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NOTES

THE UNIFORM ADOPTION ACT: STRENGTHENING NEW YORK'S PROTECTION FOR UNWED MOTHERS*

INTRODUCTION

Adoption establishes a legal relationship of child and parent between persons who are not related biologically.¹ Simultaneously, adoption severs any legal relationship between the adopted child and his or her biological parents, thereby terminating all the biological parents' rights and responsibilities associated with the child.² Because the federal government traditionally has refrained from interfering in domestic relations,³ no federal adoption statute exists.⁴ The creation of

* This article is limited to the unique situation of unwed birth mothers who, unlike many married couples, are considered more susceptible to coercion, fraud, and duress because they are often young and extremely vulnerable to societal, familial, and financial pressures to place their children up for adoption. Jane A. Robert, *Parental Consent: The Need for an Informed Decision in the Private Adoption Scheme*, 47 LA. L. REV. 889, 895 (1987).

¹ N.Y. DOM. REL. LAW § 110 (McKinney 1988). See also *Dennis T. v. Joseph C.*, 82 A.D.2d 125, 128, 441 N.Y.S.2d 476, 479 (2d Dep't 1981) ("Adoption is the legal proceeding whereby a person takes another person into the relation of [a] child . . ."); ROBERT A. FARMER, *HOW TO ADOPT A CHILD* 7 (2d ed. 1968).

² N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 1988) ("After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child.").

³ *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) (explaining that state laws traditionally govern a multitude of parent-child relationships including child custody and adoption).

⁴ More than a decade ago, a congressional effort to draft a uniform adoption

adoption law and regulation of the adoption process is entirely within the discretion of the individual states.⁵

Although New York has designed its adoption scheme to promote and protect the best interests of the child,⁶ in the last two decades unwed mothers have bombarded New York courts with adoption challenges seeking to undo finalized placements on the theory that the adoptions violated their parental rights.⁷ Many unwed birth mothers challenge adoptions on

act failed and it is highly unlikely that Congress will succeed in enacting a federal adoption statute in the near future. See Mark Hansen, *Fears of the Heart*, 80 A.B.A. J. 58, 62 (Nov. 1994).

⁵ Although state legislatures draft and implement adoption statutes, federal constitutional limits circumscribe the states' discretion. In fact, adoption statute provisions have been declared unconstitutional on more than one occasion. See, e.g., *In re Raquel Marie*, 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 928, cert. denied, 489 U.S. 984 (1990) (holding that New York Domestic Relations Law § 111-e, which required unwed fathers to openly live with the unwed mothers for six months prior to an adoption in order to veto the adoption, violated Equal Protection); see also, *Caban v. Mohammed*, 441 U.S. 380 (1980) (holding that a sex-based distinction in New York Domestic Relations Law § 111, which authorized unwed mothers, but not unwed fathers, to withhold consent to their child's adoption, violated Equal Protection); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that an Illinois statute, which automatically terminated unwed fathers' parental rights without a hearing upon the death of children's mother, violated Due Process and Equal Protection).

⁶ See N.Y. DOM. REL. LAW § 114 (McKinney 1988) ("If satisfied that the best interests of the adoptive child will be promoted thereby, the judge . . . shall make an order approving the adoption").

⁷ *In re Amanda B.*, 206 A.D.2d 636, 614 N.Y.S.2d 607 (3d Dep't 1994); *In re Female R.* 202 A.D.2d 672, 609 N.Y.S.2d 295 (2d Dep't 1994); *In re Baby Girl J.*, 192 A.D.2d 533, 595 N.Y.S.2d 816 (2d Dep't 1993); *In re Ricardo N.*, 195 A.D.2d 559, 600 N.Y.S.2d 730 (2d Dep't), *appeal denied*, 82 N.Y.2d 661, 625 N.E.2d 591, 605 N.Y.S.2d 6 (1993); *In re Adoption of Baby Boy "B"*, 163 A.D.2d 673, 558 N.Y.S.2d 281 (3d Dep't), *appeal denied*, 76 N.Y.2d 710, 564 N.E.2d 672, 536 N.Y.S.2d 62 (1990); *In re Adoption of Samuel*, 167 A.D. 2d 909, 562 N.Y.S.2d 278 (4th Dep't 1990), *appeal granted*, 77 N.Y.2d 804, 571 N.E.2d 82, 568 N.Y.S.2d 912 (1991); *In re Ricky AA.*, 146 A.D.2d 433, 541 N.Y.S.2d 264 (3d Dep't 1989), *aff'd*, 75 N.Y.2d 885, 553 N.E.2d 1021, 554 N.Y.S.2d 473 (1990); *Margenesy v. Manitta*, 156 A.D.2d 1026, 549 N.Y.S.2d 307 (4th Dep't 1989); *In re Baby Boy L.*, 144 A.D.2d 674, 534 N.Y.S.2d 706 (2d Dep't 1988), *appeal denied*, 74 N.Y.2d 606, 541 N.E.2d 427, 543 N.Y.S.2d 398, cert. denied, 493 U.S. 918 (1989); See *In re Sarah K.*, 110 A.D.2d 18, 492 N.Y.S.2d 957 (2d Dep't) *rev'd*, 66 N.Y.2d 223, 487 N.E.2d 241, 496 N.Y.S.2d 384 (1985), cert. denied, 475 U.S. 1108 (1986); *Dennis T. v. Joseph C.*, 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't 1981); *State ex rel. Baby Girl Dunn*, 133 Misc. 2d 399, 506 N.Y.S.2d 805 (Sup. Ct. N.Y. County 1986), *rev'd*, 125 A.D.2d 106, 512 N.Y.S.2d 82 (1st Dep't 1987); *In re Baby Boy N.*, 150 Misc. 2d 535, 573 N.Y.S.2d 244 (Family Ct. N.Y. County 1991); *In re Adoption of E.W.C.*, 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct. Nassau County 1976); *In re Anonymous (T.W.C.)* N.Y.L.J. Dec. 18, 1974, p. 17 col 6, *aff'd*, 48 A.D.2d 893, 369

grounds that they never consented to the adoption or that their consent was obtained improperly through fraud, coercion or duress. Such adoption challenges do not serve the best interest of the child or any party involved in the adoption process⁸ because they have the potential to frustrate the legislature's goal of providing final, stable homes for children.⁹

The finality of adoption placements is critical because a "continuous home environment is deemed essential to a child's development as a healthy, stable human being."¹⁰ It is also important to finalize adoption relationships because parent-child relationships implicate other legal rights, such as the children's rights to inherit and the parties' rights to receive governmental benefits.¹¹ Besides frustrating the goal of finality of adoptions, adoption challenges also subject adoptive and biological parents and the child to debilitating, traumatic and expensive litigation.

Compliance with New York's statutory requirements should be sufficient to guarantee that unwed birth mothers' consents are informed, voluntary and final decisions. The New York legislature has repeatedly revised the Domestic Relations Law since 1961 in order to increase protection for biological parents.¹² Despite these efforts, statutory compliance with the

N.Y.S.2d 783 (2d Dep't), *aff'd*, 38 N.Y.2d 128, 341 N.E.2d 526, 379 N.Y.S.2d 1 (1975).

⁸ See generally Robin DuRocher, *Balancing Competing Interests in Post-Placement Adoption Custody Disputes: How Do the Scales of Justice Weigh the Rights of Biological Parents, Adoptive Parents, & Children?*, 15 J. LEG. MED. 305, 306 (1994).

⁹ See N.Y. SOC. SERV. LAW §§ 384-b(1)(a)(i-iv) & 384-b(1)(b) (McKinney 1992). The legislature finds that "children [who] grow up with a normal family life in a permanent home [have] . . . the best opportunity . . . to develop and thrive." Thus "when it is clear that the natural parent cannot or will not provide a normal family home for the child . . . a permanent alternative home should be sought for the child." *Id.*

¹⁰ DuRocher, *supra* note 8, at 330; see Janet H. Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?* 38 U.C.L.A. L. REV. 917, 927 (1991).

¹¹ Robert O. v. Russell K., 80 N.Y.2d 254, 269, 604 N.E.2d 99, 106, 590 N.Y.S.2d 37, 44 (1992) (Titone, J., concurring).

¹² See *In re Baby Boy N.*, 150 Misc. 2d 535, 573 N.Y.S.2d 244 (Fam. Ct. N.Y. County 1991). Prior to 1961 the Domestic Relations Law provided little guidance to biological parents regarding the necessary procedures and content of adoption consents. Since 1961, however, the New York legislature, being "sensitive to the potential for abuse in private placement adoptions," has repeatedly intensified its scrutiny of all phases of the required adoption procedures. *Id.* at 536, 573 N.Y.S.2d at 244. Although § 115 of the New York Domestic Relations Law was

existing consent requirements does not guarantee that unwed mothers are protected against coercive, fraudulent and deceptive practices.¹³ Deficiencies in New York's Domestic Relations Law must be remedied to better protect the rights of birth parents, to prevent subsequent litigation of parental consent, and to preserve the finality of adoptive placements.

In 1994, the National Conference of Commissioners on Uniform Laws¹⁴ promulgated a comprehensive model adoption code known as the Uniform Adoption Act¹⁵ (the "UAA"). The most recent official draft of the UAA recommends procedural guidelines to govern every aspect of the adoption process. It is time for the New York legislature to re-examine its adoption scheme¹⁶ and to revise its consent requirements to better disuade challenges.

Part I of this Note will analyze New York's statutory adoption procedures, focusing on consent requirements for biological parents.¹⁷ Part II will illustrate that New York courts, eager

enacted to regulate the execution of parental consents in private-placement adoptions, it failed to specify either the form or content of the consent. Seeking to provide further guidance, the legislature revised the statute in 1972 to add § 115-b, which created two forms of consent (judicial and extrajudicial) and required judges to inform birth parents of the consequences of executing a consent. Because these consents were described in general terms, the legislature again amended § 115-b in 1986 to provide extensive details of the adoption procedures. The 1986 amendments distinguished the effects of the two different forms of consent, mandated that the consent advise natural parents of their right to have both independent legal representation and supportive counseling, and required specific print-size for extrajudicial consents. *Id.* at 536-38, 573 N.Y.S.2d at 245-46.

¹³ See, e.g., *State ex rel. Baby Girl Dunn*, 512 N.Y.S.2d 82, 86 (1st Dep't 1987) ("[t]he surrender agreement cannot withstand the factual features of estoppel or duress or even perhaps fraud which are suggested by the circumstances herein presented.").

¹⁴ The National Conference of Commissioners (the "Conference"), a Chicago-based state organization comprised of 300 influential judges, lawyers, law professors and state officials, seeks to promote uniformity on nationwide issues by creating model legislation for state legislatures to modify, ratify and adopt. The Conference has played a crucial role in the development and enactment of state legislation such as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act. Hansen, *supra* note 4, at 62.

¹⁵ UNIFORM ADOPTION ACT (Proposed Official Draft 1994).

¹⁶ See N.Y. DOM. REL. LAW § 110 (defining adoption), §§ 111 & 111a (specifying notice and consent requirements), §§ 112 & 113 (governing agency adoptions), § 114 (governing the order of adoption), §§ 115 & 115-b (governing private placements & revocation of parental consent to adoption), and § 117 (governing the effect of adoption and grounds for adoption challenges) (McKinney 1988).

¹⁷ See *infra* notes 27-43 and accompanying text.

to promote finality, are reluctant to engage in individual factual inquiries concerning coercion and duress when unwed mothers' challenged consents comply with statutory requirements.¹⁸ Part II will also review recent adoption challenges brought by biological mothers in order to illustrate that New York's current adoption consent requirements do not adequately protect the rights of unwed birth mothers. Finally, Part III of this Note will recommend that the New York State Legislature amend the current Domestic Relations Law in light of the recently proposed UAA to provide better protection for unwed birth mothers and to promote the finality of adoptions. Although the UAA has not yet been introduced before the New York legislature,¹⁹ its proposals can be instrumental in assisting New York to achieve necessary reform regarding consent requirements. New York can better ensure the finality of adoptions by revising the Domestic Relations Law to provide additional safeguards for unwed mothers executing adoption consents.²⁰

I. NEW YORK'S ADOPTION SCHEME

The Domestic Relations Law generally governs the adoption process in New York.²¹ In order to comprehend the inadequacies inherent in New York's adoption consent requirements, it is necessary to provide an overview of that law's parental

¹⁸ See *infra* notes 72-82, 100-102 and accompanying text.

¹⁹ Telephone Interview with Katie Robinson, Legislative Assistant, National Conference of Commissioners on Uniform Laws, Chicago Ill. (Feb. 17, 1995). The Michigan legislature has adopted virtually all of the provisions of the 1993 Uniform Adoption Act Draft (the "UAA"). In addition, the UAA has been introduced for debate before legislatures in Florida, Mississippi, Missouri, Oklahoma and Vermont. *Id.*

²⁰ Although the UAA provides procedural guidelines governing every aspect of the adoption process, this Note will focus primarily on the UAA's requirements relating to parental consent to adoption. These include provisions regarding when a birth mother may execute consent, counseling options for birth mothers prior to executing consent and mandatory representation by independent counsel. See UNIFORM ADOPTION ACT §§ 2-203, 2-401, 2-402, 2-404, 2-405, 2-406, 2-407, 2-408, 3-402, 3-403, 3-404, 3-405 (Proposed Official Draft 1994).

²¹ N.Y. DOM. REL. LAW §§ 110-117 (McKinney 1988). The Domestic Relations Law governs adoption procedures in general and private-placement adoptions in particular. Agency adoptions in New York, however, are governed by both N.Y. DOM. REL. LAW §§ 112 & 113 (McKinney 1988 & Supp. 1995), and by N.Y. SOC. SERV. LAW §§ 383-c, 384, 384-c & 385 (McKinney 1992 & Supp. 1995).

consent procedures.

The Domestic Relations Law provides two forms of adoption: agency adoption and private placement.²² Whereas agency adoptions are primarily arranged between unrelated persons,²³ private placement adoptions are frequently achieved through the independent actions of the natural and adoptive parents and a "facilitator," who is often a "neutral" third party lawyer or doctor.²⁴ The facilitator becomes acquainted with childless married couples and unmarried pregnant women seeking to give up their children,²⁵ interacts with both separately to arrange an adoption and receives a standard fee for his or her services.²⁶

Once an unwed birth mother has made a decision to place her child up for adoption and has coordinated the preliminary arrangements, she must execute a parental consent to the adoption in order to terminate any existing rights and responsibilities regarding the child.²⁷ Some states mandate a statutory waiting period after the child's birth before parental consent can be executed. Generally, this waiting period extends for several days after the child's birth to allow the unwed birth mother time to make a thoughtful, informed decision.²⁸ Cur-

²² An overwhelming majority of states, including New York, recognize both private-placement and agency adoptions. Only Connecticut, Delaware, Massachusetts, Michigan and North Dakota have declared private-placement adoptions illegal. See Dickson, *supra* note 10, at 925 n.42. Opponents of independent adoptions argue that one who facilitates a private placement cannot have the time or the resources to properly evaluate the adoptive parents. FARMER, *supra* note 1, at 62.

²³ The adoption agency is responsible for directly obtaining the natural parent's or legal guardian's consent and for subsequently locating a suitable environment for the child. FARMER, *supra* note 1, at 31-32.

²⁴ Other categories of independent adoptions consist of both intra-family adoptions (children adopted by blood relatives or by interested couples discovered by blood relatives or friends) and black market adoptions (babies illegally sold for a considerable profit). FARMER, *supra* note 1, at 61-62.

²⁵ FARMER, *supra* note 1, at 61-62.

²⁶ Facilitators who are doctors are entitled to fees for medical services, which include the childbirth delivery fee. FARMER, *supra* note 1, at 62. Similarly, attorneys representing prospective adoptive parents are entitled to the reasonable and actual fees charged for consultations and legal services such as the preparation and filing of the adoption papers. See *In re Male Infant B.*, 96 A.D.2d 1055, 1056, 466 N.Y.S.2d 482, 483 (2d Dep't 1983).

²⁷ N.Y. DOM. REL. LAW § 111 (McKinney 1988).

²⁸ See W. VA. CODE § 48-4-5(A)(1) (1995) ("The consent or relinquishment is executed after the expiration of seventy-two hours after the birth of the child . . ."); KY. REV. STAT. ANN. § 199.500(5) (Michie 1991) ("In no case shall . . . a

rently, New York's adoption scheme does not impose any such period. Therefore, an unwed mother may even terminate her rights prior to the child's birth.

In New York, a birth mother may execute consent in one of two ways: before a judge or surrogate,²⁹ or extrajudicially.³⁰ When an unwed mother executes her consent to adoption in the presence of a judge or surrogate, the judicial consent becomes irrevocable immediately.³¹ Immediate finality is justified because at the time of execution the court informs the unwed birth mother of the consequences of the decision and of her rights to obtain supportive counseling and the advice of an independent attorney.³² The court also has the opportunity to evaluate the birth mother's understanding of the consequence of executing the consent form.³³ If, however, a mother chooses to execute an extrajudicial consent (i.e., outside of the court's presence), the consent does not become final until after forty-five days have elapsed.³⁴ In addition to meeting the requirements of the judicial consent, the extrajudicial consent must also contain a statement that the birth mother was informed of her right to obtain an independent attorney, her right to supportive counseling and the effects of a revocation of the consent.³⁵ During this forty-five day period, the birth mother may at any time give notice to the court of her intention to revoke the consent.³⁶

consent for [an] adoption be held valid if . . . given prior to the fifth day after the birth of the child."); VA. CODE ANN. § 63.1-220.3(c) (Michie 1995) ("When . . . the adoptive child is at least ten days old, the birth parent or parents . . . shall execute consent to the proposed adoption . . ."); WA. REV. CODE ANN. § 26.33.160 (West 1986) ("The consent will not be presented to the court until forty-eight hours . . . after birth of the child . . .").

²⁹ N.Y. DOM. REL. LAW § 115-b(2) (McKinney 1988).

³⁰ N.Y. DOM. REL. LAW § 115-b(3)(a) (McKinney 1988). An extrajudicial consent to adoption is a consent executed by the adoptee's birth parent outside the presence of a judge or surrogate.

³¹ N.Y. DOM. REL. LAW § 115-b(2) (McKinney 1988).

³² N.Y. DOM. REL. LAW § 115-b(2)(b) (McKinney 1988).

³³ See *In re Ricardo N.*, 195 A.D.2d 559, 600 N.Y.S.2d 730 (2d Dep't 1993) (Appellate court refused to vacate judicial consent despite the lower court's failure affirmatively to explain to unwed mother that her execution of a judicial consent precluded her from relying on the forty-five day revocation period provided in a simultaneously executed extrajudicial consent).

³⁴ N.Y. DOM. REL. LAW § 115-b(4)(v) (McKinney 1988).

³⁵ N.Y. DOM. REL. LAW § 115-b(2)(b) (McKinney 1988).

³⁶ *Id.*

Once the court has obtained the necessary parental consent(s),³⁷ the adoptive parents' attorney prepares and files a lengthy adoption petition. This petition recites facts to show that the parties have complied with all statutory requirements.³⁸ Even while the adoptive parents await an order of adoption from the court, an unwed birth mother who has executed an extrajudicial consent may revoke her consent if she gives notice to the court within the forty-five day statutory period.³⁹ If the adoptive parents do not oppose the revocation, the child is returned to the unwed birth mother.⁴⁰ If, however, the adoptive parents oppose the notice, timely revocation in itself does not automatically guarantee the return of the child to the birth mother. Instead, revocation triggers a "best interest of the child" hearing⁴¹ in which the court determines who

³⁷ If a parental consent to an adoption is executed by only one parent, the court must then determine if consent is required from the other birth parent. Whereas the New York Domestic Relations Law always requires the natural mother's consent to validate an adoption, N.Y. DOM. REL. LAW §§ 111(1)(b) & 111(1)(c) (McKinney 1988), the legislature has established separate criteria to determine whether a father's consent is required. Although a father's consent is mandatory if a child is conceived or born within a marriage, his consent is not required if the child is born out of wedlock unless the court finds that he has maintained "substantial and continuous contact with the child." N.Y. DOM. REL. LAW § 111(1)(a) (McKinney 1988). "Substantial and continuous contact" will be established if an unwed father visits the child monthly, regularly communicates with the child, files with the putative father registry, assists the unwed mother with prenatal medical care and holds himself out to be the infant's father. N.Y. DOM. REL. LAW § 111(e) (McKinney 1988). See also *In re Raquel Marie X*, 76 N.Y.2d 387, 408, 559 N.E.2d 418, 428, 559 N.Y.S.2d 855, 865, cert. denied, 498 U.S. 986 (1990).

³⁸ See N.Y. DOM. REL. LAW §§ 112 (standards and mandatory contents for agency adoption petitions) & 115 (standards and mandatory contents for private-placement adoption petitions) (McKinney 1988 & Supp. 1995). In general, adoption petitions for both private and agency adoptions contain information regarding the identity of the child, how the adoption was arranged, biographical information about the adoptive parents such as their occupation, religious faith and marital status and affidavits enumerating economic compensation associated with the adoption such as the child's prenatal care, the unwed birth mother's medical bills, reimbursements for travel and lawyers' compensation fees for private placement adoptions. *Id.*

³⁹ N.Y. DOM. REL. LAW § 115(b)(3)(b) (McKinney 1988).

⁴⁰ *Id.*

⁴¹ The court cannot employ any presumption in favor of the biological parent(s) when determining the best interest of the child. N.Y. DOM. REL. LAW § 115-b(6)(d)(v) (McKinney 1988). Since the "rights of the [biological] parent to custody shall not be superior to those of the adoptive parent," N.Y. DOM. REL. LAW § 115-b(4)(a)(iv) (McKinney 1988), the court is compelled to place both the adoptive and

shall receive custody.⁴² After the execution of a judicial consent, or after the expiration of an extrajudicial consent's forty-five day revocation period, courts are precluded from vacating a final adoption consent absent proof that the consent was procured through fraud, duress or coercion.⁴³

This adoption scheme does not adequately prevent unwed mothers from challenging adoptions. The current statute falls short of the New York legislature's goals of promoting the best interests of the child, protecting the rights of both unwed birth mothers and adoptive parents and maintaining an adoption process which is fair, efficient, prompt and final.⁴⁴ The statute fails because it does not contain sufficiently specific regulatory requirements and because New York courts refuse to interpret the requirements set forth in the statute to maximize the welfare of the child. Instead, New York courts presume that statutory compliance is the equivalent of providing adequate protection.

II. ADOPTION CHALLENGES IN NEW YORK

A. *Evolution of New York Courts' Analysis of Challenged Adoption Consents: The Statutory-Compliance Approach*

When an unwed mother consents to put her child up for adoption, she has agreed to sever all ties with her child.⁴⁵

natural parents on equal footing.

⁴² N.Y. DOM. REL. LAW §§ 115-b(6)(d)(iv) & (v) (McKinney 1988). "[F]inancial status, character, mental and physical health, ability to provide for the child's needs, available support from extended family members, continuity and stability, and capacity to accept the child," are among the factors New York courts consider in determining the best interests of the child. *In re Sarah K.*, 66 N.Y.2d 223, 233, 487 N.E.2d 241, 245, 496 N.Y.S.2d 384, 388 (1985), *cert. denied*, 475 U.S. 1108 (1986).

⁴³ N.Y. DOM. REL. LAW § 115-b(7) (McKinney 1988).

⁴⁴ *Lehr v. Robinson*, 463 U.S. 248, 266 (1983); *In re Sarah K.*, 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985), *cert. denied*, 475 U.S. 1108 (1986); *In re Baby Boy N.*, 150 Misc. 2d 535, 536, 573 N.Y.S.2d 244, 244 (Fam. Ct. N.Y. County 1991).

⁴⁵ *In re Ricardo N.*, 195 A.D.2d 559, 559, 600 N.Y.S.2d 730, 731 (2d Dep't 1993) (extrajudicial consent affidavit form states, "I . . . fully realize that I will finally lose all legal rights in and to the said minor as soon as this document and accompanying papers are signed."). Prior to executing a consent, the surrogate must specifically inform the biological parent that after his or her appearance

Sometimes, however, unwed birth mothers who have relinquished custody of their infants seek to reestablish their parental ties by claiming that their consents were procured through fraud, duress and coercion.⁴⁶ New York courts facing these claims have the difficult task of ascertaining, through hindsight, whether an unwed mother who previously made a voluntary, well-informed decision has had a change of heart, or whether the mother was a victim of fraud due to inadequate protection at the time of execution⁴⁷ and thus never truly consented to the adoption in the first place. According to the law, only the second scenario can justify overturning the challenged adoption. This, however, was not always the case in New York.

In the last two decades, the New York courts have altered their approach in resolving adoption challenges brought by unwed mothers. In the past, New York courts were sympathetic towards unwed mothers and liberally accepted evidence of both emotional turmoil and mistakes of fact as sufficient to vacate an adoption consent.⁴⁸

In *Musso v. McAlpine*,⁴⁹ an appellate court vacated an unwed mother's adoption consent on the ground that the presence of emotional turmoil rendered the consent involuntary. The court held that because the unwed mother had been a "very frightened girl" at the time of surrender, her decision

before the court, he or she will have nothing further to say in regard to the child.
Id.

⁴⁶ See *In re Amanda B.*, 206 A.D.2d 636, 614 N.Y.S.2d 607 (3d Dep't 1994); *In re Female R.*, 202 A.D.2d 672, 609 N.Y.S.2d 295 (2d Dep't 1994); *In re Baby Girl J.*, 192 A.D.2d 533, 595 N.Y.S.2d 816 (2d Dep't 1993); *In re Ricardo N.*, 195 A.D.2d 559, 600 N.Y.S.2d 730 (2d Dep't), *leave to appeal denied*, 82 N.Y.2d 661, 625 N.E.2d 591, 605 N.Y.S.2d 6 (1993); *In re Adoption of Baby Boy "B"*, 163 A.D. 2d 673, 558 N.Y.S.2d 281 (3d Dep't 1990); *In re Adoption of Samuel*, 167 A.D. 2d 909, 562 N.Y.S.2d 278 (4th Dep't 1990); *In re Baby Girl Z.*, 154 A.D.2d 471, 545 N.Y.S.2d 941 (2d Dep't 1989), *appeal denied*, 75 N.Y. 2d 709, 554 N.E.2d 1279, 555 N.Y.S. 2d 691 (1990); *In re Sarah K.*, 110 A.D.2d 18, 492 N.Y.S.2d 957 (2d Dep't), *rev'd* 66 N.Y.2d 223, 487 N.E.2d 241, 496 N.Y.S.2d 384 (1985), *cert. denied*, 475 U.S. 1108 (1986).

⁴⁷ *Morone v. Morone*, 50 N.Y.2d 481, 488, 413 N.E.2d 1154, 1157, 429 N.Y.S.2d 592, 596, (1980) ("For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to their conduct . . . runs too great a risk of error.").

⁴⁸ See, e.g., *Musso v. McAlpine*, 36 A.D.2d 901, 321 N.Y.S.2d 287 (4th Dep't 1971); *In re Emmanuel T.*, 81 Misc. 2d 535, 365 N.Y.S.2d 709 (Fam. Ct. N.Y. County 1975); .

⁴⁹ 36 A.D.2d 901, 321 N.Y.S.2d 287 (4th Dep't 1971).

was "not made willingly, but only as a result of circumstances which [she] believed left her no other choice."⁵⁰ Recognizing that the unwed birth mother had expressed concern for the baby and had engaged in a lengthy search for the child after changing her mind, the court reasoned her conduct did not support a "settled purpose to be rid of all [her] parental obligations."⁵¹

Similarly, in *In re Emmanuel T.*, a New York family court vacated an unwed mother's consent because it interpreted her consent as having been based upon a factual misrepresentation.⁵² In *Emmanuel T.*, the unwed mother agreed to have her child adopted by a couple whom she had never met. She was told only basic information about the adoptive parents by their attorney, such as their economic, religious and moral circumstances.⁵³ When the unwed mother appeared in court to execute the adoption consent, she learned for the first time that the adoptive mother was sixty-three years old and that her husband was fifty-six years old.⁵⁴ The unwed mother executed the consent form,⁵⁵ but later sought to revoke it claiming that she had acted under "bewilderment and distress," and that if she had known of the adoptive parents' ages prior to the hearing she never would have consented.⁵⁶ The court held that her consent was not "truly voluntary" because it had been based on a mistake of fact.⁵⁷ Relying on *Musso v. McAlpine*, the court also concluded that the consent was involuntary because the unwed mother was a "very frightened young girl," who had acted under great pressure while in a confused and disturbed state.⁵⁸

New York courts have since rejected the notion that emotional turmoil constitutes duress or coercion such as to warrant reversing an adoption order.⁵⁹ In *In re Baby Boy L.*, Nicole, a

⁵⁰ *Id.* at 902, 321 N.Y.S.2d at 289.

⁵¹ *Id.*

⁵² *In re Emmanuel T.*, 81 Misc. 2d 535, 365 N.Y.S.2d 709 (Fam. Ct. N.Y. County 1975).

⁵³ *Id.* at 537, 365 N.Y.S.2d at 713.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Emmanuel T.*, 81 Misc. 2d at 538, 365 N.Y.S.2d at 714.

⁵⁸ *Id.*

⁵⁹ See *In re Baby Boy L.*, 144 A.D.2d 674, 534 N.Y.S.2d 706 (2d Dep't 1938),

seventeen year-old, unmarried high school student gave birth and then executed a consent to adoption.⁶⁰ Although a New York family court vacated her consent upon finding that "pressures upon Nicole seriously interfered with [her] judgment and ability to make an independent, knowing and voluntary consent,"⁶¹ the appellate court reversed. Despite evidence that the teenager had misgivings about the adoption and executed a consent form because her mother threatened to throw her into the street if she kept the baby, the appellate court declared that "parental consents to adoption have consequences and cannot be undone at will."⁶² Although the court recognized that "Nicole was confronted by an emotionally difficult choice," it held that she had voluntarily elected to defer to her mother's wishes.⁶³ Because Nicole's "decision to proceed with the adoption was, instead, reflective of her express desire to remain with her parents," the court concluded that her consent was voluntary.⁶⁴

New York courts also consider parental threats, pressure by the surrendering mother's family, advice by the surrendering parent's physician and depression of the unwed mother as insufficient to overturn the release of a child for adoption.⁶⁵ One appellate court decision, frequently quoted by other New York courts, addressed unwed mothers' emotional trauma surrounding such consent decisions with the following stern words:

Contemplation of the surrender of one's own child is, in many if not all cases a cause of emotional and mental stress No statute has said that surrenders are valid only if executed free from emotion, tensions and pressures caused by the situation. No principle of law requires the rule. A balance of interests of the persons concerned and society weighs strongly against it.⁶⁶

appeal denied, 74 N.Y.2d 606, 541 N.E.2d 427, 543 N.Y.S.2d 398, *cert. denied*, 493 U.S. 918 (1989).

⁶⁰ *Id.* at 675, 534 N.Y.S.2d at 706.

⁶¹ *Id.* at 675, 534 N.Y.S.2d at 707.

⁶² *Id.*

⁶³ *Id.* at 676, 534 N.Y.S.2d at 708.

⁶⁴ *Baby Boy L.*, 144 A.D.2d at 676, 534 N.Y.S. 2d at 708.

⁶⁵ *Id.* at 675, 534 N.Y.S.2d at 707 (quoting *Podomere v. Our Lady of Victory Infant Home*, 82 A.D.2d 48, 51, 442 N.Y.S.2d 334 (4th Dep't 1981)), *appeal denied*, 74 N.Y.2d 606, 541 N.E.2d 427, 543 N.Y.S.2d 398, *cert. denied*, 493 U.S. 918 (1989)).

⁶⁶ *In re Anonymous*, N.Y.L.J. Dec. 18, 1974 at 17, (quoting *In re Surrender of*

Similarly, New York courts are no longer amenable to vacating final consents based on mistakes regarding material facts. The appellate court in *In re Baby Girl Z.* avoided vacating a consent based on a mistake of fact by rephrasing the material issue involved in order to preserve finality and certainty in adoption proceedings.⁶⁷ In *Baby Girl Z.*, a devout Lutheran unwed mother challenged her extrajudicial consent on grounds that the adoptive parents had fraudulently concealed the adoptive father's Jewish religion. The birth mother had originally wanted her child to be raised Lutheran, but agreed that it could be raised in the Catholic faith.⁶⁸ The birth mother sought additional assurances and was repeatedly guaranteed by the adoptive parents and their attorney that the child would "be raised as a Catholic in a *Christian* home."⁶⁹ Because the surrogate court found that the adoptive parents were aware of the importance of the Christian religion to the birth mother, it held that their failure to divulge the adoptive father's Jewish background constituted fraudulent concealment and justified vacating the consent.⁷⁰ The appellate court, however, disagreed. The appellate court disregarded evidence of the unwed mother's strong desire regarding her child's religious upbringing and upheld the consent, rephrasing the material issue upon which the unwed mother's consent was based as "the concern of the birth mother as to the *religion in which the child was to be raised* and not *the religious heritage of the adoptive [parents]*."⁷¹

Because New York courts no longer consider an unwed mother's emotional turmoil or mistake in executing a consent⁷² when faced with challenges to adoption consents, New

Minor Children, 181 N.E.2d 836, 839 (Mass. 1962)), *aff'd*, 48 A.D.2d 893, 369 N.Y.S.2d 783 (2d Dept.), *aff'd*, 38 N.Y.2d 128, 341 N.E.2d 526, 379 N.Y.S.2d 1 (1975).

⁶⁷ *In re Baby Girl Z.*, 154 A.D.2d 471, 545 N.Y.S.2d 941 (2d Dep't 1989).

⁶⁸ *Id.* at 471, 545 N.Y.S.2d at 942.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.* at 472, 545 N.Y.S.2d at 942.

⁷¹ *Id.* at 473, 545 N.Y.S.2d at 943 (emphasis added).

⁷² *In re Sarah K.*, 66 N.Y.2d 223, 241, 487 N.E.2d 241, 250, 496 N.Y.S.2d 384, 393 (1985) ("Moreover, neither emotional distress nor mistake is a ground for vitiating consent under Domestic Relations Law. . . ."), *cert. denied*, 475 U.S. 1108 (1986).

York courts must only ascertain whether the consent was the product of coercion or duress.⁷³ In determining the presence of coercion and duress, it appears that New York courts apply a bright-line "statutory compliance" approach to decide whether an unwed mother's consent was voluntary. This approach requires a court to decide only whether the unwed mother's consent complies with the required procedures set forth in the adoption statute.⁷⁴ Whenever statutory consent requirements have not been met,⁷⁵ or whenever legislatively mandated adoption procedures have been blatantly violated,⁷⁶ courts have no difficulty vacating a parental consent or reversing an order of adoption. When executed final consents do comply with New York's statutory requirements, however, courts are reluctant to inquire into individual circumstances surrounding the execution of the consent or to interpret the specific requirements in the statute.

Thus, New York courts tend to uphold an unwed mother's consent whenever it appears that she has had the benefits of either counseling⁷⁷ or representation by an attorney,⁷⁸ or

⁷³ N.Y. DOM. REL. LAW § 115-b(7) (McKinney 1988).

⁷⁴ See *In re "Female" R.*, 202 A.D.2d 672, 672, 609 N.Y.S.2d 295, 296 (2d Dep't 1994) ("The surrender agreement, which was effectuated in the manner required by statute, was valid and irrevocable."); see also, *In re Baby Boy "B"*, 163 A.D.2d 673, 674, 558 N.Y.S.2d 281, 282 (3d Dep't 1990), *appeal denied*, 76 N.Y.2d 710, 564 N.E.2d 672, 563 N.Y.S.2d 125 (1991).

⁷⁵ *In re Male Infant L.*, 61 N.Y.2d 420, 426, 462 N.E.2d 1165, 1168, 474 N.Y.S.2d 447, 450 (1984) (court denied foster parents' request for best-interests hearing despite physical custody of child, since unwed mother had not complied with consent procedures); *Dennis T. v. Joseph C.*, 82 A.D.2d 125, 131-132, 441 N.Y.S.2d 477, 481 (2d Dep't) (court vacated adoption where natural mother's signing of incomplete consent form prior to giving birth was invalid), *appeal denied*, 55 N.Y.2d 603, 431 N.E.2d 977, 477 N.Y.S.2d 1026 (1981); *State ex rel. Dunn v. Catholic Home Bureau for Dependent Children*, 133 Misc. 2d 399, 506 N.Y.S.2d 805 (Sup. Ct. N.Y. County 1986), (court vacated consent where agency failed to comply with New York Social Services Law § 384(3), which requires consent be acknowledged and recorded) *rev'd*, 125 A.D.2d 106, 512 N.Y.S.2d 82 (1st Dep't 1987).

⁷⁶ *In re Adoption of Samuel*, 167 A.D.2d 909, 562 N.Y.S.2d 278 (4th Dep't 1990), *appeal granted sub nom.*, *In re Samuel*, 77 N.Y.2d 804, 571 N.E.2d 82, 568 N.Y.S. 2d 912 (1991). In *Samuel*, the appellate court vacated an adoption order where, before the parental consent became effective, the birth mother communicated to her attorney her desire to withdraw her adoption consent and where the attorney disregarded the mother's instructions, and obtained custody of the infant in violation of § 371[1],[2] of the New York Social Services Law.

⁷⁷ See *In re Commissioner of Social Serv.*, 141 A.D.2d 821, 529 N.Y.S.2d 883 (2d Dep't 1988); see also *In re Baby Girl B.*, 144 Misc. 2d 583, 554 N.Y.S.2d 963

when the court is satisfied that the unwed mother received and understood the court's full explanation regarding the import of her actions.⁷⁹ For example, in *In re Female R.*, where the unwed mother had received a thorough explanation of the gravity of her consent, had been represented by an attorney and had been advised of her right to counseling, the court refused to inquire whether her consent was voluntary and upheld the adoption.⁸⁰

The extremity of the courts' reliance on statutory compliance is illustrated in *In re Baby Girl J.*⁸¹ In *Baby Girl J.*, the appellate court upheld a parental consent by conclusively stating that "the consent had been given with full knowledge of the consequences and had not been procured through fraud, coercion or undue influence" without providing *any* factual analysis in its opinion of the circumstances surrounding the execution.⁸² The court's reluctance to provide a factual basis for its opinion illustrates its aversion to examining individual circumstances and preference for assuming that statutory compliance is an adequate measure of an informed, voluntary choice.

This distinct shift in the New York courts' attitude towards unwed mothers can be attributed to both society's changed social values regarding parental rights and New York

(Sur. Ct. Monroe County 1989) (denying nineteen year-old unwed mother's petition to vacate her consent since the consent was freely and voluntarily given in the hospital in the presence of her attorney and after counseling by an experienced, though uncertified, hospital social worker), *aff'd*, 161 A.D.2d 1201, 558 N.Y.S.2d 875 (1st Dep't 1990).

⁷⁸ *In re Baby Boy B.* 163 A.D.2d 673, 558 N.Y.S.2d 281 (3d Dep't), *appeal denied*, 76 N.Y.2d 710, 564 N.E.2d 672, 563 N.Y.S.2d 62 (1990).

⁷⁹ See *In re Amanda "B"*, 206 A.D.2d 636, 614 N.Y.S.2d 607 (3d Dep't 1994) (appellate court upheld consent where "[family court] determined . . . the execution . . . was voluntary by making careful inquiry regarding [unwed mother's] state of mind and understanding of the legal consequences of her action."); *Margensey v. Manitta*, 156 A.D.2d 1026, 549 N.Y.S.2d 307 (4th Dep't 1989) (judicial consent upheld where surrogate fully explained consent was irrevocable and mother recited consent was product of her own free will, despite fact that adoptive parents' attorney told unwed mother she had six months to change her mind); *In re Adoption of E.W.C.*, 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct. Nassau County 1976) (upholding irrevocable consent over unwed mother's argument that she relied on adoptive parents' promise of visiting rights where surrogate expressly informed unwed mother that consents could not be conditional and where mother affirmatively stated that her execution of consent was voluntary).

⁸⁰ *In re Female R.*, 202 A.D.2d 672, 609 N.Y.S.2d 295 (2d Dep't 1994).

⁸¹ 192 A.D.2d 533, 595 N.Y.S.2d 816 (2d Dep't 1993).

⁸² *Id.*

courts' reliance on the legislature's efforts to provide additional protection for birth parents. In 1972, the New York legislature abandoned its traditional parental-presumption rule which deemed the status of biological parental rights superior to those of adoptive parents and which directed the courts to accord great weight to birth parents' rights when determining custody in adoption placements. Prior to 1972, a "natural" mother who attempted to revoke consent to adoption usually regained custody.⁸³ There existed a prevalent assumption that the best interests of a child would be served if it was raised by its birth parents, unless the parent was disqualified by gross misconduct.⁸⁴ Thus, the adoption statute required courts to apply a strong presumption in favor of biological parents in determining the best interest of the child in adoption disputes against third parties.⁸⁵

Courts interpreting the parental presumption presumed that "a mother's love" was one factor which would always endure, "possibly after other claimed material advantages and emotional attachments may have proven transient."⁸⁶ A natural mother's change of heart was not considered "an evil thing."⁸⁷ In fact, it was to be accorded great sympathy and, in a proper case, encouragement and favorable action.⁸⁸ The status of birth parents was so important in determining the best interests of the child in adoption disputes that they could coun-

⁸³ Nancy Mandelker Frieden, *The Constitutional Rights of Natural Parents Under New York State Adoption Statutes*, 12 N.Y.U. REV. L. & SOC. CHANGE 617 (1984); see also Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 454-55 (1976) [hereinafter "Child's Best Interests"]; Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564, 566-67 (1961) [hereinafter "Revocation"].

⁸⁴ *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 941 (1971).

⁸⁵ See N.Y. SOC. SERV. LAW § 383(1) (McKinney 1995), cited in *People ex. rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y.2d 185, 192, 269 N.E.2d 787, 791, 321 N.Y.S.2d 65, 70, cert. denied, 404 U.S. 805 (1971).

⁸⁶ *People v. Free Synagogue Child Adoption Comm.*, 194 Misc. 332, 337-38, 85 N.Y.S.2d 541, 546 (Sup. Ct. N.Y. County), appeal dismissed, 275 A.D.2d 823, 91 N.Y.S.2d 926 (1st Dep't 1949).

⁸⁷ *Spence-Chapin Adoption Serv.*, 28 N.Y.2d at 194, 269 N.E.2d at 792, 321 N.Y.S.2d at 72, (quoting *People ex. rel. Anonymous v. New York Foundling Hosp.*, 17 A.D.2d 122, 125, 232 N.Y.S.2d 479, 483 (1st Dep't) *aff'd*, 12 N.Y.2d 863, 187 N.E.2d 791, 237 N.Y.S.2d 339 (1962)).

⁸⁸ *Id.*

terbalance, even outweigh, superior material and cultural advantages which adoptive parents may have been able to provide.⁸⁹

In 1972, the New York Court of Appeals decision in *People ex. rel. Scarpetta v. Spence-Chapin Adoption Service*,⁹⁰ radically transformed society's attitude towards the parental presumption. In *Scarpetta*, the unwed birth mother notified the adoption agency of her intent to revoke her consent to the adoption five days after surrendering her child to the agency.⁹¹ The adoptive parents were prohibited from intervening in the adoption and were never informed by the agency of the revocation until eight months later when the child had become an integral part of their family.⁹² The court, applying the parental presumption, ordered the infant returned to the birth mother.⁹³

The decision outraged the public, struck terror in the hearts of prospective adoptive parents, and discouraged others from entertaining adoption as an alternative.⁹⁴ Society began to recognize the need for finality in adoption placements.⁹⁵ Society also began to gain sympathy for adoptive parents and adopted children whose lives could be disrupted by birth parents whom the law favored in custody battles.⁹⁶ Moreover, fear existed that dislodging a child from its adoptive home could cause trauma to the child or impede his or her development.⁹⁷ Consequently, the New York State Legislature, recognizing the need to "provide stronger guarantees of the permanence of child adoption arrangements,"⁹⁸ amended the Domestic Relations Law in 1972 to eliminate the parental presumption and mandated that adoptive parents be "placed on equal

⁸⁹ *Free Synagogue Child Adoption Committee*, 194 Misc. at 335, 85 N.Y.S.2d at 544.

⁹⁰ 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65, cert. denied., 404 U.S. 805 (1971).

⁹¹ *Id.* at 189, 269 N.E.2d at 789, 321 N.Y.S.2d at 67.

⁹² *Id.* at 195-96, 269 N.E.2d at 796, 321 N.Y.S.2d at 72-74.

⁹³ *Id.* at 193, 269 N.E.2d at 792, 321 N.Y.S.2d at 71.

⁹⁴ Frieden, *supra* note 83, at 623-24.

⁹⁵ Frieden, *supra* note 83, at 624.

⁹⁶ Frieden, *supra* note 83, at 624.

⁹⁷ *Child's Best Interests*, *supra* note 83, at 454-65; *Revocation*, *supra* note 83, at 567.

⁹⁸ Frieden, *supra* note 83, at 624 (citing Memorandum of Assemblyman Joseph R. Pisani, New York Legislative Annual 1972 at 202, 203).

footing" with birth parents in determining the best interest of the child.⁹⁹

Courts, no longer required to concentrate primarily on the biological parents' fitness, were now able to focus their custody decisions on whether the child would be better served by being returned to the birth parent. Recognizing the importance of finality to an adopted child's continuous development, courts have assumed a tougher stance towards unwed birth mothers seeking to revoke their consent.

The courts have justified this hardened attitude towards unwed mothers by relying upon the legislature's repeated revisions of the Domestic Relations Law in the last two decades to provide safeguards for biological parents.¹⁰⁰ Courts rely upon the "far broader spectrum of formalities and protections for a natural parent"¹⁰¹ provided in the Domestic Relations Law to provide the benchmark of what constitutes a voluntary consent. One appellate court has explicitly stated its reliance on the current requirements with the following explanation:

Domestic Relations Law § 115-b provides the safeguards specified by the Legislature to insure voluntariness and knowing consent. *Since the consent form complies with the statutory requirements and since petitioner executed that form, there is no need for further inquiry into that issue.*¹⁰²

Since it is difficult for courts to ascertain through hindsight whether unwed birth mothers actually had enough protection at the time of consent, the current bright-line "statutory compliance" approach is necessary to preserve adoptions. The current approach, however, promotes finality at the expense of the rights of unwed birth mothers because the requirements are not sufficient to guarantee that unwed birth mothers are protected.

⁹⁹ Ch. 639 § 4, [1972] N.Y. Laws p. 1233, 1237.

¹⁰⁰ See *supra* note 12 and accompanying text.

¹⁰¹ *In re Baby Boy N.*, 150 Misc. 2d 535, 538, 573 N.Y.S.2d 244, 246 (Fam. Ct. N.Y. County 1991).

¹⁰² *In re Baby Boy B.*, 163 A.D.2d 673, 674, 558 N.Y.S.2d 281, 282 (3d Dep't 1990) (emphasis added).

B. *Mandatory Procedures and Questionable Consents*

New York courts ignore the fact that mere statutory compliance with the current Domestic Relations Law may not guarantee that unwed mothers have adequate protection at the time of consent. Courts contend that compliance ensures that parents are adequately protected because the legislature has revised New York's adoption statutes in previous years *with the intent to provide additional safeguards* for those executing consent. The cases, however, belie this broad assumption. New York courts have actually confronted situations in which unwed mothers executed parental consents according to mandatory procedures, but where surrounding circumstances such as the time of consent, the counseling received and the failure of the birth mother to have legal representation rendered the voluntary nature of the consent questionable at best.

1. Time of Consent

Because New York's adoption scheme currently does not impose any statutory waiting period for the execution of parental consent, an unwed mother may consent to give up her child at any time. The danger inherent in permitting termination of parental rights at any time is that unwed mothers, burdened by familial or financial pressures, may hastily consent to an adoption prior to the child's birth, without considering fully the ramifications of such a serious, life-long decision.

Although some birth mothers who execute consent either upon discovering that they are pregnant or during some later period of their pregnancies will not regret their decisions, it is foreseeable that some birth parents who have made rash decisions will change their minds once their child is born. Some of these birth parents may even seek to challenge their consent and, thus, potentially threaten the finality of the adoption. One such challenge occurred in *Dennis T. v. Joseph C.*¹⁰³

In *Dennis T.*, Lisa, a sixteen-year-old unwed high school student discovered she was pregnant.¹⁰⁴ After informing her parents of her pregnancy, Lisa and her mother consulted her

¹⁰³ 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't 1981).

¹⁰⁴ *Id.* at 126, 441 N.Y.S.2d at 478.

physician about the possibility of adoption.¹⁰⁵ The physician agreed to inquire whether any of his medical group's patients were interested in adoption. Thereafter, Lisa, her parents and the adoptive parents' attorney participated in a meeting where Lisa, then eight months pregnant, signed a consent to her unborn child's adoption.¹⁰⁶ The consent form recited the unwed birth mother's understanding that she was giving her final and irrevocable consent, that she would not be able to regain custody of her child and that she would not be able to maintain an action against the adoptive parents.¹⁰⁷

Lisa gave birth to a son on November 6, 1980.¹⁰⁸ The child was delivered to the adoptive parents with her consent on November 9, 1980.¹⁰⁹ Forty days later, on December 19, 1980, Lisa contacted the adoptive parents' attorney to inform him that she had changed her mind and wanted the baby back.¹¹⁰ Subsequently, she brought a writ of habeas corpus to regain custody of her child and was awarded custody.¹¹¹

If an unwed mother executes a judicial consent to an adoption prior to giving birth, any attempt to revoke her consent after the child is born will be futile because the consent becomes irrevocable upon execution. Similarly, if an unwed mother executes an extrajudicial consent prior to giving birth, the statutory forty-five-day revocation period also may elapse either prior to the child's birth, or soon after birth, but before the unwed mother has changed her mind. The result, however, is the same: the unwed birth mother will be foreclosed from challenging her consent to adoption. For example, if not for the technicality of the form of the unwed mother's extrajudicial consent in *Dennis T.*, she would not have been permitted to revoke her consent. Approximately one-third of the forty-five-day revocation window associated with extrajudicial consents would have elapsed while the unwed birth mother was still

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 126-27, 441 N.Y.S.2d at 478-79.

¹⁰⁸ *Dennis T.*, 82 A.D.2d at 127, 441 N.Y.S.2d at 479.

¹⁰⁹ *Id.* at 127, 441 N.Y.S.2d at 479.

¹¹⁰ *Id.* at 128, 441 N.Y.S.2d at 479.

¹¹¹ *Id.* The appellate court vacated the unwed mother's consent because it determined that the form of the consent did not comply with statutory procedures. *Id.* at 130-31, 441 N.Y.S.2d at 480-481.

pregnant and would have expired on November 28, 1980. Thus, the unwed birth mother's change of heart in December would have occurred outside the revocation period and she would have been precluded from revoking her consent, since no fraud, duress or coercion existed.

The current Domestic Relations Law permits an unwed birth mother to terminate her parental rights during her pregnancy. Because it is unclear whether a birth mother, who has carried her child for nine months will change her mind about adoption after her child is born, the legislature should amend New York's adoption scheme to impose restrictions on when an unwed mother can consent to adoption. This will both eliminate the unwed mothers' impulsive consents as well as preserve commencement of the statutory revocation period for unwed mothers who do change their minds.

2. Counseling

New York's statutory scheme provides that courts must inform parents who elect to execute either a judicial or extrajudicial consent of their right to obtain supportive counseling in both private placement and agency adoptions.¹¹² Courts are reluctant to interpret the current counseling requirement to the extent of examining the nature of the counseling, unless the circumstances are extreme.

In *State ex. rel. Dunn v. Catholic Home Bureau for Dependent Children*, the appellate court vacated an unwed mother's consent where evidence indicated that her counselors resorted to outrageous conduct that constituted fraud, duress and coercion in order to convince the unwed mother to surrender her child.¹¹³ In *Dunn*, the unwed mother, who was in "dire straits" financially and psychologically due to her pregnancy, sought counseling from the Catholic Home Bureau ("CHB").¹¹⁴ The unwed mother met with Sister Rosalie, a social worker for CHB, to discuss both her indecision over whether to keep her baby and the availability of a shelter.¹¹⁵ Sister

¹¹² N.Y. DOM. REL. LAW § 115-b(2)(b) (McKinney 1988).

¹¹³ *State ex. rel. Dunn v. Catholic Home Bureau for Dependent Children*, 125 A.D.2d 106, 512 N.Y.S.2d 82 (1st Dep't 1987).

¹¹⁴ *Id.* at 107, 512 N.Y.S.2d at 84.

¹¹⁵ *Id.* at 107-08, 512 N.Y.S.2d at 84.

Rosalie referred the mother to the Nazareth Life Center ("Nazareth"), one of several homes run by CHB for unwed mothers. Sister Rosalie also informed the mother that if she chose to keep her baby she would be required to pay rent, but that she could reside there for free if she surrendered the child to CHB for adoption.¹¹⁶ The mother stayed at Nazareth until after the child was born.¹¹⁷

Prior to the birth of her child, the unwed mother had numerous counseling sessions with a social worker from Nazareth where she repeatedly expressed her uncertainty.¹¹⁸ The social worker never explained that the unwed mother had the option to place the child in foster care, that she could receive additional counseling, or that she could consult a lawyer.¹¹⁹ On the "traumatic day" before giving birth, the unwed mother agreed to surrender the child to foster care and the social worker visited her at the hospital to obtain her consent to temporary foster care. This allowed the social worker to deliver the infant to the "Does" until the unwed mother executed a legal surrender.¹²⁰ In the meantime, the unwed mother revealed her situation to her family and, still uncertain as to what to do, informed the social worker that she felt she needed additional counseling.¹²¹ Sister Rosalie gave the mother the names of two counselors associated with CHB, and on the very day that her counseling began, Sister Rosalie pressured the mother to make a decision.¹²² Thereafter, Sister Rosalie accused her of stalling in signing the papers and the mother yielded, provided she had thirty days to change her mind.¹²³ Sister Rosalie arranged a meeting at a busy Friendly's restaurant where, after an hour of discussion, the unwed mother executed a legal adoption consent.¹²⁴ Subsequently, the unwed mother changed her mind and challenged her consent on grounds of fraud, coercion and duress.¹²⁵ The appellate court

¹¹⁶ *Id.* at 108, 512 N.Y.S.2d at 84.

¹¹⁷ *Id.*

¹¹⁸ *Dunn*, 125 A.D.2d at 108, 512 N.Y.S.2d at 84.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 108-09, 512 N.Y.S.2d at 84-85.

¹²¹ *Id.* at 109, 512 N.Y.S.2d at 85.

¹²² *Id.*

¹²³ *Dunn*, 125 A.D.2d at 109, 512 N.Y.S.2d at 85.

¹²⁴ *Id.*

¹²⁵ *State ex. rel. Dunn v. Catholic Home Bureau for Dependent Children*, 133

reversed the trial court's findings and concluded that the surrender agreement could not "withstand the factual features of estoppel or duress or even perhaps fraud which [were] suggested by the circumstances" ¹²⁵

In short, although the Domestic Relations Law provides that birth parents are to be informed of their right to supportive counseling, the current statutory requirements fall short of protecting unwed birth mothers from coercive influences. Although courts should not be expected to engage in individual factual inquiries to ascertain in hindsight what occurred during confidential counseling sessions, the Domestic Relations Law should be amended to prevent situations where unwed mothers are counseled by persons who are employed by adoption agencies that have an interest in securing their children for placement.

3. Legal Representation

In New York, section 115-b(2)(b) of the Domestic Relations Law provides that parental adoption consent forms must inform the birth parent of his or her right to be represented by independent legal counsel of the party's own choice.¹²⁷ Prior to 1989, it was common in privately arranged adoptions for unwed birth mothers' legal representation to be provided by the attorney for the adoptive parents.¹²⁸ This arrangement, creating an inherent conflict of interest, failed to provide adequate protection for the unwed birth mother.

In 1987, the American Bar Association declared that, because the interests of adoptive and biological parents inherently conflict and cannot be reconciled in private placement adoptions, it is unethical for attorneys to represent both sides in these highly emotional undertakings.¹²⁹ The unwed birth

Misc. 2d 399, 402, 506 N.Y.S.2d 805, 807 (Sup. Ct. N.Y. County 1986).

¹²⁵ *Dunn*, 125 A.D.2d at 111, 512 N.Y.S.2d at 86. The court also vacated the consent on grounds that CHB failed to have the consent acknowledged and recorded as required by § 384(3) of the New York Social Services Law. *Id.*

¹²⁷ N.Y. DOM. REL. LAW § 115-b(2)(b) (McKinney 1988).

¹²⁸ N.Y. SOC. SERV. LAW § 374 Joseph R. Carrieri, *Practice Commentaries* (McKinney 1992) at 449, 451.

¹²⁹ ABA Comm. on Ethics and Professional Responsibility, Op. 1523 (1987) (simultaneous representation of adoptive and biological parents in private adoption proceeding).

mother should be entitled to have her lawyer fully disclose the irrevocable consequences of the adoption. She should also be able to expect his or her advice on how to revoke the consent, should she wish to do so. At the same time, though, the lawyer who simultaneously represents the adoptive parents has a duty to them, his clients, to secure final consent and to avoid revocation, a duty which conflicts with the duty to the unwed mother.¹³⁰

The existence of the potential dangers associated with simultaneous representation of both sides of an adoption were illustrated by the outrageous conduct of infamous New York private adoption attorney Stanley B. Michelman. Michelman on three separate occasions had coordinated adoptions between adoptive and biological parents, and in some instances represented both parties.¹³¹ He arranged for the physical transfers of the infants to occur in hospital parking lots where the adoptive parents would pay over necessary "fees."¹³² He represented to one unwed birth mother that the adoption arrangement could easily be reversed with a phone call, but when she changed her mind, he neglected to return her phone calls.¹³³ Michelman was indicted in Suffolk and New York counties for illegally obtaining twenty-four babies from poor women on false pretenses and "baby selling,"¹³⁴ but was later acquitted when adoptive parents, fearful of losing their adopted children, refused to testify against him.¹³⁵ Simultaneously, the Committee on Grievances of the Association of the Bar of the City of New York reviewed his practice of dual representation.¹³⁶

¹³⁰ *Id.* See also, *id.* at n.4, State Bar of Michigan Opinion 156, 9/53; New York State Bar Association Opinion 68, 1/8/68; North Carolina State Bar Opinion 38, 7/25/47; *But see*, CAL. CIV. CODE § 225m (West 1982) (simultaneous representation of biological and adoptive parents in adoption matters is permissible if both parties execute a written consent); N.Y.S.B.A. Comm. on Professional Ethics Op. 584 (1987) (stating that it is ethically improper for an attorney to represent both a potential surrogate mother and an intermediary in a surrogacy arrangement).

¹³¹ *People v. Michelman*, 93 Misc. 2d 297, 298, 403 N.Y.S.2d 417, 418 (Sup. Ct. Suffolk County 1978).

¹³² *Id.*, See also, Paul Vitello, *Fighting for Justin*, NEWSDAY, May 15, 1994, at A3, available in LEXIS, News Library, Newsday File.

¹³³ Vitello, *supra* note 132, at A3.

¹³⁴ Vitello, *supra* note 132, at A3.

¹³⁵ Paul Vitello, *On Dangers Unforeseen*, NEWSDAY, June 14, 1994, at A6, available in LEXIS, News Library, Newsday File.

¹³⁶ *In re Stanley B. Michelman*, 202 A.D.2d 87, 91, 616 N.Y.S.2d 409, 411 (2d

Although the Committee determined not to press formal charges, it warned Michelman that he should not engage in dual representation.¹³⁷

As a result of Michelman's conduct, in 1989, the New York legislature amended Section 374(6) of the New York Social Services law to prohibit dual representation in adoption proceedings.¹³⁸ Not only must an unwed birth mother seek her own attorney, but it is preferable that the adoptive parents not recommend one to her.¹³⁹ If the unwed mother does not know of an attorney to represent her, she should be advised to contact the clerk of the Surrogate's court or local bar association which can recommend an attorney familiar with adoption.¹⁴⁰ If it appears that any lawyer engages in advising both the unwed mother and the adoptive parents, the consent will be invalid, and the adoption vacated.¹⁴¹ Moreover, the attorney violating section 374(6) may be subject to discipline by the Grievance Committee.¹⁴²

Although the prohibition against dual representation is a step in the right direction, its protection does not extend far enough to guarantee that unwed birth mothers make informed and voluntary decisions. New York law requires that unwed mothers be informed of their right to counsel and that, if they choose to seek legal advice, they can be represented by their own counsel, but it does not *require* that birth parents be represented by counsel in adoption proceedings. Currently, unwed birth mothers who choose not to have advice of an attorney may remain uninformed and ill-advised of their rights regarding adoption consents.

Dep't 1994).

¹³⁷ *Id.*

¹³⁸ N.Y. SOC. SERV. LAW § 374(6) (McKinney 1992); *see also*, Ch. 314 § 2 [1989] N.Y. Laws 723, 724; Ch. 315 § 1 [1989] N.Y. Laws 724, 725.

¹³⁹ Carrieri, *supra* note 128, at 451.

¹⁴⁰ Carrieri, *supra* note 128, at 451.

¹⁴¹ *See* Adoption of Samuel, 167 A.D.2d 909, 912, 562 N.Y.S.2d 278, 279 (4th Dep't 1990); Adoption of Baby Boy, 147 Misc. 2d 873, 878, 556 N.Y.S.2d 463, 467 (Sur. Ct. Rensselaer County 1990).

¹⁴² *See In re Stanley B. Michelman*, 202 A.D.2d 87, 616 N.Y.S.2d 409 (2d Dep't 1994). The Grievance Committee suspended the attorney for three years for representing both the adoptive and birth parents in adoption proceedings. *Id.* at 92, 616 N.Y.S.2d at 412. The Committee rejected his argument that the adoption could not have gone forward because the birth mother did not wish to have independent counsel. *Id.*

The danger that unwed mothers may consent to an adoption without being fully apprised of their rights and, thus, not make voluntary final decisions is illustrated by *In re Ricky AA*.¹⁴³ In *Ricky AA*, the court refused to vacate an adoption where it was questionable whether an unwed mother not represented by counsel understood the consequences of her acts.¹⁴⁴ The fifteen-year-old unwed mother had appeared in family court, unrepresented by counsel, and executed her consent to adoption.¹⁴⁵ According to the family court, immediately after her execution of consent, the court became concerned about the unwed mother's voluntariness absent the advice of counsel.¹⁴⁶ The family court appointed a law guardian for the unwed teenage mother, but only after the consent had been obtained.¹⁴⁷ Due to the illness and subsequent replacement of the first law guardian, the case languished for more than two years.¹⁴⁸ Finally, the family court held a trial to determine the validity of the unwed mother's consent. The court held the consent "invalid because the mother did not understand the full import of her action."¹⁴⁹

The appellate court reversed, however, eager to promote the finality of the adoption.¹⁵⁰ Curiously, the court focused on the fact that a second law guardian had been appointed to the unwed mother two days after she had executed the consent form,¹⁵¹ but ignored the fact that at the time she executed the form, she did not have the benefit of any law guardian. The dissent noted that at the time of consent the unwed mother was in the eighth grade, had repeated three grades and gave only monosyllabic answers to the family court judge's questions regarding the consent documents.¹⁵² The dissent further argued that great deference should be paid to the family court's decision to vacate the consent. According to the dissent, because the trial judge who determined that the consent should

¹⁴³ 146 A.D.2d 433, 541 N.Y.S.2d 264 (3d Dep't 1989).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 434, 541 N.Y.S.2d at 265.

¹⁴⁶ *Id.*, 541 N.Y.S.2d at 265.

¹⁴⁷ *Id.*, 541 N.Y.S.2d at 265.

¹⁴⁸ *Ricky AA*, 146 A.D.2d at 434, 541 N.Y.S.2d at 265.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, 541 N.Y.S.2d at 265.

¹⁵¹ *Id.* at 436, 541 N.Y.S.2d at 266.

¹⁵² *Id.* at 436, 541 N.Y.S.2d at 266. (Yesawich, Jr. J., dissenting).

he vacated was the same judge who presided when the consent was originally given, he was in the best position to evaluate the voluntariness of the consent.¹⁵³

The mere acknowledgment of the availability of legal counsel is not sufficient to adequately protect the rights of unwed birth mothers. Had the unwed mother in *Ricky AA.* been required to have the benefit of legal representation prior to giving her consent, she would have been in a position to understand the import of her actions. To avoid circumstances similar to these, the New York legislature should amend the Domestic Relations Law to mandate that all unwed mothers executing consent to adoption are represented by independent legal counsel.

III. REFORM DESIGNED TO PROTECT THE ADOPTIVE MOTHER

Promoting stability and finality in adoption relationships is essential. Because it is difficult for courts to ascertain through hindsight the actual circumstances under which an unwed mother consented to an adoption, courts will probably continue to utilize a "statutory compliance" analysis to promote finality. Since compliance with New York's current statute is not sufficient to guarantee that an unwed mother's decision is an informed and voluntary one, the New York legislature should amend the Domestic Relations Law to include three crucial safeguards: (1) imposing time restrictions upon mothers' ability to execute their consent, (2) requiring unwed mothers who elect to seek counseling to consult with objective counselors, and (3) requiring mothers to consult independent counsel prior to executing their consent. These measures would both increase protection of unwed mothers' rights and ensure that compliance with the Domestic Relations Law results in consents that are informed and voluntary and can support final placements.

A. *Time to Consent*

New York's adoption scheme makes it too easy for an unwed mother to give up her parental rights prospectively, with-

¹⁵³ *Ricky AA.*, 146 A.D.2d at 437, 541 N.Y.S. 2d at 267.

out regard to the turmoil or pressures of pregnancy. Whereas certain states' adoption laws mandate a waiting period after a child's birth before parents may consent to an adoption,¹⁵⁴ New York law imposes no such requirement. As a result, an unwed birth mother may hastily execute her consent upon discovering her pregnancy, and subsequently change her mind as the pregnancy progresses.¹⁵⁵ Although New York provides that a parent who executes an extrajudicial consent has a forty-five-day period to revoke her consent and retrieve custody of the child,¹⁵⁶ this revocation interval begins to run upon the execution of consent, not the child's birth. Thus, the danger exists that the revocation period may elapse prior to the child's birth. Unwed mothers who give birth and then change their minds after their opportunity to do so has elapsed are not protected by the forty-five-day window, and may suffer an unfortunate fate.

While requiring mothers to wait a specific number of days after giving birth before executing adoption consents may ensure that their intentions are serious, it would create problems. Such time restrictions may interfere both with the mother's decision-making process and her ability to obtain financial aid for birth expenses.¹⁵⁷ Preventing unwed mothers from consenting prior to giving birth may discourage adoptive parents from paying the birth mother's medical expenses. To balance these competing interests, the New York legislature should adopt the position, endorsed by the UAA, that although birth mothers are not required to wait a specified number of days after birth before executing their consents, they must wait at least until after the child is born.¹⁵⁸ The UAA position does not interfere with an unwed birth mother's decision-making process since the mother can still negotiate and coordinate all arrangements with the adoptive parents prior to giv-

¹⁵⁴ See *supra* note 28 and accompanying text.

¹⁵⁵ See *Dennis T. v. Joseph C.*, 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't 1981).

¹⁵⁶ N.Y. DOM. REL. LAW § 115-b(6)(a) (McKinney 1988) ("A parent may revoke his consent to adoption only by giving notice, in writing, . . . no later than forty-five days after the execution of the consent to the court in which the adoption proceeding has been or is to be commenced").

¹⁵⁷ UNIF. ADOPTION ACT § 2-403 commentary at 74 (Proposed Draft 1993).

¹⁵⁸ UNIF. ADOPTION ACT § 2-404(a) (Proposed Draft 1994).

ing birth.

It is possible, however, that an unwed mother may hastily consent to adoption in the hospital immediately after giving birth. Requiring mothers to wait until after birth to consent will also protect an eager mother in these circumstances. Since a mother who impulsively executes her consent at the hospital will have executed an extrajudicial consent, the UAA time restriction causes New York's forty-five-day window to begin after the child is born. Thus, the statutory revocation period will still provide mothers who elect not to place their children for adoption with an opportunity to regain custody. Moreover, requiring an unwed mother to wait until after giving birth to execute her consent to adoption allows her the entire pregnancy period to contemplate the crucial decision of whether to forever relinquish the child she will bear.

B. Counseling

When an unwed birth mother releases her parental rights to her child, she has made one of the most crucial decisions she will ever make. An unwed woman faced with motherhood can be in an extremely vulnerable position. The hormonal changes her body undergoes during pregnancy and immediately after birth may also contribute to emotional turmoil and confusion.¹⁵⁹ During pregnancy, women experience significant changes in estrogen and progesterone hormonal levels which contribute to mood swings and depression.¹⁶⁰ Similarly, women who have had problems dealing with loss or separations in their lives, have marital or financial problems, or worry about having a sick or handicapped child often experience mental stress.¹⁶¹

Physiological changes coupled with other common reasons for not wanting the child, such as abandonment by the father,

¹⁵⁹ A postpartum mental illness may initially surface before, during or after a woman's pregnancy. Christine Anne Gardner, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?*, 24 N.E. L. Rev. 953, 962 (1990). According to one commentator, "Physical, psychological and environmental factors have all been noted, either separately or in combination, as possible causative agents in postpartum depression." *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 964-65.

rape, economic instability and inability to obtain child care, may subject the unwed birth mother to intense mental stress both before and after birth.¹⁶² Therefore, the unwed mother should be provided with counseling when she begins to contemplate placing the child for adoption.

New York's statutory scheme provides that courts must inform parents who elect to execute a judicial consent of their right to obtain supportive counseling in both private placement and agency adoptions.¹⁶³ Similarly, when biological parents execute an extrajudicial consent, the consent must state clearly that the parent was informed by an attorney of his or her right to counseling.¹⁶⁴ The proposed UAA also provides that the content of the consent by the unwed mother must contain a statement that the individual executing the consent has received or been offered counseling services.¹⁶⁵ Both the current New York statutory scheme and the UAA correctly refrain from mandating that the biological parent submit to counseling. Imposition of mandatory counseling would undermine the principle that birth parents should be permitted to decide for themselves whether or not they want to consult a personal counselor, a psychologist, a psychiatrist or a social worker.¹⁶⁶

While the New York statute should not impose counseling upon all birth parents, the Domestic Relations Law should be amended (1) to prohibit birth parents from being counseled by persons affiliated with the hospitals or adoption agencies to which the child is surrendered; (2) to provide extended counseling for the duration of the revocation period; and (3) to increase publicity of counseling services.

First, amending the adoption statute to provide birth parents with the right to objective counseling is crucial in circumstances where an unwed mother contemplates surrendering her child to a private adoption agency and, in exercising her statutory right, is counseled by the very agency to which she is surrendering the child.¹⁶⁷ Because counselors associated with

¹⁶² *Id.*

¹⁶³ N.Y. DOM. REL. LAW § 115-b(2)(b) (McKinney 1988).

¹⁶⁴ N.Y. DOM. REL. LAW § 115-b(4)(a)(v) (McKinney 1988).

¹⁶⁵ UNIF. ADOPTION ACT § 2-406(d)(3)(iii) (Proposed Draft 1994).

¹⁶⁶ See UNIF. ADOPTION ACT § 2-404 commentary at 77 (Proposed Draft 1993).

¹⁶⁷ See *In re Sandra G.*, 141 A.D.2d 821, 529 N.Y.S.2d 883 (2d Dep't 1988); *State ex rel. Dunn v. Catholic Home Bureau for Dependent Children*, 133 Misc. 2d

particular adoption agencies will most likely have an interest in securing the child for adoption, this presents a conflict of interest and danger similar to that posed when an attorney represents both the adoptive and birth parents. Since the legislature has prohibited an attorney's dual representation in adoption,¹⁶⁸ the legislature should also extend to birth parents, specifically unwed mothers, protection against potential undue influence by agency counselors. Instead, unwed mothers should be referred to multi-service, non-profit family and children's agencies where objective counseling is available and all options, including adoption, can be explored.¹⁶⁹ Furthermore, prohibiting adoption-agency employees from providing counseling to an unwed birth mother whose consent they seek to obtain will eliminate any opportunity for the agency counselor to unduly influence the mother.

Second, the current statute should be amended to explicitly advise a birth mother to seek counseling even after she has executed an extrajudicial consent. Currently, the New York statute only requires a birth mother to be informed of this right prior to terminating his or her relationship with the child. In fact, the opportunity to obtain objective counseling during the forty-five-day statutory window period may be crucial to a mother's decision to revoke her extrajudicial consent. For example, in *In re Baby Boy N.*, the unwed mother executed an extrajudicial consent to the adoption of her child in August 1990.¹⁷⁰ On October 23, 1990, however, the mother made an untimely attempt to revoke the consent.¹⁷¹ Since the child's birth she had undergone the benefit of psychological counseling and her attorney had provided ongoing advice throughout the period.¹⁷² Unfortunately for this unwed mother, even though the counseling was effective, she did not make her decision to revoke the consent in time. For others, the benefit of counsel-

399, 506 N.Y.S.2d 805 (Sup. Ct. N.Y. County 1986), *rev'd*, 125 A.D.2d 106, 512 N.Y.S.2d 82 (1st Dep't 1987).

¹⁶⁸ N.Y. SOC. SERV. LAW § 374(6) (McKinney 1992); *see also*, Ch. 314 § 2 [1989] N.Y. Laws 723, 724; Ch. 315 § 1 [1989] N.Y. Laws 724, 725.

¹⁶⁹ Annette Baran, *Be Careful with Code*, USA TODAY, Aug. 27, 1993, at A10.

¹⁷⁰ *In re Baby Boy N.*, 150 Misc. 2d 535, 573 N.Y.S.2d 244 (Fam. Ct. N.Y. County 1991).

¹⁷¹ *Id.*

¹⁷² *Id.*

ing throughout the revocation period may save some unwed mothers from making an irrevocable choice that has the potential to affect the rest of their lives.

Finally, steps should be taken to increase the availability and publicity of counseling services. The Domestic Relations Law and the UAA are extremely vague as to the extent, scope and procedure of counseling. The legislature should revise the Domestic Relations Law to require courts to provide unwed mothers with a specific list of social service counselors from which the birth parents can select a disinterested counseling service. These services should inform women of the consequences of their decisions to place their children for adoption, and to assist them in resolving any emotional and/or psychological problems which may be motivating the adoption in order to prevent women from making a decision they will forever regret.

C. Independent Legal Representation

Although unwed birth mothers in New York are required to obtain their own attorneys if they elect to have independent legal representation, there is no requirement that those who execute consent must be represented by counsel. The New York legislature should adopt a provision to mandate independent legal representation for all birth parents executing consent, in order to prevent the dangers they may face if they choose to forego this right.

The UAA position on legal representation mandates independent counsel, but only for minor parents. The UAA proposes that when the parent executing a consent to an adoption is a minor, she or he must have the advice of a lawyer who is not representing an adoptive parent.¹⁷³ The lawyer before whom the minor executes consent must certify in writing that he or she has orally explained the contents and consequences of the consent or relinquishment to the minor, and that to the best of his or her knowledge or belief the parent executing the consent read, understood and signed the consent voluntarily, and was

¹⁷³ UNIF. ADOPTION ACT § 2-405(c) (Proposed Draft 1994) The UAA requires the same for a minor relinquishing a child to an adoption agency. *Id.*

offered counseling services.¹⁷⁴ In contrast, adult birth parents are merely required to aver in their adoption petition that they were informed of their right to have a lawyer.

The UAA provision should be modified before incorporating it into the present Domestic Relations Law because the distinction drawn between minor and adult parents does not further any legitimate purpose and should therefore be eliminated. First, adult parents have brought challenges on the grounds that they did not understand the nature or ramifications of their actions.¹⁷⁵ Second, if the UAA is willing to impose costs for mandatory legal representation upon minor parents, who usually do not have finances to support legal fees, the financial burden may also be imposed on adult parents who are more likely to be employed and thus better situated to bear it.

The argument that requiring all birth parents who attempt to place their child for adoption be represented by counsel will hinder the adoption process by increasing costs is unsupported. Because the adoptive parents' attorney is responsible for preparing and filing the adoption petition, the adoptive parents will bear most of the costs of the adoption process. Moreover, the UAA only requires birth parents to seek the *advice* of a neutral lawyer. The unwed mother does not engage in a lengthy relationship with an attorney. Hence, the unwed mother's lawyer's fee, if any, can be limited to consultation services wherein the lawyer can simply review a consent already prepared by the adoptive parents' attorney and/or complete a standard form certifying that the unwed mother understood the import of her consent. Requiring all mothers to be represented by independent legal counsel will ensure that they are fairly apprised of the legal implications of their consent.

¹⁷⁴ UNIF. ADOPTION ACT § 2-405d(1)-(5) (Proposed Draft 1994).

¹⁷⁵ See *In re Infant D.*, 41 A.D.2d 961, 962, 344 N.Y.S.2d 428, 430 (2d Dep't 1973) (Benjamin, J., dissenting); *In re Baby Girl Dunn*, 133 Misc. 2d 399, 400, 506 N.Y.S.2d 805, 806 (Sup. Ct. N.Y. County 1986) (unwed mother 28 years old); *In re Daniel C.*, 115 Misc. 2d 130, 453 N.Y.S.2d 572, 573 (Sur. Ct. Westchester County 1982) (unwed mother senior in college), *aff'd* 99 A.D.2d 35, 472 N.Y.S.2d 666 (2d Dep't 1984), *aff'd* 63 N.Y.2d 927, 473 N.E.2d 31, 483 N.Y.S.2d 679 (1984); *In re EWC*, 89 Misc. 2d 64, 65, 389 N.Y.S.2d 743, 745 (Sur. Ct. Nassau County 1976) (unwed mother 21 years old); *In re Adoption of Anonymous*, 32 Misc. 2d 683, 683, 223 N.Y.S.2d 792, 793 (Sur. Ct. Westchester County 1962) (unwed mother 23 years old).

CONCLUSION

The New York legislature should amend the Domestic Relations Law to incorporate select modified provisions of the Uniform Adoption Act to increase the protection afforded to unwed mothers at the time they execute consent. Revising statutory consent requirements regarding the time of consent, supportive counseling and legal representation will better protect birth mothers' rights and, thus, result in greater adoption finality.

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