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Adoption - Withdrawal of Parent's Consent to Adoption

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subrogees.[14] The tendency in recent years has been to provide that "the king can do wrong," as indicated by Congress in passing a number of acts waiving sovereign immunity, among them the Tucker Act and the Federal Tort Claims Act. The courts, recognizing this trend, have now begun to interpret the latter act liberally. The doctrine of sovereign immunity has never seemed sound when applied to our own government of limited, delegated powers and where the body that makes the laws is not the same body that determines the rights and wrongs. Neither has it seemed just when considered in the light of the burden it casts on the injured party. As a result, the present decision should be heartily approved. As Judge Cardozo said:

> "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."[15]

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Adoption — Withdrawal of Parent's Consent to Adoption — Plaintiff, mother of a child born out of wedlock, delivered the child to the defendant Bureau eight days after his birth. At the same time the plaintiff executed a written instrument wherein she surrendered the custody of the child and consented to the child's adoption by whosoever the Bureau should select. At once the child was placed with the prospective adoptive parents. Two months after plaintiff gave up the child she requested his return. One month after this request plaintiff petitioned for habeas corpus to obtain the child. On a rehearing the lower court dismissed the petition and plaintiff appealed. *Held:* That the formal written grant of the infant by the mother is not binding on her although it is stated in irrevocable terms. *Commonwealth ex rel. Berg v. Catholic Bureau, 76 A. (2d) 427 (Pa. 1950).*

In 46 of the 48 states adoption proceedings are entirely statutory in nature.[1] The natural parents' consent to an adoption proceeding is almost uniformly required in the various state statutes.[2] If the natural parents' consent is not given, the court is ordinarily held to be without jurisdiction to grant an order of adoption unless the natural parents' rights to the child have been judicially terminated.[3] After a final order

[14] United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 70 S.Ct. 207 (1949).

[15] Anderson v. John L. Hayes Construction Company, 243 N.Y. 140, 153 N.E. 28 (1926).

[1] Quarles, The Law of Adoption—a Legal Anomaly, 32 Marq. L. Rev. 237, 241 (1949).

[2] 4 Vernier, American Family Laws 340 (1936).

[3] Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922) "Except there be an abandonment by the natural parents of the child and such fact of abandonment be found, the written consent of or actual notice to the living natural

or judgment changing the status of the child has been entered in the adoption proceedings, the natural parents who gave their consent to the adoption cannot have the adoption set aside by withdrawing that consent.[4]

But the courts are divided on the question of whether the prior consent of a person whose consent is necessary to a valid adoption can be effectively withdrawn before the judicial proceedings become final. A majority of the jurisdictions follow the older rule that a parent who gives consent required under a statute for adoption may withdraw such consent at any time before a judgment or decree approving the adoption has been entered.[5] Such withdrawals have been permitted during the period allowed for rehearing after an order confirming the adoption has been entered.[6]

But a more recent trend of the law is toward the rule that after consent to adoption is given freely and with full knowledge of all necessary facts such consent cannot be arbitrarily withdrawn even though the adoption proceedings have not become final.[7] This rule has been supported on the following grounds: that the consent has been acted upon by a court;[8] that the adoptive parent has a "vested right" in the child;[9] or because of judicial interpretation of the adoption statutes of a particular jurisdiction.[10] Other cases have held that execution on the part of the parent of the child of a document of surrender containing a consent to adoption constitutes abandonment, making the consent unnecessary and its revocation ineffective as a bar to adoption proceed-

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parents is an essential to jurisdiction of the county court to make a lawful order of adoption for such child."

[4] Lane v. Pippin, 110 W.Va. 357, 158 S.E. 673 (1931).

[5] Re White, 300 Mich. 378, 1 N.W. (2d) 579, 138 A.L.R. 1034 (1942). (and cases collected therein). State v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921); In re Nelmo, 153 Wash. 242, 279 P. 748 (1929); Adoption of Capparelli, 180 Ore. 41, 175 P. (2d) 153 (1946); Allen v. Morgan, 75 Ga. App. 738, 44 S.E. (2d) 500 (1947); In re McDonnell's Adoption, 77 Col. App. (2d) 805, 176 P. (2d) 778 (1947); Green v. Paul, 212 La. 337, 31 So. (2d) 819 (1947).

[6] Re White, *supra,* note 5.

[7] Re Adoption of a Minor, 79 U.S. App. D.C. 191, 144 F. (2d) 644, 156 A.L.R. 1001 (1944); cases collected in annotation, 156 A.L.R. 1011 (1944).

[8] Wyness v. Crowley, 292 Mass. 459, 461, 198 N.E. 758, 759 (1935) "Under the English practice in equity assent to a decree cannot be arbitrarily withdrawn although no decree has been entered thereon 'unless some error is shown which satisfies the Court that the consenting party ought not to be bound.'" Accord, Kalika v. Munro, 323 Mass. 542, 83 N.E. (2d) 172 (1948).

[9] The term 'vested rights" as used herein refers to the bonds of affection formed during the period of the adoptive parents care for the child and the expenditures of time, energy and money necessary thereto. Lee v. Thomas, 297 Ky. 858, 181 S.W. (2d) 457 (1944) (Adoptive parents cared for child with mother's consent for 15 months); A. v. B., 233 S.W. (2d) 629 (Ark. 1950) (Where baby had lived with adoptive parents for most of 3 years of its life.)

[10] Ex parte Schultz, 64 Nev. 264, 181 P. (2d) 585 (1947); Re Adoption of a Minor, *supra,* note 7.

ings.[11] The welfare of the child is generally a primary concern of the court, and where the child's best interests will be served by adoption the court will be more reluctant to allow the natural parents to revoke their consent.[12]

In Wisconsin there are no decided cases in point. The only opinion on the question in Wisconsin is a statement of the Attorney General to the effect that, under Section 322.04 (1) of the Wisconsin Statutes,[13] a court cannot grant an adoption decree unless it has an unrevoked written consent of the natural parents whose consent is required.[14] But this statement assumes that the Court would allow the natural parents to make an effective revocation of their consent, previously given. It is doubtful whether such an assumption can be made in Wisconsin. The question is an open one, and our Supreme Court has at least three possible choices. In the absence of a decision it cannot be determined whether the courts would permit the parents to arbitrarily withdraw their consent or hold that a consent cannot be withdrawn without the permission of the court. If the latter rule is followed, the natural parents would not be allowed to revoke their consent unless it was obtained through fraud, duress or mistake. A possible third rule would be to render a decision on the facts and circumstances of each case, that is, allow parents to withdraw their consent where such an action would not interfere with "vested rights" of adoptive parents or be contrary to the welfare of the child.

Three interests must be considered by the court in these cases: the right of the natural parents to the care and custody of their children, the right of one who has filled the position of parent for an extended length of time, and the best interests of the child.

The majority rule places primary emphasis upon the interests of the natural parent and ignores the interests of the adoptive parents who may have acted upon the natural parents' consent to adoption and taken the child into their home for a long period of time. Under the newer rule the courts consider the rights of the natural parents along with the interests of the adoptive parents and the welfare of the child according to the facts of each case.

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[11] Appeal of Weinbach, 316 Pa. 333, 175 A. 500 (1934), In re Davison's Adoption, 180 Misc. 494, 44 N.Y.S. (2d) 763 (Sur. Ct. 1943). But cf., In re Annonymous, 178 Misc. 142, 33 N.Y.S. (2d) 793 (Sur. Ct. 1942); Matter of Cohen, 155 Misc. 202, 279 N.Y.S. 427 (Sur. Ct. 1935).

[12] Re Adoption of a Minor, *supra,* note 7. The court has power "as *parens patriae,* to diagnose the case of the unfortunate infant and prescribe a course of treatment for its future; unhampered by the changing winds of emotion which alternately submerge and restore parental attributes." Accord, Lee v. Thomas, *supra.* note 9; A. v. B., *supra,* note 9.

[13] Wis. Stats. (1949), 322.04(1) "Except as otherwise specified in this section, no adoption shall be permitted except with the written consent of the living parents of a child. . . ."

[14] 35 O. A. G. 155 (1946).

It seems to the writer that a just decision will be more often arrived at by following the latter rule which enables the court to consider the rights of all parties taking part in the adoption proceeding.

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