Touro Law Review

Volume 14 | Number 3 Article 21

1998

Due Process, Court of Appeals: Chaya S. v. Frederick L.

U.S. CONST. amend. V:

No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

U.S. CONST. amend. XIV, § 1:

No State shall . . . deprive to any person of life, liberty, or property without due process of law . . . .

N.Y. CONST. art. I, § 6:

No person shall be deprived of life, liberty or property without due process of law.

COURT OF APPEALS

Chaya S. v. Frederick L.[1]
(decided June 12, 1997)

This case presents a challenge to the New York Domestic Relations Law[2] governing consent in private placement adoptions.[3] Here, a biological mother sought nullification of the adoption of her child, based on the Surrogate's failure to follow statutory procedure; a procedure which was designed to balance and protect the rights of the biological parents, the adoptive parents, and the child.[4] While not specifically addressed, the case alluded to a right to independent counsel issue implicit in the dual

---

[1] 90 N.Y.2d 389, 683 N.E.2d 746, 660 N.Y.S.2d 840 (1997).

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

[3] *Chaya S.*, 90 N.Y.2d 389, 683 N.E>2d 746, 660 N.Y.S.2d 840.

[4] *In re* Sarah K., 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985) (recognizing the importance of certainty for adoptive parents, it was determined that the natural parents should be bound by their irrevocable consent, despite insufficiency of notice under the statute).

representation of a birth parent and adoptive parents.[5] Furthermore, because of the fundamental nature of the interest in family and child-rearing, due process requires certain procedural safeguards to protect one's freedom of choice in these areas of important personal matters.[6] Indeed, as this case points out, "New York's statutory procedure for consent to private placement adoption raises serious issues of due process and waiver rights of natural parents."[7]

Petitioner, Chaya S., sought revocation of judicially supervised consent which granted adoption of her child to her parents, and thus terminated her parental rights.[8] Her consent was given at a hearing before the Surrogate court, with the able assistance of counsel.[9] The attorney, though originally retained to represent Chaya in her divorce proceedings, also represented Chaya's parents, the respondents and adoptive parents in this case.[10] Though successful in negotiating Chaya's divorce, and in executing the present adoption, the attorney, Mandel, was herself challenged on the question of whether she represented Chaya or Chaya's parents in the adoption matter.[11]

New York's Domestic Relations Law section 115-b requires a judge in an adoption proceeding to inform a biological parent of a

---

[5] *See* N.Y. SOC. SERV. LAW § 374(6) (McKinney 1997). This statute states in pertinent part: "No attorney or law firm shall serve as the attorney for, or provide any legal services to both the natural parents and adoptive parents." *Id.* Prior to this amendment in 1989, New York law did not preclude one attorney from representing both the adoptive parents and the birth mother in an adoption proceeding. Therefore, the dual representation at issue in the present case was legally permissible at the time of this adoption. *Id. Chaya S.*, 90 N.Y.2d at 397, 683 N.E.2d at 749-50, 660 N.Y.S.2d at 843.

[6] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part: "Nor shall any State deprive any person of life, liberty, or property; without due process of law . . . ." *Id.*

[7] *In re Sarah K.*, 66 N.Y.2d at 239 n.6, 487 N.E.2d at 249 n.6, 496 N.Y.S.2d at 392 n.6.

[8] *Chaya S.*, 90 N.Y.2d at 394, 684 N.E.2d at 748, 660 N.Y.S.2d at 842.

[9] *Id.*

[10] *Id.* at 395, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[11] *Id.* Mandel testified that "she represented the adoptive parents . . . ." *Id.*

right to counsel of one's own choosing.[12] Here, the Surrogate, noting Mandel's' presence in court and seemingly adequate representation, assumed that Mandel was Chaya's chosen attorney.[13] Under this assumption, the Surrogate did not inform Chaya of this right.[14] This failure to inform of a statutory right is the basis of petitioner's argument for revocation of her consent, and thus nullification of the adoption.[15]

The New York Court of Appeals blocked petitioner's attempt to revoke the adoption, concluding that the Surrogate's technical oversight should not defeat an otherwise valid, judicially supervised consent.[16] Furthermore, the court found that "dual representation" did not preclude petitioner's rights at the consent hearing, and the attorney in question appropriately appeared on behalf of both parties.[17] Accordingly, the court concluded that petitioner's right to counsel was not abridged, and her petition to void the adoption should have been denied.[18]

The facts of this case begin with a marriage in turmoil.[19] Petitioner, Chaya, was married for less than three months when she and her husband, Asher A., decided to separate.[20] At this point, Chaya discovered that she was two months pregnant with Asher's child.[21] Wishing to be discharged from any future

---

[12] N.Y. DOM. REL. LAW § 115-b (2)(b) (McKinney 1988). This statute provides in pertinent part:

> At the time that a parent appears before a judge or surrogate to execute or acknowledge a consent to adoption, the judge or surrogate shall inform such parent of the consequences of such act pursuant to the provisions of this section, including informing such parent of the right to be represented by legal counsel of the parent's own choosing . . . .

Id.

[13] *Chaya S.*, 90 N.Y.2d at 397, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[14] *Id.* at 396, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[15] *Id.* at 394, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[16] *Id.* at 392, 683 N.E.2d at 747, 660 N.Y.S.2d at 841.

[17] *Id.* at 397, 683 N.E.2d at 750, 660 N.Y.S.2d at 844 .

[18] *Id.* at 397-98, 683 N.E.2d at 750, 660 N.Y.S.2d at 844.

[19] *Id.* at 392, 683 N.E.2d at 747, 660 N.Y.S.2d at 841.

[20] *Id.*

[21] *Id.*

financial responsibility for the baby, Asher asked petitioner to have an abortion.[22] Instead, Chaya opted for her parents to adopt the child, an arrangement that Asher approved of, so long as he would be released from future liability.[23] Indeed, the adoption, handled by attorney Mandel, was intrinsic to the couple's divorce settlement.[24] The terms of the divorce agreement stated that Chaya was represented by Mandel, that the couple irrevocably consented to the adoption of the child by respondents, and in consenting to the adoption, both Chaya and Asher waived any future rights or responsibilities for the care and maintenance of the child.[25] Throughout the representation, Chaya consulted with attorney Mandel directly, inquisitive about every aspect of the divorce and adoption arrangements.[26]

Soon after the baby was born, Mandel filed a petition for adoption on behalf of respondents.[27] Pursuant to statute, Chaya, accompanied by Mandel, sought judicial consent to the adoption before the Surrogate in Queens County.[28] The Surrogate asked Chaya what she would do if the child's father would not consent to the adoption.[29] Referring to Mandel by her side, Chaya definitively answered: "I would consult with my lawyer and see what options we have."[30] The Surrogate then informed petitioner that consent would effectively sever her control over any aspect of the child's future.[31] Chaya maintained that she understood the gravity of her actions, and consented voluntarily.[32] As a result, her consent became instantly irrevocable and the adoption was

---

[22] *Id.* at 392-93, 683 N.E.2d at 747, 660 N.Y.S.2d at 841.

[23] *Id.* at 393, 683 N.E.2d at 747, 660 N.Y.S.2d at 841.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 394, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[28] *Id. See* N.Y. DOM. REL. LAW § 115-b (2)(a) (McKinney 1988). This statute states in pertinent part: "A consent to a private placement adoption may be executed or acknowledged before any judge or surrogate in this state having jurisdiction over adoption proceedings." *Id.*

[29] *Chaya S.*, 90 N.Y.2d at 394, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[30] *Id.*

[31] *Id.*

[32] *Id.*

finalized.[33] Thereafter, Mandel also successfully concluded petitioner's divorce.[34]

Sometime after Chaya had remarried, respondents terminated visitation rights.[35] Seeking to invalidate the consent to adoption, Chaya brought suit claiming fraud in eliciting her consent and a denial of representation by independent counsel.[36] The trial court dismissed petitioner's claim of fraud as unwarranted and advised petitioner of the consequences of her consent.[37] Furthermore, the court held that the Surrogate reasonably surmised that petitioner was already represented by counsel, despite the fact that Mandel testified that she represented the respondents and that Mandel was named as the attorney for the adoptive parents on the petition for adoption.[38]

However, the Appellate Division reversed the decision of the trial court, finding instead that "petitioner was not represented by counsel and that Mandel in fact represented the adoptive parents."[39] This conclusion was based on the Surrogate's failure to inform petitioner of her right to counsel of her own choosing, as was required by statute.[40] In support of this position, the Appellate Division mentioned specifically that respondents' paid the attorney's fee, the attorney's name appeared on the adoption petition, and the attorney herself swore in the affidavit and testified that she represented the adoptive parents.[41]

Section 115-b of the New York Domestic Relations Law[42] has been seen as an attempt to bring certainty and permanence to an area which, historically, has been "unfair to adoptive parents and

---

[33] *Id.* *See* N.Y. DOM. REL. LAW § 115-b (2)(a) (McKinney 1988). "Such consent shall state that it is irrevocable upon such execution or acknowledgement." *Id.*

[34] *Id.* Asher had also appeared before the Surrogate, and had freely and knowingly given his consent to the adoption. *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 395, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] N.Y. DOM. REL. LAW § 115-b (2)(b) (McKinney 1988).

unsettling to adoptions generally.[43] Prior to the enactment of this statute in 1972, the law recognized the biological parents as superior in status and allowed them a right to revoke their consent prior to the final order of adoption.[44]

The public became dissatisfied with this parental preference rule after unpopular court decisions that required children to be taken out of the adoptive home and returned to the birth parents.[45] The New York legislature responded to public sympathies by reforming the adoption statutes to provide "humane regard for the rights of the child, the natural parents and the adoptive parents."[46] In reality, the new statutes gave the adoptive parents a status equal to that of the natural parents, who had previously been given preference by the parental presumption.[47] What resulted was a statutory scheme that provided a procedural framework for consent to adoption in both judicial and extrajudicial contexts.[48] In both contexts, consent must be knowing and voluntary and the biological parents must be apprised of the consequences of their irrevocable consent.[49]

The impact of the 1972 enactment can be seen in the case of *In re Sarah K.*[50] Here, the parents of a Down Syndrome infant decided shortly after the birth of the baby that they were

---

[43] *In re* Sarah K., 66 N.Y.2d 223, 233, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985).

[44] *Id.*

[45] *See, e.g.,* Scarpetta v. Spence-Chapin, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971) (allowing birth mother to revoke surrender of her child based solely on the mother's fitness without consideration of adoptive parents' legal interests).

[46] Scheinkman, Practice Commentaries, N.Y. DOM. REL. LAW § 115-b at 499 (McKinney 1988).

[47] *Id.* "[T]he statute affords substantial procedural rights and protections to adoptive parents and, where revocation is contested, places adoptive parents on an equal footing, as proposed custodians for the child, with the natural parents." *Id.* "In short, the statute takes away from the natural parents the benefits of the presumptions afforded them by common law . . . ." *Id.*

[48] *Id.* at 500.

[49] Chaya S v. Frederick L., 90 N.Y.2d 389, 396, 683 N.E.2d 746, 749, 660 N.Y.S.2d 840, 843 (1997).

[50] *In re* Sarah K., 66 N.Y.2d 223, 487 N.E.2d 241, 496 N.Y.S.2d 384 (1985).

emotionally unequipped to handle a disabled child.[51] In arranging for an extrajudicial consent for adoption pursuant to section 115-b of the Domestic Relations Law, the natural parents "were single-minded in their resolve that Sarah be adopted immediately, and they sought out - and found - the quickest way to accomplish their objective, for the perceived good of the child as well as their family."[52] On these facts, the Court of Appeals determined that consent was not given under compulsion or threat.[53] However, the birth parents were given insufficient notice of the commencement of the adoption proceeding, and the consent forms were ambiguous as to the consequences of untimely revocation.[54] This prompted two Appellate Division justices to recognize the threat to one's right of revocation, and admonished such practice as "badly flawed."[55] Despite these defects, the Court of Appeals held that "[a] parent's consent to the release of a child for adoption has consequence in law, and cannot invariably be undone at will."[56]

The New York Court of Appeals asked the legislature to reexamine section 115-b of the Domestic Relations Law in light of the practical difficulties evident in *In re Sarah K.*[57] The legislature responded in 1986 with a bill which amended the law in relation to consents in private placement adoptions.[58] The 1986 Amendment employed several procedural safeguards to make certain a natural parent's full understanding of the "permanent and profound nature of their consent to adoption."[59] Accordingly, to ensure that the biological parents consent voluntarily and knowingly, the judiciary must inform the

---

[51] *Id.* at 228, 487 N.E.2d at 242, 496 N.Y.S.2d at 385.
[52] *Id.* at 241, 487 N.E.2d at 250, 496 N.Y.S.2d at 393.
[53] *Id.* at 242, 487 N.E.2d at 251, 496 N.Y.S.2d at 394.
[54] *Id.*
[55] *Id.* at 237, 487 N.E.2d at 248, 496 N.Y.S.2d at 391.
[56] *Id.* at 233, 487 N.E.2d at 245, 496 N.Y.S.2d at 388.
[57] *Id.* at 242, 487 N.E.2d at 251, 496 N.Y.S.2d at 394.
[58] Act of Aug. 2, 1986, ch. 817, 1986 N.Y. Laws 1923 (1987) (an act relating to consent in private placement adoptions).
[59] Chaya S. v. Frederick L., 90 N.Y.2d 389, 396, 683 N.E.2d 746, 749, 660 N.Y.S.2d 840, 843 (1997).

biological parents: (1) of a right to counsel of one's own choosing; (2) of the availability of supportive counseling; and, (3) of the right to be assigned counsel, if indigent and subjected to a custody or revocation dispute.[60] Once consent is so given, it becomes automatically irrevocable, absent circumstances of fraud, duress, or coercion in its execution.[61]

In the present case, all parties conceded that the Surrogate failed to inform petitioner of her right to independent counsel.[62] The trial court determined that such omission did not in fact deprive Chaya of representation, as it was obvious that she was with counsel and was being advised by counsel.[63] However, the Appellate Division reversed this decision, finding that the dual representation deprived Chaya of her right to counsel of her own choosing.[64] In response to this order of modification, the Court of Appeals reviewed the evidence and concluded that the representation in the adoption proceedings was intrinsic to the representation for the matrimonial proceedings.[65] The court further found that Chaya made an independent choice to be represented in this matter by this lawyer.[66] As the court pointed out, this conclusion "more nearly comports with the weight of the evidence."[67]

The court found that Mandel worked very closely with petitioner in both the matrimonial and adoption proceedings, with the ultimate goal of obtaining a "Get," a divorce recognized

---

[60] *Id.*

[61] Scheinkman, Practice Commentaries, N.Y. DOM. REL. LAW § 115-b at 501 (McKinney 1988).

[62] *Chaya S.*, 90 N.Y.2d at 396, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[63] *Id.* at 397, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[64] *Id.* at 396, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[65] *Id.* at 395, 683 N.E.2d at 748, 660 N.Y.S.2d at 842.

[66] *Id.*

[67] *Id.* at 396, 683 N.E.2d at 749, 660 N.Y.S.2d at 843. *See* Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 380, 494 N.E.2d 70, 76, 502 N.Y.S.2d 965, 971 (1986) (concluding that a court may review questions of fact when confronted with an appellate court's order of modification to determine which of the findings more nearly comports with the weight of the evidence).

under Jewish religious law.[68] Although Mandel admittedly represented the adoptive parents and was named as their attorney on the adoption petition, the facts show that Mandel consulted directly with Chaya, and appeared with her at the consent hearing.[69] Furthermore, when asked by the Surrogate what her reaction would be if the father tried to block the adoption at this stage, she answered in reference to Mandel, "I would consult with my lawyer and see what options we have."[70] The court weighed this statement significantly, deeming this to indicate "that she already had counsel at the adoption proceeding."[71]

The Court of Appeals also recognized the prudence of the 1989 Amendment of the Social Services Law[72] that has since precluded "dual representation" in these circumstances. The Amendment clearly prohibits representation of both natural and adoptive parents by the same attorney.[73] Indeed, "[n]ot only should the birth parent be represented by her own attorney, it is recommended that the attorney for the adoptive parent should not recommend an attorney to represent the birth parent."[74] The court recognized the potential conflict of interest that the Amendment was designed to prevent; nevertheless, the court did not see fit "that every adoption finalized in the era of dual representation . . . be voided."[75] The case was remitted to the Appellate Division with instructions to defer to the determination that the Surrogate's failure to inform of a right to independent counsel did not, in fact, deprive petitioner of an attorney of her own choosing.[76]

---

[68] *Chaya S.*, 90 N.Y.2d at 396-97, 683 N.E.2d at 749, 660 N.Y.S.2d at 843. Attorney Mandel properly advised her of the consequences of the adoption consent, and secured for Chaya a final divorce and a Get. *Id.*

[69] *Id.* at 397, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[70] *Id.*

[71] *Id.*

[72] N.Y. SOC. SERV. LAW § 374(6) (McKinney 1997).

[73] *Chaya S.*, 90 N.Y.2d at 396, 683 N.E.2d at 749, 660 N.Y.S.2d at 843.

[74] Carrieri, Practice Commentaries, N.Y. SOC. SERV. LAW § 374[6] at 107 (McKinney Supp. 1997).

[75] *Chaya S.*, 90 N.Y.2d at 397, 683 N.E.2d at 750, 660 N.Y.S.2d at 844.

[76] *Id.* at 397-98, 683 N.E.2d at 750, 660 N.Y.S.2d at 844.

Judge Titone concurred in the result but analyzed the facts quite differently.[77] The judge concluded that dual representation in this case, though then permissible, resulted in a lack of representation for petitioner.[78] The concurring opinion explained that petitioner's parents were not disinterested parties in this resolution and in fact paid for Mandel's representation entirely.[79] Furthermore, while all correspondence regarding the divorce proceedings were sent to petitioner directly, all adoption correspondence went solely to respondents, indicating that the adoption proceeding was not necessarily connected to the matrimonial proceeding.[80]

Judge Titone considered petitioner's remarks regarding consultation with her attorney "a weak predicate, since it was a hypothetical remark made in response to a hypothetical question."[81] The judge found instead Mandel's own remarks more compelling in that they revealed that she did not consider herself to be petitioner's attorney.[82] Judge Titone found this fact alone to be dispositive of Chaya's lack of representation.[83]

However, in considering the Surrogate's omission in his allocution, one "need not conclude that a failure to follow the statutory mandate should always invalidate the adoption proceeding itself."[84] Judge Titone analyzed this case according to the totality of the circumstances. He balanced the rights of all involved, and sought to secure certainty and finality in the adoption, as was intended by the statute.[85] Where consent is shown to be knowing and voluntary, "no useful judicial or social

---

[77] *Id.* at 398, 683 N.E.2d at 750, 660 N.Y.S.2d at 844 (Titone, J. concurring).

[78] *Id.* (Titone, J., concurring).

[79] *Id.* (Titone, J., concurring).

[80] *Id.* (Titone, J., concurring).

[81] *Id.* at 399, 683 N.E.2d at 750, 660 N.Y.S.2d at 844 (Titone, J., concurring).

[82] *Id.* at 399, 683 N.E.2d at 751, 660 N.Y.S.2d at 845 (Titone, J., concurring).

[83] *Id.* (Titone, J., concurring).

[84] *Id.* at 400, 683 N.E.2d at 751, 660 N.Y.S.2d at 845 (Titone, J., concurring).

[85] *Id.* (Titone, J., concurring).

purpose would be served by undoing the adoption order and disrupting the child's new family ties because of a technical flaw in the surrender allocution."[86]

There are constitutional issues implicit in this case involving the fundamental liberty interest of the parent-child relationship. The termination of parental rights is an extreme threat to one's liberty representing the most significant of state intrusions.[87] Indeed, "[a]ny procedure that affects those parental rights must guarantee due process."[88] This case never reaches the stage of challenging the constitutionality of New York's adoption statutes. Rather, it illustrates the procedures that the law in New York has employed to assure the protections of due process in the adoption arena.

Daxor Corporation v. New York State Department of Health[89] (decided June 5, 1997)

Appellant, New York State Department of Health [hereinafter "State"], terminated the respondent, Daxor Corporation's [hereinafter "Daxor"], provisional licenses to operate certain medical facilities.[90] Daxor commenced the instant action, asserting that the termination was "biased, arbitrary and capricious,"[91] and that due process, guaranteed by both the Federal[92] and New York State[93] Constitutions, had been violated

---

[86] *Id.* (Titone, J., concurring).

[87] *See In re* Sarah K., 66 N.Y.2d 223, 239 n.6, 487 N.E.2d 241, 249 n.6, 496 N.Y.S.2d 384, 392 n.6 (1985).

[88] *Id.*

[89] 90 N.Y.2d 89, 681 N.E.2d 356, 659 N.Y.S.2d 189 (1997).

[90] *Id.* at 95, 681 N.E.2d at 359, 659 N.Y.S.2d at 192.

[91] *Id.*

[92] U.S. CONST. amend. XIV, § 1 This section provides in pertinent part: "No State shall . . . deprive to any person of life, liberty, or property, without due process of law." *Id.*

[93] N.Y. CONST. art. I, § 6. This section provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*