

# Parental Consent: The Need for an Informed Decision in the Private Adoption Scheme

Jane A. Robert

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## PARENTAL CONSENT: THE NEED FOR AN INFORMED DECISION IN THE PRIVATE ADOPTION SCHEME

### *Introduction*

Louisiana offers two methods of adoption—agency adoption and private adoption. Licensed adoption agencies generally provide the natural mother with an experienced trained staff able to help her not only to cope with her decision, but also to understand fully the ramifications of her actions. It is this source of counselling regarding the alternatives available and the legal consequences of surrendering the child for adoption that constitutes one of the main advantages of the agency method.<sup>1</sup> Agency adoption also offers the parties a degree of certainty which, as will be shown below, is unavailable under the private scheme, in that the formal act of surrender in an agency adoption is, absent a vice of consent, irrevocable.<sup>2</sup>

Private adoptions entail a more informal procedure. Some of the safeguards traditionally associated with agency adoptions are conspicuously absent. A well-meaning relative or friend, who may act as an intermediary, seldom has the training or experience demanded by the complexity of the situation. Even if the intermediary is a more knowledgeable professional, such as an attorney or medical doctor, he may neglect to convey much needed information to the mother.<sup>3</sup> A major deficiency in private adoptions, then, is the natural mother's usual lack of access to information essential for her to make an informed decision. This comment will examine the implications of, and several alternatives to, this flawed scheme.

### *Should Private Adoptions be Outlawed?*

In view of this inadequacy of private adoptions, one alternative would be to outlaw that method of adoption.<sup>4</sup> By eliminating this informal procedure, natural mothers would theoretically be compelled

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1. See Frieden, *The Constitutional Rights of Natural Parents Under New York's Adoption Statutes*, 12 *Rev. L. & Soc. Change* 617, 626 (1983).

2. *Allen v. Volunteers of Am.*, 378 So. 2d 1030 (La. App. 2d Cir. 1979).

3. W. Meezan, S. Katz, and E. Russo, *Adoptions Without Agencies—A Study of Independent Adoptions* 5 [hereinafter Meezan].

4. Five states have outlawed private adoptions: Minnesota, Connecticut, Delaware, Michigan, and Massachusetts.

to utilize the services of an agency, thus receiving the greater protections offered in an agency adoption.

Nevertheless, agency adoptions involve significant disadvantages which must be addressed. An agency imposes a more complicated process, perceived by many as inflexible, impersonal and an invasion of privacy.<sup>5</sup> Medical care is typically offered through public hospitals or clinics which may not provide the staff or facilities which the mother may prefer. Finally, the obvious corollary of the implementation of counselling, which leads to a more informed decision by the mother, is the extended period of time required for such a process.

Private adoptions, though lacking in the requisite informative communication, do offer other benefits. In private adoptions, hospital costs may be assumed by the prospective adoptive parent, thus enabling the mother to select a medical facility of her choice. Private adoption also allows the natural mother to maintain an element of control over her child's future. For example, she may wish to specify the type of home in which she would like the child placed, or she may request information concerning the prospective adoptive parents.<sup>6</sup>

While recognizing these considerations, a state may perceive agency adoption as the better method when viewed in its entirety. However, serious consequences may result when agency adoption becomes the sole available method. As with any monopoly, there exists a great potential for abuse. Statutes governing agencies would have to be revised to prevent any intermediary from simply qualifying as an agency.<sup>7</sup> The widespread acceptance of contraceptives, abortions, and unwed motherhood has resulted in a shortage of infants available for adoption.<sup>8</sup> The improbability of an agency's ability to meet the increased demands of a much larger clientele suggests the real possibility of an increase in black market adoptions.<sup>9</sup> These findings reflect only a sampling of the results of a national research study entitled *Adoptions Without Agencies: A Study of Independent Adoptions*, conducted by William Meezan, Sanford Katz, and Eva Manoff Russo.

Outlawing private adoption, therefore, may not be the definitive answer. A better solution would be to impose upon the private adoption scheme the advantages of impressing upon the natural mother the legal consequences of her action, thus leading to a more informed decision.

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5. Meezan, *supra* note 3, at 10-11.

6. Frieden, *supra* note 1, at 627.

7. Meezan, *supra* note 3, at 232-233.

8. *Id.* at 9.

9. *Id.* at 233.

*The Best Interests of the Child*

Prior to 1960, the continuing consent of the natural parents was required before a final decree of adoption could be granted.<sup>10</sup> This allowed the natural parent who experienced a change of heart to regain custody of the child. Consequently, a child who had formed emotional attachments could suddenly be snatched from his or her adoptive parents and familiar surroundings.<sup>11</sup> This also placed the natural parents in a superior position by enabling them to use this requirement as a bargaining tool in completing the financial arrangements.

In 1960 the legislature shortened the time period in which the natural parent could revoke this consent.<sup>12</sup> The natural parent's absolute right of revocation could only be exercised prior to an interlocutory decree rather than a final decree. Furthermore, revocation of consent between the interlocutory and final decrees would not necessarily bar the adoption.<sup>13</sup>

The Private Adoption Act of 1979<sup>14</sup> once again shortened the period in which a natural parent may revoke consent, specifying that "the parents . . . may oppose the adoption of the child surrendered only by a . . . revocation made within thirty days after executing the . . . surrender." More importantly, the Act significantly restricted the power of revocation. Even a timely notice of revocation does not assure the return of the child to the natural parent.<sup>15</sup> Instead, it only entitles the natural parent to a hearing to determine what would be in the best interest of the child.<sup>16</sup> In this hearing, the natural parent and the adoptive parent are placed on equal footing. The pendulum thus swung from an absolute focus upon the natural parent's needs to recognition of the child's needs as paramount.

This shift of the legislature's focus was foreshadowed by the eminent work of Goldstein, Freud, and Solnit,<sup>17</sup> who noted that "continuity of relationships, surroundings, and environmental influence are essential for

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10. In *Green v. Paul*, 212 La. 337, 31 So. 2d 819, 820 (1947), the Louisiana Supreme Court stated that the continuing consent of the natural parent was needed before a final decree of adoption could be granted under Act 54 of 1942.

11. Note, *In re CDT: The Need for Greater Clarity in Private Adoption*, 44 La. L. Rev. 845, 849 (1984).

12. La. R.S. 9:429 (1965 & Supp. 1987) (as amended by 1960 La. Acts No. 268 and 1979 La. Acts No. 686 § 4).

13. *Id.*

14. La. R.S. 9:422.3 to :422.12 (Supp. 1987) (added by 1979 La. Acts No. 686).

15. La. R.S. 9:422.11 (Supp. 1987).

16. *Id.*

17. J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child* (1973) [hereinafter *Goldstein*].

a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world."<sup>18</sup> The study stated that while this stability may be provided by the biological parents, the adoptive parents can provide it equally effectively by becoming the child's "psychological parents."<sup>19</sup> A psychological parent is "one, who on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological . . . [or] adoptive . . . parent . . . , or any other person."<sup>20</sup>

The study also stated that after the initial assignment at birth, neither the biological nor the adoptive parent can be presumed to be the psychological parent.<sup>21</sup> The authors concluded that the implications of their work in the area of adoption "are that each child placement [must] be final and unconditional and that pending final placement a child must not be shifted to accord with each tentative decision."<sup>22</sup>

The 1979 amendments reflect these findings. One proponent<sup>23</sup> supported the bill because it would vest the court with the discretionary power needed to ensure protection of the best interests of the child, necessary because a child's early years are crucial to his development.<sup>24</sup> This amendment attempted to move private adoptions closer to agency adoptions<sup>25</sup> by limiting the natural parent's ability to revoke consent to the adoption. In this way, private adoptions would hopefully become more attractive to prospective adoptive parents.

The legislators' stated primary concern was the welfare of the child.<sup>26</sup> The increased limits placed on the natural parent's right of revocation<sup>27</sup> manifest this concern, as they contribute toward ensuring a stable environment for the child. The legislators' efforts would have been more effective, however, had they considered not only the revocation period, but also the initial consent of the natural parents. As the court stated in *In re Shavor*,<sup>28</sup> "[a]lthough an adoption can now be granted even

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18. Goldstein, *supra* note 17, at 31-32.

19. *Id.* at 17-19.

20. *Id.* at 98.

21. *Id.*

22. *Id.* at 35.

23. Otis Bedwell of the Louisiana Foster Parents Association appeared in support of the bill.

24. Private Adoption Act: Hearing on Senate Bill No. 210 Before the La. Senate Judiciary Committee (Minutes of Meeting, June 26, 1979).

25. *Id.*

26. *Id.*

27. La. R.S. 9:422.11 (Supp. 1987) (added by 1979 La. Acts No. 686).

28. *In re Shavor*, 428 So. 2d 952 (La. App. 1st Cir.), writ denied, 433 So. 2d 155 (La. 1983).

when consent is withdrawn, a valid initial consent is still a prerequisite."<sup>29</sup> If the consent is invalid from the beginning, the revocation period is inapplicable. The parent may claim that a valid consent was never given, thus nullifying the entire adoption proceedings.<sup>30</sup>

### *Strengthening the Private Adoption Scheme*

The required contents of the formal act of surrender are specified in Louisiana Revised Statutes (La. R.S.) 9:422.6.<sup>31</sup> In order to strengthen the validity of the initial consent, additional measures should be adopted to convey as much information as possible to the natural mother regarding her rights with respect to revocation of that consent.

The Supreme Court of Alaska faced a related question in the case of *B.J.B.A. v. M.J.B.*<sup>32</sup> The natural mother, in attempting to rescind her surrender of her child, argued that the consent was defective for not including a statement of her right of withdrawal. The statutory provision governing relinquishment of parental rights contained such a requirement. The court refuted the mother's argument, stating that the requirement was inapplicable to a consent to adoption. However, the court conceded that "it might be beneficial to include such a requirement in [the statute], but that action is appropriate for consideration by the legislature rather than this court."<sup>33</sup>

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29. *Id.* at 954.

30. Note, *supra* note 11, at 850.

31. La. R.S. 9:422.6 (Supp. 1987) provides the following:

The formal act of surrender shall identify the parents or parent of the child by name, parish of domicile, age, and marital status; shall identify the child and the parish of birth of the child; shall indicate the name and address of the person or persons to whom the surrender is made, or the name and address of the representative of that person or persons; and shall recite: (1) the date of birth of the child to be surrendered and that the act is not signed earlier than the fifth day following that date; (2) that the parent or parents freely and voluntarily surrender custody of the child for the purpose of private placement and adoption; (3) that the parent or parents consent to the adoption; (4) that the parent or parents have been informed and understand that their rights as parents of the child are to be terminated, and (5) that notice and service of any pleading of any sort in any subsequent adoption proceeding is waived. Should a surrendering parent of the child be under the age of eighteen at the time of signing, the formal act shall also recite that fact and shall state that the surrendering parent under the age of eighteen is joined in signing the formal act of surrender by those individuals indicated in R.S. 9:422.3. Each necessary party must sign in the presence of a notary and two witnesses, although it is not necessary that they sign the same instrument.

32. *B.J.B.A. v. M.J.B.*, 620 P.2d 652 (Alaska 1980).

33. *Id.* at 655. *Strobel v. Garrison*, 255 Or. 16, 464 P.2d 688 (1970), cited in support of this conclusion, recognized that "[s]ince the legislature has enacted statutes prescribing how adoptions shall be accomplished, this court has no power to change . . . the law as

There have been cases<sup>34</sup> in which Louisiana courts have required a statement of the right of revocation in the surrender form beyond what the legislature has required. The resulting uncertainty makes it apparent that not only should a statement of the right to revoke be included, but more importantly, such a statement should emphasize that this right is not absolute.

In the Louisiana case of *In re G.O.*<sup>35</sup> the act of surrender contained the following language: "this . . . Surrender is completely irrevocable, if no written opposition is served . . . within thirty (30) days, after the execution of the . . . surrender."<sup>36</sup> The surrender form, however, failed to specify the restricted nature of the right to revoke. The trial court interpreted this language as granting an absolute right of revocation. The trial judge found the surrender invalid because it proposed to exceed legally permissible bounds. The Third Circuit Court of Appeal recognized that this interpretation by the lower court was "not an unreasonable one," but chose to rely on other grounds to invalidate the surrender.<sup>37</sup>

In another Louisiana case, *In re J.E.C.*,<sup>38</sup> the act of surrender contained the same language. The court recognized the three attendant effects of the formal act of surrender: it transfers custody to the adoptive parent, it terminates parental rights of the natural parents, and it serves as a consent to the adoption.<sup>39</sup> The natural mother in *In re J.E.C.* argued that the surrender was invalid because of the ambiguities in the language it contained.<sup>40</sup> These ambiguities "led the natural mother to believe she could execute an act of revocation and thereby revoke the transfer of custody and the termination of parental rights along with her consent to the adoption."<sup>41</sup> In other words, the natural mother understood the right of revocation to be absolute.

The Fifth Circuit Court of Appeal interpreted the act of surrender as follows:

Clearly, the act of surrender and its three effects are as stated by the language "completely irrevocable if no written *opposition*. . . [is executed or served.]" Since execution of the act

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expressed in those statutes. . . . The role of this court is limited to construing the adoption statutes and attempting to ascertain the meaning of the legislature as expressed therein." 464 P.2d at 689-90.

34. See *In re G.O.*, 433 So. 2d 1115 (La. App. 3d Cir. 1983); *In re J.E.C.*, 487 So. 2d 675 (La. App. 5th Cir. 1986).

35. *In re G.O.*, 433 So. 2d 1115 (La. App. 3d Cir. 1983).

36. *Id.* at 1117.

37. *Id.*

38. *In re J.E.C.*, 487 So. 2d 657 (La. App. 5th Cir. 1986).

39. La. R.S. 9:422.8 (Supp. 1987).

40. *In re J.E.C.*, 487 So. 2d at 678.

41. *Id.*

of surrender has already accomplished the transfer of custody and termination of the parental rights, the use of the word "opposition" can only have reference to something which has not as yet been accomplished. The only thing which had not as yet been accomplished was the adoption. Consequently, "opposition" could only have reference to the natural parent's consent to the adoption.<sup>42</sup>

The court based its conclusion on the fact that the transfer of custody and termination of the parental rights had already been accomplished.<sup>43</sup> The court's reasoning is circular because this was the very issue to be decided. Whether these two effects have actually been accomplished depends on the validity of the consent in question.

Even accepting the reasoning of the court, it is inconceivable to expect the natural mother, at such a stressful time, to comprehend such a complicated construction of the statutory language. In many instances the parent is an unmarried mother with limited finances.<sup>44</sup> In this vulnerable position, the young parent may be easily influenced by social and family pressures to give up the child for adoption.<sup>45</sup> When the parent signs a consent to an adoption, she "sets in motion a complex statutory process. If within a few days or weeks the parent has a change of heart, and attempts to revoke that consent, . . . she may find that the adoption process, once set in motion, moves ineluctably to the final adoption decree."<sup>46</sup> Upon execution of the final decree, the parental rights are terminated.

Along with the hope that a more informed decision will increase the probability of the validity of the consent, it would certainly be beneficial to all parties concerned to clarify the limited nature of the right of revocation.

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42. *Id.* at 679.

43. *Id.*

44. See, e.g., *Janet G. v. New York Foundling Hosp.*, 94 Misc. 2d 133, 403 N.Y.S. 2d 646, 652 (Sup. Ct. 1978), in which the consent of a seventeen year old mother was found to be deficient because at the time of execution, she was "alone and uncounseled, faced with a printed form surrender prepared by the State." See generally, Annot., "Right of Natural Parent to Withdraw Valid Consent to Adoption of Child," 74 A.L.R.3d 421, 435-37 (1976).

45. See, e.g., *Duncan v. Harden*, 234 Ga. 425, 214 S.E. 2d 890 (1975). See generally, Annot., "What Constitutes Duress in Obtaining Parent's Consent to Adoption of Child or Surrender of Child to Adoption Agency," 74 A.L.R.3d 527 (1976); Annot., "What Constitutes Undue Influence in Obtaining a Parent's Consent to Adoption of Child," 50 A.L.R.3d 918 (1973); Annot., "Mistake or Want of Understanding as Ground for Revocation of Consent to Adoption or of Agreement Releasing Infant to Adoption Placement Agency," 74 A.L.R.3d 489 (1976).

46. *Frieden*, *supra* note 1, at 617.

In a recent New York case, *In Re Sarah K.*,<sup>47</sup> the mother argued that, on constitutional grounds, "the statute . . . should require that biological parents be informed that, upon revocation, they do not necessarily secure the return of their child, but may face a best interests hearing in which they stand on equal footing with the adoptive parents."<sup>48</sup> Since the natural parents failed to exercise a revocation within the stipulated period, the court reasoned that they did not have standing to challenge the constitutionality of the statute.<sup>49</sup> Notably, however, the court concluded its opinion by recognizing the need for affirmative action by the legislature:

While the issues before us are resolved without reaching the constitutionality of the statute, we note that the reforms of 1972 were motivated by the Legislature's concern that controversy and uncertainty overhung adoptions. Because certain dissatisfactions with the statute in its actual application have now several times been identified in the case law and literature, we believe it would be highly desirable for the Legislature to examine [the statute] in the light of [thirteen] years' experience, for it appears that the well-founded concerns that engendered the law are not yet dispelled.<sup>50</sup>

Because of the similarities of the statutory reforms of New York and Louisiana in substance<sup>51</sup> as well as in the concerns which motivated them,<sup>52</sup> the Louisiana Legislature would be well-advised to take notice of the insightful statements of this New York Court.

### *Recommendations*

One possible solution would be for the legislature to mandate the use of a particular formal act of surrender form. Presently, there is a form available in the Code of Civil Procedure.<sup>53</sup> This form, entitled "Parents' Formal Act of Surrender of a Child for Private Adoption,"

47. *In Re Sarah K.*, 66 N.Y. 2d 223, 487 N.E. 2d 241, 496 N.Y.S. 2d 384 (1985).

48. *Id.* at 236, 487 N.E. 2d at 247, 496 N.Y.S. 2d at 390.

49. *Id.* at 240, 487 N.E. 2d at 250, 496 N.Y.S. 2d at 393.

50. *Id.* at 242, 487 N.E. 2d at 251, 496 N.Y.S. 2d at 394.

51. N.Y. Dom. Rel. Law § 115-b (McKinney 1977 and Supp. 1987) provides for the irrevocability of consent after 30 days from the commencement of adoption proceedings unless written notice is received within this period. This revocation is given effect only if it is determined that this would serve the best interests of the child.

52. The *Sarah K.* court stated that "[a]n effort was made by this reform to introduce certainty and finality by limiting a parent's right to revoke consent, with the stated intention of balancing the rights of surrendering parents, adoptive parents and children." 66 N.Y. 2d 223, 234, 487 N.E. 2d 241, 246, 496 N.Y.S. 2d 384, 389.

53. La. Code Civ. P., Form No. 2563(b) (Supp. 1987).

states that "this Act of Surrender grants . . . irrevocable consent to the adoption, subject only to the exceptions of law found in Section 9:422.10." Even if one chooses to comply with this form, the result may still be unsatisfactory. The form refers only to Section 9:422.10,<sup>54</sup> which deals primarily with the procedural requirements of revocation. Reading Section 9:422.10 out of context can still lead to the erroneous belief that the right of revocation is absolute. Instead, Section 9:422.10 must be read together with Section 9:422.11, the pertinent part of which states that "the withdrawal of the consent . . . of the parents who . . . executed the formal act of surrender shall not bar a final or interlocutory decree of adoption, if the decree is in the best interests of the child."<sup>55</sup>

The deficiency in the form could be corrected by a requirement in Section 9:422.6 similar to the Georgia legislative solution which demands that the surrender form used conform substantially to the form provided by the statute. The Georgia form clearly states that "[one has] the right to withdraw [a] surrender within ten days from the date [signed]."<sup>56</sup> Of course, in Louisiana, further language would be needed to explain clearly that revocation during this period does not guarantee the return of the child to the natural mother. This would ensure that the natural parent has at least been exposed to this vital information, thus better guaranteeing a valid consent.

Another proposal would be to require that all consents to private adoptions be executed before a court. The imposition of judicial supervision would reduce the potential for fraud, duress, or misunderstanding,<sup>57</sup> since "the court, representing the public, can see that the parents when they consent to the adoption of their children are informed and fully understand the effect of the act which they are performing."<sup>58</sup>

There are, however, disadvantages to requiring court supervised consents. One would be the burden placed on the judicial system. Furthermore, many parents may be unwilling to come into court to execute the surrender. This latter drawback may be overcome, however, by the use of a procedure similar to one adopted by Utah.<sup>59</sup> The Utah system provides for the appointment of a commissioner "to take [the parent's] written consent and to certify the same to the court. The commissioner shall explain to such person the legal significance of such consent, and shall certify to the court his findings as to whether or not the consent

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54. La. R.S. 9:422.10 (Supp. 1987).

55. La. R.S. 9:422.11 (Supp. 1987).

56. Ga. Code Ann. 19-8-4 (c)(2) (1982 and Supp. 1986).

57. Frieden, *supra* note 1, at 633-34.

58. Utah Code Ann. 78-30-8 comment (1953).

59. Utah Code Ann. 78-30-8 (1953).

is freely given."<sup>60</sup> Thus, the cautionary advantages of judicial supervision are achieved with a minimum of intimidation to the parties.

There are additional measures that could be taken to insure an informed consent. For instance, an attorney may transcribe conversations with the natural mother, along with a signed statement of consent in the mother's own words, for evidentiary purposes, as well as to emphasize to her the impact of her actions.<sup>61</sup>

### *Conclusion*

The legislature has chosen to place emphasis on the child's best interest, thereby rejecting the parental preference standard previously employed. The purpose of this comment is not to challenge the wisdom of that decision, but rather to suggest that the legislature go one step further by ensuring that all parties have knowledge of this legislative policy choice which so drastically alters a parent's rights.

Clearly this requirement would be beneficial to all parties involved in the adoption process. First, the natural mother would want to be informed of the limited nature of her right to revoke the adoption *before* signing the surrender. Second, the adoptive parents would feel more secure in their rights concerning the child. Above all, the conveyance of this information would serve the best interests of the child. The finality of the adoption decree hinges directly on the validity of the consent. The final adoption decree must not be vulnerable to later claims of ignorance, fraud, or error by the natural mother. By reducing potential claims of fraud, misunderstanding, and attendant litigation, the child will be allowed to settle into a single, stable environment.

*Jane A. Robert*

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60. *Id.*

61. Frieden, *supra* note 1, at 631.