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ADOPTION - EFFECT ON ADOPTION PROCEEDING OF PRIOR CONSENT OF PARENT

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RECENT DECISIONS

ADOPTION — EFFECT ON ADOPTION PROCEEDING OF PRIOR CONSENT OF PARENT — In 1923 the mother of an illegitimate child surrendered the child to the Children's Home Society and signed an agreement consenting to adoption by any parents chosen by the institution. In 1926 in an adoption proceeding, the child was adopted by the plaintiff's intestate with the society's consent, but with no consent of the mother other than that given in 1923. Upon the death of the intestate in 1936 the plaintiffs, the natural heirs at law, brought suit to set aside the adoption proceedings as being void for lack of parent's consent. *Held*, that the general consent given by the mother was insufficient because it neither identified the adoptive parents nor was given in the adoption proceedings; therefore the proceedings were void for want of jurisdiction over the subject matter. *In re Holder*, (N. C. 1940) 10 S. E. (2d) 620.

Adoption proceedings are purely statutory,[1] and although the statutes vary from state to state, they generally provide that the consent of the parents to the adoption proceeding is necessary.[2] But the character of the required consent is a matter of statutory construction. Where a parent, upon the surrender of the child to an institution or to specific persons, signs an agreement of consent to adoption the courts do not agree whether the consent is binding on the parent in a subsequent adoption proceeding. One line of authority holds that such acts on the part of the parent amount to an abandonment of the child, and the parent thereby forfeits all of his rights to the child including the right to object to any adoption.[3] Since the parent's prior consent results in abandonment of the child, no other consent to a subsequent adoption is necessary.[4] Another line of

[1] In re Jobson's Estate, 164 Cal. 312, 128 P. 938 (1912); Beach v. Bryan, 155 Mo. App. 33, 133 S. W. 635 (1911); In re Ziegler, 82 Misc. 346, 143 N. Y. S. 562 (1913); St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 189 Wis. 483, 206 N. W. 921 (1926).

[2] In Ward v. Howard, 217 N. C. 201 at 207, 7 S. E. (2d) 625 (1940), the court said, "it is not without reason that society looks first to the concern and foresight of the natural parents in the selection for the child adoptive parents into whose hands they surrender the duties and burdens of custody, training, and tuition. . . ." In Luppie v. Winans, 37 N. J. Eq. 245 (1883), the court held that it would not allow a construction of the statute to permit adoption of a child without the consent of the parents. In re Cozza, 163 Cal. 514, 126 P. 161 (1912); Watts v. Dull, 184 Ill. 86, 56 N. E. 303 (1900); *contra*, Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531 (1907).

[3] In re McCann, 104 Pa. Super. 196, 159 A. 334 (1932); Weinbach's Appeal, 316 Pa. 333, 175 A. 500 (1934); Hurley v. St. Martin, 283 Mass. 415, 186 N. E. 596 (1933).

[4] In re Larson, 31 Hun (38 N. Y. S. Ct.) 539 (1884), reversed on other grounds, 96 N. Y. 381 (1884); In re McCann, 104 Pa. Super. 196, 159 A. 334 (1932); Lacher v. Venus, 177 Wis. 558, 188 N. W. 613 (1922); Nugent v. Powell, 4 Wyo. 173, 33 P. 23 (1893). The court in People ex rel. Lentino v. Feser, 195 App. Div. 90, 186 N. Y. S. 443 (1921), held that a parent can be afforded a hearing on the issue of abandonment and cannot be precluded by an ex parte hearing.

authority holds that a general consent is revocable by the parent if the court in its discretion feels that the revocation is consistent with the child's welfare.[5] Conversely, if the revocation is not consistent with the welfare of the child the general consent is binding on the parent.[6] A third group of courts in agreement with the decision in the instant case holds that a prior general consent is not binding on the parent because it does not identify the adoptive parent or is not part of the particular proceeding.[7] Although the interests of three persons are involved in the adoption of the child, the first view favors only the interest of the adoptive parent; the second, the interests of the child with some consideration given to that of the natural parent; and the third favors only the interest of the natural parent. There is some merit to each of these views. The first by favoring the adoptive parent facilitates the placement of the child by the institution. The third permits the natural parent to reconsider the advisability of giving up his child to the particular adoptive parents. It would seem, however, that the second view is the most satisfactory because in addition to giving consideration to the interests both of the child and of the natural parent it carries out the purpose of the adoption statutes—to promote the welfare of the child.[8] Although the natural parent of the child is not objecting to the adoption in the instant case, the court follows the view which protects his interest. Thus by means of mechanical jurisprudence the court reaches a result which is probably contrary to the desires of the natural parent, the child, and the adoptive parent.[9]

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[5] Chance v. Pigneguy, 212 Ky. 430, 279 S. W. 640 (1926); In re Cohen, 155 Misc. 202, 279 N. Y. S. 427 (1935).

[6] In re Miller, 119 Misc. 638, 197 N. Y. S. 880 (1922); Weinbach's Appeal, 316 Pa. 333, 175 A. 500 (1934); In re Anonymous, 161 Misc. 371, 292 N. Y. S. 689 (1936).

[7] Ward v. Howard, 217 N. C. 201, 7 S. E. (2d) 625 (1940); State ex rel. Platzer v. Beardsley, 149 Minn. 435, 183 N. W. 956 (1921); In re Nelms, 153 Wash. 242, 279 P. 748 (1929); Davis v. Sears, (Tex. Comm. App. 1931) 35 S. W. (2d) 99. *Contra,* Hurley v. St. Martin, 283 Mass. 415, 186 N. E. 596 (1933). The court in the latter case held that a general consent given to an institution upon the surrender of the child was binding even though the mother did not read the instrument before signing it. Morrow v. Brashears, 265 Ky. 203, 96 S. W. (2d) 434 (1936). The conflict arises because of the difference of opinion of the courts as to the interpretation of the adoption statutes. One side holds that since adoption proceedings are in derogation of common law, unless the statutes are strictly complied with the proceedings are void. The other courts hold that the proceedings are valid if there is substantial compliance with the statutory requirements.

[8] In Leonard v. Honisfager, 43 Ind. App. 607 at 609, 88 N. E. 91 (1909), the Indiana appellate court said that "The object or purpose of our statute relating to this matter is manifestly to give to unfortunate children . . . the benefits of a home and of such parental care, and the law should receive a liberal construction to effect this purpose." Bilderback v. Clark, 106 Kan. 737, 189 P. 977 (1920); Magevney v. Karsch, 167 Tenn. 32, 65 S. W. (2d) 562 (1933).

[9] The instant case was decided under N. C. Consol. Stat. (1919), §§ 183, 184. Sec. 183: "The parent or guardian, or the person having charge of such child, or with whom it may reside, must be a party of record in this proceeding." Sec. 184: "with the consent of the parent or parents, if living, or of the guardian, if any, or of the

person with whom such child resides, or who may have charge of such child . . . the court may . . . allow such adoption. . . ." In Truelove v. Parker, 191 N. C. 430, 132 S. E. 295 (1926), the court interpreted sections 183 and 184 to mean that the consent of the parent or parents, if living, is necessary to make adoption legal. The consent of the guardian or person in charge is necessary where both parents are dead. The court also said that the parents must be made parties if living. In the Truelove case the proceedings for adoption took place in 1912. The quoted sections of the adoption statutes were later repealed and have been replaced by N. C. Code (1935), § 191 (4) and (10). Had the proceeding in the principal case been under the more recent statute, the result of the case would have been different, since § 191 (4) states that the consent of the parent in the proceeding is necessary, provided "that when the parent, parents, or guardian . . . has signed a release of all rights to the child, the person, agency, or institution to which said rights were released shall be made a party to this proceeding and it shall not be necessary to make the parent, parents, or guardian parties."

Mich. Stat. Ann. (1938), § 27.3151(4) allowed the adoption of a child placed in an institution only if the principal officer of such institution consented. This statute was repealed in 1939, but was reenacted in the same form by the Michigan Probate Code of 1939, Mich. Stat. Ann. (Cum. Supp., 1940), § 27.3178 (542).