

(3) The uncontroverted evidence and admitted facts show the following. Bailey actively assisted Susan and the child in terminating the illicit relationship with Bailey and leaving with Sharp. For a period of four months thereafter Bailey knew of the whereabouts of the child or of facts from which he could have ascertained its whereabouts. Bailey did not during the period contribute in any manner to the care and support of the child. At the expiration of this four month period Bailey wrote a letter to Susan in which he requested resumption of Bailey's and Susan's relationship, even though in the meantime Susan had married Sharp. Sharp in February of 1956 responded to the letter and told Bailey to quit bothering them. Thereafter Bailey made no inquiries concerning the child or its whereabouts and welfare and did not provide for its care and support down to the time of the hearing in this matter. Bailey told Mrs. Alice Olson, case worker for

the Children's Service Society of Utah, in a conversation three weeks prior to the date of hearing that he had not contributed to the support of the child since Susan and the child left with Sharp because he knew Sharp had \$800.00 at the time, was employed and was able to care for the child (R. 57-58). Bailey told Sharp's sister that he consented that Susan leave with Sharp because Sharp was in a better position to care for the child than Bailey (R. 168-169). It is submitted that the foregoing constitutes the child a neglected child within the meaning of the third paragraph of Section 55-10-6, U.C.A., 1953, above quoted to the effect that a neglected child includes, "A child whose parent * * * 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." See, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, and *In re Olson* (1947) 111 U. 365, 180 P. 2d 210, so holding. In the *Bradley* case the mother left the child with the mother's aunt for a period of four months without providing care and support or arranging for such care and support. In the *Olson* case the father permitted the child to remain with its maternal grandparents and aunt and did not provide care because he believed the grandparents were providing adequate care and did not provide financial support because the grandparents did not

request it. In both cases the court held the children involved to be neglected children within the meaning of Sections 55-10-6 and 55-10-32, U.C.A., 1953. It is no answer that Bailey left the child in the care of its mother, Susan. Bailey was his father. As such, to the extent that Bailey claims any interest in the child born of an illegitimate relationship, he had an independent duty to provide parental care and support. Instead he actively assisted Susan and the child in leaving with Sharp and thereafter knowingly and intentionally neglected to provide subsistence and care for the child.

(4) The evidence further shows the following. Both before and after birth of the child Susan pleaded with Bailey to marry her for the purpose of legitimating the child. Bailey persistently refused and openly rejected marriage as an institution because he believed that people should be free to live in promiscuity according to their desires and because "no child is illegitimate before God". Susan's positive testimony to this effect is corroborated by four witnesses (R. 40-41, 50, 75-76, 180-183, 337-338). Bailey affirmatively suggested that Susan leave him and go and live with Sharp. Bailey told Sharp that Bailey's principal objective was to dump Susan and the child because he did not want the responsibility. Bailey affirmatively suggested that Susan and Sharp take the child with them and actively as-

sisted them and the child in departing. For a period of four months thereafter Bailey knew the whereabouts of the child and did not contribute to its support. Thereafter Bailey did not inquire concerning the whereabouts of the child or its welfare and did not contribute to its support down to the time of the hearing. It is submitted that the foregoing evidence supports a finding that the child, born out of wedlock, was abandoned by its natural father within the meaning of the first paragraph of Section 55-10-6, U.C.A., 1953, which defines a neglected child to include, "A child who is abandoned by his parent * * *." Although the meaning of the word "abandoned" as used in Section 55-10-6, U.C.A., 1953, has not been defined by this court, there is no question that under admitted facts of this case the child is a neglected child within the meaning of both Sections 55-10-6 and 55-10-32. See, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, at page 983.

(5) Appellant asserts that by reason of the fact that the evidence shows that the child was in the care of a third party, to-wit, the Children's Service Society of Utah from and after February 9, 1956, down to the date of the hearing in this matter and by reason of the fact that appellant did not know the actual physical location of the child during this period, the child could not have been a neglected child on the date of the hearing. (Appel-

lant's brief, pp. 7-9, 21-22, 31-32, 44-45.) The evidence conclusively shows the following. That appellant actively assisted Susan and the child in leaving with Sharp on October 30, 1955. That appellant did not thereafter support the child because appellant thought that Sharp was in a better position than appellant to do so. That appellant knew the whereabouts of the child or facts from which he could have ascertained its whereabouts for a period of four months after Susan and the child left with Sharp down to February of 1956 and that, upon receipt of a letter from Sharp in February of 1956 telling appellant to quit bothering Susan and Sharp, appellant did not thereafter inquire concerning the welfare and whereabouts of the child and did not contribute to its support. That such conduct does constitute present neglect of the child, see, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, and *In re Olson* (1947) 111 U. 365, 180 P.2d 210. In the *Olson* case the father claimed that because the child was receiving adequate care and support from its grandparents at the time of the hearing, the child was not then a neglected child. The court said at 180 P.2d pp. 213-214:

“The contention that the petition fails to state facts sufficient to show neglect on the part of appellant to support his minor child, assumes that there are allegations which negative parental neglect by showing

that the child has been and is now being well cared for by the grandfather and maternal aunt. The petition states that since 1938 appellant as father of Judith has failed to provide support or training for her, and that her grandparents have been caring for her. * * * An allegation that other relatives or friends provide care for a child neglected by a parent, does not negative the averment that a parent has neglected his parental responsibilities.

“By specifying that the words ‘neglected child’ include 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’ *the statute seeks to reach the person who is primarily responsible for the care and support of the child.* The fact that some third person may be providing care for a child by reason of neglect of the parent to do so, does not deprive the juvenile court of jurisdiction to inquire into the welfare of such child and to fix responsibility and determine custody for the child within the scope of the statutory authority granted to the court.” (Emphasis added.)

Appellant asserts that evidence of appellant’s past immorality and misconduct during all periods that the child was with appellant and for prolonged periods thereafter does not constitute evidence that the child was a neglected child and appellant an unfit and improper person to have its custody at the

time of the hearing. (Appellant's brief, pp. 21-22, 31-32, 44-45.) The evidence as to appellant's immorality and misconduct showed that it persisted during all periods that the child was with appellant and for prolonged periods both before and after that time. It was positive, direct and uncontroverted. Appellant did not deny it and offered no evidence that his traits in this respect had changed at the time of trial.

Appellant cites *In re State in Interest of Johnson* (1946) 110 U. 500, 175 P.2d 486, and *In re Miller* (1952) 40 Wash.2d 319, 242 P.2d 1016, as authority for the proposition that evidence of prior immorality and misconduct on the part of a parent will not support a finding that the child is a presently neglected child and that the parent is an unfit and improper person to have the custody of the child at the time of the hearing. (Appellant's brief, pp. 20-22, 44-45.) In the *Johnson* case it was alleged in the petition that the parent, in the future, would be unable to provide support and care for the child. The supreme court held that an allegation that the mother in the future would be unable to support and care for the child did not constitute an allegation of the present status of the child as a dependent child within the meaning of Section 55-10-6, U.C.A., 1953. The court in so holding said that, if the petition had alleged that prior to the filing of the petition

the mother had not properly supported the child, the allegation would have been sufficient to confer jurisdiction on the juvenile court on ground of present dependency within the meaning of the statute. The court said at 175 P.2d p. 489:

“The petition does not allege that Billy was homeless or destitute or without proper support or care through no fault of his parent. All it says along this line is that the mother is financially unable to provide a fit and proper home for said child. *This is not an allegation of the present status of the child, but is an attack on the ability of the mother in the future to look after him. For all that the petition alleges we do not know but that, up to the time of the filing of the petition, the mother had properly supported the baby.*” (Emphasis added.)

In the *Miller* case the Supreme Court of Washington affirmed the juvenile court in permanently depriving the father of his rights in the child because the father had previously treated the child in a brutal and sadistic manner. That evidence of past immorality, misconduct and irresponsibility on the part of a parent is admissible on the issue of, and will support a finding of, present neglect of a child and unfitness of a parent to have its custody, see also, *In re Bradley* (1946) 109 U. 538, 167 P.2d 978, and *In re Olson* (1947) 111 U. 365, 180 P.2d 210.

POINT II.

THE ORDER PERMANENTLY DEPRIVING APPELLANT OF CUSTODY OF THE CHILD AND AUTHORIZING PLACEMENT OF THE CHILD FOR ADOPTION IS SUPPORTED BY THE FINDINGS. THE JUVENILE COURT FOUND THE CHILD TO BE A NEGLECTED CHILD WITHIN THE MEANING OF SECTIONS 55-10-6 AND 55-10-32, U.C.A., 1953, AND THAT THE WELFARE OF THE CHILD REQUIRED THAT HIS CUSTODY BE TAKEN FROM APPELLANT.

Section 55-10-32, U.C.A., 1953, so far as material to the point under consideration, provides the following:

“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 * * * (1) 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 in the case that * * * (2) the welfare of the child requires that his custody be taken from its parents * * *.”

Appellant asserts that because the juvenile court did not insert the word “knowingly” in its findings of fact showing that appellant, not only knowingly but intentionally, failed and neglected to provide for the child proper maintenance, care, training and education contemplated and required by both law and morals, and because the juvenile

court did not insert the word “welfare” in its express finding that the best interest of the child required that his custody be taken from appellant that, therefore, the findings do not meet the requirements of Section 55-10-32, U.C.A., 1953, and do not, therefore, support the judgment of the court permanently depriving appellant of custody of the child and authorizing placement of the child for adoption. (Appellant’s brief, pp. 39-42.)

The juvenile court expressly found facts showing the following. (1) That appellant abandoned and knowingly neglected the child in that he voluntarily assisted Susan and the child in leaving with Sharp and that he did not thereafter contribute to the support of the child although he knew of the whereabouts of the child or facts from which he could have ascertained its whereabouts from the approximate time that Susan and the child separated from him on October 30, 1955, to February of 1956, and that thereafter he did not make any effort to determine the whereabouts of the child and did not contribute to its support. (2) That appellant knowingly and intentionally failed to provide the child with subsistence, medical and other care necessary to the child’s health, morals and well-being in that appellant knowingly neglected to provide for the child as in (1) above set forth and in that appellant knowingly and intentionally failed to provide neces-

sary medical and other care for the child during the pregnancy, birth and post confinement and during prolonged periods that the child suffered from diarrhea accompanied by fever, jaundice and bronchial difficulty thereafter. (3) That the child lacked proper parental care and was in a situation dangerous to its health and morals by reason of the fault, habits, conduct and manner of living of appellant. The juvenile court also expressly found the following ultimate facts. (4) That the custody of the child should be taken from appellant because of his fault, habits and manner of living and (5) that the best interest of the child required that appellant be deprived of his custody. The latter two findings were set forth in the court's conclusions of law.

That a finding of ultimate fact set forth by the court in its conclusions of law has the legal effect of a finding of fact, see, *Consolidated Wagon & Machine Co. v. Kay* (1933) 81 U. 595, 221 P.2d 836. That the failure of the court to insert the word "knowingly" in its findings of fact showing that appellant knowingly and intentionally failed and neglected to provide the child with proper maintenance and care contemplated and required by both law and morals and that the failure of the court to insert the words "welfare of the child" in its express finding that the custody of the child should

be taken from appellant because of appellant's fault, habits and manner of living and in its express finding and that the best interest of the child required that appellant be deprived of the child's custody, was not error and did not invalidate the findings, see, *In re Miller* (1952) 40 Wash.2d 319, 242 P.2d 1016. In the *Miller* case the Washington statute defined a dependent child as a child, "whose home, by reason of neglect, cruelty or depravity of its parents or either of them is an unfit place for such child * * *." The juvenile court found the children were dependent children in that the father was a brutal and sadistic person and in that he was not a fit and proper person to have the care and custody of the children. The father appealed from the judgment of the juvenile court permanently depriving him of custody of the children and claimed that the judgment was not supported by the findings because the court did not insert in the findings an express provision to the effect that the children's "home was an unfit place for such children." The Supreme Court of Washington affirmed the judgment of the juvenile court permanently depriving the father of custody of the children and held that, although the statute defining a dependent child required the juvenile court to find that the "home of the child was unfit", it was not necessary that the juvenile court insert the express words, "that the home was unfit" in its findings. The court said at 242 P.2d p. 1018:

“While the juvenile court did not, in the above quoted findings, *specifically state that the home was an unfit place for these children*, we think that is to be inferred from the findings relative to the unfitness of the father and mother to have the custody of their children.” (Emphasis added.)

Appellant asserts that because the juvenile court found that the mother of the child testified to certain facts as to appellant's immorality, intentional neglect of the child and misconduct (which testimony was not controverted) the court did not, ~~therefore, find the child to be a neglected child.~~ *R.A.*
~~court expressly found facts showing that the child~~
(Appellant's brief, pp. 22-26, 46-48.) The juvenile court expressly found facts showing that the child was a neglected child by reason of the fault, habits and misconduct of appellant and by reason of appellant's abandonment of the child and by reason of appellant's intentional neglect to provide the child with proper and necessary maintenance and care contemplated by both law and morals. The fact that the juvenile court further found that the mother of the child testified (which testimony was uncontradicted) to certain additional facts as to appellant's immorality, intentional neglect of the child and misconduct does not mean that the juvenile court failed to find the child to be a neglected child. We concede that the findings, made and entered by the juvenile court, were not artfully drawn. That this does not result in reversible error, see, *In re*

Clift's Estate (1927) 70 U. 409, 260 P. 859, 867, where the court said:

“Other errors of a technical nature are assigned as to the findings. While some of the findings are not in artistic form according to approved models, nevertheless, they indicate clearly the mind of the court. Such assignments are therefore without merit.”

Furthermore, if it were assumed for purposes of argument only that the juvenile court's findings were defective, the error could not have prejudiced appellant because the uncontroverted evidence and admitted facts conclusively show the child to be a neglected child and appellant to be an unfit and improper person to have its custody. That the failure of a trial court to find against an appellant on material issues does not prejudice the appellant and is not reversible error, where the uncontroverted evidence is against the appellant on those issues, see: *Parowan Mercantile Co. v. Gurr* (1934) 83 U. 463, 30 P.2d 207; *Piper v. Hatch* (1935) 86 U. 292, 43 P.2d 700; *In re Miller* (1952) 40 Wash.2d 319, 242 P.2d 1016; and, *In re Johnson* (1931) 50 Idaho 573, 300 P. 492.

In *Parowan Mercantile Co. v. Gurr* the appellant claimed that the failure of the trial court to find on a material issue, to-wit, whether or not there was consideration for the promissory note sued on, rendered the judgment void and required

reversal by the supreme court. The Supreme Court of Utah affirmed the trial court and held, that since the evidence conclusively showed that there was consideration for the note, the failure of the trial court to find on that issue could not have prejudiced appellant and was not, therefore, reversible error. The court said at 30 P.2d p. 210:

“We have, however, reviewed the pleadings and the evidence set forth in the transcript. We are satisfied that had the trial court made specific findings on all issues, material or otherwise, presented by the answer no finding would have been permissible other than such as would support the judgment. We are therefore of the opinion that the error, if any, did not affect any substantial right of the defendant.”

In the *Miller* case the father, on appeal from the judgment of the juvenile court permanently depriving him of custody of his children, claimed that because the findings of the juvenile court were general findings to the effect that the father was a brutal and sadistic person and not fit to have the custody of the children they did not constitute findings of fact and did not, therefore, support an adjudication that the children were dependent children. The Supreme Court of Washington held that, since the facts as to the misconduct of the appellant were not controverted, the appellant was not prejudiced by the omissions in the findings and the case was

not, therefore, subject to reversal on that ground. The court said at 242 P.2d p. 1018:

“However, our examination of the relatively short record indicates that the basic facts are not in serious dispute. Relators have therefore not been prejudiced because of the general nature of the findings, and, accordingly, we would not be warranted in reversing on that ground.”

POINT III.

THE JUVENILE COURT FOUND THE CHILD TO BE THE LEGITIMATE CHILD OF APPELLANT BY VIRTUE OF PUBLIC ACKNOWLEDGMENT PURSUANT TO THE PROVISIONS OF SECTION 78-30-12, U.C.A., 1953.

Appellant asserts that the juvenile court found that the child was the illegitimate child of appellant and that the child was not legitimated by appellant's acknowledgment of the child as his own. From this appellant concludes that the juvenile court, therefore, treated the case as a habeas corpus action and not as an action in the interest of the child for the purpose of determining whether the child was a neglected child and whether appellant was a fit person to have its custody. (Appellant's brief, pp. 13-19.)

Both assertions by appellant are incorrect and contrary to the record. (1) The court expressly found in its findings of fact that appellant and the child's mother lived openly as man and wife with the child at the duck club, which was appellant's

home, from the time of birth of the child on January 7, 1955, to October 30, 1955. The court in its conclusions of law expressly adjudicated that the child may be considered to be the legitimate child of appellant because of recognition of said child as his son by J. Gordon Bailey. (2) The case was not treated as a habeas corpus action. The action was instituted in the juvenile court, entitled State of Utah in the interest of Karl Bailey, and the entire proceeding was conducted for the purpose of determining whether or not the child was a neglected child and whether or not appellant was a fit and proper person to have its custody.

Furthermore, there is no logical connection between appellant's unsupported assertion that the juvenile court did not find the child to have been legitimated by appellant's acknowledgment of the child and appellant's unsupported conclusion that, therefore, the juvenile court treated the case as a habeas corpus action and not as a proceeding in the interest of the child.

If it were assumed for purposes of argument only that the juvenile Court did find the child to be an illegitimate child and not to have been legitimated by appellant's acknowledgment of the child as his son, the error could not have prejudiced appellant because the uncontroverted evidence and admitted facts conclusively show that the child is a neglected

child and that appellant is an unfit and improper person to have its custody.

We do not concede, by virtue of the foregoing, that the juvenile court was necessarily correct in finding that the child was the legitimate child of appellant by reason of appellant's recognition of the child as his son. Section 78-30-12, U.C.A., 1953, provides the following:

“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.” (Emphasis added.)

It might well be held, as a matter of law, that appellant did not “otherwise treat the child as if it were a legitimate child” in view of the fact that appellant persistently refused to marry the child's mother, while he was living with her as man and wife, in spite of her pleading that he do so in order to legitimate the child. Susan's testimony to this effect is corroborated by the physical circumstances of a mother of an illegitimate child, the testimony of four witnesses and Bailey's evasive testimony on the stand.

POINT IV.

THE JUVENILE COURT DID NOT ERR IN ADMITTING EVIDENCE CONCERNING THE PROSPECTIVE ADOPTING PARENTS IN THE INTEREST OF THE CHILD.

Appellant asserts that the juvenile court erred in admitting evidence concerning the prospective adopting parents and in authorizing the Children's Service Society to complete adoption of the child on the following ground. That the juvenile court is a court of limited jurisdiction. That the sole question before the court was whether the child was a neglected child. That the juvenile court is not an adoption court. That, therefore, admission by the court of evidence that some fifteen months prior to the hearing the child had been placed in a foster home, that natural ties of love and affection had developed between the child and the foster parents, that the foster parents had applied for adoption of the child, that the Children's Service Society of Utah had approved the qualifications of the foster parents as adoption applicants, and that the foster parents were qualified to adopt the child was error, and that the juvenile court's finding of the above facts and grant of custody to the Children's Service Society of Utah with right of adoption placement and with authorization to complete adoption of the child by the foster parents was error. (Appellant's brief, pp. 33-39.)

(1) This suggestion ignores the fact that the primary purpose of the hearing was the best interest and welfare of the child and that any evidence bearing on that issue was admissible under the provisions of Section 55-10-26, U.C.A., 1953, which provisions expressly authorize the juvenile court in all cases relating to delinquency, neglect and dependency of children to, "adopt any form of procedure * * * which it deems best suited to ascertain the facts * * * and to make a disposition in the best interests of such children * * *," and expressly require the juvenile court to, "inquire into the home environment, history, associations and general condition of such children * * *."

(2) This suggestion further ignores the provisions of Section 55-10-43, U.C.A., 1953, which provisions expressly authorize and require children's aid societies to report the facts as to adoption placements to the juvenile court and the juvenile court, based on the evidence presented, to pass upon the qualifications of the adoption applicants and, if it deems it advisable, to authorize completion of the adoption by the applicants.

(3) The evidence that, during the fifteen month period, natural ties of love and affection had been established between the child and the prospective adopting parents and as to the latter's qualifications was further admissible on the following

ground. Bailey had actively assisted Susan and the child in leaving with Sharp on October 30, 1955, under circumstances considerably more flagrant than the average abandonment. He had persistently refused to honor Susan's pleas that he marry her in order to legitimate the child. During the four month period thereafter down to February of 1956 he knew of the child's whereabouts and did not contribute to its support. From February of 1956 down to the time of the hearing in this matter he did not inquire concerning the welfare of the child or its whereabouts and did not support it. In the meantime in February of 1956 the Children's Service Society placed the child in the home of the foster parents, and over the fifteen month period natural ties of love and affection were established between them. The damage to the emotional stability of the child that would result from severance of that relationship would be the direct result of Bailey's misconduct, intentional neglect of the child and irresponsibility. It was clearly within the province of the juvenile court to hear and consider the evidence in the best interest of the child.

Appellant asserts that the admission of evidence concerning the prospective adopting parents and the order of the juvenile court authorizing placement of the child for adoption violated due process because appellant did not have notice that one of the

issues at the hearing would be authorization to place the child for adoption. (Appellant's brief, p. 42.) Appellant did have notice that the purpose of the hearing was the best interest and welfare of the child. Furthermore, the summons and notice served on Bailey twelve days prior to the hearing expressly stated that the purpose of the hearing was to permanently deprive J. Gordon Bailey of his parental rights, if any, in the child and to grant custody of the child to the Children's Service Society of Utah with authorization to place the child for adoption. (R. 17.)

Furthermore, if it were assumed for purpose of argument only that the juvenile court erred in admitting the evidence concerning the prospective adopting parents, the error could not have prejudiced appellant because the uncontroverted evidence and admitted facts show the child to be a neglected child and appellant to be an unfit and improper person to have its custody.

Respectfully submitted,

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