North Dakota Law Review

Volume 24 | Number 4 Article 2

1948

# Right of Natural Parents to Notice in Adoption Proceedings

Richard C. Maxwell

# RIGHT OF NATURAL PARENTS TO NOTICE IN ADOPTION PROCEEDINGS

RICHARD C. MAXWELL*

THE statutes of North Dakota provide that "The natural parents of an adopted child shall be deprived by the decree of adoption of all legal rights respecting the child . . . . " [1] This paper is concerned with the question of how far adoption procedures must provide an opportunity for the natural parents to oppose this deprivation of their rights of parenthood. If there is a social advantage in preserving the anonymity of the adoptive parents in relation to the natural parents, can this advantage be validly gained by previous consent and waiver of notice of the adoption proceedings by the natural parents?

Although a decree of adoption involves changes of status, the rule that the state of the domicile of the parties has exclusive control over such changes has not been given full application. The fact that either the adopting parent or the adoptive child is a domiciliary has been held sufficient to give the courts of a state jurisdiction to decree a valid adoption.[2] Assuming that such a jurisdictional basis exists, our inquiry will concern itself with the futher steps that must be taken to render the decree of adoption immune from future collateral attack by the natural parents.

It is usual for adoption statutes to provide that an adoption cannot be effected without the consent of the natural parents of the child.[3] Most states, however, have provided exceptions to this rule, as North Dakota has in the case of "a parent who has abandoned the child, or who cannot be found, or who is insane or otherwise incapable of giving consent, or who has lost custody of the child through divorce proceedings or the order

---

* Associate Professor of Law, University of North Dakota.

1 N. D. Rev. Code (1943) Sec. 14-1114.

2 Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441 (1903); Goodrich, Conflict of Laws, Sec. 142 (2d ed. 1938); for criticism of this policy, see Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 Minn. L. Rev. 605,608. It seems doubtful that Sec. 14-1108 of the N. D. Code, which provides for petitions to adopt by "Any person...in the county in which he is a resident...," was meant to be jurisdictional. *Cf.* Schillerstrom v. Schillerstrom, 32 N. W. 2d 106 (N. D. 1948).

3 4 Vernier, American Family Laws 340 (1936).

of a juvenile court. . . . " [4] It is in the application of these exceptions that most problems of notice have arisen.

A good starting point in an analysis of the cases in which natural parents have successfully attacked adoption decrees is *Schiltz v. Roenitz.*[5] In that action by a father to recover the value of the services of a minor daughter, the defendant interposed a decree of adoption of the child as a defense. It appeared that the adoption proceedings recited the abandonment of the child by the father and the fact that the mother was dead, but there was nothing to show that the father was ever given notice of the hearing on the petition to adopt. In reversing a judgment for the defendant in the lower court, the Supreme Court of Wisconsin held that the decree of adoption was a nullity as to the father, since its attempt to deprive him "without notice . . . of his most sacred natural rights in respect to his child" was a violation of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.[6] The application of the reasoning in the *Schiltz Case* to statutes obviating the necessity of consent by the natural parents to adoption where they have abandoned the child results in the requirement that the fact of abandonment be judicially determined with such notice to the natural parents as will satisfy the requirements of due process.[7]

Suppose, however, that the natural parent has had his day in court on the question of the right to custody of the child, and that he has been deprived of that right by a judicial decree. Does due process require that he be given notice of a proceeding for the adoption of the child commenced after such a decree is rendered? Custody decrees awarded in the course of divorce litigation have given rise to most of the decisions on this point. Although the North Dakota statutes specifically provide that the consent of the parent deprived of custody is not necessary to the valid adoption of the child in such a

---

[4] N. D. Rev. Code (1943) Sec. 14-1114.

[5] 86 Wis. 31, 56 N. W. 194, 39 Am. St. Rep. 873 (1893).

[6] If a decree of adoption is invalid on a constitutional ground, the validity of section 14-1112 of the N. D. Code, limiting attack to one year from the entry of the decree, seems questionable.

[7] Sullivan v. People, 224 Ill. 468, 79 N. E. 695 (1906); Lacher v. Venus, 177 Wis. 558, 188 N. W. 613 (1922); *In re* Davis' Adoption, 142 Misc. 681, 255 N. Y. S. 416 (1932); *see In re* Sulewski, 113 Pa. Super. 301, 173 At. 747 (1934); Notes, 24 A. L. R. 403 (1922); 76 A. L. R. 1077 (1932). Section 14-1110 indicates that the court may direct service by publication; *see* Rockford v. Bailey, 322 Mo. 1155, 17 S. W. 2d 941 (1929).

situation,[8] they also provide that notice of the hearing on the petition for adoption shall be given to such a parent.[9] It has been successfully maintained that such notice is not necessary. In *In re Beers*,[10] where a divorced father was attacking a decree of adoption consented to by his divorced wife to whom custody had been awarded, the court sustained the validity of the decree, being of the opinion that the estranged father "did have his day in court in the divorce case, wherein it was adjudged that his wife was the proper person to have the care and custody of the child...." The attempt of a divorced mother to get a modification of the custody decree rendered in a divorce action was met in *In re Hardesty's Adoption* [11] with a decree of adoption made with the consent of the divorced father without notice to the mother. The court found that "The adoption having been regularly made, the status of the child was changed, it was no longer the child of its natural parents...." There is nothing to indicate that the courts of these jurisdictions were without the power to exercise a discretion similar to that which has been conferred on the North Dakota courts to modify awards of custody as they deem proper.[12] The error in the finality which is in effect given by these decisions to an award of custody is made evident by another line of cases. The parent to whom custody had been awarded in *In re De Leon* [13] died, and adoption proceedings were instituted without notice to the surviving parent. The court upheld an order vacating the decree of adoption on the petition of the living parent, recognizing that under the statutes of California, which do not differ substantially from those involved in other cases considered in this paper, "so long as the child ... continues to be a minor, there is no such thing as a final order pertaining to the custody of such child." Recent cases have recognized that a custody award does not destroy the parental relationship and that the parent who is deprived of the child retains at least the possibility of resuming parental control in the future; and that, therefore, the judicial determination of custody as incident to a divorce action does not supply the

---

[8] See note 4 *supra*.
[9] N. D. Rev. Code (1943) Sec. 14-1110.
[10] 78 Wash. 576, 139 Pac. 629 (1914).
[11] 150 Kan. 271, 92 P. 2d 49 (1914).
[12] N. D. Rev. Code (1943) Sec. 14-0522; Compare Kan. Gen. Stat. (1935) Sec. 60-1510.
[13] 70 Cal. App. 1, 232 Pac. 738 (1925).

judicial hearing to which the parent is entitled before his parental status can be legally destroyed.[14] Regardless of whether or not the consent of the parent who has been deprived of custody is required for a valid adoption,[15] it seems that a proper analysis discloses rights in such a parent which cannot be finally cut off without notice and an opportunity to be heard.[16] This principle was clearly applied by the North Dakota Supreme Court in *Nelson v. Ecklund*,[17] where an allegedly insane father was given no notice of proceedings to adopt his minor daughter. In declaring the resulting adoption decree void as to the father, the Court stated: "Confusion appears to arise from failure to distinguish between the consent of the insane person and notice of proceedings to be given to him .... While the consent of the father may not have been necessary, nevertheless he was entitled to notice of the proceedings ... adoption proceedings are judicial in their nature and there can be no judicial hearing of any kind without notice to the parties affected."

The principles thus far evolved must be examined in relation to yet another situation to determine the answer to the question posed at the beginning of this paper. That situation, in which an unwed mother surrenders her child for adoption soon after its birth, is perhaps the commonest setting for adoption proceedings. Our object is to construct a procedure which will preserve the privacy of both the adoptive parents and the natural mother and yet safeguard the adoption decree from collateral attack by recognizing the constitutional rights of the natural parent.[18] The obvious practical solution is to have the natural mother consent in advance to the adoption of the child, leaving the custody of the child and the handling of the adoption to a public welfare institution. Although there are cases indicating that the mere signing of a statement by

[14] Rubendall v. Bisterfelt, 227 Iowa 1388, 291 N. W. 401 (1940); Stone v. Dickerson, 138 S. W. 2d 200 (Civ. App. Tex. 1940); Grider v. Grider, 182 Tenn. 406, 187 S. W. 2d 613 (1945); *cf.* Smith v. Smith, 180 P. 2d 853 (1947).

[15] See Note, 91 A. L. R. 1387 (1934).

[16] The fact that an adoption decree is held invalid as to a parent who has not had notice does not, of course, mean that the parent will be entitled to custody as against the alleged adoptive parents. Fielding v. Highsmith, 152 Fla. 837, 13 So. 2d 208 (1943), "the moral, intellectual and material welfare of the child are the matters of chief importance ..."; See Note, *Consent in Adoption in Iowa*, 33 Iowa L. Rev. 678 (1948).

[17] 68 N. D. 724, 283 N. W. 273 (1938).

[18] The writer realizes that there are human values which will not be safeguarded by a mere recognition of constitutional rights. This discussion is limited, however, to a consideration of legal soundness only.

the mother giving up her rights to the child is sufficient to negative the necessity of notice of the adoption proceedings being given to her,[19] this is hardly a sound basis on which to permit the adoptive parents to build their new family. One difficulty that can arise out of such a situation is the necessity of determining whether the consent has been withdrawn before the adoption is completed. Although, as a recent case stated, the efficacy of such withdrawal might be subject to "well established principles of contract, waiver, and equitable estoppel . . . ," [20] the obvious need of a judicial determination of these issues would seem to call for notice of the adoption proceedings to finally determine the rights of the natural mother. In *Adoption of Capparelli,*[21] written consent was withdrawn and the natural mother became an intervenor at the adoption hearing on that issue, successfully defeating the petition to adopt. If the mother had not been a party to the adoption proceeding, would not her rights have persisted for use in a later collateral attack?

It has been noted that one of the situations where the consent of the natural parents is not required in North Dakota is where custody of the child has been lost through "the order of the juvenile court . . . . " [22] Our statutes do not specifically require notice to the natural parents in such a situation at the time of the adoption proceedings, but do provide for notice to "a parent who has lost custody of the child through divorce proceedings. . . . "[23] If the juvenile court has exercised its power because the parents' home is "an unfit place for such child to live . . . , " [24] this distinction does not seem justified. Deprivation of custody for social welfare reasons seems no more conclusive of the parents rights as to the child than the custody decree in the divorce action, and the permanent change of status envisaged by subsequent adoption proceedings must be accomplished with notice.[25] However, another

---

[19] *See In re* Rising, 104 Wash. 581, 177 Pac. 351 (1919); *In re* Foster, 209 N. C. 489, 183 S. E. 744 (1936).

[20] *See In re* Adoption of a Minor, 144 F. 2d 644, 648 (App. D. C. 1944).

[21] 175 P. 2d 153 (Ore. 1946).

[22] See note 4 *supra.*

[23] See note 8 *supra.*

[24] N. D. Rev. Code (1943) Sec. 27-1608 (1).

[25] *In re* Whetstone, 137 Fla. 712, 188 So. 576 (1939), "notice of and participation in commitment proceedings . . . cannot be substituted for . . . notice of subsequent proposed adoption proceedings."; cf. *Ex Parte* Parker, 195 Okl. 224, 156 P. 2d 584.

basis on which a successful elimination of such notice might be founded is suggested by the abandonment cases. It seems clear that a judicial determination of abandonment with notice could be followed by an adoption valid without notice to the abandoning parent.[26] Once the fact of abandonment has been determined in a proceeding in which the natural parent has had an opportunity to be heard, the requirements of due process appear to have been met. In the event that the natural parent appears in the proceeding to adjudge abandonment and denies the fact, claiming the child, a different result would seem to follow. It would be difficult for the court in such a situation to decree the present existence of a state of abandonment, but a deprivation of custody might be ordered if warranted by a record of previous neglect. Our analysis would require that in such a case notice be given of the commencement of a subsequent adoption proceeding. If, however, the decree of abandonment is entered with notice but without opposition, the abandoning parent is placed in such a position that in the absence of an intervening judicial proceeding, such as habeas corpus by the parent to obtain custody of the child, his dormant rights can be cut off without notice. This is not because the decree of abandonment finally changes the status of the child, destroying the parental rights. The decree does not have this effect. An attempt by habeas corpus to regain the child's custody, even though unsuccessful, would activate the parental rights to the extent that they could not be destroyed without notice; but the decree of abandonment, standing alone, would furnish an adequate legal basis on which to found an adoption decree rendered without further notice to the natural parents. Suppose, then, that an unwed mother petitions the juvenile court for an adjudication relieving her of her parental responsibilities and depriving her of her parental rights, and that she consents before the court to the child being placed for adoption. Is this proceeding analogous to an adjudication of abandonment or to a mere judicial deprivation of custody? It seems clear, though the word is harsh in this application, that the mother's acts amount to a legalized abandonment. The decree entered in this proceeding, like the decree of abandonment, does not completely cut off the moth-

[26] *See* State ex rel. Thompson v. District Court, 75 Mont. 147; 242 Pac. 959 (1926); *cf.* People v. Feser, 195 App. Div. 90, 186 N. Y. S. 443 (1921); People v. Pickle, 213 N. Y. S. 70, 215 App. Div. 38 (1925). See text to note 6 *supra*.

er's rights as to the child; but unlike a mere deprivation of custody, such rights as the mother retains must, to survive, be asserted before the entry of an adoption decree. Adoption proceedings can be instituted without further notice to the natural mother,[27] and the decree entered under such circumstances seems secure from successful collateral attack by her.

Although such a procedure seems to adequately protect the legal rights of the natural parent, the protection of the human rights involved is dependent on more complicated factors than the analysis of case law. It would seem, however, that such a proceeding, before a judge fully cognizant of his responsibilities to all concerned, would have real value, beyond legal necessity, in assuring that the natural mother is reaching a properly considered decision in giving up her child.

[27] As to the rights of the natural father of an illegitimate child, *see* Gibson, Appellant, 154 Mass. 378 (1891) (notice not necessary); *In re* Adoption of a Minor, 155 F. 2d 870 (1946) (notice required under statute).