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PARENTAL RIGHT TO WITHDRAW CONSENT IN ADOPTION
PROCEEDINGS*Introduction*

Public interest has often been aroused by parents objecting to the adoption of their child, particularly when the child has been living in a foster home for a period of time. Sometimes the child has been living in the foster home because of his parents' default; at other times he has been placed there for adoption with the consent of his parents. When to allow this consent to be revoked has been a problem for as long as adoption has been permitted.

Adoption, a modern innovation of statute,¹ is the permanent substitution, as parent, of one or two persons for the natural parents of a child.² All states require judicial proceedings in order to effectuate an adoption.³ Legally, its effect is three-fold:

- (1) the rights of the natural parent concerning the child are completely cut off,⁴ with corresponding severance of parental responsibility;⁵
- (2) the parental rights and responsibilities are assumed by the foster parent;⁶
- (3) the child's duties to the natural parent are transferred to the foster parent.⁷

Before adoption may be effected, however, it is imperative to determine whether the parents' consent is necessary inasmuch as adoption takes away legally recognized parental rights.

¹ Adoption was not recognized at common law and is strictly statutory in nature. See *Matter of Thorne*, 155 N.Y. 140, 143, 49 N.E. 661, 662 (1898). The first common-law jurisdiction to pass a statute legalizing adoption was Massachusetts, in 1851. See *Ross v. Ross*, 129 Mass. 243, 262 (1880). New York enacted its first adoption statute in 1873. Laws of N.Y. 1873, c. 830. England did not authorize adoption until 1926. Adoption Of Children Act, 1926, 16 & 17 Geo. 5, c. 29.

² See LEAVY, *THE LAW OF ADOPTION* 65 (2d ed. 1954); IV VERNIER, *AMERICAN FAMILY LAWS* § 261 (1936).

³ *E.g.*, N.Y. DOM. REL. LAW § 110. See also IV VERNIER, *op. cit. supra* note 2, § 257; *cf.* *Middleworth v. Ordway*, 191 N.Y. 404, 84 N.E. 291 (1908).

⁴ See LEAVY, *op. cit. supra* note 2, at 65; IV VERNIER, *op. cit. supra* note 2, § 261.

⁵ For a tabular summary of state laws concerning the criminal liability of parents for juvenile delinquency, see LUDWIG, *YOUTH AND THE LAW* 153-67 (1955). For a resume of statutes relating to civil liability for support, see IV VERNIER, *op. cit. supra* note 2, § 234.

⁶ See LEAVY, *op. cit. supra* note 2, at 65; IV VERNIER, *op. cit. supra* note 2, § 261.

⁷ See IV VERNIER, *AMERICAN FAMILY LAWS* §§ 235, 261 (1936).

Bases for Requiring Parental Consent to Adoption

That there are parental rights is implied or express in the law; however, neither statute nor opinion in New York or elsewhere definitively lists them. One right that is generally recognized is that of a parent to the services and earnings of his child;⁸ another is that of custody.⁹ The former is probably a holdover from the common law, which gave a father an almost proprietary interest in his children.¹⁰ Notwithstanding its general recognition this parental right is not usually considered in adoption proceedings, perhaps because it is only a consequence of custody. The legal right to custody, more pertinent here, should be based upon the parents' moral duty and right to educate children.¹¹ Thus, whether the legal right to custody is absolute or not should depend upon whether the moral duty and right to educate are absolute. This duty is primarily in the parents as opposed to the state.¹² However, government has the duty to protect the interests of a child when parents are found wanting either physically or morally, whether by default, incapacity or misconduct, in their duty.¹³ Thus the parental right is subject to administrative supervision by the state and is, therefore, not absolute. Hence, the legal right to *custody*, which flows from the moral right and duty to educate,¹⁴ is not an absolute right.

Consent of the natural parents to an adoption is necessary from a moral standpoint because adoption takes away the natural and legal right of custody. Perhaps in recognition of this, the statutes of every American jurisdiction require the consent of both natural parents to adoption under ordinary circumstances.¹⁵ Logically, when the parent defaults in the performance of the duty which is the basis of his right, his consent may be dispensed with. Accordingly, the normally requisite parental consent is often deemed unnecessary when the parent

⁸ See IV VERNIER, *op. cit. supra* note 7, § 232. Morally, a parent does not have an unqualified right to *all* the child's earnings. Cf. 2 Corinthians 12:14.

⁹ See IV VERNIER, *op. cit. supra* note 7, § 232.

¹⁰ *IV id.* §§ 231, 232.

¹¹ "Parents are under a grave obligation to see to the religious and moral education of their children, as well as to their physical and civic training, as far as they can, and moreover to provide for their temporal well-being." CODE OF CANON LAW, Can. 1113. See Encyclical, Pope Pius XI, *On Christian Education Of Youth*, translated in FIVE GREAT ENCYCLICALS 37, 45, 46 (1939); Ryan, *Philosophy Of Marriage And The Family*, in MARRIAGE AND FAMILY RELATIONSHIPS 42, 55 (1950).

¹² See Encyclical, Pope Pius XI, *supra* note 11, at 46.

¹³ *Id.* at 49.

¹⁴ See Fischer v. Meader, 95 N.J. 59, 111 Atl. 503 (Sup. Ct. 1920).

¹⁵ *E.g.*, N.Y. DOM. REL. LAW § 111(2); see IV VERNIER, AMERICAN FAMILY LAWS § 259 (1936); FLA. STAT. ANN. § 72.14 (Supp. 1954); MD. CODE ANN. art. 16, § 82 (Flack, 1951); S.C. CODE tit. 15, § 15-1382 (Supp. 1955); TENN. CODE ANN. § 9572.21 (Williams, Supp. 1952).

is insane,¹⁶ or has abandoned the child,¹⁷ or is the father of an illegitimate child,¹⁸ or no longer has the legal custody of a child.¹⁹ In the last instance though, the consent of the person or agency having legal custody of the child is necessary.²⁰

Parental Right to Revoke Consent

Having once given the requisite consent, what right does a parent have to *withdraw* that consent? A parent may or may not have an absolute right to revoke, given different jurisdictions and varying certain factors. Moreover the decisions are sometimes guided by emotion,²¹ rather than sound reasoning. New York courts have been particularly perplexed by this problem,²² and have been unable to formulate a general rule to govern revocation cases.

The situation occasionally arises where a party to an adoption experiences a change of heart after a final order has been issued. Ordinarily this order cannot be reopened. However, some states permit abrogation of the adoption under certain circumstances. For example, New York allows abrogation on the condition that all of the parties concerned consent thereto.²³ In addition, a final order

¹⁶ See, *e.g.*, *People ex rel. Strohsahl v. Strohsahl*, 221 App. Div. 86, 222 N.Y. Supp. 319 (1st Dep't 1927); N.Y. DOM. REL. LAW § 111; Note, *Due Process Rights Of Mentally Ill Parents In Nonconsensual Adoptions*, 30 IND. L.J. 431 (1955).

¹⁷ *E.g.*, N.Y. DOM. REL. LAW § 111; see also IV VERNIER, *op. cit. supra* note 15, § 259.

¹⁸ See, *e.g.*, *Matter of Hardenbergh*, 144 Misc. 248, 258 N.Y. Supp. 651 (Surr. Ct. 1932); *State ex rel. "A" v. A Licensed Or Chartered Child-Placing Agency*, 194 Tenn. 400, 250 S.W.2d 776 (1952); N.Y. DOM. REL. LAW § 111(3).

¹⁹ See, *e.g.*, *Matter of Magee*, 52 N.W.2d 99 (S.D. 1952); N.Y. DOM. REL. LAW § 111(4). Although in New York the consent of a parent divorced for adultery is not required, notice of the proposed adoption must be given him. *Id.* § 111. This statute has sometimes been interpreted as giving the divorced parent a right to prevent the adoption. See, *e.g.*, *Caruso v. Caruso*, 175 Misc. 290, 23 N.Y.S.2d 239 (Sup. Ct. 1940); *Matter of Norris*, 157 Misc. 333, 283 N.Y. Supp. 513 (Surr. Ct. 1935). *But see* *Matter of Bress*, 191 Misc. 930, 77 N.Y.S.2d 852 (County Ct. 1948).

²⁰ See, *e.g.*, *People ex rel. Marabottini v. Farr*, 186 Misc. 811, 33 N.Y.S.2d 600 (Sup. Ct. 1942); *cf.* *Matter of Santacose*, 271 App. Div. 11, 61 N.Y.S.2d 1 (4th Dep't 1946); *People ex rel. Our Lady of Victory Infant Home v. Venniro*, 126 Misc. 135, 212 N.Y. Supp. 741 (Sup. Ct. 1925); N.Y. DOM. REL. LAW § 111(4).

²¹ See, *e.g.*, *Matter of Kane*, 91 Ohio App. 327, 108 N.E.2d 176 (1952) (where the court found inspiration for its decision in two sentimental pictures of mother and child which hung in its library).

²² See cases cited notes 38, 43, 45 *infra*.

²³ N.Y. DOM. REL. LAW § 116, *Matter of McDevitt*, 176 App. Div. 418, 162 N.Y. Supp. 1032 (2d Dep't), *aff'd*, 221 N.Y. 598, 117 N.E. 1076 (1917). See also IV VERNIER, *AMERICAN FAMILY LAWS* § 264 (1936); 28 ST. JOHN'S L. REV. 111 (1953). *But cf.* N.Y. DOM. REL. LAW § 118 (provides that a foster parent who has adopted a child from an authorized agency may petition for abrogation if the child is guilty of wilful desertion, a misdemeanor, or ill-

may be set aside if it was obtained by fraud,²⁴ or if some element essential to its validity is lacking.²⁵ More frequently, the situation arises where the natural parent seeks to revoke after consent has been given, but before a final order has been decreed. In determining whether a parent may revoke before the final order, the fulfillment of statutory requirements often overrides principles of contract law which might be applicable in other situations. Thus, if the consent is not in statutory form, it may be withdrawn.²⁶ Again, the consent of a minor parent may not be avoided by a plea of infancy.²⁷ In addition, the right to revoke is personal and may not be exercised by anyone other than the party who originally consented.²⁸ Even though a non-statutory consent or a contract to consent has been acted upon by the adopting parents, estoppel is not available to bar a consenting party's attempted revocation.²⁹ Specific performance will not lie;³⁰ however, there may be a cause of action for damages under certain circumstances.³¹ On the other hand, contract principles are not entirely disregarded. For example, when the consent is obtained through fraud or duress, or when the parent is not made aware of the true import of the agreement, there has been no meeting of the minds and thus the consent is voidable.³²

behavior, and that the court may allow the abrogation if the interests of foster parent and child so require), *Matter of Souers*, 135 Misc. 521, 238 N.Y. Supp. 738 (Surr. Ct. 1930) (where abrogation was granted over agency's objection).

²⁴ *Stevens v. Halstead*, 181 App. Div. 198, 168 N.Y. Supp. 142 (2d Dep't 1917); N.Y. DOM. REL. LAW § 114.

²⁵ *Murphy v. Brooks*, 120 Misc. 704, 199 N.Y. Supp. 660 (Sup. Ct. 1923); *Matter of Gallegos*, 21 Ariz. 250, 187 Pac. 573 (1920); cf. *Oeth v. Erwin*, 6 Ill. App.2d 18, 126 N.E.2d 526 (1955).

²⁶ *Foley v. Carnesi*, 123 Colo. 533, 232 P.2d 186 (1951); see *People ex rel. Catholic Charities v. Hagstotz*, 117 N.Y.S.2d 818 (Sup. Ct. 1952).

²⁷ *In re Adoption Of A Minor*, 144 F.2d 644 (D.C. Cir. 1944); *Matter of Presler*, 171 Misc. 559, 13 N.Y.S.2d 49 (Sup. Ct. 1939). *But see Matter of Harvey*, 375 Pa. 1, 99 A.2d 276 (1953).

²⁸ Cf. *Matter of Oddo*, 186 Misc. 359, 59 N.Y.S.2d 612 (Surr. Ct. 1946).

²⁹ *Keheley v. Koonce*, 85 Ga. App. 893, 70 S.E.2d 522, 527 (1952) (dictum); *accord*, *Matter of Paden*, 181 Misc. 1025, 43 N.Y.S.2d 305 (Surr. Ct. 1943). *Contra*, *Matter of Adoption of D—*, 252 P.2d 223 (Utah 1953).

³⁰ *Bardorf v. Rebecca Talbot-Perkins Adoption Soc'y, Inc.*, 240 App. Div. 275, 269 N.Y. Supp. 794 (2d Dep't 1934). However, that part of a contract to adopt which provides that the child shall be made an heir of the adopting party will be specifically enforced. *Gavin v. Aitken*, 258 N.Y. 595, 180 N.E. 348 (1932) (memorandum opinion); *Middleworth v. Ordway*, 191 N.Y. 404, 84 N.E. 291 (1908); *Ansley v. Ansley*, 154 Ga. 357, 114 S.E. 182 (1922) (memorandum opinion).

³¹ See *Bardorf v. Rebecca Talbot-Perkins Adoption Soc'y, Inc.*, *supra* note 30; *Matter of Nelms*, 153 Wash. 242, 279 Pac. 748, 749 (1929).

³² See, e.g., *Matter of Kropp*, 279 App. Div. 934, 111 N.Y.S.2d 767 (2d Dep't 1952) [no opinion, but facts are stated in *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 467, 113 N.E.2d 801, 802 (1953)]; *Matter of Anonymous*, 195 Misc. 6, 88 N.Y.S.2d 829 (Surr. Ct. 1949); *People ex rel. Flannagan v. Riggio*, 193 Misc. 930, 85 N.Y.S.2d 534 (Sup. Ct. 1948).

When there is no problem regarding formal statutory requirements, and the parent attempts revocation, the fundamental issue of whether the right to revoke is absolute or conditional is reached. Formerly, the rule in the majority of jurisdictions was that the right to revoke consent before a final order was absolute and could be exercised arbitrarily.³³ In recent years, however, the trend has been otherwise, and the majority rule now is that the right is limited, and that its exercise is conditioned upon a consideration of its effect on all the parties.³⁴ Some states deny the absolute right of revocation on the ground that the parent is powerless to deprive the court of jurisdiction once it has been acquired.³⁵ Diametrically opposed to this stand is the extreme position of Michigan. There, a parent may withdraw consent during the period in which the court has power to grant a rehearing after a final order has been decreed.³⁶ In New York, although there is a recent decision³⁷ in line with the now prevailing view, the problem cannot be considered settled because the Court of Appeals has never decided the issue and there are conflicting opinions in the lower courts.³⁸

The amount of time that a child has spent in the adopting home has been determinative, in some cases, of whether the right to revoke is absolute or conditional. The statutes of most jurisdictions require that the child be in the adopting home for a minimum period of time before a final order of adoption will be decreed.³⁹ In New York this period is six months.⁴⁰ The time requirement may be waived in the discretion of the court hearing the petition,⁴¹ but if there is an abuse of discretion the decree is invalid.⁴² The significance of the required

³³ Annot., 138 A.L.R. 1038 (1942). See, e.g., *Matter of White*, 300 Mich. 378, 1 N.W.2d 579 (1942); *Fitts v. Carpenter*, 124 S.W.2d 420 (Tex. Civ. App. 1939); *Matter of Nelms*, 153 Wash. 242, 279 Pac. 748 (1929).

³⁴ *Bailey v. Mars*, 138 Conn. 593, 87 A.2d 388, 392 (1952) (dictum); Annot., 156 A.L.R. 1011 (1945). See, e.g., *In re Adoption Of A Minor*, 144 F.2d 644 (D.C. Cir. 1944); *Keheley v. Koonce*, 85 Ga. App. 893, 70 S.E.2d 522 (1952); *Matter of Cannon*, 53 N.W.2d 877 (Iowa 1952); *Ex parte Schultz*, 64 Nev. 264 181 P.2d 585 (1947).

³⁵ *Bailey v. Mars*, *supra* note 34 at 391 (dictum); see, e.g., *Graham v. Francis*, 83 Colo. 346, 265 Pac. 690 (1928); *Wyness v. Crowley*, 292 Mass. 461, 198 N.E. 758 (1935).

³⁶ See *Matter of White*, *supra* note 33.

³⁷ *Matter of Anonymous*, 143 N.Y.S.2d 90 (App. Div. 2d Dep't 1955).

³⁸ Compare *People ex rel. Anonymous v. Anonymous*, 195 Misc. 1054, 91 N.Y.S.2d 591 (Sup. Ct. 1949), and *Matter of Burke*, 60 N.Y.S.2d 421 (Surr. Ct. 1946) (allowing an absolute right of revocation), with *People ex rel. Grament v. Free Synagogue Child Adoption Comm.*, 194 Misc. 332, 85 N.Y.S.2d 541 (Sup. Ct. 1949), and *People ex rel. Harris v. Commissioner*, 188 Misc. 919, 70 N.Y.S.2d 389 (Sup. Ct. 1947) (denying an absolute right).

³⁹ See LEAVY, *THE LAW OF ADOPTION* 60-63 (2d ed. 1954).

⁴⁰ N.Y. DOM. REL. LAW § 112(7).

⁴¹ *Ibid.*

⁴² *Matter of Bruce*, 269 App. Div. 791, 53 N.Y.S.2d 502 (3d Dep't 1945), *aff'd*, 295 N.Y. 702, 65 N.E.2d 336 (1946).

waiting period is not clear. In one case a surrogate indicated that the law gave a parent an absolute right to revoke,⁴³ and allowed a mother to revoke because she ". . . exercised her *statutory prerogative* within six months. . . ." ⁴⁴ On the other hand, the court in *People ex rel. Harris v. Commissioner* ⁴⁵ stated that the statutory provision for a minimum waiting period ". . . does not make the natural parent's surrender of the child conditional or subject to revocation within six months . . . [and that a consent] is not revocable . . . merely because the parent has experienced a change of mind or heart." ⁴⁶ The legislative history of the New York statute does not indicate that the minimum period was established to provide the natural parent with a *locus poenitentiae*, but rather that ". . . *full opportunity . . . be offered to learn if the proposed adoption is desirable in all respects.*" ⁴⁷ Apparently then, the purpose was to provide both a trial period for the child in the new home and time for the court to investigate the proposed adoption.⁴⁸

Exploitation of Adoption

Adoption, like all other matters involving humans, is subject to exploitation by the unscrupulous. For example, in recent years newspaper headlines have denounced "black market" adoptions, *i.e.*, transactions where a third party, for a profit, encourages a parent to part with the custody of his child. Although this practice is not widespread,⁴⁹ it illustrates the danger of racketeering, even in family affairs. Moreover, parents themselves may try to profit financially

⁴³ Matter of Burke, 60 N.Y.S.2d 421 (Surr. Ct. 1946).

⁴⁴ *Id.* at 423 (emphasis added).

⁴⁵ 188 Misc. 919, 70 N.Y.S.2d 389 (Sup. Ct. 1947).

⁴⁶ *Id.* at 922, 70 N.Y.S.2d at 393.

⁴⁷ Brief for Appellants, p. 21, Matter of Anonymous, 143 N.Y.S.2d 90 (App. Div. 2d Dep't 1955).

⁴⁸ The issue of abandonment has been interjected into many adoption cases. The adopting parents have sometimes sought to thwart a withdrawal of consent by claiming that the natural parent had abandoned the child by signing a consent to adoption. Although there is some opinion to the contrary, consent to adoption does not of itself constitute abandonment. Matter of a Minor, 178 Misc. 142, 33 N.Y.S.2d 793 (Surr. Ct. 1942); Matter of Harvey, 375 Pa. 1, 99 A.2d 276 (1953). *Contra*, Matter of Anonymous, 198 Misc. 185, 189, 101 N.Y.S.2d 93, 97 (County Ct. 1950) (dictum). Because consent of an abandoning parent is not necessary, the adoption process has often commenced without parental approval. In determining whether to allow the parent to terminate the abandonment and thus make parental consent necessary, the "statutory prerogative" approach has been used to permit the parent to recover the child if efforts to do so were made within the "trial" period. See, *e.g.*, Matter of Cohen, 155 Misc. 202, 279 N.Y. Supp. 427 (Surr. Ct. 1935). Conversely, adoption has been allowed when a mother's efforts were not "seasonable." See, *e.g.*, Matter of Anonymous, 80 N.Y.S.2d 839 (Surr. Ct. 1947); Matter of Davison, 44 N.Y.S.2d 763 (Surr. Ct. 1943).

⁴⁹ See Comment, 59 YALE L.J. 715 (1950).

from the adoption of their children. They may do this by contracting with prospective foster parents for a sum of money in exchange for their consent in the first instance, or by threatening, after the foster parents have custody of the child, to withdraw consent unless financial demands are met. To combat this prostitution of adoption, the New York Legislature has made it a crime to request, receive or give money in connection with the adoption of a child.⁵⁰ In addition, some courts have been alert to this danger.⁵¹ For example, in *In re Adoption Of A Minor*,⁵² the Circuit Court for the District of Columbia stated that "[i]t is inconceivable that Congress . . . could possibly . . . have contemplated *unrestricted withdrawal of consent without cause or reason of any kind*,"⁵³ and further that "[a] premium would . . . be put upon the emotional instability which produces illegitimates; to say nothing of the possibilities for racketeering which such an interpretation of the law would put in reach of those who may be criminal in their tendencies as well as lacking in the qualities of parenthood."⁵⁴

A recent New York case, *Matter of Anonymus*,⁵⁵ strikingly demonstrates the possibility of extortion if a parent were to have an unlimited power of revocation. In that case an unmarried mother executed a written consent to the adoption of her infant and delivered the baby to the prospective foster parents. Later, when the petition for adoption was filed, the mother acknowledged the agreement in court. She was examined by the surrogate who found that the consent was freely and deliberately given. Subsequently, according to the foster parents, she threatened to take her baby back unless she was paid \$1,000. The district attorney, acting upon the complaint of the foster father, monitored telephone conversations between the natural and foster parents. After the natural mother was questioned by the district attorney's office concerning the conversations, which were clearly open to the interpretation that money was demanded as the price of continued consent, she moved before the surrogate to revoke her consent. He refused to hear evidence of the attempted extortion and permitted revocation. The Appellate Division unanimously reversed, holding that the mother had no *absolute* right to withdraw consent. The court declared that consent is conditionally revocable, that is, it may be withdrawn only in the discretion of the surrogate. It further stated that evidence of the violation of the Penal Law was

⁵⁰ N.Y. PENAL LAW § 487-a. Authorized child-placing organizations are exempted from this sanction. *Id.* § 487-a(1). However, the adopting parent may pay reasonable and actual medical and hospital fees for services rendered in connection with the birth of the child to be adopted. *Id.* § 487-a(4).

⁵¹ See, e.g., *People ex rel. Hydock v. Greenberg*, 273 App. Div. 710, 712, 79 N.Y.S.2d 389, 392 (1st Dep't 1948); *Matter of Anonymous*, 198 Misc. 185, 188, 101 N.Y.S.2d 93, 96 (County Ct. 1950).

⁵² 144 F.2d 644 (D.C. Cir. 1944).

⁵³ *Id.* at 648.

⁵⁴ *Id.* at 650.

⁵⁵ 143 N.Y.S.2d 90 (App. Div. 2d Dep't 1955).

admissible; that proof of illegality or immorality of purpose would require denial of revocation.

Conclusion

The right of revocation should be conditional in order to protect the interests of all parties involved. As in cases involving only the custody of a child,⁵⁶ the primary consideration in adoption proceedings should be the child's welfare, because that is the basis of the moral duty to educate and the legal right to custody. The importance to a child of stability in home life is well recognized.⁵⁷ Deleterious effects might result from taking a child out of a foster home to which he had become accustomed, and in which he may have lived for years. At the same time, however, consideration must be given both to the natural parents and to the foster parents. Natural parents should be given the opportunity to discharge properly the great duty, imposed upon them by natural law, to rear their children. Although they may be excused under certain circumstances, this responsibility cannot be shifted merely by placing a child in the care of strangers.⁵⁸ Parents must, insofar as possible, secure the child's adoption in some good family.⁵⁹ Therefore, they have a real interest in the child after placement, but before final adoption. Should they feel that the prognosis for the child's integration into the adopting family unit, or for his welfare, is poor, they should be given the opportunity to object to final adoption. Also, the circumstances of the natural parents may have greatly changed after their consent; this should be weighed against any changes that may have occurred in the foster home. The foster parents may have made financial outlays, or changed their mode or place of living in contemplation of the addition of the child to their family. Certainly a real though intangible factor which should be considered is the affection which the foster parents may have developed for the child. Public policy is also involved. Disregard for the interests of foster parents may tend to discourage worthy individuals from attempting to adopt a child.

The opinion in *Matter of Anonymous*⁶⁰ is broad enough to comprehend the foregoing considerations. It is hoped that the ruling there, that revocation may only be exercised in the trial court's discretion, will become firmly established, by legislation or by judicial opinion, as the law in New York.

⁵⁶ See, e.g., *People ex rel. Sisson v. Sisson*, 271 N.Y. 285, 287, 2 N.E.2d 660, 661 (1936); *People ex rel. Johnson v. Erbert*, 17 Abb. Pr. 395, 400 (N.Y. Gen. T. 1st Dist. 1864).

⁵⁷ See, e.g., *Matter of Bock*, 280 N.Y. 349, 353, 21 N.E.2d 186, 187 (1939); *Mary I. — v. Convent of Sisters of Mercy*, 200 Misc. 115, 119, 104 N.Y.S.2d 939, 943 (Sup. Ct. 1951).

⁵⁸ II NOLDIN AND SCHMITT, *SUMMA THEOLOGIAE MORALIS* 271, 278 (27th ed. 1951).

⁵⁹ *Id.* at 278.

⁶⁰ 143 N.Y.S.2d 90 (App. Div. 2d Dep't 1955).