Judicial Review of Adoption Decrees

William F. Zacharias

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol23/iss3/3

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
JUDICIAL REVIEW OF ADOPTION DECREES

William F. Zacharias*

NO SMALL amount of discussion has been evoked by the recent decision of the Illinois Supreme Court in the case of Ekendahl v. Svolos¹ wherein a petition was filed in the appropriate County Court praying for a decree of adoption on the ground that the minor child therein named had been abandoned and deserted. The natural parents were made parties defendant and were duly served. The natural mother answered the petition and contested the allegations and the prayer thereof but, after hearing, an order of adoption was entered. Appeal was taken from that order, by the natural mother, to the Appellate Court for the First District. The petitioners moved to dismiss such appeal on the ground that there was no authority in law for either appeal or writ of error in adoption cases. That court denied such motion, considered the appeal on the merits and reversed the decree of adoption.² Leave to appeal having been granted, the Illinois Supreme Court reversed that decision on the same ground as that suggested in petitioner's motion to dismiss.

Earlier decisions in Illinois on the point bear out this view,³ but they rested on the fact that, at the outset, the natural parents were not parties to the adoption proceedings, or, when made parties by statutory mandate,⁴ that the proceeding was not a "case" according to the common law, hence any semblance of judicial review was possible only through

* Professor of Law, Chicago-Kent College of Law.


³ The rule was first laid down in Meyers v. Meyers, 32 Ill. App. 189 (1889), on analogy with cases involving the appointment of a guardian for a minor, c.f. Cramer v. Forbis, 31 Ill. App. 259 (1889), and a finding of insanity, c.f. People ex rel. Fullerton v. Gilbert, 115 Ill. 59, 3 N. E. 744 (1885). Subsequent cases in accord are: In re Warner's Petition, 193 Ill. App. 382 (1915); Holman v. Brown, 215 Ill. App. 247 (1919), where writ of error was held improper; Dixon v. Haslett, 232 Ill. App. 152 (1924). Appeal from an order denying a petition to vacate a decree of adoption was dismissed in Moore v. Brandt, 234 Ill. App. 306 (1924).

⁴ Statutory requirement that the parents be made parties was first added in 1907. See Laws 1907, p. 3.
The unfortunate result of such holdings was that the natural parent could assert a right to custody of the adopted child only if it could be shown that the court in which adoption was decreed was entirely lacking in jurisdiction so as to make the decree a nullity. If jurisdiction was present but the order was based on an erroneous finding, no review was available.

Support for so narrow a view was said to rest in the fact that adoption proceedings were unknown to the common law, did not belong to the general jurisdiction of county courts, and existed, if at all, only by reason of special statutes establishing a special and summary manner of procedure. Unless appeal was expressly provided for therein, no review in that fashion was deemed possible.

While it is no doubt true that adoption proceedings are purely the creature of statute and formed no part of the common law, it was thought that a way for obtaining appellate review of adoption decrees had been opened by the holding of the Illinois Supreme Court in the recent case of Superior Coal Company v. O'Brien. That case declared that review of purely statutory proceedings was possible by writ of error where no other method of review was provided and the use of writ of error was not expressly forbidden, since the last named form of review was said to be a matter of right.

Application of that rule to the instant problem was rejected, in the Ekendahl case, on the ground that such a writ may only be used where (1) some property right is affected, or (2) personal liberty is involved. No question over the per-

---

5 Sullivan v. People, 224 Ill. 468, 79 N. E. 695 (1906).
6 In People ex rel. Witton v. Harriss, 307 Ill. App. 283, 30 N. E. (2d) 169 (1940), the court said: "... the sole inquiry to be made ... is whether the county court had jurisdiction to render the order... ."
7 The Appellate Court, in People ex rel. O'Connor v. Cole, 238 Ill. App. 413 at 423 (1925), made a trenchant comment on this point when it stated: "It is hardly to be thought that the legislature would provide a procedure by which, without the right of trial by jury and without the right to a review of the evidence by a higher court, a parent could, as against his will, have his child taken from him and given to another." The comment appears to have passed unnoticed.
8 In re Warner's Petition, 193 Ill. App. 382 (1915), elaborates on this point.
9 An ancient and curious case, which might indicate that the contrary is true, is discussed at length in Zane, A Mediaeval Cause Celebre, 1 Ill. L. Rev. 363 (1907).
10 SS III. 394, 50 N. E. (2d) 453 (1943), noted in 23 CHICAGO-KENT LAW REVIEW 33.
sonal liberty of the natural parent is concerned in an adoption proceeding, hence the writ could not be sought by the parent on that ground. Whether or not some property interest is involved is, however, a debatable question. On that score, the Illinois Supreme Court flatly rejected any such possibility by saying: “There is nothing in the nature of the right which natural parents have in their children and to their custody that will support a review of an adoption proceeding by writ of error.”\textsuperscript{11} Mere contingent possibilities that property rights might be affected were said to be insufficient to justify the use of such a writ. In that regard, it might be said that in Holman v. Brown\textsuperscript{12} a writ of error was dismissed because no contention had been made that any property right had been affected by the decree of adoption. Attempt was subsequently made, in Dixon v. Haslett\textsuperscript{13} to distinguish the case from the Holman decision on the ground that property rights were there involved. On this point the court said: “The foundation of the argument that property rights are involved is that the children will inherit from their adoptive parents and their adoptive parents will inherit from them.”\textsuperscript{14} That argument was refuted by the court when it found that no present property right was concerned since the heir apparent might not live to inherit, or, living to the time to inherit, might be cut off by will.

The only other possibility that a “property” right might be affected by the adoption proceeding would seem to lie in the fact that a parent, if entitled to custody, is entitled to the child’s earnings and, in case injury is done to the child affecting that earning capacity, to a cause of action in his own right against the wrongdoer to recover damages.\textsuperscript{15} True, in the case of most minors, such right is more nebulous than real, but it must be a right \textit{in esse} to ripen into a cause of action if invaded. Such interests, while not encompassed within any narrow definition of property, could have satisfied the requirement that some property right be affected so as to warrant

\textsuperscript{11} 388 Ill. 412 at 415, 58 N. E. (2d) 585 at 587.
\textsuperscript{12} 215 Ill. App. 257 (1919).
\textsuperscript{13} 232 Ill. App. 152 (1924).
\textsuperscript{14} 232 Ill. App. 152 at 154-5.
\textsuperscript{15} Kerr v. Forgue, 54 Ill. 482 (1870).
the use of a writ of error had the Illinois Supreme Court seen fit to give liberal treatment to the problem before it in the Ekendahl case. The narrow attitude displayed, probably out of respect to the idea that statutes in derogation of the common law are to be confined as much as possible, is, however, in direct contrast to the liberality usually displayed by that court in cases affecting the welfare of children.

Whatever the reason may be, judicial review of adoption proceedings in this state can now only be obtained if the legislature sees fit to amend the present statute. Mere deletion of the restriction therein against reliance upon the appellate provisions of the Civil Practice Act will not accomplish the purpose of providing adequate review of adoption decrees. If, therefore, the legislature is concerned in remedying what would appear to anyone to be an obvious defect in the law, serious consideration should be given to the problem as well as to proposals already made for its rectification. Some form of statute ought to be adopted for it is unthinkable, in this day and age, that a parent, no matter how callous, should be deprived of the custody of his child and his parental ties destroyed, without relief from his parental obligations, unless some review before a higher court of the evidence supporting such action is granted.

Before considering the specific proposals pending in the Illinois legislature, it might prove worthwhile to examine the state of the law as it exists in the other American jurisdic-

---

16 Illustrative of the liberal treatment accorded in some states is the case of Appeal of Cummings, 126 Me. 111, 136 A. 662 (1927), where statutory review, granted to a "person aggrieved," was permitted to the natural parent, although such parent was said not to have any tangible, valuable or enforceable property rights, because the decree deprived the parent of the status of heir presumptive of the child being adopted which was treated as enough of an interest to support proceedings to review.

17 Ill. Rev. Stat. 1943, Ch. 4, § 13, currently declares that the provisions of the Civil Act shall apply to adoption proceedings "except as to any provision for appeal and except as otherwise provided in this Act."

18 Following the decision in the Ekendahl case, measures were introduced in the 64th General Assembly by Representative Edwards, H. B. 219 and H. B. 220; by Senator Daley, S. B. 207; and by Senator Baker, S. B. 226. A companion bill to S. B. 226 was introduced in the House by Representatives O'Grady and Stransky: See H. B. 356. They will be discussed at greater length hereafter in this article. The proposals of Representative Edwards have passed the House, and are pending in the Senate Committee on Judiciary at the time of writing, while the Senate bills have not yet been enacted by that body.

19 See note to Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), in 16 Chicago-Kent Review 198.
JUDICIAL REVIEW OF ADOPTION DECrees

tions. As late as 1936, an eminent compiler of American statutes dealing with the family relationship, when writing on this point, stated: "The statutes of ten jurisdictions expressly provide for an appeal. Where such provisions are not found, an appeal may no doubt be taken, ordinarily, under general statutes." Since that time, nine other states have enacted statutory provisions, to a total of nineteen, but the diversity in the language thereof is noteworthy. The suggestion that reliance may be placed on general statutes covering appeals in other civil causes, however, does not appear to be generally supported by decisions for in those states without express statutory enactment only three have recognized a clear right to some form of review, three others have seemingly permitted review without inquiry over the point, while four others, including Illinois, have flatly rejected the possibility. The remaining twenty states and the District of Columbia have neither statute nor judicial decision bearing on the point.

When analysis is made of the existing statutes, it would

21 The most recent check discloses statutes in the following jurisdictions:
22 Arkansas permits appeal by one who is a party to the proceeding: Fries v. Phillips, 189 Ark. 712, 74 S. W. (2d) 961 (1934), but denies It to one not a party: Deffenbaugh v. Roden, 182 Ark. 348, 31 S. W. (2d) 406 (1930). Limited review by certiorari is permitted in North Dakota: Nelson v. Ecklund, 68 N. D. 724, 283 N. W. 273 (1938), but an appeal was dismissed on the court's own motion in In re Mair, 61 N. D. 256, 237 N. W. 756 (1931). In Pennsylvania, review to the extent possible under certiorari was permitted in Appeal of Weinbach, 316 Pa. 333, 175 A. 500 (1934). See also In re Young, 259 Pa. 573, 163 A. 344 (1918).
24 In re Palmer's Adoption, 129 Fla. 630, 196 So. 637 (1937); Leonard v. Honfarger, 43 Ind. App. 607, 88 N. E. 91 (1909), followed in Shirley v. Grove, 51 Ind. App. 17, 88 N. E. 874 (1912), and Freeland v. Weed, 75 Ind. App. 273, 128 N. E. 666 (1920); In re Hughes, 88 Oklahoma, 257, 213 P. 79 (1923). The effect of the Florida decision was subsequently nullified by Fla. Laws 1943, Vol. I, p. 187, § 17. The Oklahoma case cited indicated that adoption, in that state, was essentially a matter of contract rather than a judicial proceeding although it required the sanction of a judicial officer for its consummation. The court therein also suggested that California might be in the same category. The Illinois cases are listed in footnotes 1 and 3, ante.
seem that in no single instance has the problem of the right of appeal been thoroughly examined. In some, careful attention has been given to one or more of the following subordinate elements, to-wit: (1) who should be permitted to appeal, (2) when and how appeal should be taken, (3) should an appeal bond be necessary, (4) ought costs for an unsuccessful appeal be imposed, (5) should the appeal be limited to cases where a decree of adoption has been entered and denied in case the petition to adopt is rejected, (6) ought appeal be permitted in case the adoption decree is subsequently vacated on petition, and (7) what disposition should be made of the custody of the minor pending appeal; but no one measure encompasses all points. A comparison of the several statutes, with critical comment on their provisions, should possess some value.

With respect to the first point, i.e. who should be entitled to appeal, the widest dissimilarity is present. Under the Kansas statute, for example, the right of appeal is assimilated to appeals in other civil cases, while in Arizona a broad class of persons entitled to appeal is expressly named. The phrase most frequently found in use in such statutes indicates that “any party [person] aggrieved” may appeal. The term “party,” of course, would seem to limit the right of appeal only to those litigants actually concerned in the proceeding, while the looser term “person” might extend to one not named therein. When the expression is qualified by the adjective “aggrieved,” still further uncertainty is introduced. In order to be “aggrieved,” the individual must usually show that the decree or judgment operates on his property or bears directly upon his interests. Such might be the case in the

25 Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401, merely states an appeal may be taken without saying by whom.
28 Such was the holding in Fries v. Phillips, 189 Ark. 712, 74 S. W. (2d) 961 (1934), in the absence of statute. H. B. 219, § 11, uses the term “party to the proceeding.”
29 There are no decisions on this point, but the term “person” is used in S. B. 226, § 7-2, instead of “party.”
30 See comment in 23 CHICAGO-KENT LAW REVIEW 94 on the use of this term in connection with appeals from decisions in probate matters.
event the appellant was either the minor or the petitioner, but, in the light of the attitude displayed by the Illinois Supreme Court in the Ekendahl case, the term "aggrieved" could hardly be said to extend to the natural parent.\textsuperscript{31} Use of such phrase to describe the persons entitled to appeal is not desirable,\textsuperscript{32} particularly if the objective sought is one permitting appeal by the natural parent.

Somewhat similar phraseology appears in other statutes. In Vermont and West Virginia, the right is confined to "any person interested,"\textsuperscript{33} which is closely parallel to that given by the Louisiana statute to "any party in interest,"\textsuperscript{34} but no interpretation of the essential "interest" has been provided by judicial decision. The North Carolina statute permits appeal by a "party to . . . adoption proceedings,"\textsuperscript{35} but is defective in that the appeal can only be taken by such person from a "completed and final adoption," hence is not broad enough to include an unsuccessful petitioner. In Washington, the statute, at least by implication, extends the right of appeal to "parties . . . and those notified as herein provided,"\textsuperscript{36} but no reason appears for the latter expression since it would seem that if one is entitled to notice he should be a "party." The Missouri statute is at least more logical for it confines the right to appeal to a person who should consent to the adoption but does not.\textsuperscript{37} Although that phraseology would seem to be inapplicable to the petitioner, it has been held in that state that the successful petitioner may appeal, under another statute permitting appeals from orders granting new trials, if the adoption decree is subsequently vacated.\textsuperscript{38}

Specific description of the person entitled to appeal is con-

\textsuperscript{31} It was held broad enough, for this purpose, in Appeal of Cummings, 126 Me. 111, 136 A. 662 (1927).
\textsuperscript{32} S. B. 226, § 7-2, and its companion, H. B. 356, uses the phrase "any person who considers himself aggrieved." Italicics added. The use of a subjective rather than an objective test is not deemed suitable in legal proceedings.
\textsuperscript{33} Vermont, Pub. Laws 1933, § 3334, and West Virginia, Code 1943, §4760.
\textsuperscript{36} Washington, Laws 1943, Ch. 268, § 11.
\textsuperscript{38} In re Zartman's Adoption, 334 Mo. 237, 65 S. W. (2d) 951 (1933). Further enlargement appears to have been permitted in the case of In re Hickman, 170 S. W. (2d) (Mo. App.) 695 (1943), where petitioner successfully appealed from an order denying the petition. No question was presented, however, as to the right to maintain such an appeal.
tained in other statutes, but again wide dissimilarity is apparent. Under the South Carolina statute, for example, appeal is limited to the "parent or, in case there be no parent, by the guardian, custodian or next friend."\(^{39}\) Clearly the disappointed petitioner would not fall in this category, but it is not clear whether the parent could proceed in his own right or must seek review on behalf of the child. The Montana statute seems equally confined for the phrase there used would seem to limit the right of appeal to parent who had been made a party to the proceeding.\(^{40}\) Even more limited is the Massachusetts statute which restricts appeal to "a parent, who upon a petition for adoption, had no personal notice of the proceedings before the decree."\(^{41}\) More elaborate would seem the language in the Nebraska statute which authorizes an appeal "by any person against whom such order, judgment or decree may be made, or who may be affected thereby,"\(^{42}\) but in the last analysis such cumbersome language would seem to boil down so as to be the equivalent of "any person aggrieved."

In three of the statutes, those found in Maine, Oregon and Rhode Island, the class of persons who may appeal is limited to (a) the petitioner, and (b) the adopted child acting through a next friend.\(^{43}\) Unless the natural parent proceeds as a next friend, therefore, the parent's appeal from the adoption decree will be dismissed according to the holding the case of Moore v. Phillips.\(^{44}\) Certainly, if the natural parent's feelings in the matter are to be consulted, no such circumscrip-

\(^{40}\) Montana, Laws 1941, p. 187, amending Rev. Code 1935, Vol. III, Ch. 9, § 5859. Prior thereto, a writ of review was permitted to a parent who had not been notified on the ground that while a writ of habeas corpus could test the validity of the adoption it was not adequate: State ex rel. Thompson v. District Court, 75 Mont. 147, 242 P. 959 (1926).
\(^{41}\) Mass., Ann. Laws, Vol. VI, Ch. 210, § 11. The extreme nature of the limitation on the right to review is illustrated by Hurley v. St. Martin, 283 Mass. 415, 186 N. E. 596 (1933), wherein the natural mother was denied review because she had not sustained the burden of proving that her petition to vacate, made necessary by the statute, was filed "within one year after actual notice" of the decree.
\(^{42}\) Nebraska, Rev. Stat. 1943, Vol. III, § 43-112. There is dicta in In re Zehner's Estate, 130 Neb. 375, 264 N. W. 891 (1936), to the effect that the natural heir of the adoptive parent would have no appealable interest.
\(^{44}\) 94 Me. 421, 47 A. 313 (1900). The natural parent, in Appeal of Cummings, 126 Me. 111, 138 A. 662 (1927), was allowed to conduct an appeal under another statute, Rev. Stat. 1930, Ch. 67, § 31, permitting "any person aggrieved by any order" to appeal from the same. The court rejected a similar contention, in Moore v. Phillips, since other provisions of that statute were not satisfied therein.
tion should be placed in the appeal provision. Still more elaborate is the Vermont statute under which the "parent, grand-parent, guardian or husband" of an adopted minor may seek to have the adoption decree vacated. The decision on such petition may be reviewed by "a party interested," so presumably all of the persons named as well as the formerly successful adopting parent whose decree is vacated might obtain review. The minor himself, however, would seem to be without remedy in the premises except as some slight relief is furnished by a provision, enacted, in 1941, under which the minor, within one year after attaining majority, may file a dissent from such adoption. Most elaborate of all, is the Arizona provision which grants a right of review to the "petitioner, parent, guardian or other person having the custody of the child," and the child itself "by next friend." Unfortunately, that statute contains the qualification that the appeal may run only "from a decree of adoption," with the consequent result that appeal from an order denying a petition to adopt was held improper in Sargent v. Superior Court. If any conclusion is to be drawn from this analysis as to the persons who should be permitted to appeal, then it could only be one to the effect that careful thought is necessary to fix and name the class in question.

The time and manner of taking the appeal, where permitted, is customarily handled in the same fashion as is true of civil cases generally. There would seem to be no reason why any different regulation should be imposed in adoption cases, particularly where the parties are before the court or have been personally served with notice of the pendency of the proceedings. For that reason, the adoption decree usually becomes final as to such persons at the expiration of thirty days after the entry thereof. In some instances the appeal procedure merely contemplates a hearing de novo in the next

48 28 Ariz. 605, 238 P. 387 (1925). In the case of In re Clark's Adoption, 38 Ariz. 461, 1 P. (2d) 112 (1931), the court indicated, without discussing the point here concerned, that denial of a petition to adopt would not be disturbed on appeal "without a showing of a very grave abuse of discretion."
49 Compare Washington, Laws 1943, Ch. 268, § 11, with S. B. 226, § 7-2.
highest court,\textsuperscript{50} but in other statutes the nature of the review intended is clearly that customarily provided by appellate tribunals.\textsuperscript{51} Where the court hearing the adoption proceeding in the first instance is a court of record, and particularly where the evidence in the proceeding is preserved in the record,\textsuperscript{52} it would seem that appellate review rather than trial de novo should suffice. The bills now pending in the Illinois legislature, at least, are drawn along the line of providing for appellate review only.\textsuperscript{53}

A common provision found in statutes regulating the right of appeal requires the appellant to post a bond for costs, or an even more substantial bond in case the appeal is to operate as a supersedeas.\textsuperscript{54} There would seem to be no occasion for changing this requirement in adoption cases, except in one particular, so most of the statutes permitting appeal direct that the same shall be taken “in manner and form provided for appeals in civil actions.”\textsuperscript{55} The exception referred to becomes of grave concern in case the appellant is the minor, frequently one who has been adopted at a time when his wishes in the matter could not be ascertained because of his immaturity. Such person would be unable to procure bond while the onus of incurring expense in the minor’s behalf, with the risk of suffering judgment for costs, should not be thrust on his next friend. Only four of the statutes analyzed seem to give consideration to this problem, but they do provide that no bond shall be required of, or costs awarded


\textsuperscript{52} On that point, attention is invited to Ill. Rev. Stat. 1943, Ch. 110 § 188(3), which directs that no certificate of evidence is necessary to support the decree “in any case in equity.” See also Eick v. Eick, 277 Ill. App. 329 (1934).

\textsuperscript{53} H. B. 219 provides that appeals from the final order or judgment shall be taken “to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other cases.” As the Appellate Court is a court of limited jurisdiction, a companion measure, H. B. 220, seeks to enlarge the jurisdiction of that court by suitable amendment to Ill. Rev. Stat. 1943, Ch. 37, § 32.

\textsuperscript{54} See, for example, Ill. Rev. Stat. 1943, Ch. 110, § 206.

\textsuperscript{55} That phrase, or comparable language, appears in at least twelve of the statutes. The same thought appears carried over into H. B. 219, S. B. 207 and S. B. 226.
against, the minor or his next friend.\textsuperscript{56} To require the minor to wait until attaining his majority before permitting him to act to rescind a decree of adoption, as is done in some states,\textsuperscript{57} affords no reasonable solution to this problem for irreparable damage to the minor's interests might be done in the meantime. The oversight on the part of most of the legislatures is one that calls for attention.

In several instances, the adoption statutes would seem to limit the right of appeal to cases wherein adoption has been decreed.\textsuperscript{58} So far as the natural parent is concerned, there would be no occasion to seek review if the contested petition to adopt was denied since the parent's rights would in no way be disturbed and any question of custodial rights could be dealt with through habeas corpus proceedings. Ordinary fairness, however, would seem to indicate that if the natural parent is to be entitled to seek review, so too should the disappointed petitioner whose request for adoption has been denied. Where the right is granted to "any person aggrieved," that phraseology might be construed sufficiently broad to permit review at the request of the petitioner but there are decisions to the contrary.\textsuperscript{59} If it is intended that the petitioner should have the right to seek review from an adverse order, clarity of expression would dictate naming him as a person entitled to the benefit of the statutory provision.\textsuperscript{60}

\textsuperscript{56} See Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209; Maine, Rev. Stat. 1930, Ch. 80, § 39; Rhode Island, Gen. Laws 1938, Ch. 420, § 8; Wisconsin, Stats. 1943, § 324.02. The proposed measures in Illinois are silent on this point.

\textsuperscript{57} Vermont, Laws 1941, p. 61; West Virginia, Code 1943, § 4760.


\textsuperscript{59} Compare Sargent v. Superior Court, 28 Ariz. 605, 238 P. 387 (1925), with In re Hickman, 170 S. W. (2d) (Mo. App.) 605 (1943), decided under a statute which apparently limited appeal to a non-consenting parent.

\textsuperscript{60} See Kansas, G. S. 1943 Supp., Probate Code, Art. 59-2401; Oregon, Comp. Laws Ann., Vol. V, § 63-409, applied in In re Flora's Adoption, 152 Ore. 155, 52 P. 178 (1935); Rhode Island, Gen. Laws 1938, Ch. 420, § 8; Vermont, Pub. Laws 1933, § 3334; Washington, Laws 1943, Ch. 268, § 11. Proposed H. B. 219 uses the expression "any party to the proceeding" which might be construed to be sufficient to permit appeal by the petitioner. S. B. 207, on the other hand, is open to criticism on this point for proposed Section 10a specifically grants a right of appeal to "a natural parent who was a defendant in an adoption proceeding hereunder and who was deprived of the custody of his child" and then purports to make appli-
Of equal concern should be the question of the right of the natural parent or other similar person, who was not notified personally and who did not participate in the proceeding, to make application to vacate any decree based upon publication either (a) within a reasonable time after the entry thereof, or (b) within a specified period after actual notice of such decree. A substantial number of adoption decrees are based on service by publication, sometimes addressed to interested persons by the description of “all whom it may concern,” so that the absent parent might not learn of the decree in time to seek appeal under ordinary rules. The former Chancery Act of this state gave any person notified by publication an absolute right to have a decree in equity vacated upon request made within one year from the date thereof. That provision was repealed at the time of the enactment of the Civil Practice Act, and in lieu thereof the present statute authorizes a petition within one year after such decree upon which, after hearing, the court may set the decree aside or alter or amend the same “if it shall appear that such decree ought not to have been made against such defendant.” There is doubt that such statute would have application to adoption proceedings since it commences with the words “when any final decree in chancery shall be entered,” and would seem to be limited in application. It could scarcely be contended that adoption proceedings fit that category, but assuming that such section did apply, there is a vast difference between the right to have a decree vacated and the mere possibility of being able to convince the court that “such decree ought not to have been made,” as the latter contemplates some exercise of discretion on the part of the trial court. Should the petitioner be successful, there is still left undetermined the question of the right of the adopting parent to seek review of an order vacating the decree. In one state, a provision of limited nature permits direct appeal from the decree itself by the natural parent. 

62 The Washington statute limits the time for appeal to thirty days after entry of the decree: Washington, Laws 1943, Ch. 268, § 11.
64 Ill. Rev. Stat. 1943, Ch. 110, § 174(S).
without preliminary petition to vacate the same. Only in Vermont, Washington and West Virginia, however, has the problem been given serious consideration, and only the Washington statute expressly recognizes the right of the adoptive parent to seek review of an order vacating the adoption decree. Under the circumstances, it would seem that any statutory provision for review should be reasonably explicit on these points.

When denying the right to an appeal in insanity proceedings, the Illinois Supreme Court once expressed concern that to permit the taking of an appeal "would suspend the proceeding and leave the insane person at large until the appeal . . . could be decided." Much the same concern might have been in the mind of the first Illinois court asked to determine whether appeal was possible in adoption matters, for it cited that case in support of its holding denying such right. Certainly, no minor should "be left at large" until the appeal could be decided, but it does not follow that provision could not be made for the minor's custody pending the appeal. In only one instance, however, does it appear that any legislature has given thought to this problem and then, apparently, only as an afterthought. An addition to the Rhode Island statute, enacted in 1940, states: "During the pendency of such appeal the superior court shall have jurisdiction with respect to the custody of such child and shall make such orders as may be for the best interest of such child. This jurisdiction shall continue after verdict or decision until the final determination of the appeal." A similar provision could be inserted in any proposed amendment to the Illinois act and the custody of the minor pending appeal could well be left to the discretion of the trial judge, thereby obviating a potential objection to granting appeal in such cases.

67 Washington, Laws 1943, Ch. 268, § 11, permits application within six months from decree.
68 West Virginia, Code 1943, § 4790.
69 None of the Illinois proposals, except by inference which might be drawn from reference to the applicability of the Civil Practice Act, touch on this point. Assumption that the Civil Practice Act covers the situation is unwarranted.
70 Such right has since been granted: Ill. Rev. Stat. 1943, Ch. 91 1/2, § 24.
71 People ex rel. Fullerton v. Gilbert, 115 Ill. 59 at 61, 3 N. E. 744 at 745 (1885).
72 Rhode Island, Acts and Resolves 1940, p. 608.
Tested in the light of these suggestions, the proposed amendments to the Illinois act would all appear to be inadequate. House Bill 219 proposes to eliminate the qualification on the language which makes the Civil Practice Act applicable to adoption proceedings by deleting the words “except as to any provisions for appeal and” as they now appear in Section 11 of the Adoption Act. That is the first essential step. But that bill then proposes to add the following: “Any party to the proceedings may appeal from the final order or judgment of the Court to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other cases.” Such language would seem sufficiently broad to permit appeal by either the petitioner, the parent, or the minor from decrees of adoption or orders denying the prayer of the petition. The time and manner of taking appeal can be determined by reference to other statutory provisions, but the quoted language would appear to be insufficient to settle the other problems which will be apt to arise upon proceedings to review unless some amplification is made. The companion bill, House Bill 220, is essential in order to enlarge the jurisdiction of the Appellate Court. Care must be taken, however, to avoid the situation of conferring jurisdiction of appeals taken under an act which might, at the same session, be repealed.73

Proposed Senate Bill 207 is designed to add a new section to the present statute. That section, designated Section 10a, would read:

A natural parent who was a defendant in an adoption proceeding hereunder and who was deprived of the custody of his child by the decree entered in such proceeding may appeal to the Appellate Court for a review of all questions of law and fact presented by the record. It is followed by a slight modification of Section 11 under which the words “except as to any” would be deleted and the word “including” substituted in place thereof so as to make the Civil Practice Act “including the provisions for appeal” cover adoption proceedings. The scope of review permitted

73 S. B. 226 proposes to repeal the act of Feb. 27, 1874, as amended, and to substitute an entirely new statute in its place. The language of H. B. 220 would be nullified if such measure were passed unless suitable amendment was made therein.
by proposed Section 10a is obviously very narrow, but conflict is engendered with the subsequent change which purports to throw the door wide open. One significant thing should be noticed, and that is the fact that proposed Section 10a would permit review "of all questions of law and fact presented by the record." It would be unfortunate if appellate review were to be limited merely to questions of law, for the most seriously disputed question before the trial court, in adoption cases, is the one over the point of whether or not the natural parent is so far at fault as to warrant taking the child from under his custody and placing it with another.

More comprehensive is the change proposed by Senate Bill 226 which would repeal the existing statute and substitute a new adoption act in place thereof. There is no occasion, here at least, to comment on all of its provisions, but the section regarding the question of review is worthy of attention. That section now reads:

Sec. 7-2. Appeals from the final orders or judgments of the County Court or the Circuit Court, made and entered in proceedings under this Act, may be taken, by any person who considers himself aggrieved, to the Appellate Court of this State, in the same manner as in other civil cases in courts of record, provided, that no appeal may be taken more than thirty days after the entry of the order or judgment appealed from.

Two points should be noted, to-wit: (1) the appellant may be "any person who considers himself aggrieved," and (2) the time for taking the appeal is limited to "thirty days after the entry of the order or judgment appealed from." The ambiguity concerning the person who might appeal would doubtless require judicial construction. The short period permitted in which the appeal might be taken would not be objectionable as applied to one who had been personally served and was present in court, but it seems unreasonably short as applied to one presumably notified by publication, particularly if the notice was not, in fact, received.

As introduced, that statute, like the present one, makes no specific reference to the consequences of adoption as between the child and the adopting parents, nor does it purport to change the rule laid down in Dwyer v. Dwyer, 366 Ill. 630, 10 N. E. (2d) 344 (1937), noted in 16 CHICAGO-KENT REVIEW 198, with respect to the duty owed to the child by the natural parents after adoption has taken place. S. B. 226 is also silent on the right of the adopting parents to seek to vacate the decree in case the adopted child should subsequently, within a reasonable period, be discovered to be insane, feeble-minded or the like.
As none of the proposed amendments would seem sufficient to meet the needs of the situation produced by the decision in the Ekendahl case, a proposed statute is here presented for consideration. Such statute is admittedly lengthy, but it purports to cover all of the problems noted above. It may be substituted for Section 11 of the present act, or, with suitable modification, might be inserted in place of Section 7-2 of the contemplated new statute on the subject. A companion bill enlarging the jurisdiction of the Appellate Court, similar to House Bill 220, would be required to provide complete coverage. The text of the appeal provision should be substantially as follows:

The provisions of the Civil Practice Act and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act. No matters not germane to the distinctive purpose of this proceeding shall be introduced by joinder, counterclaim or otherwise.

Any petitioner, parent, guardian or other person having the custody of a child may appeal from the final order or judgment of the Court to the Appellate Court for the proper district, in the method and manner provided by the Civil Practice Act in other civil cases in courts of record, for a review of all questions of law and fact presented by the record, provided, that no appeal may be taken more than thirty days after the entry of the order or judgment appealed from; and the child adopted may, by next friend, appeal in like manner, but no bond shall be required of or costs awarded against such child or next friend on an appeal from an order of adoption. During the pendency of any such appeal, the court in which the adoption proceedings were instituted shall have jurisdiction with respect to the custody of the child and shall make such orders as

75 The first paragraph is taken from the present statute with the words “except as to any provisions for appeal and” deleted.
76 The class of persons names is borrowed from Arizona, Code Anno. 1939, Vol II, Ch. 27, § 27-209.
77 The words “final order or judgment” are to be preferred over “decree of adoption,” so as to permit appeal by either side.
78 A fixed time limitation would seem desirable to avoid the possibility of both a “short” appeal and a “long” appeal permitted under Ill. Rev. Stat. 1943, Ch. 110, § 200.
79 This clause is substantially similar to Arizona, Code Anno. 1939, Vol. II, Ch. 27, § 27-209. It should be noticed that the qualification that no bond shall be required of or costs awarded against the minor is confined to appeals from “an order of adoption.” The minor would scarcely need to seek relief except from such a decree. If, therefore, the minor or his next friend wishes to appeal from any other final order, he should be prepared to bear the onus of an unsuccessful appeal.
may be for the best interests of the child, which jurisdiction shall continue until the final determination of the appeal.\footnote{This sentence, with suitable modification, is borrowed from Rhode Island, Acts and Resolves 1940, p. 608.}

If notice of the pendency of adoption proceedings be given to any person by publication in the manner herein provided,\footnote{Service by publication in certain cases is permitted by Ill. Rev. Stat. 1943, Ch. 4, § 2, and is contemplated under S. B. 226, § 2-2.} and such person shall fail to appear or participate in such proceedings, any such person may, prior to the expiration of twelve months from the entry of any final decree of adoption,\footnote{Any reasonable period of time might be substituted, but it is thought that the same amount of time should be allowed as is granted in cases of decrees in chancery based on publication under Ill. Rev. Stat. 1943, Ch. 110, § 174(8), so that the practice might be substantially similar. That statute fixes the time period at “within one year after such decree.”} file in the court in which such adoption proceedings were instituted his verified petition for the vacation or modification of the final decree alleging the grounds, if any he has, for such action.\footnote{The requirement that the petitioner shall advance “the grounds, if any he has, for such action,” borrowed from Washington, Laws 1943, Ch. 268, § 11, is inserted to indicate that the petitioner is not entitled to have the decree vacated as a matter of absolute right.} Upon the filing of such petition, the court shall, upon application, fix a time for hearing thereon and shall require the petitioner to give not less than ten days' notice, in writing, to all of the parties to the adoption proceeding of the date set for such hearing. The court may permit such parties to answer such petition. If, upon the hearing upon said petition, it shall appear that such decree ought not to have been made, the same may be set aside, altered or amended as shall appear just; otherwise such petition shall be dismissed at petitioner's costs.\footnote{The procedure subsequent to filing the petition is substantially similar to that laid down in Ill. Rev. Stat. 1943, Ch. 110, § 174(8).} An appeal from any order vacating, altering or amending such decree or dismissing the petition, may be taken in the manner and within the time hereinabove set forth.\footnote{A discussion of the need for this provision is given above: footnotes 61 to 69, ante.}

If no appeal be taken or if no petition to vacate be filed, within the time hereby permitted, then any decree of adoption granted hereunder shall be final and conclusive and shall not be subject to attack either directly or collaterally.\footnote{This idea is borrowed from Washington, Laws 1943, Ch. 268, § 11.}

If such a statute were enacted, it could well be contended that Illinois recognizes the wisdom of permitting appeals in adoption cases and has made adequate provision to see that justice is done to all concerned therein.