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Notice and Adoption - The Requirements of Due Process

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Justice Act provides adequate compensation in all cases, nevertheless, it represents substantial progress by providing for remuneration of the lawyer for his time spent in preparing and trying the case; for expenses; and for investigative, expert or other necessary services. It also provides for extra remuneration if the litigation becomes unduly prolonged.[38] Realizing that the insoluable nature of this problem is manifestly evident, it is contended that the Criminal Justice Act should be used as a standard from which the states should proceed in attempting to more equally distribute this burden between the bar and society.

Tom J. Stollenwerck

Notice and Adoption — The Requirements of Due Process

I. INTRODUCTION

Adoption is, from a legal viewpoint, the act by which the adoptive parent assumes the relationship of natural parent to the child adopted, and by which the natural relationship existing between a child and his parent or parents is severed.[1] In Texas, some of the rights which are at once terminated and established, as to natural parents and adoptive parents respectively, include the rights of support and maintenance, inheritance,[2] custody, and the right to services and wages of the child.[3]

[38] 18 U.S.C. § 3006A (1964).

[1] 2 C.J.S. *Adoption of Children* § 1a (1936).

[2] The natural parents may not inherit from the child, but he may inherit from them. See note 3 *infra*.

[3] Tex. Rev. Civ. Stat. Ann. art. 46a(9) (1959):

> Sec. 9. When a minor child is adopted in accordance with the provisions of this Article, all legal relationship and all rights and duties between such child and its natural parents shall cease and determine, and such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though naturally born to them in lawful wedlock. Said child shall be entitled to proper education, support, maintenance, nurture and care from said parent or parents by adoption, and said parent or parents by adoption shall be entitled to the services, wages, control, custody and company of said adopted child, all as if said child were their own natural child. For purposes of inheritance under the laws of descent and distribution such adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural legitimate child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such

Normally, these rights cannot be severed without the consent of the natural parent or parents.[4] Consent of a natural parent is dispensed with in certain cases of misconduct, such as abandonment[5] or failure to support the child,[6] as it is presumed that the parent has, by such conduct, rendered himself "unworthy" as a parent.[7] The problem of the notice which must be given to a natural parent is to be distinguished from consent, because dispensing with notice to a natural parent, in light of the important rights which are involved,[8] raises serious questions of due process.[9] Most states require notice in all cases.[10] Two important decisions of the United States

adopted child the same as if such child were the natural legitimate child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but said child shall inherit from and through its natural parent or parents. Nothing herein shall prevent any one from disposing of his property by will according to law. Such adopted child shall be regarded as a child of the parent or parents by adoption for all other purposes as well, except that where a deed, will, or other instrument uses words clearly intended to exclude children by adoption, such adopted child shall not be included in such class.

[4] Tex. Rev. Civ. Stat. Ann. art. 46a(6) (Supp. 1964). Quoted in pertinent part: Sec. 6. Except as otherwise provided in this Section, no adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent or parents shall voluntarily abandon and desert a child sought to be adopted for a period of two (2) years, and shall have left such child to the care, custody, control and management of other persons, or if such parent or parents shall have not contributed substantially to the support of such child during such period of two (2) years commensurate with his financial ability, then, in either event, it shall not be necessary to obtain the written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence; or if there be no Juvenile Court, then on the written consent of the Judge of the County Court for the county of such child's residence.

[5] *Ibid.*

[6] *Ibid.*

[7] Lee v. Purvin, 285 S.W.2d 405 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[8] See statute cited note 3 *supra.*

[9] Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case,* 100 U. Pa. L. Rev. 305 (1951).

[10] Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); Carpenter v. Forshee, 103 Ga. App. 758, 120 S.E.2d 786 (1963); Child Saving Inst. v. Knobel, 327 Mo. 609, 37 S.W.2d 920 (1931); Nelson v. Ecklund, 68 N.D. 724, 283 N.W. 273 (1938); Annot., *Necessity of Notice to Parent or Legal Custodian Before Adoption of Child,* 24 A.L.R. 419 (1923), Supplemented in Annot., 76 A.L.R. 1077 (1932).

NOTICE PROVISIONS IN ADOPTION STATUTES

Notice Required. Alaska Stat. § 20.10.040 (1962); Ala. Code tit. 27, § 3 (1958); Ariz. Rev. Stat. Ann. §§ 8-104, 8-105 (1956); Ark. Stat. Ann. § 56-104 (Supp. 1963); Cal. Civ. Code Ann. § 224 (1960); Colo. Rev. Stat. Ann. § 4-1-8 (1953); Conn. Gen. Stat. Rev. § 45-61 (1958); Del. Code Ann. tit. 13, § 908 (1958); D.C. Code Ann. §§ 16-304, 16-306 (Supp. II 1961); Fla. Stat. Ann. § 72.13 (1964); Hawaii Rev. Laws § 331-2 (1955); Ill. Ann. Stat. ch. 9.1, §§ 5, 7 (Smith-Hurd 1959); Ind. Ann. Stat. § 3-120 (1946); Iowa Code Ann. § 600.4 (1947); Kan. Gen. Stat. Ann. § 59-2278 (Supp. 1961); Ky. Rev. Stat. §§ 199.480, 199.515 (1960); La. Rev. Stat. Ann. § 9:425 (1950); Me. Rev. Stat. Ann. ch. 158. § 37 (1954); Md. Rules of Proc. Rule D74 (1963); Mass. Ann. Laws ch. 210, § 4 (1955); Minn. Stat. Ann. § 259.26 (1959); Miss. Code Ann. § 1269-03 (1956); Neb. Rev. Stat. § 43-103 (1960); Nev. Rev. Stat. § 127.040 (1963); N.H. Rev. Stat. Ann. § 461:4 (1955); N.Y. Dom. Rel. Law § 111; N.C. Gen. Stat. § 48-5 (Supp.

Supreme Court have raised the question of the notice required in adoption proceedings. *Mullane v. Central Hanover Bank & Trust Co.*[11] involved a common trustee's accounting. Notice by publication was served on the beneficiaries, who resided in diverse parts of the country. The Court held the notice to be insufficient because many of the addresses of the beneficiaries were on file with the trustee, so that personal notice to those beneficiaries would have been possible. While passing over, but not rejecting, the traditional distinctions between actions in rem and in personam, the Court stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . .[12]

Thus the Court reiterated the requirement that in order to comply with due process, the best means available must be used in giving notice of the pendency of actions; that where the address of a party is known, notice should be given by personal service. At least one commentator noted the possibility of *Mullane's* applicability to adoption.[13]

1963); N.D. Cent. Code § 14-11-10 (Supp. 1963); Ohio Rev. Code Ann. § 3107.06 (Supp. 1964); Okla. Stat. Ann. tit. 10, § 60.8 (Supp. 1964); Ore. Rev. Stat. §§ 109.324, 109.330 (Supp. 1961); Pa. Stat. Ann. tit. 1, § 3 (1963); R.I. Pub. Laws ch. 106, §§ 15-7-7, 15-7-8 (1962); S.C. Code Ann. § 10-2587.7 (Supp. 1964); Tenn. Code Ann. §§ 36-108, 36-110 (Supp. 1964); Utah Code Ann. § 78-30-5 (1953); Vt. Stat. Ann. tit. 15, § 441 (1958); Va. Code Ann. § 63-351 (Supp. 1964); Wash. Rev. Code Ann. § 26.32.080 (1951); Wyo. Stat. Ann. § 1-710 (1957).

Statute Silent as to Notice. Ga. Code Ann. §§ 74-403, 74-408 (1964). (Statute only provides for notice to those whose consent is required. Carpenter v. Forshee, 103 Ga. App. 758, 120 S.E.2d 786 (1961), held that these two statutes require notice even where no consent is required.); Idaho Code Ann. §§ 16-1504, 16-1506 (Supp. 1965) (No notice required to be given to parent who has abandoned the child, Finn v. Rees, 65 Idaho 181, 141 P.2d 976 (1943). Cf. Smith v. Smith, 67 Idaho 349, 180 P.2d 853 (1947) (dissent also).); Mich Stat. Ann. § 27.3178 (542) (1962) (Notice is required to be given to a nonconsenting parent. See *In re* Ives, 314 Mich. 690, 23 N.W.2d 131 (1946), (construing pre-1945 law which was substantially the same.); Mo. Ann. Stat. § 453.040 (1952) (Notice required where consent not necessary. Child Saving Inst. v. Knobel, 327 Mo. 609, 37 S.W.2d 920 (1931)); N.J. Stat. Ann. §§ 9:3-17 to 9:3-35 (1960) (Notice mentioned only in connection with those having custody.); S.D. Code § 14.0406 (Supp. 1960); W. Va. Code Ann. § 4755 (1961); Wis. Stat. Ann. § 48.84 (1957) (No notice required to be given to parent who has abandoned the child. Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922) (Interpreting old statute.)).

No Notice Required. Mont. Rev. Codes Ann. § 61-211 (Supp. 1963) (*In re* Adoption of Bascom, 126 Mont. 129, 264 P.2d 223 (1952), held notice was mandatory under prior statute which purported to give the court discretion as to notice to a parent whose consent was not required.).

[11] 339 U.S. 306 (1949).

[12] *Id.* at 314.

[13] See Fraser, *supra* note 9.

In *May v. Anderson*,[14] the Court held that a Wisconsin judgment awarding custody of children to their father was not entitled to full faith and credit because the Wisconsin court did not have personal jurisdiction over the mother, who resided in Ohio. Resting the decision on the concept of divisible divorce,[15] the Court reasoned that since alimony rights could not be terminated without personal jurisdiction, a parent's "precious" rights in and to her children are entitled to at least as much protection.[16] Justice Jackson, who wrote *Mullane*, dissented, urging that "status" afforded a sufficient basis for recognizing the validity of the Wisconsin decree, but he recognized the importance of notice and the opportunity to be heard.[17]

These two cases seem to stand for the proposition that when one seeks to terminate parental rights in and to children, personal jurisdiction[18] must be obtained as to the parent whose rights are sought to be terminated and the service must run in a manner which is most likely, under the circumstances, to give notice of the action.[19]

If a parent consents to the adoption of his child, he is deemed to have had sufficient notice of the proceedings.[20] Some courts have confused the problems of consent and notice by stating that where no consent is required (*e.g.*, in cases of abandonment), no notice is required.[21]

The Texas adoption statute is silent as to notice, requiring only that consent of the natural parents be given and that in certain cases of misconduct this consent may be dispensed with.[22] Texas courts have interpreted this provision as meaning that consent stands in the place of notice and that where no consent is required, no

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[14] 345 U.S. 528 (1952).

[15] In Estin v. Estin, 334 U.S. 541 (1948), the Court held that an ex parte divorce was sufficient to sever the marital ties between husband and wife but was insufficient to cut off the wife's right to alimony obtained under a prior decree in another state. "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." *Supra* at 546. The theory as to the former is apparently in rem or quasi in rem with the marriage status as the res; as to the latter, the action is in personam, requiring personal jurisdiction. See Ehrenzweig, CONFLICT OF LAWS § 71 at 236-237 (1962); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 Va. L. Rev. 379 (1959).

[16] Hazard severely criticizes this holding. Hazard, *supra* note 15, at 384.

[17] 345 U.S. at 541. The concept of status and its accompanying jurisdictional problems is not a factor in the noted case.

[18] See note 36 *infra* and accompanying text.

[19] Even in cases where the status theory is applied to adoption, notice, as distinguished from personal jurisdiction, is required. Ehrenzweig, *op. cit. supra* note 15, § 26 at 86-87 and cases cited.

[20] Trotter v. Pollan, 311 S.W.2d 723 (Tex. Civ. App. 1958) *error ref. n.r.e.*; Medina v. Yzaguirre, 304 S.W.2d 715 (Tex. Civ. App. 1957); Austin v. Collins, 200 S.W.2d 666 (Tex. Civ. App. 1947) *error ref. n.r.e.*; Pearce v. Harris, 134 S.W.2d 859 (Tex. Civ. App. 1939).

[21] *E.g.*, Finn v. Rees, 65 Idaho 181, 141 P.2d 976 (1943). See also note 10 *supra*.

[22] Note 4 *supra*.

notice is required.[23] This reasoning has been justly criticized. "By misconduct the parent may lose the right to object to the adoption of his child, but he is still entitled to notice prior to the complete severance of the parent-child relationship."[24] Texas rationalizes the lack of notice of the hearing by stating that a parent may be heard in a subsequent proceeding on the issue of whether sufficient facts existed to authorize the entry of the judgment.[25] The subsequent proceedings which are available, viz., motion for new trial, habeas corpus, or bill of review, would seem to be

> . . . illusory answers to due process requirements, imposing on the natural parent a burden of proof requiring that he negate grounds which should properly have been proved by the adoptive parents in the adoption proceeding. Further, the best interests of the child are still of paramount importance, and these interests undoubtedly change after the child has remained with the adoptive parents for the period of time required for the subsequent hearing to be presented.[26]

II. ARMSTRONG V. MANZO[27]

Salvatore E. Manzo, joined by his wife, petitioned the 120th District Court of El Paso County, Texas, for the adoption of Molly Page Armstrong, a minor child of a previous marriage of his wife. The child was in the custody of the mother, pursuant to the decree of divorce between Manzo's wife and the child's father. At the time of filing, the petitioners were residing in El Paso County, Texas, and the father of the child, R. W. Armstrong, Jr., resided in Tarrant County, Texas. Armstrong did not consent to the adoption and received no notice of the proceedings until after entry of judgment.[28] The adoption was granted upon a finding that Armstrong had failed to contribute to the support of the minor child commensurate with his financial ability for a period in excess of two years, the failure being regarded as grounds for dispensing with the consent of the natural parent and substituting therefor the consent of the judge of a juvenile court in El Paso County.[29] Armstrong learned of the judgment in time to file a motion for new trial which was overruled. On appeal to the court of civil appeals, Armstrong's constitutional

[23] DeWitt v. Brooks, 143 Tex. 122, 182 S.W.2d 687 (1944); Trotter v. Pollan, 311 S.W.2d 723 (Tex. Civ. App. 1958) *error ref. n.r.e.;* Lee v. Purvin, 285 S.W.2d 405 (Tex. Civ. App. 1955) *error ref. n.r.e.;* Matthews v. Whittle, 149 S.W.2d 601 (Tex. Civ. App. 1941); Comment, *Adoption and the Problem of Consent,* 5 So. Tex. L.J. 186 (1960). See Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex. 1965).

[24] Fraser, *op. cit. supra,* note 9, at 318.

[25] See cases cited in note 23 *supra.*

[26] Petitioner's Brief, p. 15, Armstrong v. Manzo, 380 U.S. 545 (1965).

[27] 380 U.S. 545 (1965).

[28] Armstrong learned of the adoption through a letter from Manzo.

[29] See statute cited in note 4 *supra.*

objections to the lack of notice were rejected in reliance upon the established Texas rationale,[30] and the Supreme Court of Texas refused an application for writ of error.[31]

Predictably, the United States Supreme Court, on writ of certiorari, struck down the Texas adoption procedure as unconstitutional. The Court held that the failure to give notice to petitioner Armstrong of the pendency of the adoption proceedings rendered the judgment constitutionally invalid and that the subsequent hearing on petitioner's motion for new trial was insufficient to cure the invalidity.

A. *Notice Of The Hearing*

Justice Stewart, writing for a unanimous Court, found in the lack of notice an obvious violation of the due process clause of the fourteenth amendment. "[A]s to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was to permanently deprive a legitimate parent of all that parenthood implies."[32] Thus, the personal rights of a parent to the care, custody, management, and companionship of his children, which were recognized in *May v. Anderson*,[33] were re-emphasized.

Armstrong v. Manzo establishes that the termination of the personal custody rights of a parent to his child, as well as the other important incidents of the parent-child relationship, can be done only with constitutionally sufficient notice to the non-moving parent.[34]

Left unanswered by Supreme Court decisions is the question of the constitutional basis of jurisdiction in adoption proceedings. There would seem to be two theoretical bases available. The Court can analogize to divorce proceedings, reasoning that jurisdiction over the "status" res is sufficient;[35] or, the language in *May v. Anderson* might be found to establish a purely personal basis of jurisdiction.[36] The

[30] *In re* Adoption of Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963). See also note 23 *supra* and accompanying text.

[31] 7 Tex. Sup. Ct. J. 74 (Appendix B 1964). The notation was "no reversible error."

[32] 380 U.S. at 550.

[33] 345 U.S. 528 (1952). See text accompanying note 14 *supra*.

[34] In the recent case of Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex. 1965), the court had before it a case almost identcal on its facts with *Armstrong*. The court failed to require that notice be given to a natural parent, preferring to rely instead upon the fact that the burden of proof was actually placed upon the adoptive parents in the later hearing.

[35] See *e.g.*, Estin v. Estin, 334 U.S. 541 (1948). See note 15 *supra*. Of course, full faith and credit problems would arise if a status theory were used to modify personal rights. May v. Anderson, 345 U.S. 528 (1952).

[36] "Wisconsin [did not have] . . . the personal jurisdiction that it must have in order to deprive their mother of her personal right to their [the children's] immediate possession." 345 U.S. at 533-34. "If this language means anything, it means that a state may not deprive a parent of custody unless the parent has been personally served with process within the

reciprocal rights of inheritance and the right of the parent to the services and wages of the child would seem to be "in rem" rights which might be susceptible of termination without personal jurisdiction. But the rights of custody and support fall within those "precious" personal rights mentioned in *May v. Anderson*[37] as requiring personal jurisdiction for their termination. With respect to a parent within the forum state, the distinction is meaningless because *Armstrong v. Manzo* requires that he be given notice and his presence within the state confers jurisdiction on the court. If a nonconsenting parent is absent from the state, however, it is conceivable that a decree of adoption could dispose of his rights to inherit from and through the child and his rights to the child's services and wages if a quasi in rem theory of jurisdiction is followed.[38]

May v. Anderson exacted personal jurisdiction as the price of full faith and credit in a custody case.[39] An adoption decree involves not only a revision of the custody of a child, but also a termination of the entire legal relationship between a child and his natural parent.[40] One might conclude that an adoption decree would not be entitled to full faith and credit absent personal jurisdiction over the nonmoving spouse. In fact, *May* has been interpreted as holding that before a parent can be deprived of custody, he must be personally served within the jurisdiction of the court; that is, personal jurisdiction is required to comport with procedural due process, full faith and credit questions aside.[41] This would seem to require that the notice of which the *Armstrong* Court speaks must be given in such a manner as to confer personal jurisdiction. If personal jurisdiction really is the *sine qua non,* then the vitality of the status or in rem theory of adoption is open to question.

If this is what *Armstrong* means, then adoption decrees rendered without personal jurisdiction (personal service within the forum state) over both parties will not only not be entitled to full faith and credit but will be invalid even within the forum state because of a lack of compliance with procedural due process. The possibility of such a result has already been suggested and inveighed against.[42]

If such a holding were to be applied retroactively, countless family

territorial limits of the state. . . . The opinion has been so interpreted." Hazard, *supra* note 15, at 384.

[37] 345 U.S. 528 (1952).

[38] See Ehrenzweig, *supra* note 15, § 26 at 86-87.

[39] See text accompanying note 14 *supra.*

[40] See note 1 *supra* and accompanying text.

[41] See cases cited by Hazard, *supra* note 15 at 384, including Cooper v. Cooper, 229 Ark. 770, 318 S.W.2d 587 (1958); Dahlke v. Dahlke, 97 So. 2d 16 (Fla. Sup. 1957).

[42] Hazard, *supra* note 15, at 391.

relationships[43] would become unsettled, simply because the judgments on which they are based would be subject to collateral attack.[44] The question of retroactivity is one which, of course, will not be decided until properly presented.[45] Even if the holding in *Armstrong* is confined to problems of notice, the retroactive application of the rule would unduly unsettle many family relationships, the stability of which is of primal importance in our society. Moreover, the demise of the Texas procedure casts doubts upon similar practices in other states,[46] the retroactive overturning of which would multiply the upheaval.

B. *Subsequent Hearing*

Texas courts have long held that if some form of subsequent hearing was afforded, a party could not complain of the lack of notice of a prior adoption proceeding.[47] The Supreme Court disagreed, resting its decision on the shift of the burden of proof in the later proceeding. As Justice Stewart pointed out, the burden at the trial would have rested upon Manzo to prove his fitness as an adoptive parent as well as the grounds for dispensing with Armstrong's consent. At the hearing on the motion for new trial, the burden was placed upon Armstrong to show affirmatively that he had contributed to the support of the child in accordance with the statute. Recognizing the extreme importance of the incidence of the burden of proof, the Court noted that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[48] Presumably, this means that the right to be heard must be exercised at the original hearing when the time factor has not caused a change in the child's situation and the burden of proof is in its proper place—upon the party seeking the adoption.[49]

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[43] In 1963 there were 100,004 adoptions in forty-five reporting states, and Texas ranked second in number of adoptions with 8,432. U.S. Bureau of the Census: *Statistical Abstract of the United States* 310 (1963).

[44] A party having no notice of a proceeding usually will not appear and litigate a jurisdictional issue, so that such a defect will not be cured by res judicata.

[45] Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962).

[46] See note 10 *supra*.

[47] See cases cited in note 23 *supra*.

[48] 380 U.S. at 552.

[49] As pointed out by the Supreme Court of Texas in the recent case of Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex. 1965), DeWitt v. Brooks, 143 Tex. 122, 182 S.W.2d 687 (1944), places the burden of proof at the subsequent hearing upon the party seeking the adoption. Many subsequent Texas decisions do not seem to have followed this holding. *Cf.* Trotter v. Pollan, 311 S.W.2d 723 (Tex. Civ. App. 1958) *error ref. n.r.e.*; Lee v. Purvin, 285 S.W.2d 405 (Tex. Civ. App. 1955) *error ref. n.r.e.*

III. Conclusion

Armstrong v. Manzo brings an important element in Texas adoption procedure into line with the great weight of authority among the several states, requiring notice to be given to a parent in all cases in which he retains rights in a child sought to be adopted.[50]

It is hoped that there will soon be a clarification of the important jurisdictional aspects of adoption, custody and related proceedings. If *May v. Anderson* and *Armstrong v. Manzo* are indeed harbingers of more stringent jurisdictional requirements in adoption and custody areas, and in view of the tremendous amount of litigation in the field, the Court may soon find it necessary to speak directly to the point of what the due process clause means in this context.

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[50] *But cf.* Gunn v. Cavanaugh,*supra* note 49. See also the provision for citation of parents in proceedings to declare a child to be dependent and neglected. Tex. Rev. Civ. Stat. Ann. art. 2332 (1964). A parent's right to custody of his child may be adjudicated in such a proceeding and yet the statute requires citation only if one or both of the parents is found within the county. The remedy of a parent who receives no notice is, as in adoption cases, a subsequent hearing. Reina v. State, 377 S.W.2d 838 (Tex. Civ. App. 1964) *error ref.*