Washington and Lee Law Review

Volume 17 | Issue 2 Article 9

Fall 3-1-1960

Revocation Of Adoption Agreements

compensable under the workmen's compensation statutes by either of two methods: first, by amending the acts to include such disabilities specifically, as the court in the principal case impliedly recommended; and secondly, by judicially construing the present statutes to cover such disabilities, as the court in *Chernin* declined to do. It is submitted that the latter method is more appropriate. If the Texas Supreme Court could reach such a result under a "violence to the physical structure of the body" statute, surely a New York court could reach a similar result under a less restrictive statute.

NICHOLAS H. RODRIGUEZ

REVOCATION OF ADOPTION AGREEMENTS

Adoption is a statutory right unknown to the common law,[1] and it is universally held that the consent of the child's natural mother to the adoption is a prerequisite to the vesting of this statutory right.[2] When a natural mother gives her written consent to the adoption of her illegitimate child, and then, before a final decree of adoption, attempts to withdraw her consent, a question arises resulting in conflict among courts of different jurisdictions, as well as between courts of the same jurisdiction.

This problem was clearly presented in the Georgia case of *Hendrix v. Hunter*.[3] The mother of a child born out of wedlock had entered into a written contract with the adoptive parents, whereby she consented to their adoption of the child. As consideration for the contract the adoptive parents were to pay the mother's medical and hospital expenses for prenatal care and delivery. Shortly after the birth of the child the mother executed a second written consent to the adoption, and subsequently the adoptive parents, having had custody of the child for six months, filed a petition for adoption. At the interlocutory hearing the mother filed objections to the adoption. The court used a threefold basis in refusing to allow the natural mother to revoke her written consent:(1) it would better serve the interests of the child to allow the adoption petition; (2) the evidence was not sufficient to allow a withdrawal of consent under the 1957 amendment to the Georgia adoption law;[4] and (3) the contract was not

[1]Madden, Persons and Domestic Relations § 106, at 354 (1931).

[2]Annot., 138 A.L.R. 1038 (1942).

[3]99 Ga. App. 785, 110 S.E.2d 35 (1959).

[4]"[N]o adoption shall be permitted except with the written consent of the living parents of a child. Said consent when given freely, voluntarily, may not be

void as violating public policy since the "benefits [accruing to the mother] were secondary, indirect and incidental to the prenatal care of the then unborn child."[5] The dissenting opinion asserted that the consideration, tantamount to a barter and sale of a child, violated public policy and vitiated the contract,[6] and further that the mother should be able to withdraw her consent at the interlocutory hearing without the court even considering the welfare of the child.[7]

There are three views relating to this problem. The traditional majority view is that the natural parents may revoke consent at any

---

revoked by the parents as a matter of right." Ga. Laws 1957, No. 313 § 3, at 367. As stated in the caption of the act, the purpose was to restrict the parents right to withdraw consent.

[5]110 S.E.2d at 38.

[6]It seems undisputed that a child is not subject to barter and sale. In the case of In re Adoption of Anonymous, 286 App. Div. 161, 143 N.Y.S.2d 90 (2d Dep't 1955), in which the natural mother sought to extort money from the adoptive parents by threatening to withdraw her consent, the court said, "[I]f she attempts to sell her rights, or to dispose of her child to another for her own financial profit ... the question presented is one of public policy in the administration of the law. She may place her child with others for adoption, but she may neither demand nor accept any compensation therefor except for reasonable medical fees and hospital charges connected with her confinement." Id. at 94. See People ex rel. Gill v. Lapidus, 202 Misc. 1116, 120 N.Y.S.2d 766 (Sup. Ct. 1953). Thus it would seem that accepting reasonable medical expenses does not constitute a barter and sale. This is supported by Barwin v. Riedy, 62 N.M. 183, 307 P.2d 175 (1957), in which the agreement consisted of paying the mother $400 cash for medical expenses. The money was paid directly to the mother. The New Mexico Supreme Court, in holding that this did not violate public policy, said, "It is commonly the case that persons wishing to adopt a child will make provision with its mother, or mother and father, before the birth of the child, to pay hospital and medical expenses in connection with the care of the mother and child. There is nothing in this practice inimical to public policy." Id. at 184. The court went on to say that it would have been better to pay the doctor and hospital directly, but that paying the parents, if done in good faith, constituted no wrong. Ibid. In the principal case there is no evidence to the contrary that the adoptive parents paid the expenses directly to the creditors. For other cases allowing such expenses to be paid by the adoptive parents see In re Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944); Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952); Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457 (1944); In re Adoption of Morrison, 260 Wis. 50, 49 N.W.2d 759 (1951).

Generally, the type of consideration that does vitiate the contract is that which runs directly to the mother, or parents, for their pecuniary benefit. Willey v. Lawton, 8 Ill. App. 2d 344, 132 N.E.2d 34 (1956). However, if the consideration moves to the child there seems to be no problem. Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E.2d 766 (1940).

[7]The case of Combs v. Edmiston, 216 Ark. 270, 225 S.W.2d 26 (1949) would seem to support the dissent in Hendrix in that the court held that at the interlocutory hearing the various views on withdrawal of consent were not yet applicable. In Combs, however, it would seem that the decision rested primarily on the fact that consent had not been freely and voluntarily given. That consent was freely and voltarily given was undisputed in the principal case. Hendrix v. Hunter, 110 S.E.2d at 42.

time prior to the final adoption decree.[8] The jurisdictions following this theory generally consider such revocation to be a matter of right.[9] A good example of the reasoning used is to be found in the case of *In re Adoption of Schult*,[10] in which it was held "that where the law provides that parental consent is an essential prerequisite in adoption, it means the intelligent, deliberate and voluntary consent of the parent, ... and such consent must continue up until the actual judicial approval of the adoption. Any change of mind by the parent, in the interim, must be resolved in favor of the parent."[11]

The strict minority rule allows revocation only if some legal cause is shown,[12] such as fraud or duress in the initial procurement of the consent.[13] This rule is based on the view that once consent has been freely and voluntarily given, the interest of society is better served by denying revocation in the absence of legal cause.[14] *In re Adoption of a Minor*,[15] quoted at length in the principal case due to the similarity in facts, is illustrative of the minority rule. In construing the District of Columbia adoption statute,[16] the court held that con-

[8]In re White's Adoption, 300 Mich. 378, 1 N.W.2d 579 (1942); In re Anderson, 189 Minn. 85, 248 N.W. 657 (1933); State ex rel. Platzer v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921); In re Nelms, 153 Wash. 242, 279 Pac. 748 (1929). It should be noted that there are still recent cases upholding the majority view. Wheeler v. Howard, 211 Ga. 596, 87 S.E.2d 377 (1955); Keheley v. Koonce, 85 Ga. App. 893, 70 S.E.2d 522 (1952); In re Thompson's Adoption, 178 Kan. 127, 283 P.2d 493 (1955); In re Byrd, 226 La. 194, 75 So. 2d 331 (1954); In re Bilyeu's Adoption, 210 Ore. 266, 310 P.2d 305 (1957).

[9]Wheeler v. Howard, 211 Ga. 596, 87 S.E.2d 377 (1955); In re Thompson's Adoption, 178 Kan. 127, 283 P.2d 493 (1955). In at least one case, however, the court noted that "vested rights" might intervene. "It is our opinion that under the circumstances of this case, no vested rights having intervened (such as the adoptive parents having had custody of the child for a substantial length of time), the natural mother had the right to withdraw her consent to the adoption during the 90 days while the probate court still had control over the matter by a rehearing...." In re White's Adoption, 300 Mich. 378, 1 N.W.2d 579, 581 (1942).

[10]14 N.J. Super. 587, 82 A.2d 491 (Hudson County Ct. 1951).

[11]Id. at 493. "The same privilege of withdrawing consent to the adoption, prior to the final order, should be accorded to the natural parents as the petitioners have through their right to control the litigation." Keheley v. Koonce, 85 Ga. App. 893, 70 S.E.2d 522, 527 (1952).

[12]In re Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944); In re Adoption of a Minor Child, 127 F. Supp. 256 (D.D.C. 1954); Ex parte Barents, 99 Cal. App. 2d 748, 222 P.2d 488 (1950); Sessions v. Oliver, 204 Ga. 425, 50 S.E.2d 54 (1948); In re Simaner's Petition, 16 Ill. App. 2d 48, 147 N.E.2d 419 (1957); In re Adoption of Cannon, 243 Iowa 828, 53 N.W.2d 877 (1952); Wyness v. Crowley, 292 Mass. 461, 198 N.E. 758 (1935). See Annot., 156 A.L.R. 1011 (1945).

[13]Lee V. Thomas, 297 Ky. 858, 181 S.W.2d 457 (1944).

[14]In re Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944); Wyness v. Crowley, 292 Mass. 461, 198 N.E. 758 (1935).

[15]144 F.2d 644 (D.C. Cir. 1944).

[16]D.C. Code Ann. § 16-201-03 (1951).

sent, freely and voluntarily given, could not be withdrawn as a matter of right. In restricting revocation to legal cause shown, the court relied heavily on public policy considerations. "The illegitimate child is the visible evidence of transgression against religious and moral standards,"[17] and as a result of this the child is subjected to various pressures and ridicule from the dominant group of society. Because of this problem and a resulting desire to place such children in responsible homes, the court held that to permit the mother to revoke consent at her own discretion, after having set the adoption in motion by granting consent, would defeat any possible remedial action that might be taken by various organized groups endeavoring to better the position of such illegitimate children.[18] This is not to say, however, that illegitimate children are to be taken from their natural parents solely because the adoptive parents can give them certain superior advantages.[19] The right of the natural parent to his or her child is not a matter to be dispensed with lightly.[20]

The intermediate theory, emphasizing sound judicial discretion, is based upon a consideration of all the facts of the particular case,[21] with the primary concern being the welfare of the child.[22]

---

[17]144 F.2d at 650.

[18]Ibid.

[19]"[N]o opinion of any court so far as we are aware approves the right in anyone to take away from natural parents the custody of their children solely upon the ground that the adopting parent is better prepared to provide superior advantages to the child which the natural parent for any cause might be unable to provide. But where that situation exists, and the parent has agreed that his or her child might be adopted and has executed such consent or offer in the manner pointed out by the statutory regulations of the particular jurisdiction which has been acted on by the proposed adopter, then such consent or agreement, in the absence of fraud or duress in its procurement, plus the vastly increased opportunities of the adopted child, creates a case where there is no alternative but to sustain the adoption applied for." Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457, 460 (1944).

[20]Ex parte Schultz, 64 Nev. 264, 181 P.2d 585, 596-97 (1947). Pertinent, however, is the following statement by Dean Roscoe Pound in his The Spirit of the Common Law (1921) which is quoted in In re Adoption of Morrison, 260 Wis. 50, 49 N.W.2d 759 (1951): "Courts no longer make the natural rights of the parents with respect to children the chief basis of their decisions. The individual interest of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society. In other words, here also social interests are chiefly regarded." Id. at 764.

[21]A v. B, 217 Ark. 844, 233 S.W.2d 629 (1950); In re Adoption of Pitcher, 103 Cal. App. 2d 859, 230 P.2d 449 (1951); Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952); Weisbart v. Berezin, 347 Ill. App. 13, 105 N.E.2d 814 (1952); In re Dickholtz, 341 Ill. App. 400, 94 N.E.2d 89 (1950); In re Mayernik, 292 S.W.2d 562 (Mo. 1955); In re Adoption of Anonymous, 286 App. Div. 161, 143 N.Y.S.2d 90 (2d Dep't 1955); In re Adoption of Anonymous, 198 Misc. 185, 101 N.Y.S.2d 93 (Del. County Ct. 1950).

[22]Ibid. "When a child comes before the court for adoption, whether on the basis of the desertion or consent of the natural parents filed with the court, the pres-

This theory is perhaps best illustrated by *In re Adoption of D——*,[23] wherein the child was also illegitimate and the natural mother had likewise given written consent. In refusing to allow the mother to revoke such consent, the Supreme Court of Utah said:

> "Reading of many cases on this subject teaches that each depends upon its own facts: the circumstances of the placement of the child; those under which the consent was given; the length of time the adoptive parents have had the child; any 'vested rights' that have intervened; the welfare of the child; the conduct, as well as the character and ability of the respective claimants; these and the particular governing statute are all given consideration in determining whether the consent may be revoked."[24]

Other jurisdictions following this intermediate view consider similar criteria, such as the financial and physical condition of the mother, her previous mode of life, and the losses that the adoptive parents may be subjected to as a result of relying upon the mother's consent.[25] It is suggested that any or all of the aforementioned criteria are material considerations for the court in determining what is in the best interest of the child, the determination of which is the foundation of the intermediate theory.[26]

It would seem that there are at least two advantages to leaving the matter of revocation of consent to the court's discretion. Both are pointed out by *In re Adoption of Anonymous*,[27] in which the court said that "although the mother may have no right to condition her consent on a subsequent change of mind, the Surrogate may, in the exercise of his discretion, and on consideration of all the circumstances, relieve her of her agreement and permit the consent to be

---

ent disposition, the status and the fact of the blood relationship of the natural parents are material factors for consideration by the court. They are material in determining what is for the present best interests of the child. They are not considerations which void all others. The dominant and ultimate consideration is the best interests of the child." Rhodes v. Shirley, 234 Ind. 587, 129 N.E.2d 60, 63-4 (1955). Accord, In re Holman's Adoption, 80 Ariz. 201, 295 P.2d 372 (1956); Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955); Kalika v. Munro, 323 Mass. 536, 83 N.E.2d 172 (1948); Hammond v. Chadwick, 199 S.W.2d 547 (Tex. Civ. App. 1946).

[23]122 Utah 525, 252 P.2d 223 (1953).

[24]Id. at 227.

[25]In re Adoption of Anonymous, 198 Misc. 185, 101 N.Y.S.2d 93 (Del. County Ct 1950).

[26]"It is our conclusion that the provision for revocation only by leave of court does not destroy in toto the right of the mother to call back unto herself the sacred relationship of parent and child. But she may not arbitrarily undo and destroy that which she herself has permitted to be set in motion." Adoption of McKenzie, 275 S.W.2d 365, 372 (Mo. App. 1955).

[27]286 App. Div. 161, 143 N.Y.S.2d 90 (2d Dep't 1955).