# CHILDREN'S LEGAL RIGHTS JOURNAL

VOLUME 3, NUMBER 6
JUNE 1982

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# Balancing the Rights of Putative Fathers and Pre-Adoptive Children in New York State

Contested adoption proceedings, and in particular, private placement adoptions, present the courts with what are undoubtedly the most difficult and heart-rendering determinations that a judge can be called upon to make. No litigation other than the trial of a contested adoption is as fraught with psycho-social implications, not only for the litigants, but more importantly, for the innocent and defenseless third party subject of the action--the infant. The stakes are never higher than where the right to permanent custody of an infant is at issue. In many, if not all such instances, this represents the adoptive parents' only chance to have a family. It is no wonder that in too many instances, the unsucessful litigants are quick to resort to extra-judicial measures, such as fleeing the jurisdiction and foresaking all material possessions as well as family and friends in order to preserve their family life.

Mindful of the emotional trauma and upset such contested adoptions cause, New York has gone to great lengths to insure that an infant once placed (for adoption) cannot be up-rooted from its pre-adoptive home except for the most grievous reasons. New York's Domestic Relations Law §115-b (governing consents to adoption in private placement adoptions) and New York's Social





Services Law §384 (governing the "surrender" instrument used in agency placement adoptions) are applicable. Both sections of the law, in essence, provide that the written consent to adoption becomes irrevocable thirty days after its execution and the placement of the infant with the adoptive parents and commencement of the adoption proceeding. Thereafter, the consent will only be vacated if the adoption court finds fraud, duress, or coercion. Despite these safeguards (which must be strictly followed or the instrument remains revocable at will) to preserve and protect the important emotional bonding which occurs soon after the placement of an infant with adoptive parents, pre-adoptive parents recently found such placements in jeopardy for reasons well beyond their control or comprehension despite the best intentions of the legislators.

New York's statutory scheme received its first set-back in April 1979 when the United States Supreme Court in Mohammed v. Caban,1/ ruled that §111 of the Domestic Relations Law was unconstitutional gender-based discrimination insofar as it required the consent to adoption only of the mother of a child born out-of-wedlock. This holding put virtually every surrendered out-of-wedlock child then awaiting adoption in peril where the consent of the fathers had neither been procured nor even thought necessary. In many instances the identity of such putative fathers was unknown or uncertain. Adoption social workers and the courts found themselves in a real quandry, uncertain as to how to proceed, knowing that the surrendered child was secure in the loving home of his pre-adoptive parents and fully mindful of the turmoil that could be caused by seeking, much less finding, the often "fleeting impregnator." 2/ In some instances the adoption proceeding was merely delayed for additional months. In others, the Supreme Court's holding bestowed upon the fathers of out-of-wedlock children an absolute veto over the adoption, with tragic results.

In Matter of Baby Boy G., 3/ decided in the wake of Caban and before remedial legislation was enacted, the New York Family Court held the consent to adoption of the father of this out-of-wedlock child an absolute necessity without which the adoption had to be dismissed. 4/ The pre-adoptive couple fled with the child after exhausting all legal avenues of appeal. The child's whereabouts as well as that of the fugitive pre-adoptive parents continues to be unknown.

***"In short, the father who has acted as a parent to his out-of-wedlock child as demonstrated by his physical presence and financial support has the same legal rights as the mother."***

New York's response to Caban was swift. By July, 1980, §111 of the New York's Domestic Relations Law was amended to distinguish, in accordance with Caban dictates, between the interested and disinterested father of the out-of-wedlock child. The amendment provided equality to the former while obviating the need for the consent to adoption of the latter. In brief, the amendments §111 (1)(d) & (e) D.R.L. require the consent to adoption of the father of a child born out-of-wedlock only where a de facto natural family exists. Specifically, it provides that the consent to adoption by the putative father is necessary if he has lived with the child or the child's mother for six months preceding the child's placement for adoption, has contributed to the expenses incurred in the birth of the child (according to his means), and has held himself out to the community as the child's father. In short, the father who has acted as a parent to his out-of-wedlock child as demonstrated by his physical presence and financial support has the same legal rights as the mother.

This appeared to resolve the quandary by

clearly identifying those putative fathers with whom the adoption workers and courts had to contend. The legislation seemed to comply with the Caban holdings, but was it constitutional? The first court test was not long in coming.

The test to the statute's legality arose in a contested private adoption proceeding which had been in litigation prior to Caban. By the time the case reached the Appellate Division of New York's Supreme Court the infant was four years old and had been living with her adoptive parents since shortly after birth. The adoption court had denied the adoption, holding the new amendments to §111 (1) D.R.L. unconstitutional. In addition to the putative father's successful first stage challenge to the amendments' constitutionality, the adoption court had also vacated the fifteen year old mother's consent to the adoption upon the grounds of duress. 5/

To make matters worse for the litigants of this long and bitterly contested adoption proceeding, the trial was held before one Surrogate who retired without making a decision and was decided by the interim acting Surrogate who had never seen nor heard the witnesses and had only the sterile transcript of the trial, which had taken over sixteen days, following proceedings spanning some four years. The final order dismissing the adoption was signed by the newly inducted Surrogate who took office before the acting Surrogate had completed his duties in the case. The adoptive parents, faced with the dissolution of their de facto family immediately appealed.

The adoptive parents successfully argued to the court that the statutory amendments were valid and proper steps taken by the legislature to further the adoption of illegitimate newborns into stable families. They also argued that the amendments fully complied with the Supreme Court's dictates in Caban which speak in terms of a father who

> has established a substantial relationship with the child and has admitted his paternity ... [or has] ... manifested a significant paternal interest in the child

and in terms of the harshness of excluding "some loving fathers" from the adoption proceedings. 6/ Thus, they argued some distinction between unwed mothers and unwed fathers is permissible if the distinction is reasonable and not arbitrary. The distinctions which New York had carefully drawn were constitutional.

The Appellate Division agreed:

> In our view, the foregoing statutory scheme effectively promotes the adoption of illegitimate newborns into stable adoptive families. The statute requires the consent of both parents where a de facto family unit has been created through the efforts of the natural father but, at the same time, precludes an absentee biological father from frustrating the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it. Thus the statute '"serve[s] important governmental objectives and [is] * * * substantially related to [the] achievement of those objectives."' 7/ It therefore satisfies the constitutional test for a gender-based classification. Whether or not other criteria might also serve the purpose of demonstrating that an unwed father is available to his infant so that the father's pre-adoption consent should be required need not concern us here .... 8/ Contrary to the Surrogate's conclusion, the failure of [the father] to satisfy the statutory criteria does not render the statute constitutional .... 9/ It does, however, permit the adoption to go foward without his consent. (emphasis added)

On the issue of the validity of the natural mother's consent, the Appellate Division concluded that her claim of coercion was contrary to the weight of the evidence. The natural mother, although only fifteen years old at the time of her consent to adoption, was found to be a headstrong young woman who, had she chosen to go against the wishes of her parents regarding the adoption of the infant, would clearly have done so. The decision of the lower court was reversed in both important aspects and the proceedings returned for completion of the adoption. 10/

Thus, the first challenge to New York's amendments to the Domestic Relations Law was soundly defeated. Few could argue with the outcome. This little girl, unlike "Baby Boy G.," will continue to enjoy her loving home and stability of the relationships she has established with psychological parents.

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FOOTNOTES

1/ 441 U.S. 380 (1979).



2/ A phrase coined by Surrogate Gelfand in Matter of Cecelie Ann T., 101 Misc. 2d 472 (Surr. Ct. Bx. Co., 1979).

3/ 75 A.D.2d 810 (2d Dept. 1980).

4/ This was not the only factor on which the decision of the court turned. The consent of the mother was found to have been procured through duress and the identity of the father fraudulently withheld from the adoption court.

5/ Matter of "Female" F.D., ___A.D.2d___ 442 N.Y.S. 2d 575 (2d Dept. 1981)

6/ 441 U.S. at 393, 394.

7/ Califano v. Webster, 430 U.S. 313, 316-317, quoting Craig v. Boren, 429 U.S. 190, 197 (1976).

8/ See Caban v. Mohammed, 441 U.S. 380, 390, 393, Lalli v. Lalli, 439 U.S. 259, 274 (1978).

9/ Cf. Vance v. Bradley, 440 U.S. 93, 108.

10/ The natural parents subsequently failed to prosecute the appeal further. It was dismissed by the New York Court of Appeals and the adoption was recently completed.

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