

1962

Adoption Revisited

Harold S. Cook

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Harold S. Cook, *Adoption Revisited*, 27 MO. L. REV. (1962)

Available at: <http://scholarship.law.missouri.edu/mlr/vol27/iss3/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

ADOPTION REVISITED*

HAROLD S. COOK**

INTRODUCTION

It has been fourteen years since the present Adoption Act¹ was passed by the Sixty-Fourth General Assembly,² and almost that long since Fred A. Eppenberger and this writer prepared an article pertaining to that act which appeared in the *Journal of the Missouri Bar*.³ Surprisingly, that article has been much quoted; perhaps because there is so little else in print relating to the Missouri law of adoption. Obviously that article, written so soon after the passage of the new act, could do little more than restate the provisions of the new law with some reference to prior cases which the authors believed had not been outmoded.

However, in these fourteen years there have been an exceptional number of cases decided by our appellate courts involving adoption and, in addition, there have been some minor changes in the adoption code itself and in the procedure thereunder.

It is the author's purpose herein to update the Missouri adoption case law and to comment on some of the decisions, mostly from a practical rather than a theoretical point of view. The handling of adoption cases is not one of the more lucrative legal fields, and many lawyers with large practices do not care to participate therein. However, the pleasure resulting to adoptive parents from a well planned adoption and the knowledge that a child, which would otherwise be a public charge, has been given a secure home and loving parents, are satisfactions to a lawyer far beyond any monetary reward he could receive.

GENERAL CONSIDERATIONS

There is no doubt that adoption in Missouri creates a new status, that of parent and child, and that it is entirely statutory, adoption having been

*As the title suggests, this article is a sequel to an earlier one: Cook & Eppenberger, *The New Adoption Act*, 4 J. Mo. B. 228 (1948).

**Attorney, St. Louis, Mo.; LL.B., Washington University, 1922.

1. Ch. 453, RSMo 1959. Unless otherwise indicated, all section numbers referred to in the text and the footnotes will be from the 1959 Revised Statutes of Missouri.

2. 2 Mo. Laws 1947, at 213, effective May 21, 1948.

3. Cook & Eppenberger, *The New Adoption Act*, 4 J. Mo. B. 228 (1948).

unknown at common law.⁴ The adoption chapter has been held to be a code in itself⁵ and no suggestion was made to the contrary in any case until recently, when the Missouri Supreme Court en banc overlooked the fact and applied doctrines which would seem to be applicable only in a court of equity and not in the juvenile division.⁶ This case will be discussed more at length in a subsequent part of this article.

The courts continue to give lip service at least to the requirement that the adoption laws be strictly construed,⁷ although they favor a liberal construction so far as the rights of natural parents are concerned.⁸

It is furthermore significant that although the doctrine of equitable adoption is still recognized by the courts as a possibility, there have been only three cases where such adoption has been decreed since the new code was adopted in 1948,⁹ and the Supreme Court of Missouri has now made the degree of proof so difficult¹⁰ that as a practical matter the doctrine is a dead issue. In the author's opinion this is an improvement in the law. Too often in the past, the doctrine has been used as a cloak for the establishment of a fraudulent claim to property where no real parent-child relationship ever existed, and almost invariably the claim was made after the persons most interested were dead and could not speak for themselves. For many years Missouri alone had more equitable adoption cases in its appellate courts than all other states combined. This scandal has now been terminated by judicial interpretation.

Since, as above stated, adoption is a creature of statute, the easiest way to consider it is to follow the sections of the Missouri Adoption Code.

4. *Wailes v. Curators of Central College*, 363 Mo. 932, 254 S.W.2d 645 (1953) (en banc) (*sub nom. In re Furnish's Will*); *Slaughter v. Slaughter*, 313 S.W.2d 193 (St. L. Ct. App. 1958).

5. *In re Adoption of Sypolt*, 361 Mo. 958, 237 S.W.2d 193 (1951); *In re Smith*, 314 S.W.2d 464 (K.C. Ct. App. 1958).

6. *In re McDuffee*, 352 S.W.2d 23 (Mo. 1961) (en banc).

7. *Rumans v. Lighthizer*, 363 Mo. 125, 249 S.W.2d 397 (1952); *State ex rel. M. L. H. v. Carroll*, 343 S.W.2d 622 (St. L. Ct. App. 1961); *In re G. K. D.*, 332 S.W.2d 62 (St. L. Ct. App. 1960); *In re Adams*, 248 S.W.2d 63 (St. L. Ct. App. 1952).

8. *In re Mayernik*, 292 S.W.2d 562 (Mo. 1956); *Robertson v. Cornett*, 359 Mo. 1156, 225 S.W.2d 780 (1949); *In re Slaughter*, 290 S.W.2d 408 (Spr. Ct. App. 1956); *In re Adoption of Wine*, 241 Mo. App. 628, 239 S.W.2d 101 (Spr. Ct. App. 1951).

9. *Lukas v. Hays*, 283 S.W.2d 561 (Mo. 1955); *Rumans v. Lighthizer*, *supra* note 7; *Keiser v. Wiedmer*, 283 S.W.2d 914 (St. L. Ct. App. 1955).

10. *Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1957); *Hogane v. Ottersbach*, 269 S.W.2d 9 (Mo. 1954); *Capps v. Adamson*, 362 Mo. 539, 242 S.W.2d 556 (1951); *Rich v. Baer*, 361 Mo. 1048, 238 S.W.2d 408 (1951).

STATUTORY PROVISIONS

A. *Petition for Permission to Adopt—Section 453.010*¹¹

This section provides for the filing of a petition in the juvenile division of the circuit court and indicates the parties who must be joined in it. By use of the words, "the county . . . in which the person sought to be adopted may be," it was intended to eliminate the necessity of determining the "residence" of a minor, but it was never intended to confer jurisdiction on a court simply by bringing the child into the jurisdiction solely for the purpose of filing the suit. As the Kansas City Court of Appeals put it, this clause means more than mere entry into the county for the sole purpose of invoking jurisdiction.¹² The practice seems to have grown up, however, among some attorneys, of justifying the jurisdiction merely by having the child present in the county on the day the suit is actually filed and again when it is heard, regardless of the fact that there is no other relation between the place where the child is living or where the persons having custody reside. It is submitted that this is a bad practice and that the validity of the decree may be questionable on a subsequent attack.

Furthermore, the practice which is standard in Jackson County and is becoming more prevalent in metropolitan St. Louis, of filing a petition in two counts, one for transfer of custody and another for adoption, is not recommended. Although dicta in the *Smith* case¹³ apparently gave this practice some judicial sanction, and a recent decision of the St. Louis Court of Appeals¹⁴ buttressed this position somewhat, there are practical difficulties which may confront the parties in such a two-pronged petition. If the first count is granted it is impossible to appeal until the second count also is tried,¹⁵ and by that time, which must be at least nine months later, ties of affection may have been established which the court will be loath to break. It is certainly anomalous to file a proceeding which cannot under any circumstances come to trial for more than nine months, and it is submitted that the statute should be amended to require "lawful and actual custody" for a period of at least nine months prior to the filing of the adoption petition, continuing until the rendering of the decree. So far, however, the legislature has turned a deaf ear to such a suggestion.

11. § 453.010, formerly § 9608, RSMo 1939.

12. *In re Smith*, *supra* note 5.

13. *Supra* note 5.

14. *State ex rel. M. L. H. v. Carroll*, *supra* note 7.

15. *In re Smith*, 331 S.W.2d 169 (St. L. Ct. App. 1960).

Another problem which arose under this section of the act, and which exercised the juvenile judges considerably, was the contention that the court which granted a transfer of custody order was entitled to retain the case, even though the child was placed with proposed adoptive parents in another county. Some judges were so jealous of their right to retain jurisdiction that they refused to issue certified copies of the transfer of custody order to be used in the adoption hearing.

The question was put to rest, however, by the supreme court in two cases decided in 1950 and 1951.¹⁶ It is now clear that the transfer of custody proceeding may be brought in one county and the adoption proceeding itself in another.

Because section 453.090 provides that upon adoption all legal relationships and all rights and duties between the adopted child and his natural parents (other than a natural parent who joins in the petition for adoption as provided in section 453.010) shall cease and determine, it is necessary for a remarried natural parent to join with the step-parent in the petition for adoption. No case has arisen involving this rather peculiar necessity of a parent's adopting his or her own child.

The question touched upon in the 1948 article,¹⁷ as to whether this section is a venue statute or one fixing jurisdiction, is still not definitely determined, although a decision of the United States District Court for the Western District of Missouri favored the former alternative.¹⁸ Since adoption is normally a nonadversary proceeding (contrary to divorce), it is doubtful that this is a correct holding. Even assuming that the statute merely fixes venue, can a minor waive the terms thereof? Neither of these questions was considered by the district court.

B. *Petition—Guardian Ad Litem Appointed—Section 453.020*¹⁹

A guardian ad litem must be appointed in all cases where the person to be adopted is under the age of twenty-one, and in some situations, the guardian's consent to the adoption is required. This section was amended in 1959 by adding the requirement of a statement in the petition as to the birthplace of the person to be adopted.

16. *In re* Adoption of Sypolt, *supra* note 5; *State ex rel. Grimstead v. Mueller*, 361 Mo. 92, 233 S.W.2d 700 (1950) (en banc).

17. *Cook & Eppenberger*, *supra* note 3.

18. *In re* Robertson, 127 F. Supp. 3 (W.D. Mo. 1954).

19. § 453.020, formerly § 9612, RSMo 1939.

The Springfield Court of Appeals has held a petition incomplete which did not state the actual name of the natural mother.²⁰ In another case,²¹ the petition clearly stated on its face that it was filed only to obtain a transfer of custody from the person having lawful and actual custody without the latter's consent, and prayed only for such transfer. The St. Louis Court of Appeals held that it had jurisdiction to consider the petition because of the statement therein that if the prayer were granted petitioners contemplated adopting the child at the close of the statutory period, and that such petition represented a "preliminary and necessary" step toward an adoption decree. The decision is not a satisfactory one, and, in view of the fact that the trial court on remand denied the petition, which was not appealed, it is not the final word on the subject.

*C. When Court Approval and Consent of the
Child and Parents Are Required—Section 453.030²²*

Former Section 9609 of the 1939 Revised Statutes of Missouri, a long section, was rewritten in 1959 and divided into three sections now numbered 453.030, .040 and .050. These three sections have been held constitutional.²³ The first of these prescribes the persons whose consent to the adoption is required. It repeats without change the first three paragraphs of the 1939 statute.

The courts still hold without exception that the welfare of the child is the paramount consideration. Almost every case cited in the footnotes is authority for this proposition.

There is no reason why a child cannot be adopted a second time and, to accomplish this, only the consent of the first adopting parents is required.²⁴

A recent case of first impression in Missouri held that the consent of a natural father who, subsequent to the child's birth, married the natural mother and recognized the child's paternity, thereby legitimizing the child under the provisions of section 474.070, was not necessary for adoption.²⁵

The solicitude of the courts for a natural parent refusing to consent to an adoption is shown by a decision of the Kansas City Court of Appeals,

20. *Adoption of McKinzie*, 275 S.W.2d 365 (Spr. Ct. App. 1955).

21. *State ex rel. M. L. H. v. Carroll*, *supra* note 7.

22. § 453.030, part of former § 9609, RSMo 1939.

23. *In re Mayernik*, *supra* note 8.

24. *Vreeland v. Vreeland*, 296 S.W.2d 55 (Mo. 1956).

25. *In re G. K. D.*, *supra* note 7.

where neither neglect nor abandonment was shown and the father vigorously opposed the adoption by the maternal grandparents, even though the child had been living with such grandparents for a long time prior to the mother's death.²⁶

D. *When the Consent of the Parents Is Not Required—Section 453.040*²⁷

Section 453.040 now includes the three exceptions to the consent requirements of its 1939 predecessor, but the language has been substantially modified. For instance, instead of an "insane parent," the new section requires an adjudication of incompetency before the consent of such a parent is not required. Furthermore, consent is no longer required of an agency or institution, public or private, even though such agency or institution may have acquired legal custody of the child through court decree or otherwise. Just why consent of such an agency is no longer required is not clear; in fact, the reason for the passage of the 1959 amendments to the consent section has never been fully explained.

The only real addition made in this section was to add the provision that the consent of a parent whose rights with reference to the child have been terminated pursuant to law is not required.²⁸

What constitutes willful abandonment or neglect by a parent, another situation in which consent is not required, has been considered in many cases.²⁹ The measure of proof here and under the Juvenile Court Act³⁰ is much the same and in many of these cases the child has first been adjudicated neglected or abandoned under that act.³¹

26. *In re Adoption of Hartwig*, 333 S.W.2d 101 (K.C. Ct. App. 1960).

27. § 453.040, part of former § 9609, RSMo 1939.

28. It is presumed that this refers to the termination of such rights under §§ 211.441-511, the so-called "Termination of Parental Rights Act," which was added to the Juvenile Code by the same legislature in 1959. Since the latter act has been used very sparingly, this new provision has had little use yet.

29. *In re Adoption of Hartwig*, *supra* note 26; *In re Hyman's Adoption*, 297 S.W.2d 1 (Spr. Ct. App. 1956); *Sherrill v. Bigler*, 276 S.W.2d 473 (Spr. Ct. App. 1955); *Perkins v. Cowan*, 263 S.W.2d 740 (Spr. Ct. App. 1954); *Hyman v. Stanley*, 257 S.W.2d 388 (Spr. Ct. App. 1953); *In re Adoption of Wine*, *supra* note 8; *In re Slaughter*, *supra* note 8. See also Annot., 35 A.L.R.2d 622 (1954), as to what constitutes abandonment or desertion of a child within the purview of the adoption laws.

30. Ch. 211, RSMo 1959.

31. *State ex rel. Grimstead v. Mueller*, *supra* note 16; *In re Hyman's Adoption*, *supra* note 29; *State v. Couch*, 294 S.W.2d 636 (St. L. Ct. App. 1956); *In re Slaughter*, *supra* note 8; *Hyman v. Stanley*, *supra* note 29.

E. *Waiver of Necessity of Parental Consent—Consent of the Person Adopted—Section 453.050*³²

The language of this section, which includes the last three paragraphs of former section 9609, has not been changed.

There have been several cases decided under its provisions giving the court power, after a hearing, to permit the natural mother to revoke her consent.³³ But in only one of them, where there had been no transfer of custody or ties of affection created, did the court permit such revocation.³⁴

The waiver of the necessity of consent to a future adoption permitted by this section has been held merely to eliminate the requirement of notice of the adoption proceeding, but the proceeding itself cannot be commenced merely by the filing of such waiver.³⁵

F. *Service on Parties and Right to Appeal—Section 453.060*³⁶

Section 453.060 was completely rewritten in 1959, but there has been no change in its substance except that a parent adjudged incompetent is no longer required to be notified of the adoption proceeding.³⁷

Adoption has been decreed where the natural parents were nonresidents and served by publication.³⁸ But where one of the parties is not properly notified, the decree of adoption may be void as to him while valid as to the parties properly before the court.³⁹

Where neglect or abandonment is alleged but not sustained by the evidence, the court has no power to decree adoption over the objection of a natural parent.⁴⁰

32. § 453.050, part of former § 9609, RSMo 1939.

33. *In re Mayernik*, *supra* note 8; *In re G. K. D.*, *supra* note 7; *Adoption of McKinzie*, *supra* note 20.

34. *Adoption of McKenzie*, *supra* note 20. It is also interesting to note that the prediction made in the previous article that *Application of Graham*, 239 Mo. App. 1036, 199 S.W.2d 68, probably was no longer law, has been confirmed by *In re Mayernik*, *supra* note 8.

35. *In re Smith*, *supra* note 5.

36. § 453.060, formerly § 9610, RSMo 1939.

37. A careless mistake in phraseology of the 1959 amendment, which required service of summons on a party even though his written consent was filed in the proceedings, was corrected in 1961. Mo. Laws 1961, at 343.

38. *Robertson v. Cornett*, *supra* note 8.

39. *Vreeland v. Vreeland*, *supra* note 24; *Dee v. Stahl*, 219 S.W.2d 883 (St. L. Ct. App. 1949).

40. *In re Adoption of Hartwig*, *supra* note 26.

G. *Investigation of Child and Adoptive Parents—Section 453.070*⁴¹

As pointed out fourteen years ago, the written report of the social investigation required by section 453.070 to be submitted to the court should be made available to all interested parties. Unfortunately, the juvenile courts, at least in the metropolitan St. Louis area, have considered this report a confidential document and have not made it so available. It is submitted that it could be made available by subpoena. The decision of a case on evidence read by the judge and the guardian ad litem, but not available to the parties or their attorneys, is not recommended.

An order of the juvenile court transferring custody to the petitioners in the adoption petition, even though denominated "temporary," was held void where the investigation required by this section was not made.⁴²

The words in this section, "nor shall transfer of custody of such child to the petitioner or petitioners in such adoption petition be ordered by the juvenile court having jurisdiction," seem somewhat obscure. Actually, they were inserted because of the procedure which prevailed in Jackson County at the time the 1947 act was adopted, whereby transfer of custody was made by a motion in the adoption proceeding. The St. Louis practice generally at that time was to transfer custody by a separate proceeding. However, in a recent case, the St. Louis Court of Appeals used the quoted words as authority for asserting the court's power to take a child away from a person having legal custody (the legal guardian).⁴³ Such a result was certainly never envisioned by the framers of the Adoption Code.

This provision was also called to the attention of the supreme court in the case of *State ex rel. Dorsey v. Kelly*,⁴⁴ where peculiarly enough, the court apparently felt that the clause referred only to transfers of *legal* as opposed to *lawful* custody, that is, transfers which created a permanent status in the transferee. The language is dictum, since this section was not directly involved, but it will have persuasive force on the courts in the years ahead.

H. *Hearings and Decree—Section 453.080*⁴⁵

"Lawful and actual" custody in petitioners for at least nine months immediately prior to the entry of the decree of adoption, as required by

41. § 453.070, formerly § 9612(a), RSMo 1939.

42. *Sherrill v. Bigler*, *supra* note 29.

43. *State ex rel. M. L. H. v. Carroll*, *supra* note 7.

44. 327 S.W.2d 160 (Mo. 1959) (en banc).

45. § 453.080, formerly § 9613, RSMo 1939.

section 453.080, has probably engendered more litigation than any portion of the other sections. The litigation has centered over the meaning of the quoted phrase. For a time the lower appellate courts made no distinction between "lawful" and "legal," although such a distinction was clearly intended by the framers of the act, but the *Dorsey* case⁴⁶ has now dispelled that error and set the courts back on the right track.

Long before the decision in that case, it had been held that a step-parent's custody is lawful without a juvenile court order;⁴⁷ and that placement by the juvenile officer where the child had been found "neglected" under the terms of the Juvenile Court Act⁴⁸ gave lawful custody.⁴⁹ An unfortunate statement by the St. Louis Court of Appeals in *In re Davis' Adoption*,⁵⁰ that there could not be "lawful" custody without a court order, was disapproved in the *Dorsey* case.⁵¹

It has recently been held by the St. Louis Court of Appeals that one having legal custody under a court order (probate court) can be deprived of that custody without his consent by an order of the juvenile court.⁵² It is submitted that the decision may have ramifications damaging to family relationships and is of dubious value.

The question of what is "actual" custody has been considered in only one case.⁵³ It also held that the words, "prior to the adoption decree," mean "immediately prior."

I. *The Consequences of Adoption—Section 453.090*⁵⁴

All in all, the courts have been comparatively liberal in their interpretation of property and inheritance rights resulting from a decree of adoption. A clear distinction must be made, however, between those cases which arrive at their result from an interpretation of the testator's intention as expressed in his will or trust, and cases relying entirely on section 453.090. Of course, adopted children, just as natural children, may be disinherited, if that is clearly the testator's intent, and no provisions of this section would obstruct such action.

46. *Supra* note 44.

47. *In Matter of Adoption of Siler*, 240 Mo. App. 1097, 225 S.W.2d 379 (Spr. Ct. App. 1949).

48. Ch. 211, RSMo 1959.

49. *In re Hyman's Adoption*, *supra* note 29; *Hyman v. Stanley*, *supra* note 29.

50. 285 S.W.2d 35 (St. L. Ct. App. 1955).

51. *Supra* note 44.

52. *State ex rel. M. L. H. v. Carroll*, *supra* note 7.

53. *In re Adams*, *supra* note 7.

54. § 453.090, formerly § 9614, RSMo 1939.

Two cases have arisen since 1948 which involved adoption by deed.⁵⁵ Unfortunately, in the *Rumans* case,⁵⁶ the adoption was technically invalid since the deed was not recorded prior to the date of repeal of adoption by deed, so that section 453.150⁵⁷ did not apply. However, the court sustained the adoption in equity on the grounds of estoppel, but refused to give it any more force than adoption by deed and held that upon the adopted child's death without a spouse, her blood relatives inherited from her.

The other case, *Commerce Trust Co. v. Weed*,⁵⁸ is most interesting, involving a will made in 1927⁵⁹ containing a trust which, on termination, was distributable to the testator's lineal descendants then living. At the time of termination, besides natural children and grandchildren, there was one child adopted by one of testator's children in 1909 by deed of adoption duly recorded. In 1909, under prior decisions, such child would have inherited only from his parents who signed the deed of adoption. The court noted the passage of present section 453.090 in 1917 and a decision of the supreme court holding that it was only prospective in operation,⁶⁰ commenting that section 453.150 had been adopted in 1943 as a result of that decision. The court also pointed out that the intent of that section was to place children legally adopted before 1917 on a parity with those adopted subsequently. Finding no specific intent in the language of the will either to exclude or include the adopted child as a lineal descendant, the court decided the case in favor of the adopted child because at the time of the vesting of her right (the termination of the trust) the law made her a "lineal descendant." The court further noted that such holding did not render section 453.150 unconstitutional, either under the due process clause or as retrospective legislation, since the vesting did not occur until after the passage of the 1943 act.

Questions involving the validity of the section as applied to other situations must await the future. However, the liberal position of the court is to be highly commended.

A child adopted by decree of court under the 1917 act was held to be a pretermitted heir under his paternal grandfather's will where his adoptive father predeceased the grandfather.⁶¹ This holding was held not violative of

55. Adoption by deed was repealed July 1, 1917. Mo. Laws 1917, § 1, at 193.

56. *Rumans v. Lighthizer*, *supra* note 7.

57. Formerly § 9616(a), RSMo 1939, adopted in 1943.

58. 318 S.W.2d 289 (Mo. 1958).

59. The testator died four days after making it.

60. *McIntyre v. Hardesty*, 347 Mo. 805, 149 S.W.2d 334 (1941).

61. *Robertson v. Cornett*, 359 Mo. 1156, 225 S.W.2d 408 (1949).

the due process clauses of the State or Federal Constitutions since the right to inherit is purely statutory.

The unfortunate dictum in the *Kaltenbach* case,⁶² concerning the right of an adopted child to inherit from his natural parents, even where adoption was by decree and not by deed, was confirmed by division one of the supreme court in 1950,⁶³ but both cases were disapproved by the court en banc,⁶⁴ and the question was finally settled in 1953 so that a child adopted under the present act (or the 1917 act) is not entitled to inherit from its *natural* parents or grandparents.

A child adopted by one of the testator's children after the testator's death was entitled to share as a descendant of his adopted parent in the income of the testamentary trust and was included within the term "grand-child," so as to share in the principal.⁶⁵ And, if he died before the termination of the trust, his natural children would take his share. Such a holding was made under a will drawn in 1915, when Missouri had only adoption by deed, since the will was reaffirmed by codicils drawn in 1917 and 1918 after the passage of the predecessor of this section of the law.

It is interesting also to note that where one parent was not served, so that the adoption was void as to him, it was held valid as to the adoptive parents, so that the child was entitled to inherit from collateral relatives of his adoptive mother.⁶⁶

J. *Automatic Change of Birth Records—Section 453.100*⁶⁷

This section has been amended twice since its original enactment.⁶⁸ It now provides for automatic amendment of the birth records after adoption without request. The old birth record is sealed and cannot be examined without court order, while the new one reveals the adoptive parents as the natural parents of the child. Of course, the date and place of birth are not changed.

62. *St. Louis Union Trust Co. v. Kaltenbach*, 353 Mo. 1114, 186 S.W.2d 578 (1945).

63. *Mississippi Valley Trust Co. v. Walsh*, 360 Mo. 610, 229 S.W.2d 675 (1950).

64. *Wailes v. Curators of Central College*, 363 Mo. 932, 254 S.W.2d 645 (1953) (en banc).

65. *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649 (Mo. 1955). See also *St. Louis Union Trust Co. v. Greenough*, 282 S.W.2d 474 (Mo. 1955).

66. *Vreeland v. Vreeland*, *supra* note 24.

67. § 453.100, formerly § 9614(a), RSMo 1939.

68. Mo. Laws 1955, at 517; Mo. Laws 1959, H.B. 384.

K. *Requirement of Court Order for Transfer of Custody—Section 453.110*⁶⁹

Section 453.110 has been involved in much litigation. In the author's opinion it has been misunderstood, not only by the bar but by the courts. It was adopted primarily as a quasi-criminal statute to prevent the black market (or the gray market, as it is called in some circles) in babies. Unfortunately, it is the only section prescribing any procedure for transfer of custody, albeit a very sketchy procedure. According to the specific terms of subparagraph one, no voluntary surrender or transfer of a child can be made by anyone, nor can anyone take possession or charge of a child "so transferred" without first having filed a petition before the juvenile court of the county where the child may be, praying for such transfer and obtaining an approval order.

The second subparagraph was added in 1947⁷⁰ to make it clear that the section was not intended to apply to the placement of a child in a family home for care, if the right to supervise and resume custody was retained.

In addition to the approval of a voluntary transfer, as above set forth, the court was given broad powers to determine future custody *only* if the custody of the child before the court was transferred in violation of this section.

As early as 1949, a court order under this section was held unnecessary in step-parent adoptions.⁷¹ Actually, there is no transfer or surrender of custody in such a case, although the decisions are not placed on this ground.

The unfortunate result of dictum was never better illustrated than in *In re Davis' Adoption*, decided by the St. Louis Court of Appeals in 1955. The court there made the statement that, unless there was a natural right to the child, as in the case of a step-parent, a court order under this section was always a prerequisite to lawful custody and thus to adoption. This statement, wholly unnecessary to the decision, aggravated the bar and the child-placement agencies for some years and required a decision of the supreme court en banc to overrule it.⁷² Now it is clear that the St. Louis practice of placing children either in foster or adoptive homes by licensed child agencies which have obtained transfer of custody orders is valid without a second order under this section, and such placements give lawful custody.⁷³

69. § 453.110, formerly § 9616, RSMo 1939.

70. 1 Mo. Laws 1947, at 218.

71. *In re Adoption of Siler*, *supra* note 47.

72. *State ex rel. Dorsey v. Kelly*, *supra* note 44.

73. Opinion of Attorney General of Missouri, Aug. 27, 1957.

The third paragraph of this section, making its violation a misdemeanor, has also received some attention from the courts. In two cases where the placement of the child was clearly illegal, the court pointed out that the juvenile court should have retained jurisdiction, heard evidence, and made such transfer of custody as was in the child's best interest.⁷⁴

A rather puzzling decision by the St. Louis Court of Appeals was recently rendered in a case involving somewhat peculiar facts.⁷⁵ It is not clear whether the court found jurisdiction in the juvenile court by construing the petition as one for adoption, or whether it intended to hold that the juvenile court can forcibly take custody away from one admittedly having legal custody and give it to another, even though no grounds of jurisdiction under the juvenile code are alleged. If the latter holding was intended, it is submitted that the case was wrongly decided and may have serious future consequences. The same court has already receded somewhat from that decision in *Shepler v. Shepler*.⁷⁶

The question whether subparagraph one concerns venue or jurisdiction of the juvenile court has also received some judicial interpretation. Unfortunately, in the first case to consider the meaning of the words "where the child may be" the supreme court indicated that this language was clear and unambiguous and meant "where the child is resident at the time."⁷⁷ This is exactly the opposite result intended by the committee which originally framed the language. Its purpose was to get away from the difficult determination of the legal "residence" of a minor.⁷⁸ A good statement of what the draftsmen of the act intended the words to mean is contained in *In re Smith*,⁷⁹ decided by the Kansas City Court of Appeals in 1958.

L. *Limited Inspection of Adoption Proceeding Records—Section 453.120*⁸⁰

Section 453.120, which has received much adverse publicity from some of the media of public opinion, has worked well. Adoption records should only be inspected upon order of court for a particular reason. Certainly they should never be open to general public inspection.

74. *In re Adoption of K.*, 347 S.W.2d 239 (K.C. Ct. App. 1961); *In re Smith*, 339 S.W.2d 490 (St. L. Ct. App. 1960).

75. *State ex rel. M. L. H. v. Carroll*, 343 S.W.2d 622 (St. L. Ct. App. 1961).

76. 348 S.W.2d 607 (St. L. Ct. App. 1961).

77. *In re Adoption of Sypolt*, 361 Mo. 958, 237 S.W.2d 193 (1951).

78. Cook & Eppenberger, *The New Adoption Act*, 4 J. Mo. B. 228 (1948).

79. 314 S.W.2d 464 (K.C. Ct. App. 1958).

80. § 453.120, formerly § 9611, RSMo 1939.

M. *The Setting Aside of Adoption Decrees—Section 453.130*⁸¹

If it had been understood that an adoption decree may be set aside *at any time* the court deems it to be for the best interest of the child, section 453.130 would have been totally unnecessary. Of course, fraud in procuring the decree would always be good grounds for setting it aside. But an adoption decree creates a new status and vests important inheritance rights. After it has become final⁸² it should be set aside only for the most important reasons. Therefore, this section gave only three causes for setting aside such a decree, and then only within five years. Outside of these three reasons, and the basic ground of fraud mentioned above, a court should have no jurisdiction to consider such a petition.⁸³

Surprisingly, however, our supreme court has disapproved the St. Louis Court of Appeals in the *McDuffee case*⁸⁴ and further disapproved certain language of division one in the *Zartman case*⁸⁵ by holding recently that where there is a showing that the welfare of the child requires it, a court of equity may annul a valid decree of adoption, apparently at any time, although none of the statutory grounds are present.⁸⁶ Unfortunately, this language will make every adoption decree suspect and subject to motions, similar to those now filed in divorce proceedings, to change the custody granted by the original decree. True, the case held the petition (by the adoptive parents) was insufficient and affirmed the lower court's decree dismissing it, not on the ground of lack of jurisdiction, but on lack of allegations to show the need. In the course of the opinion the court said:

And, in the absence of some compelling reason not here shown, we think it should never be done solely at the instance of the adoptive parents (in cases other than those enumerated in Sec. 453.130) where the child would be cast aside to become a public charge and the adoptive parents freed of the obligation of parenthood by them voluntarily assumed in obtaining the adoption.⁸⁷

Such language is in itself contradictory and ambiguous.

It was the purpose of the Adoption Act to make decrees of adoption as final as possible, as shown by this section and by sections 453.140-.170,

81. § 453.130, formerly § 9615, RSMo 1939.

82. Thirty days after its rendition if no motion for new trial is filed. Mo. R. Civ. P. 82.05.

83. *In re McDuffee*, 341 S.W.2d 315 (St. L. Ct. App. 1960).

84. *Ibid.*

85. *In re Adoption of Zartman v. Alford*, 334 Mo. 237, 65 S.W.2d 951 (1933).

86. *In re McDuffee*, 352 S.W.2d 23 (Mo. 1961) (en banc).

87. *Id.* at 25.

inclusive. It is difficult to understand where the juvenile court or even a court of equity would get jurisdiction to entertain a petition to set aside a decree, once it has become final, except under the provisions of section 453.130. Adoption is purely a creature of statute and even "the best interests of the child" cannot give the court jurisdiction where it has none.

N. *Remaining Sections*⁸⁸

The other sections in the act have had no judicial interpretation except that lack of notice to the natural father was held not a mere "irregularity" under section 453.160, which was therefore inapplicable.⁸⁹

CONCLUSION

All in all, the Adoption Code passed in 1947 has proven workable and to the best interest of all parties to an adoption proceeding—the child, the natural parents and the adoptive parents. Undoubtedly other questions will arise which will require decisions of our courts for their solution. But no statute can be perfect, and what is clear and unambiguous to one person may be hazy and unclear to another. Such is human nature, especially where the parent-and-child relationship is involved. Missouri can pride itself on the liberality, not only of the act itself, but generally of the decisions of our courts construing it.

88. §§ 453.140-.170, formerly §§ 9616 (a), (b), (c), & (d), RSMo 1939.

89. *In re Adams*, 237 S.W.2d 232 (St. L. Ct. App. 1951).