

Boston College Law School

From the SelectedWorks of Sanford N. Katz

December 1971

The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work



Available at: http://works.bepress.com/sanford_katz/72

The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers*

SANFORD N. KATZ**

The recent case of "Baby Lenore" has focused national attention on the problems of adoption. That case arose when, after having previously surrendered her newborn child to an adoption agency, Olga Scarpetta, the natural mother of Baby Lenore, sought the child's return. Although not yet legally adopted, the child had been placed with an adoptive family, the DeMartinos, and the agency refused Miss Scarpetta's request. Miss Scarpetta then filed a petition in habeas corpus seeking the return of the child. This petition was granted by the lower court¹ and its decision directing the return of the child to Miss Scarpetta was subsequently affirmed by the appellate division² and by the New York Court of Appeals.³ Rather than return the child as ordered, the DeMartinos left New York for Florida. There Miss Scarpetta filed another habeas corpus petition, but after a hearing the Florida court upheld the DeMartino's claim to the child.⁴

The furor and publicity surrounding these decisions has aroused a concern which must be interpreted as a demand for a fundamental reexamination of our adoption laws. These laws,

*This article is based on a speech delivered at the Annual Meeting of the American Bar Association in New York City on July 6, 1971. The author wishes to thank the Grant Foundation for its support of the research in this area.

**Editor-in-Chief of the Family Law Quarterly; Professor of Law, Boston College Law School.

1. Superior Court, N.Y. County, (Nov. 24, 1970).

2. 36 App. Div. 2d 524, 317 N.Y.S.2d 928 (1971).

3. *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

4. Cir. Ct., Dade County (June 22, 1971).

which originated not out of a concern for the welfare of children, but out of a desire to provide heirs for families whose lineage might otherwise become extinct, were, in their inception, a device for maintaining social class and economic status.

Historically, adoption dates back to biblical times, and was the subject of extensive legislation among the Romans. Nevertheless, the practice of adoption went unrecognized in common law jurisdictions until 1851, when Massachusetts enacted legislation designed to acknowledge, and provide public records of, formerly private acts of adoption.⁵ Concern for the welfare of the child involved in adoption is a relatively recent development. Indeed, it was not until the period of broad social reform near the end of the last century that the plight of children was brought to the attention of the American people. The resulting concern for children as people in need of care and as objects to be economically exploited, led not only to child welfare and child labor laws, but to changes in adoption practices as well. The law came to view adoption not as a device for facilitating the transference of wealth and the continuity of family names, but as a means of providing children, who might otherwise grow up in institutions, with the same family life and experiences which most children obtain from their natural parents. Thus, adoption increasingly became a matter for public regulation, calling for the intimate involvement of social welfare agencies and courts, rather than for private arrangement.

Consent to Adoption

The situation which existed in the *Baby Lenore* case, where a natural parent seeks to withdraw her consent prior to the issuance of the adoption decree, raises problems not present when a final adoption decree has been issued. Although the *Baby Lenore* case has raised fears in the minds of many adoptive parents that the natural mother of their child will have a change of mind and seek the return of the child, most state laws and the Revised Uniform Adoption Act provide that neither

5. S. KATZ, *WHEN PARENTS FAIL* 114 (1971).

the natural parents nor any other parties whose consent to the adoption was required may withdraw their consent after the issuance of a final adoption decree.⁶ Where, however, a final decree has not been issued, as in the Baby Lenore case, legislatures and courts have assumed a wide range of positions with regard to withdrawal of parental consent. At one extreme is the rule in Florida and Illinois that consent, once given, is absolutely irrevocable absent fraud or duress.⁷

At the other extreme is the Michigan rule that parental consent is absolutely revocable until the final decree of adoption is issued.⁸ The positions taken by most American jurisdictions, however, lie somewhere between these two extremes. Thus, it is the rule in Georgia that parental consent, once given, "may not be revoked by the parents as a matter of right,"⁹ in Delaware that the natural parents have sixty days after the giving of consent within which to seek the court's permission to revoke it,¹⁰ and in Montana and Oklahoma that consent is revocable in the discretion of the court until the interlocutory decree is issued.¹¹ Under the Revised Uniform Adoption Act, consent may be withdrawn, prior to the issuance of the decree, if the court finds that such withdrawal is in the best interests of the child involved.¹² The New York statute, which, of course, governed the Baby Lenore case, provided that the natural parent could, if the court approved, revoke consent prior to issuance of the final decree.¹³

In interpreting the New York statute, the court did not consider it relevant whether the child was living in a home with its prospective adoptive parents. Though it would appear that

6. REVISED UNIFORM ADOPTION ACT § 8 adopted in North Dakota as N.D. CODE ANN. § 14-15-08 (Supp. 1971).

7. *Skeen v. Marx*, 105 So. 2d 517 (Fla. Dist. Ct. App. 1958); ILL. ANN. STAT. ch. 4, §§ 9.1-11 (Smith-Hurd Supp. 1970).

8. *In re White*, 300 Mich. 378, 1 N.W.2d 579 (1942).

9. GA. CODE ANN. § 74-403 (Supp. 1969). 10. DEL. CODE ANN. tit. 13, § 909 (1953).

10. DEL. CODE ANN. tit. 13, § 909 (1953).

11. UNIFORM ADOPTION ACT § 6 adopted in Montana as MONT. REV. CODES ANN. tit. 61 § 206 (1970), and in Oklahoma as OKLA. STAT. ANN. tit. 10, § 60.10 (1966).

12. REVISED UNIFORM ADOPTION ACT § 8 adopted in North Dakota as N.D. CODE ANN. § 14-15-08 (Supp. 1971).

13. *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y.2d 185, 269 N.E.2d, 787, 321 N.Y.S.2d 65 (1971).

there is nothing the prospective adoptive parents can do during the period the child is first in their home—a period which in New York is at least 6 months— to insure that they will prevail, or indeed even to improve their prospect of prevailing if the natural mother changes her mind. According to the New York Court of Appeals, the issue in such an event is not a “simple factual issue as to which affords the better surroundings, or as to which is better equipped to raise the child.”¹⁴ The natural mother must prevail, the court implies, because “the status of a natural parent ‘is so important’ that in determining the best interests of the child, it may counterbalance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents.”¹⁵ . . . “a mother’s love,” said the court, “is one factor which will endure, . . . after other claimed material advantages and emotional attachments may have proven transient.”¹⁶ Thus, the court interprets the statute as directed toward the achievement of a purpose it was never intended to achieve. The intention behind allowing a period of time between placement of the child with adoptive parents and issuance of a final decree was not, as the court implies, to allow a period during which the natural mother might change her mind. Rather, it was intended as a probationary period to allow the child to be integrated into the adoptive family and to protect the adoptive child against parents who might turn out to be incompatible.¹⁷

In commenting on the decisions of the New York courts, and in particular on the decision involving Baby Lenore, Spence-Chapin, the agency which placed the child with its prospective adoptive parents—the DeMartinis—stated that: “the decisions of the courts in this case have created feelings of anxiety and insecurity on the part of many parents seeking to adopt a child.”¹⁸ In the light of this fact, the agency argued, “new legislation is necessary which will remove the uncer-

14. *Id.* at ____, 269 N.E.2d at 792, 321 N.Y.S.2d at 72.

15. *Id.* at ____, 269 N.E.2d at 791, 321 N.Y.S.2d at 70.

16. *Id.*

17. Spence-Chapin Adoption Service, Background Information 5 (N.Y. April 30, 1971).

18. *Id.* at 7.

tainties in adoption while still giving consideration to the best interests of the child, the natural mother and the adoptive family.”¹⁹

Following the New York decision in the Baby Lenore case, a bill was passed by the New York State Assembly which would allow the natural mother, once informed of all her rights, thirty days after surrendering the child to withdraw consent.²⁰ After that time, her decision would be legally unalterable. While thus limiting the time within which the natural mother could withdraw consent, the new law would not, in contrast to the old, have required court approval. Under the new legislation the natural mother’s right of revocation of consent within the thirty day period would have been absolute.

This legislation, subsequently vetoed by Governor Rockefeller, was attacked by the Citizens’ Committee for Children of New York, Inc. on the grounds that it “would not have changed the result in a single well publicized adoption case,”²¹ and, in addition would create new problems.²²

In evaluating the vetoed New York legislation, and the positions taken by other jurisdictions,

it must be remembered that here, as in other areas of adoption law, there are three parties involved—the natural parents, the adoptive parents, and the child—all of whose rights and well-being must be considered. While natural parents should have an opportunity to maintain their relationship with their child, to give them the absolute right to

19. *Id.*

20. House Bill, A. 4255-C.

21. Citizens Committee for Children of New York, Inc. Memorandum Opposing a Grant to the Natural Mother of the Absolute Right to Withdraw Consent to an Adoption, (April 13, 1971).

22. *Id.* Among its specific objections, the committee included the fact that:

(1) In private (or independent) adoption cases the child may have been living with the prospective adoptive parents for months or even years before the natural parent is informed of the right to withdraw consent during the next thirty days.

(2) In private adoption cases, granting the absolute right to withdraw consent for thirty days after the child has been living with the prospective adoptive parents for a long period of time may encourage unfounded changes of mind at best and blackmail at worst.

(3) In private adoption cases, when the natural parent withdraws consent, the court acting upon the case no longer has the right to approve the adoption by the prospective parents although it may refuse to grant the natural parent custody, thus, leaving the child with no parents.

(4) In agency cases, the situation and procedures when consent is withdrawn are very different than in private placements; a fact which this legislation does not recognize. *Id.*

revoke consent at any time, or even within a limited time at their unrestricted election, would operate to the detriment of the parties involved in the adoption. With the threat of a natural parent's revocation hanging over the prospective adoptive parents, a smooth transition to the adoptive parent-child relationship would be difficult and might have a detrimental effect on the adoptive parents' relationship with their adoptive child. Further, the adoptive child might suffer as well, as shifts in environment stemming from the changes in the position of the natural parents might cause serious psychological problems by disrupting the continuity of care so important in the healthy development of a child. Finally, to give the natural parents an unfettered right of revocation, even for a limited time, [as the proposed New York law would do,] could provide them with the power to choose between contesting sets of adoptive parents, or conceivably, to extort money from the adoptive parents in return for a promise not to revoke consent.²³

Operating within the present framework, a requirement of court approval to any revocation of consent seems to be the minimal acceptable solution. Perhaps, however, entirely new alternatives should be sought. One possibility is the judicial termination proceeding advocated by the Children's Bureau of the U.S. Department of Health, Education, and Welfare and adopted in various forms by sixteen jurisdictions. Termination proceedings, as envisioned by the Children's Bureau proposal, would be separate from adoption. Their goal would be to legally free a child from its natural parents and make it available for adoption. The major drawback of this procedure is that even though subsequent to the termination decree and prior to placement with an adoptive couple the guardianship of the child is given to the agency, the child's legal status is in something of a limbo.

Another possibility, more in conformity with existing practices, is to change the procedure whereby consent is given and make such consent, once given, absolutely irrevocable. Initially, this approach would follow the same procedure presently followed by the better child welfare agencies. The natural parents would be engaged in a period of counseling with a view toward making clear to them the various alternatives. In the case of Baby Lenore, this counseling involved thirteen sessions over a period of six months.²⁴ At the end of this period, shortly after

23. S. KATZ, *WHEN PARENTS FAIL* 120 (1971).

24. "The evidence . . . points unmistakably to its being in the interests of the

the birth of the child, the mother would be asked, but not coerced, into granting her consent to the adoption of her child.²⁵ This consent should be given in a sufficiently formal manner, perhaps even before a judge, to insure impressing upon the natural parent the serious and irrevocable nature of the act of giving consent.

This procedure would go far toward avoiding results such as those in the Baby Lenore case. As has been pointed out, "[i]t is not unusual after surrendering her child for a natural mother to have second thoughts and almost overwhelming feelings of grief and loss, even though logically her decision was right and her circumstances have not changed."²⁶ It is important, however, that these feelings of grief not be allowed to change a decision made under less trying emotional circumstances and in so doing jeopardize the best interests of a child already placed with adoptive parents or to affect the adoptive parents themselves. To this end, most agencies provide the natural parent with counseling during this period and, almost invariably, this results in a reaffirmation of the original intent. Thus, it is only a very few cases that the law would be changed so as to deprive the natural mother of her previously relinquished child against her wishes. Moreover, even in those cases, the original decision to place the child for adoption would have been made, it should be recalled—only after lengthy, thorough and unpressured discussion.

This treatment would not be complete without a word about the nature of the adoptive parent-child relationship once the adoption decree has been issued and made final. In this respect,

adopted baby's mental health for him to be adopted soon after birth. No other arrangement permits continuity of mothering and most other arrangements fail even to insure that he gets any. If the baby remains with his mother, it is not unlikely that she will neglect and reject him; if he is parked temporarily in a nursery or group foster-home his development will often suffer in some degree . . . very early adoption is thus clearly in the interests also of the adoptive parents. Moreover, the nearer to birth that they have had him the more they will feel the baby is their own and the easier will it be for them to identify themselves with his personality." J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 124 (2d ed. 1965).

25. The New York Court of Appeals took specific note of the fact that there was no hint in the case of Baby Lenore of coercion or overreaching on the part of the agency. *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y.2d 185, ———, 269 N.E.2d 787, 788, 321 N.Y.S.2d 65, 67 (1971).

26. Spence-Chapin Background Information, *supra* note 17 at 4.

it is important to remember that the purpose of adoption today is to imitate nature by providing a normal family life and family experiences for a child who would otherwise grow up in an institution or in a series of foster homes. To this end, it is essential that the rights and obligations of the adoptive parents toward their adoptive child be identical with the rights and obligations of natural parents toward a natural child. Most state laws recognize this. Likewise, it is essential that the decree of adoption, once issued, be permanent and irrevocable. The adopted child should not, any more than is the natural child, be subject to arbitrary changes in his status. However, because the adoptive parent-child relationship is artificially established, courts sometimes allow the relationship to be terminated for reasons such as the child's misconduct, its physical or mental illness unknown at the time of adoption, or when the best interests of the child demand termination.²⁷ Adoptive parents should not be allowed to terminate or alter the adoptive relationship because they are dissatisfied with their child, regret their decision about adoption, or think they made a "bad deal." As the Supreme Judicial Court in Massachusetts has said, adoption is "for better or for worse,"²⁸ and the law should so provide.

The Role of Lawyers

Where the rights of the natural parents are involuntarily terminated, the child is normally given to a child welfare agency for placement. Increasingly, child welfare agencies also take the responsibility for placing children whose parents voluntarily give up the child for adoption. Today, more than 75% of non-relative adoptions are through agencies.²⁹ Nevertheless, where the natural parent voluntarily gives up the child for adoption, an alternative to agency placement is to place the child through a private agency, a friend, or as is often the case, through an attorney, who then secures adoptive parents for the

27. See, e.g., *Pelt v. Tunks*, 153 Colo. 215, 385 P.2d 261 (1963).

28. *In re Adoption of a Minor*, 350 Mass. 302, 304, 214 N.E.2d 281, 282 (1966).

29. National Center for Social Statistics, U.S. Dep't of Health, Education and Welfare (1969).

child and places the child with them. It is understandable that lawyers, and physicians as well, should be the two groups who have most often undertaken the task of placing children for adoption. Both these professions have traditionally viewed their role as helping persons in need, in this case the unwed mother, the child and the prospective adoptive couple.

Even given these worthy motives, however, "[t]hese independent adoptions, or, as they are sometimes called, private placements, have been widely criticized on the grounds that they may encourage black market adoptions, that they can be arranged for profit, and that they leave the rights of both the natural and adoptive parents unprotected. Moreover, even a lawyer who is well-qualified to handle the legal aspects of adoption may not be qualified to decide many questions included in placing a child which properly lie within the realm of *specialized social knowledge*."³⁰

Only competent and responsible social service agencies, particularly private agencies staffed with trained social workers, skilled in casework, can provide the kind of specialized social knowledge that is so vital to the promotion of the best interests of the three parties most directly affected by adoption; the natural parents, the adoptive parents, and the child. The role of the lawyer, who often lacks this knowledge, should be confined to legal counseling, to the drafting of legal documents, and the representation of his client when the client's rights are being challenged. In particular, lawyers should refrain from acting as brokers in the placement of children.³¹ Apart from the lawyer's lack of expertise in social and psychological areas, serious ethical problems are posed when a lawyer attempts to act as counselor both to the unwed mother and to the prospective adoptive parents. The adoption process is ripe for conflict and should conflict arise the lawyer cannot, consistent with the canons of ethics, represent both parties. Finally, lawyers should reevaluate their fee scales to insure that no child is denied an

30. S. KATZ, *WHEN PARENTS FAIL* 122 (1971).

31. As a recent article pointed out, the supply of adoptable children has been decreasing, leading to the result that black market adoptions, including those where lawyers have acted as brokers, have increased. *Wall Street Journal*, p. 1, col. 4 (Sept. 14, 1971).

adoptive home because of a prospective adoptive parent's financial limitations.

From the standpoint of the natural mother, competent social service agencies provide services directed toward helping her, first, to make a decision regarding the future of her child, and, secondly, toward helping her through what is probably the most trying experience of her life. In this regard, competent child welfare agencies make an effort to insure that the natural mother is emotionally ready to surrender the child. Having made this determination, the good agencies will generally wait for the mother to make a decision regarding the child's future. Only to the extent that it is made clear to the mother that if she decides to surrender the child for adoption, both her interests and that of her child will be best served by an early decision to do so, is she in any way pressured.

This kind of pressure has positive benefits. If the natural parent does decide on adoption, a good agency will make every effort both before and after she surrenders the child to help her to reconcile the decision with her own values and standards and to help her resume a normal life. Thus, the intervention of a competent social service agency into the life of an unwed mother will most likely have a beneficial effect. Moreover, there can be little question that crucial to a good adoption placement is the well-thought out and comfortable surrender decision of the natural parent.

From the standpoint of the well-being of the child, agency placement provides studies of the adoptive parents which include their family history, psychological, physical, and intellectual characteristics. The advantage of these studies to the child is that they are useful for determining who, among many couples, will be best able to integrate the child into a family in which it is likely to feel secure.

From the standpoint of the adoptive parents, agency placement should provide them with the casework services necessary for a couple, who, for whatever reason, is not willing or able to have natural children. From a practical point of view, adoption through a competent social service agency should, although as a practical matter this is not always the case,

provide the adoptive couple with honest and accurate information regarding the legal status of the child.

Many states recognize the importance to all the involved parties of securing the benefits of specialized social knowledge. In Connecticut³² and Delaware,³³ for example, courts are prohibited from entering a decree of adoption for any child not related by blood or marriage to the petitioners, unless the placement has been made by a licensed child welfare agency. Likewise, in other jurisdictions, where there is no requirement of exclusive agency placement, the court will, either as a matter of course or because of statutory requirements, order a study made of the child, his natural parents, and his adoptive parents, before issuing a decree of adoption,³⁴ thus securing for all concerned, some, but certainly not all of the benefits of an agency placement.

This is not to imply that the time is ripe for all states to enact legislation requiring all adoptive placements to be in the exclusive domain of social service agencies. Unfortunately, not all social service agencies are staffed with competent people. This is often true with public welfare agencies. The number of social workers in public welfare with professional training is extraordinarily low, and while agency structure and attendant supervision may provide some safeguards against inadequate staff, there is otherwise little difference between an untrained social worker involved in the placement of children and any unqualified other person. In addition, some agencies use standards for placement such as one adopted child per household, the requirement of the sterility of one of the prospective adoptive parents, the requirement of a specific age differential between child and adoptive parent, the requirement of two parents rather than a single person, the requirement of religious qualifications established by the agency, and so on, that are unrealistic and

32. CONN. GEN. STAT. ANN. § 45-63 (Supp. 1971).

33. DEL. CODE ANN. tit. 13, § 904 (1953).

34. Such a study is mandatory in Illinois, ILL. ANN. STAT. ch. 4, §§ 9.1-6 (Smith-Hurd Supp. 1967) and New York, N.Y. DOM. REL. LAW §§ 112(5), 113, 115(3), 116(2)-(3) (McKinney 1964).

often irrelevant to a child's well-being, supposedly the goal of adoption.³⁵

If the Baby Lenore case is to be more than a footnote in legal periodicals, then we as lawyers must do that which comes naturally to the profession: appropriate remedies must be sought for the problems posed. The changes in attitudes toward the adoptive child and the constellation of relationships which swirl about him have not been matched by either the institutional mechanisms responsible for them nor by the professionals, especially lawyers and social workers, most involved with them. The coveted lines of demarcation which have set off one specialization from another must be broken down if we are to provide the kind of humanely rational setting required for adoption proceedings. The welfare of natural parents, prospective adoptive parents, and adoptable children can no longer withstand a fragmented approach to their problems.

Lawyers, physicians and social workers should work together in adoption centers around the country with a view toward establishing a new integrated set of guidelines for adoption practices and placements and the development of curricula in our professional schools which would bring these three groups together as adoption-oriented professional units. These first tentative steps toward revamped adoption practices would represent a forward step in child welfare and would be a logical outgrowth of the legal profession's traditional concern for the welfare of the child.

35. See S. KATZ, *WHEN PARENTS FAIL*, 122 *et seq.* (1971).