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Domestic Relations—Parent-Child—Abrogation of Adoption

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still claim the child even after legal adoption has been granted,[10] the burden then rests upon the parent to show that the child's welfare will be advanced by having the child returned to her.[11]

In the instant case there was no showing that the mother was unfit to care for her child. In fact, to the contrary there had been evidence introduced on the trial to show her fitness. Since the order of adoption of the child had already been vacated in a previous proceeding because of the lack of consent of the mother, it was natural that the court gave the custody of the child to the mother.

Abrogation of Adoption

In New York, to effectuate an abrogation of an adoption there must be a finding that "due regard to the interests of both (the child and the foster parents) requires that such adoption be abrogated."[12] In order for a parent to obtain the abrogation, he must show that the child has been guilty of the willful desertion or a misdemeanor or ill behavior. The law goes on to state that when such an abrogation is sought, notice must be given to the agency which was a party to the adoption, or if no agency was involved, to the board or commission or official with the jurisdiction over the poor. If no such agency or institution shall appear on the return of such process, then a special guardian shall be appointed by the court.[13]

In In re *Adoption of Eaton,*[14] the parents of an adopted person, their daughter, were seeking the abrogation of adoption on the ground of desertion. The daughter had attained majority, had married, left home and had not been heard of since. In the action she appeared by counsel. The court held that once the adopted person had attained majority, no longer could there possibly be an abrogation of the adoption.[15] The court looked into the provisions of § 118 of the Domestic Relations Law to interpret the intent of the statute and found that it applied only to minor children. First of all, the violations upon which the abrogation can be sought pertain only to infractions of those duties which are owed by a child to a parent during infancy. Further, the agency which was a party to the adoption must be present to insure that

10. *People* ex rel. *Pickle v. Pickle,* 215 App. Div. 32, 213 N. Y. Supp. 70 (4th Dep't 1925).
11. *Matter of Thorne,* 240 N. Y. 444, 148 N. E. 630 (1925).
12. DOM. REL. LAW § 118.
13. *Ibid.*
14. 305 N. Y. 162, 111 N. E. 2d 431 (1953).
15. The court did not express itself or determine the abrogation of an adoption procured by fraud or any other infirmity in connection with the adoption itself. See *Myer's v. Myer's,* 197 App. Div. 1, 188 N. Y. Supp. 527 (1st Dep't 1921).

the infant will be adequately represented or the court will appoint a special guardian (who would be granted for an infant) to protect such infant's interests. Finally, the statute relates that the judge or surrogate may make such disposition for the foster child as he may deem proper; there would definitely be little or no need for this if the intent was to make the section applicable to adult adoptees. Furthermore, elsewhere in the statute there have been definite distinctions made in the treatment of adult adoptees, in contrast to infant adoptees, as to the manner of conduct and proceedings for them.[16]

The court in summing up the probable intent of the legislature in providing for the abrogation of adoptions thus said, ". . . the necessity for terminating an adoption is so unlikely, that the threat of so drastic a court remedy should not overhang the adopted child's whole adult life."[17]

B. Husband—Wife

Marriage, Common Law

Common law marriage was abolished in New York State as of 29 April 1933 by Domestic Relations Law § 11 which states that a valid marriage must be solemnized.[21] But § 11 does not spell out a retroactive effect, and since it is in derogation of the common law, it has been held not to be retroactive and so common law marriages entered into prior to 29 April 1933 are valid.[22] To establish a common law marriage the prime factor is an intent of the parties to enter into the marriage contract[23] with an ability on the part of both parties to enter the relationship[24] and an open assumption of marital duties and obligations or a promise and cohabitation.[25]

The Court of Appeals twice deliberated upon the sufficiency of evidence from which a common law marriage could be inferred.

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16. DOM. REL. LAW Art. VII, §§ 109, 110, 111, 112, 113, 116, 117.

17. See note 14 *supra*.

21. As amended L. 1933, c. 606: *Ferraro v. Ferraro*, 77 N. Y. S. 2d 246 (Dom. Rel. Ct. 1948).

22. *In re Makel's Estate*, 153 Misc. 228, 274 N. Y. Supp. 625 (Surr. Ct. 1934).

23. *Akeson v. Salvage Process Corp.*, 305 N. Y. 438, 441, 113 N. E. 2d 788, 789; *Zy v. Zy*, 13 N. Y. S. 2d 415 (Dom. Rel. Ct. 1939); see GROSSMAN, THE NEW YORK LAW OF DOMESTIC RELATIONS § 92 (1st ed. 1947).

24. A common disability is a prior valid marriage. *Castellani v. Castellani*, 176 Misc. 763, 28 N. Y. S. 2d 879 (Dom. Rel. Ct. 1941); *Karameros v. Luther*, 166 Misc. 376, 2 N. Y. S. 2d 508 (Sup. Ct. 1938), *aff'd*, 254 App. Div. 845, 5 N. Y. S. 2d 319 (1st Dep't 1938).

25. In re *Monty's Estate*, 32 N. Y. S. 2d 705 (Surr. Ct. 1941), *aff'd*, 289 N. Y. 685, 45 N. E. 2d 334 (1942). *Anonymous v. Anonymous*, 19 N. Y. S. 2d 229 (Dom. Rel. Ct. 1940). *Zy v. Zy*, *supra* note 23; *Heidig v. Heidig*, 6 N. Y. S. 2d 405 (Sup. Ct. 1938); *Castellani v. Castellani*, *supra* note 24; *Karamos v. Luther*, *supra* note 24; see GROSSMAN, *op. cit. supra* note 23 §§ 90-99.