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Adoption--Abrogation--No Relief in Absence of Express Statutory Authorization (Matter of Banfield, 204 Misc. 206 (County Ct. 1953))

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RECENT DECISIONS

ADOPTION—ABROGATION—NO RELIEF IN ABSENCE OF EXPRESS STATUTORY AUTHORIZATION.—In March of this year, two cases were decided which indicate the desirability of a revision of the adoption law relative to abrogation. In *Matter of Banfield*,¹ a foster mother sought to abrogate an adoption as to the foster father from whom she had been divorced. Although the father had consented to the proceeding, the application was denied on the ground that no provision exists in the statute² for partial abrogation. In the other case, *Matter of Eaton*,³ the adopted child deserted the foster parents after reaching majority. In affirming a reversal of the trial court which had granted the parents' petition for abrogation, the Court of Appeals held that the statute does not provide for such relief after the child has become an adult.

The adoptive relation may be terminated in several ways. The original adoption order may be annulled where the parties failed to comply strictly with the statute,⁴ where there was fraud perpetrated upon the court,⁵ or where there was a lack of jurisdiction.⁶ In New York and several other jurisdictions, an adoption valid in its inception may be terminated by recourse to an abrogation statute. Failure of parental duties,⁷ development of certain diseases in the child,⁸ and discovery that the child is of a different race from the foster parents⁹ are among the grounds allowed for abrogation.

¹ 204 Misc. 206, 121 N. Y. S. 2d 9 (County Ct. 1953).

² N. Y. DOM. REL. LAW §§ 116-118.

³ 305 N. Y. 162, 111 N. E. 2d 431 (1953).

⁴ *Murphy v. Brooks*, 120 Misc. 704, 199 N. Y. Supp. 660 (Sup. Ct. 1923) (failure to personally appear and to acknowledge consent); *Matter of Gallegos*, 21 Ariz. 250, 187 Pac. 573 (1920) ("unknown" father must be served by publication).

⁵ *Stevens v. Halstead*, 181 App. Div. 198, 168 N. Y. Supp. 142 (2d Dep't 1917).

⁶ *Matter of Johnston*, 76 Misc. 374, 137 N. Y. Supp. 92 (Surr. Ct. 1912).

⁷ N. Y. DOM. REL. LAW § 117; ALA. CODE tit. 27, § 4 (1940); ARK. STAT. c. 56, § 110 (1947). See also TEX. REV. STAT. art. 46a, § 7 (Vernon, 1948).

⁸ ALA. CODE tit. 27, § 4 (1940); ARK. STAT. c. 56, § 110 (1947); CAL. CIV. CODE § 227b (1951); IOWA CODE § 600.7 (1950); LAWS OF MINN. 1951, c. 508, § 10; MO. REV. STAT. § 453.130 (1949); UTAH CODE ANN. § 78-30-13 (1953). These statutes apply only where the disease results from pre-existing causes unknown to foster parents at time of adoption.

⁹ KY. REV. STAT. § 199.540 (Baldwin, Supp. 1953); MO. REV. STAT. § 453.130 (1949). Other grounds for abrogation are allowed. N. Y. DOM. REL. LAW § 116 (consent of all parties) and § 118 (misconduct of child); ARK. STAT. c. 56, § 110 (1947) (divorce of foster parents); ME. REV. STAT. c. 145, § 41 (1944) ("good cause"); VA. CODE § 63-362 (1950) (where "manifestly right

Where it is to the foster child's best interest, New York permits abrogation upon the consent of all interested parties,¹⁰ upon the failure of parental duties,¹¹ or upon the serious misconduct of the child.¹² Because of the statutory nature of the entire law of adoption, courts have demanded strict compliance with the abrogation statutes.¹³ The paramount consideration is the welfare of the child, even where the statute also requires observance of the foster father's interest.¹⁴

Originally, the New York adoption statute applied only to voluntary adoptions, and the abrogation statute was designed to apply solely to such adoptions.¹⁵ In 1884, the Legislature expanded the adoption law to provide for the adoption of dependent children from institutions, and sections were added to permit the abrogation of such adoptions.¹⁶ In 1938, the abrogation statutes were partially amended to apply to both types of adoptions.¹⁷ But the section permitting abrogation for misconduct by the foster child—Section 118 of the Domestic Relations Law—has never been so amended. No reported case allows the abrogation of a voluntary adoption under this section, and theoretically no such proceeding is authorized.

Both of the instant cases continue the traditional judicial requirement of strict statutory compliance: the *Eaton* case refused abrogation because there is no statutory provision for such relief once the child has reached majority; the *Banfield* case refused partial abrogation because the statute makes no provision for that type of proceeding.

The *Banfield* case raises the problem of the divorce of the foster parents. It would appear that the only method of obtaining the result desired in the instant case is by the circuitous procedure of full abrogation followed by a readoption by the mother and her new spouse. The Legislature might well consider the advisability of

and proper"). In two jurisdictions the child may disaffirm upon reaching his majority. VT. REV. STAT. § 9956 (1947); W. VA. CODE ANN. § 4760 (1949).

¹⁰ N. Y. DOM. REL. LAW § 116.

¹¹ *Id.* § 117. The foster parent himself may utilize this section. *Matter of Anonymous*, 185 Misc. 962, 58 N. Y. S. 2d 159 (Surr. Ct. 1945).

¹² N. Y. DOM. REL. LAW § 118. Mere behavior causing annoyance is insufficient [*Matter of Buss*, 234 App. Div. 299, 254 N. Y. Supp. 852 (4th Dep't 1932)], but unruly and uncontrollable conduct [*Matter of Anonymous*, 157 Misc. 951, 285 N. Y. Supp. 827 (Surr. Ct. 1936)], or misconduct coupled with desertion [*Matter of Souers*, 135 Misc. 521, 238 N. Y. Supp. 738 (Surr. Ct. 1930)], is sufficient to satisfy the statute, although even then the court is reluctant to abrogate [*Id.* at 526, 238 N. Y. Supp. at 744].

¹³ See *Mulligan v. Wingard*, 72 Ga. App. 539, 34 S. E. 2d 305 (1945).

¹⁴ See *Matter of Buss*, *supra* note 12, 254 N. Y. Supp. at 853.

¹⁵ Laws of N. Y. 1873, c. 830, §§ 5, 13. "Voluntary adoption' shall mean any adoption other than that of a minor who has been placed for adoption by an authorized agency." N. Y. DOM. REL. LAW § 109(5).

¹⁶ Laws of N. Y. 1884, c. 438, §§ 12-13.

¹⁷ Laws of N. Y. 1938, c. 606, §§ 116-117. See *Note of Revisers*, quoted

allowing partial abrogation in cases like the instant one, where, after a divorce, the foster parent retaining custody of the child remarries.¹⁸

A more important item for legislative attention is the present limitation of Section 118 of the Domestic Relations Law relative to the abrogation of institutional adoptions. Where all the parties consent, or where the foster parents fail in their duties, abrogation is allowed regardless of whether or not the adoption is institutional.¹⁹ Since the grave misbehavior of the child would give rise to the same intra-family tensions in the case of voluntary as in the case of institutional adoptions, there seems to be no valid reason for retaining in the adoption law the distinction between voluntary and institutional adoptions, and for restricting the application of the section in question to the latter.



CONFLICT OF LAWS — INCESTUOUS MARRIAGES — UNCLE-NIECE MARRIAGE, VALID WHERE PERFORMED, VALID IN NEW YORK.— Decedent and her uncle by the half-blood, both New York residents of the Jewish faith, were married in Rhode Island which exempts from its incest prohibitions marriages between Jews within the degrees of consanguinity permitted by their religion.¹ Appellant, daughter of decedent, petitioned for letters of administration on the ground that this marriage was incestuous and void pursuant to New York statute.² The Court of Appeals, applying the rule that a marriage valid where contracted is valid everywhere, held that the New York statute did not extend to a foreign marriage of domiciliaries, and that the marriage was not so repugnant to the public policy as to be adjudicated invalid. *Matter of May*, 305 N. Y. 486, 114 N. E. 2d 4 (1953).

Although marriage is considered a civil contract,³ it is regulated and prescribed by law to a greater extent than other contracts because of the social importance of the relationship created.⁴ To

in 14 MCKINNEY'S CONS. LAWS OF N. Y. ANN. 341, 344 (1941).

¹⁸ In Arkansas, abrogation is allowed if the foster parents are separated or divorced within two years of the adoption, if the child is still a minor. ARK. STAT. c. 56, § 110 (1947).

¹⁹ N. Y. DOM. REL. LAW §§ 116-117.

¹ R. I. GEN. LAWS c. 415, §§ 1-4 (1938).

² N. Y. DOM. REL. LAW § 5(3), *Audley v. Audley*, 196 App. Div. 103, 187 N. Y. Supp. 652 (1st Dep't 1921).

³ N. Y. DOM. REL. LAW § 10; *see di Lorenzo v. di Lorenzo*, 174 N. Y. 467, 472, 67 N. E. 63, 64 (1903).

⁴ *See Fearon v. Treanor*, 272 N. Y. 268, 5 N. E. 2d 815 (1936); *see Maynard v. Hill*, 125 U. S. 190, 211 (1888); *Pisciotta v. Buccino*, 22 N. J.