

ADOPTION OF MINORS:

When consent of parents may be dispensed with; notice of proceedings must be served on parents.

CONSENT; NOTICE TO PARENTS:

April 7, 1949

Mr. R. G. Mayfield
Prosecuting Attorney
Laclede County
Lebanon, Missouri



Dear Sir:

Your request for an opinion of this department has been received and reads as follows:

"An opinion is requested with reference to Section 9609, Laws of Missouri, 1937 Volume 2, Page 214.

"Over a year ago, the Circuit Court, after due notice to the parents and after an opportunity to be heard, declared a child to be a neglected child and it was made a ward of the Circuit Court. The custody of the child was taken from the parents, and placed in the Laclede County Welfare office. The child was then removed from the home of the parents, and has been in a home unknown to the parents. Since the decision of the Court, neither of the parents has made any attempt to see the child, nor have they made any attempt toward providing proper care and maintenance for the child.

"The child is now in a prospective adoptive home, and has been for a period of over nine (9) months. The persons who have been keeping the child now desire to adopt it. (Under these circumstances, can an adoption be granted by the Court without the consent of the parents as contemplated by Exception No. 2 of Section 9609? If the answer to No. 1 is yes, then is it still necessary to notify the parents of the pendency

of the adoption proceedings?)"

Section 9609, Laws of 1947, page 214, in effect provides that in cases where minor children are sought to be adopted, the written consent of the parents shall be required, and reads in part as follows:

" * * * With the exceptions specifically enumerated in paragraphs numbered 1, 2, 3 set forth below in this section, when the person sought to be adopted is under the age of 21 years, the written consent of the parents, or surviving parent, of such person, or of the mother's alone of such person if such person was born out of wedlock, to the adoption shall be required and filed in and made a part of the files and record of the proceeding. * * *"

Paragraph 2, makes an exception as to when the written consent of the parents shall not be required and reads as follows:

"2. The consent shall not be required of a parent who has, for a period of at least one year immediately prior to the date of the filing of the petition for adoption, either willfully abandoned the person sought to be adopted, or willfully neglected to provide him with proper care and maintenance. If, in any such case, any public or private agency, organization or institution, whether within or without this state, has obtained the legal custody of the person sought to be adopted, the written consent of such agency, organization or institution to the adoption shall be required, except as hereinafter provided in Section 9610;"

It appears that the child referred to in your letter has been declared to be a delinquent or neglected child within the meaning of Section 9668, R.S. Mo. 1939, which section will not be quoted here because of its length.

It further appears that your court committed the custody of the minor child here in question to your county welfare organization for the reason that he believed the moral and physical well being of the child warranted such action, since the parents had apparently failed to properly care for the child in this respect. In committing the

child, the court was concerned with its present physical condition and there is no intimation that the arrangement was to be permanent, and certainly there is no intimation that the parents were to lose custody in an adoption proceeding, as no such proceeding was pending at that time. It appears that the contemplated adoption by the parties referred to was not thought of until over a year later.

This brings us to the questions asked in your letter, namely: "Under these circumstances, can an adoption be granted by the Court without the consent of the parents as contemplated by Exception No. 2 of Section 9609? If the answer to No. 1 is yes, then **is it** still necessary to notify the parents of the pendency of the adoption proceedings?"

As to whether or not parents have willfully abandoned the child within the meaning of paragraph 2, supra, brings up the question as to what actions on the part of the parents may constitute such abandonment.

Since the statutes do not define the term "abandonment," we look to the following Missouri cases for enlightenment. In the case of Watson's Adoption, 195 S.W. (2d) 331, 336, the court said:

"A willful abandonment then would seem to imply, first, a voluntary and intentional relinquishment of the custody of the child to another, with the intent to never again claim the rights of a parent or perform the duties of a parent; or second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love, and his protection, maintenance, and the opportunity for the display of filial affection."

Also in the case of Re: Perkins, 117 S.W. (2d) 686, it was held that to make a case of neglect which will dispense with the consent of the parent in an adoption case, it must be shown that the neglect was intentional, deliberate and without just cause or excuse. The court said:

* * * * *

"Adoption proceedings being statutory, there is always the question of how the statute shall be construed, with the answer usually depending upon the angle from which the subject is approached. It is of course true that the statute is to be liberally construed with a view to promoting the best interests of the child, but such liberal construction is

obviously not to be extended to the question of when the natural parents may be divested of their rights to the end that all legal relationship between them and their child shall cease and determine. * * * Consequently it is uniformly held as a simple matter of natural justice that adoption statutes are to be strictly construed in favor of the rights of natural parents, and that when controversy arises between natural parents and those who seek to destroy their parental status, every reasonable intendment is to be made in favor of the formers' claims. (1 Am. Jur., Adoption of Children, sec.9; 2 C.J.S., Adoption of Children, sec. (6))"

It appears that the parents of the child here in question were properly notified of the hearing before your juvenile court, and knew or should have known that the purpose of same was to deprive them of their child's custody and commit to the care of other persons because of the failure of the parents to properly perform their duties in this respect.

Whether the parents failed to appear and contest the action because of a feeling of inferiority, and fear of the court, (which illiterate persons and persons of low social standing are commonly known to possess) remorse of conscience, or indifference, does not appear, but at any rate they failed to appear.

Although it appears that your court wisely committed the child to the care of the proper authorities, who would see that its present physical and moral needs were taken care of, it does not follow that the parents were permanently precluded from later appearing before the court and requesting a reconsideration of the matter in order that they might be successful in regaining the legal custody of their child.

Neither were the rights of the parents forfeited in appearing and contesting any adoption proceeding that might subsequently be instituted, and in such case there could not be any adoption without the written consent of the parents, or unless the court found that they were not entitled to notice under the provisions of paragraph 2, Section 9609, supra.

In the case of *Re: Schoenfeld*, 171 S. W. (2d) 764, where a minor child born out of wedlock had been made a ward of the court as a neglected child, it was held that the court had jurisdiction to decree the adoption with the consent of the mother. The court also cited the following case with approval *State v. Schlib*, 285 S. W. 748.

From an examination of above and other similar cases in point, it appears that in adoption cases courts are inclined to require persons seeking adoption of minor children to a strict compliance of the adoption laws, and that they are reluctant to permanently sever the relationship of parent and child, even where it appears that the parent may have been negligent in his duties toward his child. Every reasonable intendment will be decided in favor of the natural parent's right to the care and custody of his child. Only after the most clear and convincing evidence of the willful, intentional and deliberate abandonment of the child or willful neglect to provide the proper maintenance, are the courts inclined to allow the adoption of such a neglected child. In such cases the written consent of the parents to the adoption is required, except where the court is satisfied that the facts justify the dispensing with such consent under the provisions of paragraph 2, Section 9609, supra.

Whether or not there has been an abandonment by the parent sufficient to bring the case under the provisions of the exception in paragraph 2, of above mentioned section is a matter of fact to be decided by the court before whom the adoption proceeding is pending.

Regarding the case before us, we are not in a position to state whether or not the written consent of the parent to the adoption of their child may be dispensed with as that is a question of fact to be decided by your judge. Unless other facts are involved than those given in your letter, it does not appear that the consent could legally be dispensed with, and that in such adoption proceeding, the written consent of the parents must be had, and notice in any event in the manner and form provided by Section 9610 must be served upon the parents.

CONCLUSION

It is therefore the opinion of this department that where a minor child has been declared to be delinquent and neglected under the provisions of Section 9698, R.S. Mo. 1939, and has become a ward of the court, said court has ordered the child committed to the custody of a county welfare organization, and where it further appears that the question of the willful and intentional neglect, or abandonment of the child by its parents has been raised in connection with a subsequent adoption proceeding of the child before said court, such question of neglect or abandonment is one of fact to be decided by the court. It is also a question of fact to be decided by the court whether the abandonment or neglect has continued for a period of at least twelve months immediately prior to the filing of the adoption petition.

Mr. R. G. Mayfield

6.

It is the further opinion of this department that the written consent of the parents to the adoption of their child must be had, and in any event proper written notice of the proceeding must be served upon them as provided by Section 9610, Laws of 1947, and if the court is satisfied from the most clear and convincing evidence that the parents have willfully and intentionally neglected or abandoned it without just cause, no written consent of the parents shall be required under the provisions of the exception stated in paragraph 2, Section 9609, Laws of 1947

Respectfully submitted,

PAUL N. CHITWOOD
Assistant Attorney General

APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL