THE CONSTITUTIONAL RIGHTS OF NATURAL PARENTS UNDER NEW YORK'S ADOPTION STATUTES*

New York's statutory procedure for consent to private placement adoption[1] raises serious issues of due process and waiver rights of natural parents. This Note analyzes current consent provisions in private adoption in New York, demonstrates the fundamental unfairness of the procedures for the revocation of an extrajudicial consent to a private adoption, and proposes that all consents to private adoptions be executed in court with specific safeguards for a valid waiver.

A parent who consents to release a child for adoption makes a decision of vital consequence at a time when such decision-making is extremely difficult. In most instances the parent is an unmarried mother who has recently given birth, has limited financial resources, and may be under social or family pressure to give up the child. Nevertheless, in this vulnerable position a parent may execute a consent[2] to adoption that sets in motion a complex statutory process. If within a few days or weeks the parent has a change of heart, and attempts to revoke that consent,[3] he or she may find that the adoption process,[4] once set in motion, moves ineluctably to the final adoption decree. By that decree the parent will be "relieved of all parental duties . . . and of all responsibilities . . . and shall have no rights over such adopted child."[5] The parental rights will thus be "terminated."[6]

 The author appreciates the thoughtful comments and criticisms of Elizabeth Calvert, Robert Schack, Esq., and Professors Joan Wexler, Martin Guggenheim and Daniel Mandelker.

1. New York adoption statutes are N.Y. Dom. Rel. Law §§ 109-118-a (McKinney 1977 & Supp. 1983-1984) and N.Y. Soc. Serv. Law §§ 383, 384, 384-a, 384-b (McKinney 1977 & Supp. 1983-1984). See Appendix for N.Y. Dom. Rel. Law § 115, "General provisions relating to private-placement adoptions," and N.Y. Dom. Rel. Law § 115-b, "Special provisions relating to consents in private-placement adoptions" infra.

2. See text accompanying notes 75-102 infra for discussion of the consent procedure.

3. The procedures for revocation of consent are discussed in the text accompanying notes 124-38 infra.

4. The provisions for adoption through authorized agencies are found in N.Y. Dom. Rel. Law §§ 112, 113 and N.Y. Soc. Serv. Law §§ 383, 384. See notes 61, 67 and text accompanying notes 59-68 infra for a brief discussion of the "surrender" procedure in agency adoption. This Note focuses on private placement adoption.

In the interest of simplicity, the feminine gender will be used hereinafter for the natural parent, although the law applies equally to some fathers. See Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 103 S. Ct. 2985 (1983); N.Y. Dom. Rel. Law §§ 111(1)(d)-(e), 111-a.

5. N.Y. Dom. Rel. Law § 117(1) provides in pertinent part:

> 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 or to his property by descent or succession, except as hereinafter stated.

New York provides for private placement adoptions (sometimes termed "independent adoptions") that are arranged without an authorized adoption agency acting as an intermediary.[7] The parent who selects the private placement method may do so because it seems easier, or because it enables her to control the selection of the adoptive family.[8] The natural parent may

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> The rights of an adoptive child to inheritance and succession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided.

Id.

6. For the statutes providing for the termination of parental rights, see note 165 infra. Consent is not required in the special circumstances set out in note 287 infra. In In re Patricia Ann W., 89 Misc. 2d 368, 371, 392 N.Y.S.2d 180, 183 (Fam. Ct., Kings County 1977), Judge Gartenstein defined the termination of parental rights in the following manner:

> In the spectrum of those relationships coming before this court, the one surrounded by the most taboos and secrecy is that of adopting parent and child. We give effect legislatively to an almost ritual secrecy surrounding both the natural and adoptive families and perpetuate a legal fiction that "termination of parental rights" negates the very existence of a biological family. In reality, this phrase is nothing more than a label for the simple legal proposition that consent of a biological parent so adjudicated is not legally required for adoption. . . .

Id. at 371, 392 N.Y.S.2d at 183.

The Juvenile Justice Standards Project of the Institute of Judicial Administration and the American Bar Association has promulgated recommendations for proceedings for the termination of parental rights. See Institute of Judicial Administration—A.B.A. Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect 156-59, 160-80 (1981) [hereinafter Standards]. Although these proposed standards relate to termination proceedings arising in the context of abuse and neglect cases, the same constitutional safeguards for termination of parental rights are warranted when a natural parent's rights are terminated to release a child for adoption.

7. See text accompanying notes 55-74 infra for discussion of the two methods of adoption. N.Y. Dom. Rel. Law § 109(4), (5), (7) provide the following definitions:

> 4. "Authorized agency" shall mean an authorized agency as defined in the social welfare law and, for the purpose of this article, shall include such corporations incorporated or organized under the laws of this state as may be specifically authorized by their certificates of incorporation to receive children for purposes of adoption.
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> 5. "Private placement adoption" shall mean any adoption other than that of a minor who has been placed for adoption by an authorized agency.
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> . . . .
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> 7. "A child who has been surrendered to an authorized agency for the purpose of adoption" shall mean a child who has been surrendered to such an agency pursuant to the provisions of section three hundred eighty-four of the social services law.

Id.

8. For a discussion of the reasons for the choice of private adoption, see W. Meezan, S. Katz & E. Manoff Russo, Adoptions without Agencies: A Study of Independent Adoptions 10-11, 222 (Child Welfare League of America, Inc. 1978) [hereinafter Adoptions Without Agencies]. Using data for the years 1960-1975, this source, id. at 10, gives the following percentages to show the proportion of all adoptions of unrelated children that were "independent" or private adoptions: 43% in 1960; 23% in 1970; 20% for 1972-1975. The National Committee for Adoption, in a communication of October 21, 1983, supplied the following information: before 1975, 30-40% of unrelated adoptions were estimated as private placements, and current estimates range from "at least the majority" to 60-70% "private."

believe that this method does not demand an immediate, final decision, and that there is a period during which the consent may be revoked.[9] But in fact, under New York's statutory scheme, there is a finality to a valid consent to private placement adoption that may not be adequately comprehended by the parent giving that consent.[10] Technically, the statute does not effect the termination of parental rights until the final order of adoption.[11] In practice, once the natural parent executes the consent to adoption, the parental rights may be terminated immediately and irrevocably.[12]

This Note will show that it is unfair and also unconstitutional to terminate the rights of a parent, who has given an extrajudicial consent to adoption, under the procedures provided by New York's statute for private placement adoption.[13]

I

THE BACKGROUND OF THE 1972 ADOPTION STATUTE

In 1972 the New York legislature introduced radical changes for adoptions by private placement and through authorized agencies.[14] The new statutes transformed the natural parent's right of revocation. Before 1972, a natural mother who attempted to revoke her consent to adoption before the court issued the final adoption decree usually regained custody of the child[15] if she was "fit, competent and able to duly maintain, support and educate the child."[16] Since 1972 the natural parent's fitness is no longer at issue in a revocation-of-consent proceeding; instead, the court must award custody according to the "best interests of the child."[17] This radical change must be

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9. See, e.g., In re Adoption of "Male M.," 76 A.D.2d 839, 428 N.Y.S.2d 489 (2d Dep't), appeal denied, 50 N.Y.2d 1056, 410 N.E.2d 750, 431 N.Y.S.2d 817 (1980); In re Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, ____ N.Y.S.2d ____ (2d Dep't 1984); In re Meyers, 8 Fam. L. Rep. (BNA) 2361 (N.Y. Fam. Ct., Westchester County Apr. 12, 1982).

10. See text accompanying notes 96-107 infra.

11. N.Y. Dom. Rel. Law § 117, quoted in text accompanying note 5 supra.

12. See text accompanying notes 223-37 infra.

13. See Section IV infra.

14. The adoption statutes are cited in note 1 supra, and the relevant provisions for private placement adoption are reproduced in the Appendix, infra.

15. Note, Revocation of Parental Consent of Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564, 566-67 (1961); Note, In the Child's Best Interests: Rights of Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. Rev. 446, 454-55 (1976); S. Wohl Kram & N. Frank, The Law of Child Custody: Development of the Substantive Law 93-99 (1982).

16. N.Y. Soc. Serv. Law § 383(1), cited in People ex rel. Olga Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 192, 269 N.E.2d 787, 791, 321 N.Y.S.2d 65, 70, cert. denied sub nom. De Martino v. Scarpetta, 404 U.S. 805 (1971). See also People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953).

17. N.Y. Dom. Rel. Law § 115-b(3)(d)(ii), (iii), (iv).

viewed within its historical context: the existence of the parental preference rule before 1972; the case decided according to that rule in 1971, *People ex rel. Olga Scarpetta v. Spence-Chapin Adoption Services,*[18] which gained renown as the case of "Baby Lenore"; and the public response to the *Scarpetta* decision that triggered the legislation of 1972.[19]

A. Revocation of Consent to Adoption Before 1972: The Parental Presumption

Before 1972 the parental preference rule controlled judicial action when a natural parent attempted to revoke consent to adoption.[20] If the final adoption decree had not been issued, the court usually permitted the revocation.[21] In several leading cases, Justice Botein and Judge Breitel set forth the rationale underlying the parental presumption. In a case that is frequently cited throughout the state, *People ex rel. Grament v. Free Synagogue Child Adoption Committee,*[22] Justice Botein concluded, "experience teaches that a mother's love is one factor which will endure, possibly endure after other claimed material advantages and emotional attachments may have proven transient."[23] He reasoned that judicial rulings giving preference to the natural mother incorporated traditional values: such rulings were "at least presumptively an embodiment of the social judgment and conscience of the community."[24] Another leading New York case, *People ex rel. Kropp v. Shepsky,*[25] similarly upheld the parental presumption and, moreover, relied on the United States Supreme Court's ruling in *Meyer v. Nebraska*[26] to uphold the "right of a natural parent" as "fundamental."[27]

In an oft-cited passage in *People ex rel. Anonymous v. New York Foundling Hospital,*[28] Judge Breitel gave strong support to a natural parent's revocation right vis-a-vis an adoption agency:

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18. 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65, cert. denied sub nom. De Martino v. Scarpetta, 404 U.S. 805 (1971).

19. See text accompanying notes 45-50 infra.

20. *Scarpetta,* 28 N.Y.2d at 192, 269 N.E.2d at 793, 321 N.Y.S.2d at 70-71; In re Adoption of Anonymous, 60 Misc. 2d 854, 304 N.Y.S.2d 46 (Sur. Ct. Suffolk County 1969); In re Natural Parents of Their Child "Nicky" v. Dumpson, 81 Misc. 2d 132, 138, 364 N.Y.S.2d 970, 977 (Sur. Ct., Kings County 1975).

21. *In re "Nicky,"* 81 Misc. 2d at 138-40, 364 N.Y.S.2d at 975-78.

22. 194 Misc. 332, 85 N.Y.S.2d 541 (Sup. Ct., New York County), appeal dismissed, 275 A.D. 823, 91 N.Y.S.2d 926 (1st Dep't 1949).

23. Id. at 337-38, 85 N.Y.S.2d at 546; see also People ex rel. Anonymous v. New York Foundling Hosp., 17 A.D.2d 122, 124, 232 N.Y.S.2d 479, 482 (1st Dep't) (Breitel, J.), aff'd, 12 N.Y.2d 863, 187 N.E.2d 791, 237 N.Y.S.2d 339 (1962).

24. *Grament,* 194 Misc. at 336, 85 N.Y.S.2d at 544.

25. 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953).

26. 262 U.S. 390 (1923).

27. 305 N.Y. at 468, 113 N.E.2d at 803.

28. 17 A.D.2d 122, 232 N.Y.S.2d 479 (1st Dep't), aff'd, 12 N.Y.2d 863, 187 N.E.2d 791, 237 N.Y.S.2d 339 (1962).

> [A]n authorized agency has a special obligation, completely reviewable by the courts, to consider an early change of mind by the surrendering parent with the most circumspect sympathy and consideration. . . . [T]he change of mind by a natural parent is not an evil thing. Instead, the change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action.[29]

And in *Spence-Chapin Adoption Service v. Polk*,[30] Judge Breitel reiterated Justice Botein's view that "fundamental principles" dictate that "a child's best interest is that it be raised by its parent unless the parent is disqualified by gross misconduct."[31] Judge Breitel similarly grounded these "legal principles" in traditional community values: "They are legal principles, to be sure, but they also reflect considered social judgments in this society respecting the family and parenthood."[32]

These legal principles, so well established in New York before 1972, continue to be controlling in other states. Recent decisions in Kansas[33] and California[34] have equated the parental presumption with the United States

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29. Id. at 125, 232 N.Y.S.2d at 482.

30. 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

31. Id. at 204, 274 N.E.2d at 436, 324 N.Y.S.2d at 941.

32. Id., 274 N.E.2d at 436, 324 N.Y.S.2d at 941.

33. See, e.g., Sheppard v. Sheppard, 230 Kan. 146, 630 P.2d 1121 (1981), cert. denied, 455 U.S. 919 (1982). The Supreme Court of Kansas invalidated a statute, Kan. Stat. Ann. § 60-1610(b)(2) (Supp. 1980), that introduced the best interests standard in determining custody of a minor child pursuant to a divorce, annulment or separate maintenance decree. Before the introduction of the statute, Kansas routinely applied the parental preference rule and the correlative parental fitness doctrine. In re Adoption of Lathrop, 2 Kan. App. 2d 90, 575 P.2d 894 (1978). *Sheppard* tested the statute against the preference rule and in light of Stanley v. Illinois, 405 U.S. 645 (1972) and Quilloin v. Walcott, 434 U.S. 246 (1978), which the Kansas court interpreted as mandating a natural parent's right to a fitness hearing:

> It is clear under our decisions and those of the United States Supreme Court that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the state or by third persons, absent a showing that the natural parent is unfit. . . .
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> The statute under consideration takes away that right. Fitness of a parent is no longer the criteria. . . .
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> . . . [The natural parent] cannot be denied that right for the sole reason that a court determines and concludes that someone other than a natural parent might do a better job of raising the child, thus furthering his "best interests."

Sheppard, 230 Kan. at 152-53, 630 P.2d at 1124-25.

34. In re Baby Girl M., 9 Fam. L. Rep. (BNA) 2403, (Cal. Ct. App., 4th Dist. Mar. 28, 1983) held that the parental preference rule, Cal. Civ. Code § 4600 (West 1983), applies when an unwed father challenges an adoption proceeding. To deny the father custody, the court must find (1) that the parent's custody would be detrimental and (2) adoption is in the best interest of the child. In re B.G., 11 Cal.3d 679, 693-94, 523 P.2d 244, 255, 114 Cal. Rptr. 444, 454 (1974) (Tobriner, J.) similarly upholds the parental preference rule as a doctrine that is "not mere ideology, but rather . . . a recognized right." 9 Fam. L. Rep. (BNA) at 2404.

Supreme Court's protection of the fundamental liberty interest of parents.[35] But in New York, natural parents who give consent to adoption no longer benefit from the parental presumption.[36]

B. *The Scarpetta Decision*

In 1971, in *Scarpetta v. Spence-Chapin,*[37] the New York Court of Appeals accepted the trial court's finding that the natural mother was fit and then applied the law, which dictated return of the child to her mother.[38] "Baby Lenore's" mother, a college-educated woman from Colombia, had concealed her pregnancy from her family and "surrendered" the child to an adoption agency.[39] She then learned that her family would assist her in raising Lenore and attempted to revoke her surrender.[40]

Two aspects of the *Scarpetta* case influenced the 1972 legislation and are especially relevant here. First, the adoption agency acted in an arbitrary and secretive manner that was unfair to the natural mother and also to the prospective adoptive parents. Lenore's mother changed her mind and so notified the agency within twenty-three days of signing the surrender.[41] She was entitled to have her child returned unless it was "clearly established that she [was] unfit to assume the duties and privileges of parenthood."[42] The

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35. In Quilloin v. Walcott, 434 U.S. 246, 255 (1978), the Supreme Court declared:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family over the objections of parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

Id. (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977)). The parent's "fundamental liberty interest" is discussed in Section III infra.

36. See text accompanying notes 133-42 infra.

37. 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65, cert. denied sub nom. De Martino v. Scarpetta, 404 U.S. 805 (1971).

38. Id. at 189-90, 269 N.E.2d at 792, 321 N.Y.S.2d at 68.

39. See text accompanying notes 59-68 infra, for discussion of the surrender mechanism.

40. For detailed discussions of the facts and some of the controversies over the *Scarpetta* decision, see Foster, Adoption and Child Custody: Best Interests of the Child?, 22 Buffalo L. Rev. 1, 7-14 (1973); Revocation of Consent to Adoption: A Covenant Running with the Child?, 166 N.Y.L.J. 26 (Aug. 6, 1971); New York's Continuing Search for a Viable Adoption Policy, 11 Conn. L. Rev. 331, 332-37 (1979).

41. Lenore was born on May 18, 1970 and was placed in foster care. Her mother executed a formal surrender to the agency on June 1, 1970 and on June 18, 1970 Lenore was placed with the prospective adoptive family. On June 23, 1970 "the natural mother repented her actions and requested that the child be returned to her." *Scarpetta,* 28 N.Y.2d at 189, 269 N.E.2d at 791, 321 N.Y.S.2d at 68. For a somewhat different interpretation of the facts see Foster, supra note 40, at 7-8: "There is a dispute as to whether or not she asked for the return of her baby at this time. The agency recommended a psychiatrist who was consulted by the mother." Id.

42. *Scarpetta,* 28 N.Y.2d at 194, 269 N.E.2d at 795, 321 N.Y.S.2d at 72.

agency refused to return Lenore to her and did not inform the prospective adoptive parents that the surrender might be revoked. It was not until Lenore was eight months old and had become an integral member of their family that they learned that their custody had been challenged.[43] Second, in the litigation for custody of Lenore, the trial court did not permit the prospective adoptive parents to intervene. The court considered only the natural mother's fitness, and found that the prospective adoptive parents had no legal interest in the proceeding.[44]

In the extensive criticism of *Scarpetta,* public sympathies were with the prospective adoptive parents, who left New York to live in Florida to protect their custody of Lenore.[45] The public response to the case indicated little popular support for the parental preference rule, which the courts had assumed to be the embodiment of "considered social judgments . . . respecting the family and parenthood."[46]

C. *The 1972 Statute: Legislative Intent*

Public criticism of the *Scarpetta* decision influenced the legislature to revise the adoption statutes for agency as well as private placement adoptions. Senator Joseph Pisani, the sponsor of the legislation, explained that "[t]housands of letters were received by my office calling for the reform of the law, [to create] a favorable climate in this state for the adoption of

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43. Foster, supra note 40, at 8. One reason for the revision of the adoption statutes in 1972 was to assure appropriate notice to prospective adoptive parents in the event a natural parent attempted to revoke the consent. See note 102 infra.

44. *Scarpetta*, 28 N.Y.2d at 195-96, 269 N.E.2d at 796, 321 N.Y.S.2d at 72-74. The 1972 statute provides that the prospective adoptive parents may participate in the revocation hearing. N.Y. Dom. Rel. Law § 115-b(3). The prospective adoptive parents do not have a *constitutionally based* right to intervene. Smith v. Organization of Foster Families for Equality and Reform [OFFER], 431 U.S. at 842 n.48, 843-44 & nn.49-50. *OFFER* cites N.Y. Dom. Rel. Law § 110 for the proposition that "adoption . . . is recognized as the legal equivalent of biological parenthood." Id. at 844 n.51. The distinction must be made, however, between the rights of adoptive parents *after* the final adoption decree is issued and of prospective adoptive parents before the final decree.

45. Note, In the Child's Best Interest: Rights of Natural Parents in Child Placement Proceedings, 51 N.Y.U. L. Rev. 446, 454-55 & n.56 (1976). Lenore remains in "limbo," however, because there must be a termination of parental rights before an adoption can be finalized. See note 287 infra for the provisions of N.Y. Dom. Rel. Law § 111(2), permitting termination without parental consent.

46. People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953). In *In re "Nicky,"* the court asserted that not only the legislature tended to "disagree with the decisional law on the 'primacy of status' of the natural parents. The courts charged with responsibility in the matter on the basis of hard experience tend also to disagree." 81 Misc. 2d at 141, 364 N.Y.S.2d at 978. The four cases cited therein to support this point involved natural parents of very dubious "fitness": two were drug addicts, one had a consistent pattern of irresponsible behavior, and one had abandoned her child. Thus *In re "Nicky"* misrepresents the decisions of other courts where "hard experience" did, in fact, result in the grant of custody to parents who were fit.

children."[47] The Senator clearly stated that his purpose was to give greater protection to prospective adoptive parents:

> The broad damage that was done by the recent cases was to strike terror in the hearts of prospective adoptive parents and actually discourage other parents from entertaining adoption. . . . The purpose of this bill is to provide stronger guarantees of the permanence of child adoption arrangements involving authorized social agencies and private placement adoptions. This legislation is intended to provide a legal framework within which future adoptions can be undertaken with reasonable guarantees of permanence and with humane regard for the rights of the child, the natural mother and the adoptive parents.[48]

Despite the claim that the legislation would provide "humane regard" for the rights of all parties involved, the new statutes tipped the balance from the natural mother, who had been protected by the parental presumption, to the adoptive parents.[49] The legislative process may have influenced this result, for adoption agencies, social service organizations, and associations of adoptive parents exerted pressures that supported adoptive parents' rights, while few voices were raised on behalf of natural parents.[50] Moreover, the legislature may have acted on an assumption that the new statute served the best interests of a natural mother who released a child for adoption.[51]

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47. Memorandum of Assemblyman Joseph R. Pisani, New York Legislative Annual 1972, at 202, 203 [hereinafter Memorandum].

48. Id. at 203.

49. See text accompanying notes 139-45 infra.

50. Dozens of letters and telegrams from such organizations are contained in the bill jackets for Chapter 639, Laws of 1972, and Chapter 1035, Laws of 1973, enacting and amending Dom. Rel. Law § 115-b. This source reveals limited opposition to the legislation in comparison with the deluge of support. The bill jackets are on file at various depositories, including the State Library, Albany, New York, and the mid-Manhattan Public Library.

51. According to Senator Pisani, the natural parent would benefit from being forced to make an early and irrevocable decision. See Memorandum, supra note 47, at 203:

> The present structure of the law subjects the natural mother, until the adoption is completed, with the heavy emotional burden of constantly reconsidering whether she has taken the proper step . . . . This bill, therefore, provides adequate safeguards to the natural mother against an improvident decision by her to give up the child for adoption.

Id. The actual feelings of natural parents who give up their children have been inadequately studied. A. Sorosky, A. Baran & R. Pannor, The Adoption Triangle 50 (1978) [hereinafter The Adoption Triangle], explains the neglect of this subject in the following manner:

> Although a number of studies have explored the psychological factors involved in illegitimate pregnancies and the relinquishment process, no follow-up studies of birth parents exist. Adoption agencies have insisted that the birth mother's permanent anonymity and privacy were vital to her survival. She had sinned and suffered,

The 1972 statute was in fact revolutionary. To overcome the "broad damage . . . of recent cases,"[52] the legislature discarded the parental preference rule, and in response to specific issues raised by *Scarpetta* devised procedures to minimize the possibility of similar situations in the future. The major innovations are in the revocation-of-consent proceedings: the prospective adoptive parents now have the right to intervene,[53] and the "best interests of the child" standard has replaced the parental presumption.[54]

II

PRIVATE PLACEMENT ADOPTION AFTER 1972

There are two basic methods for the voluntary release of a child for adoption.[55] The natural parent may (1) "surrender" a child to an authorized adoption agency,[56] or (2) "consent" to a "private placement adoption," which is "any adoption other than that of a minor who has been placed for adoption by an authorized agency."[57] The 1972 statutes[58] changed procedures for both methods of adoption. Although this Note treats only private placements, the differences between agency and private adoption methods must be explained.

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paid dearly, and deserved to be left alone. No one had a right to barge into her life and ruin it; she had been promised freedom from fear, and the adoption agency could not violate this sacred oath.

Id.

52. See text accompanying note 48 supra.

53. N.Y. Dom. Rel. Law § 115-b(3)(d)(ii).

54. N.Y. Dom. Rel. Law § 115-b(3)(d)(iii).

55. This Note will not treat adoptions initiated by foster parents pursuant to involuntary termination of parental rights, N.Y. Soc. Serv. Law § 384-b. The procedure in such cases to terminate parental rights entails (1) a fact-finding hearing in family court to determine whether there has been permanent neglect or another cause to find the parent unfit; and (2) a dispositional hearing to determine if it is in the best interests of the child to terminate parental rights. In the first hearing the standard of proof is "clear and convincing evidence" and in the dispositional hearing, a "fair preponderance of the evidence." N.Y. Fam. Ct. Act §§ 622, 623, 631, 634 (McKinney 1983).

56. N.Y. Dom. Rel. Law § 109(4), (7); N.Y. Soc. Serv. Law § 384(3).

57. See note 7 supra for the statutory definitions. N.Y. Dom. Rel. Law § 115, "General provisions relating to private-placement adoptions," is reproduced in Appendix, infra. The provisions for the consent are N.Y. Dom. Rel. Law §§ 111, 115(6)-(7), and 115-b. The parties must comply with the statutory provisions for the surrender or consent agreements; the courts repeatedly remind parties (and their attorneys) that because adoption is in derogation of the common law, the adoption statutes must be strictly construed. See text accompanying note 156 infra. If the parties do not conform to the statutory requirements, the court will apply the law in effect prior to passage of the statute; thus the parental presumption rule controls if the consent does not meet the requirements of N.Y. Dom. Rel. Law § 115-b. See, e.g., In re Adoption of "Male M.," 76 A.D.2d 839, 428 N.Y.S.2d 489 (2d Dep't), appeal denied, 50 N.Y.2d 1056, 410 N.E.2d 750, 431 N.Y.S.2d 817 (1980).

58. N.Y. Dom. Rel. Law § 115-b; N.Y. Soc. Serv. Law §§ 383, 384.

A. *Agency Adoptions*

A parent who releases a child to an authorized agency by a "surrender,"[59] retains privileges that differ from those retained by a parent who gives a "consent"[60] to a private placement adoption. The terms themselves suggest the difference between the options. The parent *surrenders* specific rights to the agency, but in the private adoption the parent *consents* to a quasi-contractual relationship with the prospective adoptive parents. There may be more formality in the procedures for a surrender, and there are clear, precise provisions for the finality of the surrender.[61]

Agency adoptions—in theory at least—provide greater protections for all parties involved.[62] It is the obligation of the agency to provide counseling for the natural parent, to give advice on alternatives that might permit her to keep the child, and to explain the legal consequences of the surrender.[63] It is assumed that if the agency fulfills these obligations, the parent can give an informed, knowing, voluntary waiver of her parental rights.[64] An efficient, experienced agency screens the prospective adoptive families and assists them in coping with the special problems of adjusting to an adoptive child. Proponents of agency adoptions argue that an agency has the necessary experience and resources to make the critical decisions in forming an adoptive family.[65] But critics argue that agencies in the business of creating adoptive families may counsel inadequately and thus fail to protect the rights of the natural parent, who may be unaware of other options.[66]

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59. N.Y. Dom. Rel. Law § 109(7); N.Y. Soc. Serv. Law § 384(1)-(5).

60. N.Y. Dom. Rel. Law § 115-b(1)-(2).

61. The parent must sign a "surrender instrument" unless consent of the parent or custodian is not required for reasons specified in N.Y. Dom. Rel. Law § 111(2); see note 233 infra. The surrender instrument must be signed and acknowledged or executed before one or more witnesses, and acknowledged by the witness(es) before a notary public or other officer authorized to take proof of deeds. It must be recorded in the office of the county clerk and kept under seal. N.Y. Soc. Serv. Law § 384(3). The instrument states that the agency is authorized and empowered to consent to the adoption of the child; the surrendering parent *may* waive the right to notice of such adoption, N.Y. Soc. Serv. Law § 384(2), but is not required to do so. Another provision permits, but does not require, the authorized agency to petition a surrogate or judge of the family court to approve the surrender; when this process is followed, notice will be given to those entitled to it and "to such persons as the surrogate or judge may in his discretion prescribe." N.Y. Soc. Serv. Law § 384(4). A person who has received notice and has had an opportunity to be heard may not thereafter challenge the validity of the approved surrender. Id.

62. For a typical view of the advantages of agency adoptions, see Adoptions Without Agencies, supra note 8.

63. See, e.g., Janet G. v. New York Foundling Hosp., 94 Misc. 2d 603, 403 N.Y.S.2d 646 (Fam. Ct., New York County 1978).

64. The assumption may not be well-founded. See, e.g., Janet G. v. New York Foundling Hosp., 94 Misc. 2d 603, 403 N.Y.S.2d 646 (Fam. Ct., New York County 1978).

65. See Adoptions Without Agencies, supra note 8, at 28-34, 220-28. According to this source five states do not permit non-agency adoptions. Id. at 232.

66. The extensive literature that is critical of adoption agencies provides useful insights into the attitudes of some adoptive children and natural parents. See, e.g., M. K. Benet, The Politics of Adoption (1976); The Adoption Triangle, supra note 51.

New York's adoption law reflects the preference for agency adoptions: the parent's surrender becomes final and irrevocable thirty days after it is signed and recorded in the agency's files.[67] The agency is then vested with legal custody of the child and assumes responsibility for the adoption. If the thirty-day time limit has elapsed, and the child has been placed in a pre-adoptive home, the parent may not revoke the surrender.[68]

B. Private Placement Adoptions

A private placement is often initiated in an informal manner. An expectant mother may ask a relative, physician, or other intermediary to help her find adoptive parents for the child.[69] Under a typical informal agreement, the prospective parents may undertake to pay the mother's medical and hospital expenses as well as other incidental costs.[70] In addition to providing financial assistance to the natural mother, this placement method has other advantages. The natural mother may specify a certain type of home and may request and receive precise information about the prospective adoptive parents,[71] thus exerting an element of control over the choice

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67. The statute strictly circumscribes the right to revoke or annul a surrender agreement, absent a claim of "fraud, duress or coercion in the execution or inducement of a surrender." N.Y. Soc. Serv. Law § 384(5). The surrender agreement may become irrevocable immediately but if it includes a "30-day clause," the surrendering parent may not revoke his or her consent if the "child has been placed in the home of adoptive parents and more than thirty days have elapsed since the execution of the surrender." Id. If the natural parent gives notice of revocation within the 30-day period and the parent is fit, the notice may be given effect. In re Franciska J. GG, 64 A.D.2d 787, 407 N.Y.S.2d 750 (3d Dep't 1978). If the *Scarpetta* case had been decided under this statute, the natural mother would have been entitled to revoke consent, because she notified the agency 23 days after signing the surrender. But unlike the situation in *Scarpetta,* where the prospective adoptive parents were not permitted to oppose the revocation of surrender, the current statute permits "as a matter of right" the prospective adoptive parents "to intervene in any proceeding commenced to set aside a surrender." N.Y. Soc. Serv. Law § 384(3).

68. See, e.g., Patricia "BB" v. Albany County Dep't Social Serv., 47 A.D.2d 974, 366 N.Y.S.2d 692 (3d Dep't 1975) where the natural mother regained custody 48 days after her surrender because the child had not been placed.

69. However, physicians, nurses and attorneys may not act as agents in an adoption. See In re Anonymous (G.), 89 Misc. 2d 514, 393 N.Y.S.2d 900, 903 (Sur. Ct., New York County 1977) (in this decision Judge Midonick established rules and conditions for private placement adoptions); see also In re Meyers, 8 Fam. L. Rep. (BNA) 2361 (N.Y. Fam. Ct., Westchester County Apr. 12, 1982). There are organizations that assist in matching natural mothers and prospective adoptive parents; RESOLVE, Box 474, Belmont, Mass. 02187, is such an organization, and is discussed in Hecker, Wanted: A Baby to Love, 67 Wellesley 4 (Summer 1983).

70. Careful records of such reimbursements must be kept and affidavits of those expenses must be filed with the petition for adoption. See N.Y. Dom. Rel. Law § 115(7), in Appendix, infra. This provision attempts to control attorneys' fees and the payments to natural mothers, to reduce the possibilities for a "black market" in babies.

71. See, e.g., In re Adoption of "Male M.," 76 A.D.2d 839, 428 N.Y.S.2d 489 (2d Dep't), appeal denied, 50 N.Y.2d 1056, 410 N.E.2d 750, 431 N.Y.S.2d 817 (1980); In re

of the child's future home. Anonymity or relative secrecy is possible in such arrangements in New York,[72] and this may be a consideration in a parent's decision to avoid an agency adoption.[73]

The control exercised by the natural parent in the initial stages of a private placement disappears after she executes the consent to adoption. The conditions under which she relinquishes her control differ substantially, however, depending on whether she executes the consent in or out of court.[74] The remainder of this Note distinguishes these two types of consent and argues that only the judicial consent affords adequate constitutional safeguards.

C. *The Consent Provisions*

In a private placement, the natural parent may choose to execute either a judicial or an extrajudicial consent. The instrument for both types of consent must set forth the name and address of the court in which the adoption proceeding will be commenced, and the parent who executes the consent must receive a conformed copy.[75]

Special protections surround the judicial consent, however, and it becomes irrevocable immediately.

1. Judicial Consent

A judicial consent must be "executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced,"[76] and the consent must state that it "shall become irrevocable upon such execution or acknowledgment."[77] Under these provisions "no action or proceeding may be maintained by the consenting parent for the custody of the child to be adopted, and no such consent shall be revoked by

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Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984).

72. This is not possible in some states. California, for example, requires direct contact between the sets of parents and registration of the natural parent. See Carsola & Lewis, Independent Adoptions: An Alternative for Adoptive Parents, 9 Fam. L. Rep. 4019 (1983).

73. The Adoption Triangle, supra note 51, at 47-71. Couples seeking adoptive children may prefer private placement because of the dearth of babies available through the agencies. If the couple does not fit easily into agencies' conventional model (in terms of age, religion, social status, racial characteristics), private adoption may be their only possible means to gain a child.

74. N.Y. Dom. Rel. Law § 115-b(1)(c)-(d) sets out the different criteria and consequences.

75. N.Y. Dom. Rel. Law § 115-b(1)(a)-(b). Failure to conform to these provisions invalidates the consent; see, e.g., In re James M.G., 86 Misc. 2d 960, 383 N.Y.S.2d 866 (Fam. Ct., Dutchess County 1976), and In re Adoption of "Male M.," 76 A.D.2d 839, 428 N.Y.S.2d 489 (2d Dep't), appeal denied, 50 N.Y.2d 1056, 410 N.E.2d 750, 431 N.Y.S.2d 817 (1980).

76. N.Y. Dom. Rel. Law § 115-b(1)(c).

77. Id.

such parent."[78] The language could not be clearer. There is no such thing as a "conditional adoption"[79] when the natural parent goes into court to give her consent. The judicial consent imposes "an end to all such vacillation."[80]

Precisely because of the finality of the judicial consent, Judge Midonick in *In re Anonymous (G.)*[81] established a set of inquiries that the judge or surrogate should make when presiding in a consent proceeding. The parent should be questioned to discover what, if any, counseling she has had; what alternatives have been considered; whether the parent's "emotional state [is] stable enough to make a final decision"; whether she is of sound mind; and whether undue influence, duress, or fraud has been used.[82] The use of such painstaking inquiries, now routine in some courts in New York County,[83] is not the norm throughout the state. But when the consent is executed in this manner, with formal questioning[84] and an opportunity to

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78. N.Y. Dom. Rel. Law § 115-b(1).

79. In re Adoption of E.W.C., 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct., Nassau County 1976).

80. Id. at 73, 389 N.Y.S.2d at 752.

81. 89 Misc. 2d 514, 517, 393 N.Y.S.2d 900, 903 (Sur. Ct., New York County 1977).

82. Id. at 516, 389 N.Y.S.2d at 902. Judge Midonick proposed the following procedure:

> Such natural mother should have the impartial advice of a judge in court, as to whether she needs counselling, legal or financial or other assistance, adjournments and the like. In agency adoption cases, such safeguards are provided by social workers and other professionals before a natural mother executes a surrender. A private attorney does not have the facilities of an agency and usually cannot provide such counselling . . . .
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> . . . [T]he following considerations should be the subject of inquiry from the natural mother and any experts or others available: (1) whether the natural mother has been properly counselled as to how and whether she can retain her baby with or without public assistance, as to how she can regain her baby after temporary foster care if indicated, as to whether she needs more time to consider finalizing plans for her baby; (2) as to whether the natural mother's emotional state is stable enough to make a final decision; (3) as to whether the natural mother is unduly influenced by or under duress from her parents or others, or misled by fraud, to give up her baby; (4) as to whether the natural mother is of sound mind. All of this is better done in open court with an impartial judge putting such questions to the natural mother (and possibly to the natural father if he is involved), and any others, including social workers, who may be of assistance and readily available.

Id. at 516, 389 N.Y.S.2d at 902.

83. The Surrogate's and Family Courts of New York County have adopted Judge Midonick's suggested inquiries.

84. N.Y. Dom. Rel. Law § 115-b(2) *requires* the judge or surrogate to inform the parent of the consequences of the consent. Justice Gibbons, in his extensive dissent in In re Adoption of Daniel C., 99 A.D.2d 35, ____ N.Y.S.2d ____ (2d Dep't 1984), aff'g 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), argues that the consent form for an extrajudicial consent "should inform the natural parent that a revocation of consent may be subjected to judicial review under a best interests standard, viz., the organization of the statute and the explicit command contained in the initial phrase of [§ 115-b] subdivision 1." Id. at 59. See text accompanying notes 96-107 infra for analysis of the procedure for extrajudicial consent.

establish a formal record of the procedure, the consent rests on a secure legal foundation. Should the consent be challenged, there is evidence of the natural parent's understanding of the nature and legal consequences of her act.[85]

The case law indicates that judicial consents, when challenged, are seldom invalidated. In *In re Adoption of Jason ZZ,*[86] the court found that the natural mother had had a series of meetings with the pre-adoptive parents and their attorney and had "cooperated in the completion of papers necessary for the presentation . . . at . . . Surrogate's Court."[87] The court reconstructed the circumstances surrounding the execution of consent: The parties, accompanied by counsel, "proceeded to the courthouse where they waited for some time until the Surrogate reached their matter. . . . [D]uring the wait [the natural mother] read the consent papers which she signed and . . . the Surrogate asked her if her consent was voluntary and if she understood the papers to which she replied affirmatively."[88] The court rejected the mother's arguments that she was misled by the attorney and misunderstood the provisions for revocation of consent; the court relied on the mother's " 'statement under oath [when] she established the fact that a rather detailed inquiry was had by the Court (though not on record) prior to her execution of the surrender document.' "[89] Having denied credibility to the mother's assertion that she had misunderstood the consent, the court declared the consent valid and the best interests of the child served by the adoption.[90]

When the consent is executed in court, and especially if it is accompanied by inquiries such as Judge Midonick proposed,[91] the consent meets the requirements for a valid waiver; the natural parent cannot claim that she was deprived of a fundamental liberty interest without due process of law.[92] Private practitioners have devised additional procedures to ensure the validity of the judicial consent.[93] (1) To avoid a conflict of interest when the prospective adoptive parents pay the attorney for the natural mother, the attorney may request at the outset that the fee be paid in full or held in

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85. See text accompanying notes 245-52 infra for discussion of valid waiver.

86. 79 A.D.2d 737, 434 N.Y.S.2d 759 (3rd Dep't 1980).

87. Id. at 737, 434 N.Y.S.2d at 760.

88. Id., 434 N.Y.S.2d at 760.

89. Id. at 738, 434 N.Y.S.2d at 760. Similarly In re Adoption of E.W.C., 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct., Nassau County 1976), found a judicial consent valid; the natural mother's contention that she had been unhappy and under emotional stress when she executed the consent was insufficient to invalidate a document signed under judicial supervision.

90. 79 A.D.2d at 738, 434 N.Y.S.2d at 760.

91. See note 82 supra.

92. See text accompanying notes 259-97 infra for a discussion of the requirements for a valid waiver and their application to the consent.

93. I am indebted to Carolyn Heft, Esq., who shared this information with me.

escrow, so that she can serve her client and also be assured of payment whether or not the adoption is completed. (2) In order to provide the court with affidavits demonstrating the validity of the natural mother's consent, the attorney may make transcripts of conversations with the mother and file these with a signed statement in the mother's words that shows her understanding of her rights and legal obligations under the intended adoption procedure. (3) The natural mother signs a temporary transfer of custody to the prospective adoptive parents when she leaves the hospital or at another appropriate time when she releases the child. This document specifies that it is temporary and conditional, that it does not terminate her parental rights but merely transfers custody for a specified period of time, and that termination of parental rights will be effected in court.[94] The transfer of custody document may also provide that the natural parent will appear in a designated court on a specified date to execute the judicial consent to adoption.[95]

2. Extrajudicial Consent

An extrajudicial consent does not provide some of the protections of the judicial consent, and it becomes irrevocable under different condi-

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94. An appropriate instrument for the transfer of custody would explain the legal consequences of the signing of such an instrument in the following manner: (1) Rights: The transfer of custody does not terminate parental rights. The natural parent who has a change of heart within [a specified number of days] has the absolute right to regain custody of the child; (2) Obligations: The natural parent undertakes to come into court [within a specified period] to execute an irrevocable judicial consent, which is a voluntary termination of parental rights; (3) Consequences: The court will resolve the issue of termination of parental rights and custody if the natural parent does not appear in court at the designated time, does not respond to the court's second notice to appear, and does not take action to regain custody of the child.

Such an instrument and procedure presume a more adequate system of notice than now exists. For criticism of the current defective system of notice, see text accompanying notes 230-36 infra. Appropriate notice procedures to safeguard the rights of a parent who signs a transfer of custody would include the following provisions: (1) Recordation: When signed, the transfer of custody shall be recorded with the clerk of the court where the adoption is to be commenced; (2) Adequate Notice: The court shall assign the date for the execution of a judicial consent and notify the natural parent of that date. A second notice and a summons shall be sent to a parent who fails to appear in court on the appointed day; (3) Further Judicial Action: The court shall have discretion to take whatever measures it deems advisable to bring the natural parent into court. Failure of the natural parent to appear in response to notice, summons, or other methods ordered by the court, shall be construed as "an intent to forego . . . parental or custodial rights" within the meaning of N.Y. Dom. Rel. Law § 111(2)(a).

95. Under the current system for judicial consents, as soon as the consent is executed, the prospective adoptive parents can file the petition for adoption, and the adoption can go forward. The prospective adoptive parents are investigated by court personnel, the adoption hearing is held, and if all the papers and reports are in order, the court issues the adoption decree. In New York, as in all states, once the decree is issued it can be challenged only on evidence of fraud, duress, or coercion. The details of this process are provided in the statutes cited in note 1 supra.

tions.[96] It may be executed in a hospital after the infant's birth, in the office of an attorney or other intermediary, or even in less formal surroundings.[97] The salient fact is that the extrajudicial consent is "*not* executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced."[98]

The extrajudicial consent must include a "thirty-day warning" that it will become irrevocable thirty days after the commencement of the adoption proceeding. The statute provides that "[s]uch consent shall, if it shall so state, become irrevocable thirty days after the commencement of the adoption proceedings unless written notice of revocation thereof shall have been received by the court within said thirty days."[99] This provision, read alone, might suggest that the consent is revocable within the thirty-day period after commencement of the adoption proceedings and that all that is required is a "written notice of revocation" to the court.[100] But this provision of the Domestic Relations Law (section 115-b(1)(d)(i)) cannot be read out of context, because the following paragraph (section 115-b(1)(d)(ii)) explains the very limited nature of the parent's revocation rights:

> Notwithstanding that such written notice shall have been received within said thirty days, the notice of revocation shall be given effect only if the adoptive parents fail to oppose such revocation, as provided by subdivision three of this section, or, if they oppose such revocation and the court as provided in subdivision three of this section shall have determined that the best interests of the child will be promoted by giving force and effect to such revocation.[101]

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96. See text accompanying notes 99, 101 infra for the relevant provisions of N.Y. Dom. Rel. Law § 115-b which is reproduced in full in Appendix infra.

97. See, e.g., In re Meyers, 8 Fam. L. Rep. (BNA) 2361 (N.Y. Fam. Ct., Westchester County Apr. 12, 1982) where the consent was executed in a room in a motel; testimony of the attorney conflicted with that of the mother; and there was conflicting evidence about a clandestine payment of $150 to the father. The father later demanded additional payments from the attorney, and the attorney complied. The court found that the consent was induced by fraud-mistake, id. at 2364; see also id. at 2362.

98. N.Y. Dom. Rel. Law § 115-b(1)(d) (emphasis supplied).

99. N.Y. Dom. Rel. Law § 115-b(1)(d)(i). This has been interpreted to mean that the 30-day warning must be included in the consent form. See Dennis T. v. Joseph C., 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't) (Manjano, J.), appeal denied, 55 N.Y.2d 792, 431 N.E.2d 976, 447 N.Y.S.2d 250 (1981). The phrase "if it shall so state" is construed to mean that the period for notice of revocation may be more but not less than 30 days.

100. N.Y. Dom. Rel. Law § 115-b(1)(d)(i). If this were so, the extrajudicial consent would parallel a surrender to an authorized adoption agency. See text accompanying note 68 supra. Natural parents who challenge the validity of the extrajudicial consent frequently argue that they understood they had an absolute revocation right for 30 days. See, e.g., *In re Meyers*, 8 Fam. L. Rep. (BNA) at 2363; In re Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984).

101. N.Y. Dom. Rel. Law § 115-b(1)(d)(ii).

What this opaque language means is that if the natural parent files a timely notice of revocation, that revocation notice will be given effect only on one of two conditions: (1) if the prospective adoptive parents do not oppose the revocation, in which case the parent has a right to regain custody of the child; or (2) if the prospective adoptive parents do oppose the revocation but the court decides that it is in the child's best interest to be returned to the natural parent.[102]

The natural parent is least protected in using this type of consent. There is no provision for guidance counseling, comparable to the counseling that is usually provided by authorized agencies;[103] nor is there the judicial supervision and explanation that attends a carefully executed judicial consent.[104] The parent does not receive the assurance that an agency may be able to give, regarding the careful screening and selection of the adoptive parents; instead, she will rely on intermediaries to select parents for the child.[105] The most serious drawback of the extrajudicial method is that it is highly complex,[106] and therefore very difficult for a natural parent to comprehend, and even for an attorney to explain. Since only an informed, knowing, and

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102. Id. The protections for the prospective adoptive parents in these proceedings are considerable. They have a right to notice of the attempted revocation, N.Y. Dom. Rel. Law § 115-b(3)(b), and at the revocation-of-consent hearing they have at least equal status with the natural parent, N.Y. Dom. Rel. Law § 115-b(3)(d). The adoptive parents' right to notice was secured by an amendment, N.Y. Dom. Rel. Law § 115-b(3)(b)(i), (ii) (1973), which incorporated the recommendation of a conference called at the request of Chief Judge Stanley H. Fuld. Memorandum of Support, Re: A 4684, in bill jackets, Chapter 1035, Laws of 1973. See note 233 infra for a comparison of this right with the natural parent's limited right to notice.

If the adoptive parents do not oppose the revocation, it will be given full effect, but if the adoptive parents give notice of their intention to oppose the revocation, the court will conduct a hearing to determine whether such notice of revocation by the parents shall be given force and effect. N.Y. Dom. Rel. Law § 115-b(3)(d)(iii). There is thus no automatic right of revocation. "Even if written notice of revocation is received during that 30-day period, it may be given effect only if it is unopposed by the adoptive parents. . . ." In re Adoption by Anonymous of Anonymous, 55 A.D.2d 383, 384-85, 390 N.Y.S.2d 433, 434 (2d Dep't 1977). There is thus a dramatic change from the situation in the *Scarpetta* case, where the adoptive parents were not informed for many months of the natural mother's notice to revoke consent, and were not permitted to intervene to oppose that revocation. See text accompanying note 44 supra.

103. See, e.g., Janet G. v. New York Foundling Hosp., 94 Misc. 2d 133, 403 N.Y.S.2d 646 (Fam. Ct., New York County 1978). In the period before the mother of "Baby Lenore" (Scarpetta) signed the surrender, for example, she had fourteen interviews with agency personnel and had been offered six alternative plans for her expected child. Foster, supra note 40, at 7.

104. See note 82 and text accompanying notes 81-85 supra.

105. In other states such as California, it may be required that the two sets of parents meet. In New York the usual practice is to prevent such a meeting; a party who wishes to remain anonymous may do so. The advantages of the California procedure are discussed in Carsola & Lewis, supra note 72. There seems to be a trend toward such independent adoptions; see, e.g., Hecker, supra note 69.

106. N.Y. Dom. Rel. Law § 115-b(1)(d)(i)-(ii); the provisions are quoted in text accompanying notes 99, 101 supra.

voluntary consent is valid,[107] it is essential that a parent be informed fully before executing a consent to adoption.

Extrajudicial consents are more vulnerable to challenge than are judicial consents.[108] The lack of judicial supervision and official recordation presents great potential for error, misunderstanding, fraud, or duress.[109] Extrajudicial consents have been deemed invalid because they failed to set forth the name and address of the court where the adoption proceeding would commence;[110] because the natural parent did not receive a conformed copy of the consent;[111] or because the parent did not receive the thirty-day warning mandated by the Domestic Relations Law (section 115-b)(1)(d)(i)).[112] The courts give special attention to the possibility of overreaching, involuntary consent, or any other evidence of illegality. In a recent case,[113] the court invalidated a consent on the basis of misrepresentation because the consent was signed before the child's birth, contrary to the statutory requirement that the adoption be of a "child born,"[114] and the relevant birth data (sex, name, date) were filled in later.[115] Moreover, the physician-intermediary had a personal interest in the adoption and exerted pressure that militated against the voluntariness of the mother's action.[116] The natural mother had not received an adequate explanation of the consent and its implications; in fact, she had been led to believe that she must sign the consent form in order to release the child to the pre-adoptive parents.[117]

The New York Court of Appeals has given a concise, simple explanation for the exacting requirement that the consent conform to all the techni-

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107. See Section IV infra.

108. See text accompanying notes 86-92 supra.

109. Consent given under duress is invalid. In re Adoption of Female F.D., 105 Misc. 2d 86, 433 N.Y.S.2d 318 (Sur. Ct., Nassau County 1980).

110. In re James M.G., 86 Misc. 2d 960, 383 N.Y.S.2d 866, (Fam. Ct., Dutchess County 1980).

111. In re Adoption of "Male M.," 76 A.D.2d 839, 428 N.Y.S.2d 489 (2d Dep't) appeal denied, 50 N.Y.2d 1056, 410 N.E.2d 750, 431 N.Y.S.2d 817 (1980).

112. Dennis T. v. Joseph C., 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't), appeal denied, 55 N.Y.2d 792, 431 N.E.2d 976, 447 N.Y.S.2d 250 (1981).

113. Anonymous v. Anonymous, 108 Misc. 2d 1098, 439 N.Y.S.2d 255 (Sup. Ct., Queens County 1981).

114. N.Y. Dom. Rel. Law § 111(1)(b)-(c).

115. 108 Misc. 2d at 1102, 439 N.Y.S.2d at 260.

116. Id. at 1103, 439 N.Y.S.2d at 260-61. In dicta the court argued that a minor who consents to adoption should have counsel. The court assumed that the presence of counsel would assure the parent's consent with "full knowledge of its effect and understanding of its consequences." Id., 439 N.Y.S.2d at 260-61. See also, Janet G. v. New York Foundling Hosp., 94 Misc. 2d at 143, 403 N.Y.S.2d at 654; In re Anonymous (G.), 89 Misc. 2d 514, 393 N.Y.S.2d 900 (Sur. Ct., New York County 1977). The possible conflict of interest discussed in text accompanying note 93 supra indicates that representation by counsel may not always give adequate protection; see, e.g., In re Adoption of Daniel C., 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984) (Gibbons, J., dissenting).

117. 108 Misc. 2d at 1103, 439 N.Y.S.2d at 261.

cal provisions of the statute: "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on the one who would terminate the rights of a natural parent through adoption."[118] If the statute is not strictly applied, therefore, the constitutional rights of the parent may be denied. The courts will make every effort to protect "the delicate and definitive nature of the adoption proceeding, which fundamentally touches and radically alters the lives of all concerned. Precise and exacting compliance . . . is imperative. This is especially true for . . . adoption consent procedures, which permit, and carefully safeguard, the process of informed decision-making."[119] Strict judicial scrutiny of the consent procedure may help a natural parent prevail if she improperly executes an extrajudicial consent and then resolves to revoke that consent. New York's courts are not, however, in accord in their analyses of the validity of consents to adoption.[120]

Litigation regarding revocation of consent places a heavy burden on all parties involved and also on the courts. Judges are confronted with the weighty task of deciding between competing parents, and know that their determination will have emotional repercussions. Such litigation creates anxiety that disrupts the emotional bonding of the prospective adoptive parents and the child.[121] Serious, possibly permanent psychological damage may occur when a child is transferred to the natural parent after an extended period of custody with the prospective adoptive parents.[122] Moreover, the

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118. In re Corey L. v. Martin L., 45 N.Y.2d 383, 386-87, 380 N.E.2d 266, 267, 408 N.Y.S.2d 439 (1978).

119. Dennis T. v. Joseph C., 82 A.D.2d at 129, 441 N.Y.S.2d at 480.

120. See, In re Emmanuel T., 81 Misc. 2d 535, 365 N.Y.S.2d 709 (Fam. Ct., New York County), rev'd sub nom. In re Infant S., 48 A.D.2d 425, 370 N.Y.S.2d 93 (1st Dep't 1975). The trial court invalidated a consent signed by a minor one month before the child's birth, and then after the birth post-dated and notarized by the attorney for the prospective adoptive parents. The adoptive parents were 56 and 63 years old. The family court "for the child's best interests" ordered the child to be placed with an authorized adoption agency, because agencies had "long waiting lists of highly desirable adoptive parents eager to adopt normal newborn infants like this infant." 81 Misc. 2d at 541, 365 N.Y.S.2d at 716. The appellate division reversed on reconsideration of the question of the ages of the adoptive parents and did not reach the issue of the statutory violations of the consent procedure. 48 A.D.2d at 427, 370 N.Y.S.2d at 95-96.

121. The leading work on this subject is J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973) [hereinafter Beyond the Best Interests]. Curtis, The Psychological Parent Doctrine in Custody Disputes between Foster Parents and Biological Parents, 16 Col. J.L. & Soc. Probs. 149 (1980), reviews conflicting theories about the "best interests" doctrine. S. Wohl Kram & N. Frank, supra note 15, at 99-105, discuss New York courts' position on the best interests doctrine.

122. Beyond the Best Interests, supra note 121, at 31-37. The recent expansion of the constitutional rights of children, another issue in these hard cases, is beyond the purview of this Note. The issue is discussed in dicta in In re Christina L. v. James H. [In re Male Infant L.], 115 Misc. 2d 248, 454 N.Y.S.2d 379 (Fam. Ct., New York County 1982). The court there

publicity surrounding such cases creates an atmosphere of uncertainty and fear in adoptive families.[123] The fact that under the 1972 adoption statutes natural parents continue to challenge the validity of their extrajudicial consents indicates that there are serious defects in this mechanism.

D. Procedures for Revocation of Extrajudicial Consent to a Private Placement Adoption

The natural parent who attempts to revoke her extrajudicial consent to adoption will find her revocation rights to be severely circumscribed.[124] According to the statute,[125] the consent becomes irrevocable thirty days after the adoptive parents file a petition for adoption; within that thirty-day period, however, the natural parent may submit a written notice of intent to revoke consent.[126] If the court receives such timely notice, it must notify the pre-adoptive parents and their attorney of the notice of revocation. They have ten days in which to reply.[127] If the revocation is not opposed, it will be given full effect, and the natural parent will regain custody of the child.[128] But if the pre-adoptive parents give notice of their intent to oppose the revocation, the court will so advise the natural parent and then schedule a "revocation hearing."[129] Unless revocation is unopposed by the pre-adoptive parents,[130] there is no automatic or absolute right of revocation even within the thirty-day period.[131]

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declined to permit the adoption. The consent was held invalid and the mother was deemed fit, and therefore the court returned the two-year old child to the natural mother. See Child Returned to Unwed Mother despite Danger to His Welfare, 8 Fam. L. Rep. 2714.

123. Memorandum, supra note 47, at 202; see text accompanying notes 47-48 supra.

124. For a typical situation, see In re Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982) aff'd, 99 A.D.2d 35, ____ N.Y.S.2d ____ (2nd Dep't 1984). In this case an expectant mother arranged for a private placement adoption without informing her family of her pregnancy and her decision. She signed an extrajudicial consent, but within the permitted 30-day period, she reconsidered her decision. By that time her family knew about the child and wanted her to regain custody and raise the child; thus she had a viable alternative to giving up the child. She gave timely notice; the court notified the prospective adoptive parents, who had filed a petition for adoption and who subsequently opposed the revocation of consent. The court then held a revocation-of-consent hearing.

125. N.Y. Dom. Rel. Law § 115-b(1)(d).

126. N.Y. Dom. Rel. Law § 115-b(3).

127. N.Y. Dom. Rel. Law § 115-b(3)(b). See note 102 supra for the legislative history of pre-adoptive parents' right to notice. See note 233 infra for a comparison of this right with the natural parent's right to notice.

128. N.Y. Dom. Rel. Law § 115-b(1)(d)(ii).

129. N.Y. Dom. Rel. Law § 115-b(3)(b).

130. In re Adoption by Anonymous of Anonymous, 55 A.D.2d 383, 390 N.Y.S.2d 433 (2d Dep't 1977).

131. In 1971 Governor Rockefeller vetoed similar legislation that would have given the natural parent an absolute right of revocation within the 30-day period "because it would

The revocation hearing will determine whether the notice of revocation shall be given force and effect.[132] If the court makes the threshold finding that the consent is valid, it proceeds to a "best interests" hearing. In sharp departure from the prior decisional rule of a presumption in favor of the natural parent, the court must decide between two sets of parents according to the best interests of the child.[133] The statute explicitly rejects the former presumption:

> In such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the parent or parents who consented to the adoption are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be *no presumption* that such interests will be promoted by any particular custodial disposition.[134]

The issue of revocation of consent necessarily disposes of the custody question as well. If the court permits the natural parent to revoke consent, the child may be returned to her custody.[135] But if, on the basis of its best interests finding, the court refuses to give "force and effect to the notice of revocation of consent,"[136] the court in effect terminates the parental rights

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have unduly limited the discretion of the courts to consider all aspects of a situation in determining and protecting a child's best interests." New York State Legislative Annual 1971, at 614.

132. N.Y. Dom. Rel. Law § 115-b(3)(d)(iv), quoted in text accompanying note 138 infra.

133. N.Y. Dom. Rel. Law § 115-b(3)(d)(ii) provides:

> The court shall . . . take proof as to whether the best interests of the child will be promoted by the return of the child to the parents, or by the adoption of the child by the adoptive parents, or by placement of the child with an authorized agency . . . or by other disposition of the custody of the child.

Id.

134. N.Y. Dom. Rel. Law § 115-b(3)(d)(v) (emphasis added). This standard is virtually identical to that for children surrendered to adoption agencies, as set out in N.Y. Soc. Serv. Law § 383(5):

> In an action or proceeding to determine the custody of a child surrendered for adoption and placed in an adoptive home or to revoke or annul a surrender instrument in the case of a child placed in an adoptive home, the parent or parents who surrendered such child shall have no right to the custody of such child superior to that of the adoptive parents, notwithstanding that the parent or parents who surrendered the child are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

Id.

135. N.Y. Dom. Rel. Law § 115-b(3)(d)(iii).

136. See note 138 infra.

of the natural parent. The pre-adoptive parents may then proceed with the adoption.[137] The statute provides that the consent will continue to be treated as a voluntary consent, *despite* the notice of revocation: "the court . . . shall dispose of the custody of the child *as if no such notice of revocation* had been given by the parent."[138]

The statute radically changes the position of a natural parent who gives an extrajudicial consent to adoption. The prospective adoptive parents are given the right to intervene in the revocation hearing and to submit proof that the best interests of the child are served by the adoption.[139] Most significant is the abandonment of the parental presumption. The statute seems to place the natural and prospective adoptive parents on equal footing, but the practical consequence is that when a court deems the consent valid and makes its determination according to the best interests standard, many factors will be weighed in favor of the adoptive parents.[140]

When the statute was proposed in 1972, its sponsor predicted that the legislation would "provide a legal framework within which future adoptions can be undertaken . . . with humane regard for the rights of the child, the natural mother and the adoptive parents."[141] But the statute as applied does not fulfill that prediction. When the various stages of the adoption procedure are analyzed together, it becomes evident that the rights of the natural parent have been seriously reduced. A natural parent who executes an extrajudicial consent to adoption wàives the *fundamental* right to the care

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137. Another option is placement with an authorized agency. See note 133 supra. In re Emmanuel T., 81 Misc. 2d 535, 365 N.Y.S.2d 709 (Fam. Ct., New York County), rev'd sub nom. In re Infant S., 48 A.D.2d 435, 370 N.Y.S.2d 93 (1st Dep't 1975) the natural parent withdrew consent because she found the pre-adoptive parents unsuitable, but she did not request custody of the child.

138. N.Y. Dom. Rel. Law § 115-b(3)(d)(iv) (emphasis added). The subsection states:

> If the court shall determine that the best interests of the child will be served by adoption of the child by the adoptive parents, the court shall enter an order denying any force or effect to the notice of revocation of consent and shall dispose of the custody of the child as if no such notice of revocation had been given by the parent.

Id. (emphasis added).

139. N.Y. Dom. Rel. Law § 115-b(3)(b),(d). At the hearings in *Scarpetta* the pre-adoptive parents did not have any right to intervene. See text accompanying note 44 supra.

140. For example, in In re Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd 99 A.D.2d 35, _____ N.Y.S.2d _____ (2nd Dep't 1984), the trial court commented on the loving care the adoptive parents had given the child, their "capacity . . . to make a fine home for the baby boy," and the "loving family bond" that had been established. Id. at 131, 453 N.Y.S.2d at 574. The natural mother, on the other hand, was unmarried, planned to continue her education, and, the court found that she had "not given mature and full consideration to how she will provide for the infant." If returned to her custody, the child would not have "the stable environment provided by the prospective adoptive parents." Id. at 139-40, 453 N.Y.S.2d at 578.

141. See text accompanying note 48 supra.

and custody of her child; she retains only a *residual* right to be on equal footing with strangers—the prospective adoptive parents—at a revocation-of-consent hearing.[142]

In 1972 the New York legislature transformed the rights of natural parents who release children for adoption. Although it has been argued that the legislature merely followed a tendency of the bench,[143] some members of the bench preferred the pre-1972 decisional rule that

> there could be no estoppel or waiver which could make irrevocable the consent of a mother to the adoption of a child who had not been abandoned, if the mother was not unfit. . . .That principle served both the Bar and the public for many years as a humane and flexible method of dealing with the complex human problems which necessarily arise in these cases.[144]

One must question the wisdom of the legislature in altering so profoundly "legal principles" that New York Courts had found to be rooted in "considered social judgments."[145] Such a philosophical inquiry is beyond the purview of this Note, but it is essential to consider whether New York's adoption procedure meets constitutional requirements.

III

The Constitutional Rights of Natural Parents in Private Placement Adoption Proceedings

The fourteenth amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."[146] We have progressed from the nineteenth-century perception of children as "property,"[147] but it is axiomatic that the parent-child relationship involves a liberty interest.[148] Consequently, any state action that affects a parent's fundamental liberty interest in her child must afford due process.

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142. See text accompanying notes 224-30 infra.

143. *In re "Nicky,"* 81 Misc. 2d at 137-40, 364 N.Y.S.2d at 976-78 presents this argument; see note 46 supra for criticism of that court's methodology.

144. In re Adoption by Anonymous of Anonymous, 55 A.D.2d at 386, 390 N.Y.S.2d at 435 (Suozzi, J., dissenting); see also New York's Continuing Search for a Viable Adoption Policy, supra note 40, at 336 & n.27.

145. See quotations in text accompanying notes 29-32 supra.

146. U.S. Const. amend. XIV, § 1.

147. Chemerinsky, Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions, 18 J. Fam. L. 79, 95 & n.15 (1979-1980).

148. See text accompanying notes 166-214 infra.

In the period since New York introduced the adoption statutes of 1972,[149] the United States Supreme Court has clarified and strengthened the constitutional protections for parents. The Court in *Stanley v. Illinois*,[150] found an Illinois statute unconstitutional because it deprived a father of his fundamental right to the care and custody of his children:

> The rights to conceive and to raise one's child have been deemed "essential," . . . "basic civil rights of man," . . . and "[r]ights far more precious . . . than property rights," . . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment.[151]

Since 1972 the Supreme Court has set out precise procedural requirements that protect a parent's "fundamental liberty interest" when that interest is threatened by the state.[152]

Termination of parental rights, the most extreme mode of state intervention into family life, must meet the strictest standards of substantive and procedural due process.[153] Whenever the interests of the state are balanced against a parent's fundamental liberty interest, the parent's substantive rights must be accorded considerable weight. Any procedure that affects those parental rights must guarantee due process.[154]

The rights of a parent who releases a child for adoption must be considered within this framework of constitutional protections. The parent who executes a consent to adoption has a basic right to exercise freedom of

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149. See statutes cited in note 1 supra.

150. 405 U.S. 645 (1972).

151. Id. at 651 (citations omitted). See also, Developments—The Family, 93 Harv. L. Rev. 1156 (1980).

152. The Court's protections of these substantive rights predates Stanley v. Illinois, 405 U.S. 645 (1972), as the quotation indicates. Of particular interest is Armstrong v. Manzo, 380 U.S. 545 (1965), which held that failure to give notice of adoption proceedings to a natural father deprived him of his rights without due process of law. His opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Id. at 552. The development of procedural protection is set out in Santosky v. Kramer, 455 U.S. 745 (1982). There the Court commented that in Lassiter v. Dept. of Social Serv., 452 U.S. 18 (1981)

> it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." . . . The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.

455 U.S. at 753 (citations omitted).

153. See text accompanying notes 166-201 infra.

154. See text accompanying notes 179-201 infra.

choice in this, as in other personal family matters.[155] The parent is also entitled to access to adoption procedures that protect the "fundamental liberty interest" that a parent has in the care and custody of a child. The state has vital obligations to the parent, arising from the state's essential role in the adoption process.

Adoptions must conform strictly to statutory requirements. The reason for this rigid rule is that "adoption was 'unknown to the common law of England and exists in the States solely by the force of statutes.' "[156] When a parent initiates the adoption process by executing a consent to adoption, the state becomes immediately and integrally involved in that process.[157] The consent alters the rights and privileges of the natural parent in her child, creates expectancies on the part of the prospective adoptive parents, and alters the child's legal status. The state as *parens patriae* has an interest in the child;[158] it also has an obligation to afford regularity and fairness to the prospective adoptive parents. First and foremost the state must protect the constitutional rights of the natural parent throughout every stage of the official adoption process. The natural parent has priority at the moment of entry into the adoption process—that is, at the time of executing the consent—because at that moment the natural parent possesses a fundamental liberty interest in her child. If she gives up that liberty interest by utilizing statutory procedures, those procedures must provide adequate constitutional protections.

A. Due Process Standards for Procedures Affecting the Parent-Child Relationship

In New York, the due process guarantees of the fourteenth amendment are not satisfied by the statutory scheme governing the extrajudicial consent to private placement adoption.

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155. See Bellotti v. Baird, 443 U.S. 622 (1979); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973).

156. Dennis T. v. Joseph C., 82 A.D.2d at 479, 441 N.Y.S.2d at 482 (citing United States Trust Co. of N.Y. v. Hoyt, 150 A.D. 621, 624, 135 N.Y.S. 849 (1st Dep't 1912)).

157. See note 95 supra for the events that routinely follow an execution of consent in an unchallenged adoption.

158. Santosky v. Kramer, 455 U.S. at 766, comments on the state's *parens patriae* interest in a termination of parental rights proceeding:

> "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the *factfinding* proceeding. . . . As *parens patriae,* the State's goal is to provide the child with a permanent home. . . . Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance of natural familial bonds. . . . "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents."

Id. (citations omitted).

In *Matthews v. Eldridge,*[159] the United States Supreme Court promulgated a three-prong test to determine the exact parameters of procedural safeguards required by the Due Process Clause.[160] The Court in *Matthews v. Eldridge* announced "something akin to a general formula"[161] for the determination of what process is due:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; finally, the government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[162]

As originally applied, the *Eldridge* test balanced the right of an individual against the interests of the state to evaluate the constitutionality of a procedure for the termination of social security benefits. The *Eldridge* test has subsequently been applied to test procedures affecting the parent-child relationship,[163] although it has been argued that the test may be inadequate or even highly inappropriate when the "stakes" are not monetary but rather the precious rights to the care and custody of one's child.[164] Nevertheless, the *Eldridge* test provides a relatively useful means to evaluate procedural safeguards for parental rights when those rights may be terminated by the adoption process.[165] The following cases demonstrate how this test has been applied to the parent-child relationship.

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159. 424 U.S. 310, 335 (1976).

160. Id. at 335. The test is set out in the text accompanying note 162 infra.

161. L. Tribe, American Constitutional Law 540 (1978).

162. 424 U.S. at 335.

163. The *Eldridge* test was applied in Smith v. Organization of Foster Families for Equality and Reform [OFFER], 431 U.S. 816, 849 (1977) (state procedures for removing children from foster families held adequate, especially in light of conflicting interests of biological parents); Lassiter v. Dept. of Social Serv., 452 U.S. 18 (1981) (right of indigent parents to counsel in termination-of-parental-rights proceedings to be decided case-by-case); Santosky v. Kramer, 455 U.S. 745 (1982); In re Sylvia M., 82 A.D.2d 217, 235-36, 443 N.Y.S.2d 214, 224-25 (1st Dep't 1981), aff'd, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982).

164. For cogent criticism of the test see Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in *Matthews v. Eldridge:* Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1976); see L. Tribe, supra note 161. Justice Stevens, dissenting in *Lassiter*, 452 U.S. at 60, similarly comments on the inappropriateness of using the *Eldridge* factors to determine due process in the termination of parental rights: "The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. . . . For the value of protecting our liberty from deprivation by the State without due process of law is priceless." Id.

165. Termination of parental rights in an adoption setting is effectuated by a consent to private placement, N.Y. Dom. Rel. Law § 115-b(1)-(2); or by a "surrender" to an authorized

Smith v. Organization of Foster Families for Equality and Reform (OFFER)[166] used the *Eldridge* test to evaluate New York's procedures for removing children from foster families. There, the first *Eldridge* factor, the affected private interest, was that of foster families who claimed a protected liberty interest.[167] The Court did not reach the issue of what particular liberty interest foster parents can claim, but assumed *arguendo* that this private interest should receive great weight.[168] Nevertheless, the government's interest—the third *Eldridge* factor—provided a strong counterweight to the foster families' private interest. The lower court had required that the state provide for pre-removal hearings when a transfer of a foster child was contemplated; but the Supreme Court reversed because such additional hearings would "impose a substantial additional administrative burden on the state."[169] Thus the substantial governmental interest in avoiding excessive administrative burdens outweighed the foster families' liberty interest.

In reaching this result, the Supreme Court reviewed the procedures at issue and found that there was slight "likelihood of erroneous deprivation," that the value of the additional safeguards was "not at all clear,"[170] and that the pre-removal methods employed by the state were not constitutionally defective.[171]

The Court in *OFFER* applied the *Eldridge* test by balancing the competing interests of foster parents and the state. The private interest did not outweigh the governmental interest, and thus the Court found the existing procedural protections acceptable. When, however, the governmental interest is not great enough to outweigh a parent's fundamental liberty interest in her child, a higher standard of due process must be met.[172] This is in accord with the principle that "due process is flexible and calls for such procedural protections as the particular situtation demands."[173]

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adoption agency, N.Y. Dom. Rel. Law § 112(3); or by adjudication finding that consent is not legally required for an adoption, N.Y. Dom. Rel. Law § 111(2). See, e.g., In re Patricia Ann W., 89 Misc. 2d 368, 392 N.Y.S.2d 180 (Fam. Ct., Kings County 1977).

166. 431 U.S. 816 (1977).

167. Id. at 838-41. To determine whether a protective liberty interest exists, the Court will look "to the *nature* of the right at stake . . . to see if the interest is within the Fourteenth Amendment's protection of liberty and property." Id. at 841 (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)).

168. 431 U.S. at 842-47.

169. Id. at 851.

170. Id. at 850, 851; the language tracks that of the *Eldridge* test, quoted in text accompanying note 162 supra.

171. Id. at 851-56.

172. See also In re Roxann Joyce M, 99 Misc. 2d 390, 417 N.Y.S.2d 396 (Fam. Ct., Kings County 1979); Santosky v. Kramer, 455 U.S. 745 (1982).

173. *OFFER*, 431 U.S. at 848 (citing Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

When the New York Appellate Division (Second Department) used the *Eldridge* test to assess the constitutionality of the New York procedures for termination of parental rights on the ground of mental illness,[174] it found that the parent's interest in the care and custody of her child did not outweigh the state's "substantial, if not compelling interest" in the child's welfare. The challenged procedures entailed a "high standard of proof and an exacting test" to determine if the parent's "mental illness now or in the foreseeable future renders the parent unable to care or plan for the child . . . and if termination is in the child's best interest." The statute therefore afforded "mentally ill parents procedural due process."[175]

In *In re Roxann Joyce M.*,[176] the court balanced the *Eldridge* factors to assess procedures for the voluntary placement of children in foster care. The form that parents signed provided inadequate information regarding the parents' obligations and did not advise that their failure to meet those obligations could result in the termination of their parental rights. The court declared the private right at stake a "commanding" right: "The right to the integrity of the *family* is among the most fundamental rights under the Fourteenth Amendment. . . .Termination proceedings strike at the very core of this right. They may result in the severance of the most basic human relationship—the parent-child relationship."[177] This factor far outweighed the governmental interest in avoiding fiscal and administrative burdens that would be entailed in an improvement of the procedures. The state had provided inadequate safeguards for a parental consent to a voluntary foster placement.[178]

In *Santosky v. Kramer*,[179] the Supreme Court made a definitive statement on the procedural due process rights of parents and enunciated specific criteria for procedural protections of the parent-child relationship. The Court applied the *Eldridge* balancing test to determine what process is due parents who participate in a "permanent neglect" hearing, a state-initiated hearing that can result in the termination of parental rights.[180] The *Santosky* decision provides a precise formula: when a parent's fundamental liberty

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174. In re Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214 (1st Dep't 1981), aff'd, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982) (at issue were N.Y. Soc. Serv. Law §§ 383-b(6)(c), 384-b(4)(c)).

175. 82 A.D.2d at 235-36, 443 N.Y.S.2d at 224-25.

176. 99 Misc. 2d 390, 417 N.Y.S.2d 396 (Fam. Ct., Kings County 1979).

177. Id. at 397, 417 N.Y.S.2d at 401.

178. Id. at 398-99, 417 N.Y.S.2d at 401-02; the court strongly recommended "an oral recitation and explanation," which this court designated 'Roxann rights.' " Id.

179. 455 U.S. 745, 758-70 (1982).

180. Id. at 750-51: "The question here is whether [in a permanent neglect hearing] New York's 'fair preponderance of the evidence' standard is constitutionally sufficient." Id.

interest is threatened by permanent extinguishment, that interest is "commanding" and exerts a very heavy weight on the due process scale.[181]

The procedural issue in *Santosky* was the standard of proof in a permanent neglect hearing. The challenged New York statute provided that a preponderance of evidence was sufficient;[182] the Court held that the standard must be raised to "clear and convincing evidence."[183] The Court balanced the private and governmental interests by determining first that the private interest was a fundamental liberty interest protected under due process, and second that "what process was due" must be decided according to the "nature of the private interest threatened and the permanency of the threatened loss."[184]

The *Santosky* Court held that the first *Eldridge* factor, the private (parental) interest, was "commanding." The language provides an obvious parallel to the adoption procedures to be discussed below:

> When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest [of parents], but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . .A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."[185]

Balanced against the "commanding" parental interest, the state's interest in maintaining the low standard of proof was deemed only slight.[186] Actually, the state has two interests. The state's *parens patriae* interest coincides with the parental interest in an "accurate and just decision," and thus the state shares the parents' goal of appropriate procedural protections.[187] The state's second asserted interest was the fiscal and administrative benefit of avoiding "substantial fiscal burdens" imposed by changing the challenged procedure.[188] A majority of the states had assumed such burdens, and therefore

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181. Id. at 758-59.

182. New York Fam. Ct. Act § 622, § 614(1)(a)(d), set the standard for the hearings provided by N.Y. Soc. Serv. Law §§ 384-b(4)(d), 384-b(6),(7)(a). The statutes are discussed in *Santosky,* 455 U.S. at 747-51, 762, 766-67.

183. 455 U.S. at 769-70.

184. Id. at 758.

185. Id. at 759 (citing *Lassiter,* 452 U.S. at 27).

186. 455 U.S. at 758.

187. 455 U.S. at 766-67 (citing *Lassiter,* 452 U.S. at 27). These two goals are not contradictory until "*after* the parents have been found unfit." 455 U.S. at 767 n.17. N.Y. Soc. Sec. Law §§ 384-b(1)(a)(i)-(ii) sets out the legislative intent "to provide the child with a permanent home" and also to preserve "natural familial bonds." Id.

188. 455 U.S. at 766-67. The Court assessed the "risk" and "value" elements, the second *Eldridge* factor, to find that "factual error" could be reduced "without imposing substantial fiscal burdens upon the State." Id.

the state's fiscal-administrative interest received little weight and could not be accommodated.[189]

The balance thus tipped heavily toward the private interest. The Court evaluated the "disparity of consequences,"[190] and found that the parents faced a potentially irrevocable "grievous loss"[191] of profound proportions, an injury "significantly greater than any possible harm to the state."[192] In such circumstances, the Court had "no difficulty finding that the balance of private interests strongly favors heightened procedural protections."[193]

The Court considered the second *Eldridge* factor—the risk of erroneous deprivation and the value of additional procedural safeguards[194]—in light of the predominant private interest. It focused on two related aspects of the permanent neglect hearing: the unequal resources of the parties and the potential for factual errror.[195] Parents at permanent neglect hearings rarely have the legal or administrative resources that are available to the state and therefore are at a considerable disadvantage.[196] They are unable to compete with the state's battery of experts and records; in addition, it is possible that the judge or magistrate may be swayed by social prejudices to accord greater weight to representatives of the state.[197] Such disparity of resources and the possibility of judicial subjectivity would prevent the accurate findings that such a hearing must provide. The state is obligated to assure a "level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty."[198] A higher standard of proof, the Court reasoned, would overcome the potential for error and increase the opportunity for an objective and accurate decision.[199]

Santosky stressed the "correctness of factual conclusions for a particular type of adjudication,"[200] and the requirement that the state may not "tolerate undue uncertainty in the determination of the dispositive facts"[201] when a natural parent's fundamental liberty interest is at stake.

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189. Id. at 767, 749 & n.3.
190. Id. at 761.
191. Id. at 758 (citing Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)).
192. 455 U.S. at 768 (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).
193. 455 U.S. at 761.
194. See quotation in text accompanying note 2 supra.
195. 455 U.S. at 762-64.
196. Id.
197. Id. at 762 & n.12.
198. Id. at 756 (citing *Addington*, 441 U.S. at 425).
199. 455 U.S. at 756.
200. Id. at 755 (citing *Addington,* 441 U.S. at 423 and In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) for the framework for the Court's assessment of the appropriate standard of proof that will "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." 455 U.S. at 755).
201. In *Santosky,* 455 U.S. at 757 n.9, the Court states that the rights to counsel and multiple hearings do not "suffice to protect a natural parent's fundamental liberty interest if

B. *Due Process Test Applied to Procedures for Private Placement Adoptions by Extrajudicial Consent*

The permanent neglect procedures at issue in *Santosky* are similar to the procedures for private placement adoption based on an extrajudicial consent. Both may have the same legal consequence: the permanent, irrevocable termination of parental rights. Although the parent initiates the adoption process, in contrast to a state-initiated permanent neglect hearing, both procedures involve state action. The state provides the statutory bases for both processes. In the adoption process, the state mandates the procedures for the consent, for judicial action in the event of a timely notice of revocation of consent, for investigation of the prospective adoptive family, and for issuance of the final adoption decree.[202] It is therefore appropriate to test the constitutionality of New York's statutory scheme for private placement adoptions according to the test set out in *Matthews v. Eldridge* [203] and refined by *Santosky v. Kramer*.[204]

When the state moves to destroy "weakened familial bonds, it must provide the parent with fundamentally fair procedures."[205] Although the parent initiates the adoption process by choosing to release her child for adoption, the state through its legislative power has complete control of the procedures to be used. From the moment the natural parent signs the consent to adoption, the state participates in the process. The ultimate consequence, the adoption decree, terminates forever her parental rights.[206] The natural parent is entitled to notice of and participation in the final adoption hearing,[207] but under the current consent mechanism her parental rights are irrevocably extinguished long before that hearing.[208] The "fundamentally fair procedures" required when the state "destroy[s] . . . familial bonds"[209] by issuing the adoption decree must be available at each step of the adoption process, beginning with the consent procedure.

Testing the procedures for private placement adoption by the standards of *Matthews v. Eldridge,*[210] the interest of the natural parent must be

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the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." Id.

202. N.Y. Dom. Rel. Law § 109; see N.Y. Dom. Rel. Law § 115-b; N.Y. Soc. Serv. Law §§ 383, 384, 384-a, 384-b.

203. See text accompanying notes 161-65 supra.

204. See text accompanying notes 179-201 supra.

205. *Santosky,* 455 U.S. at 754.

206. N.Y. Dom. Rel. Law §§ 114, 117.

207. N.Y. Dom. Rel. Law § 115(3). According to N.Y. Dom. Rel. Law § 115(8), an order of adoption may be granted without the appearance of a natural parent whose consent to adoption is "duly acknowledged or proved and certified."

208. See text accompanying notes 224-30 infra.

209. *Santosky,* 455 U.S. at 754.

210. See text accompanying note 162 supra.

assessed according to the "nature" and "permanency of the threatened loss."[211] The interest is fundamental and the potential loss permanent. The adoption process will terminate parental rights forever.[212] The effect, according to one judge, is that the child must thereafter regard the parent as legally dead.[213] As in *Santosky*[214] and *In re Roxann Joyce M.*,[215] the private interest is "commanding."

The state has several interests in adoption proceedings. First, as *parens patriae* it must protect the interests of the child and seek a decision that is accurate and just.[216] Second, the state's interest coincides with that of the natural parent's interest in a "level of certainty" to preserve the fundamental fairness of a state-sponsored proceeding that has such profound consequences.[217] Thus the state shares with the natural parents and the child the goal of having a process that does not entail a "risk of erroneous deprivation."[218] Third, the state has an interest in the integrity of its adoption process; having created a system for adoption, it is obligated to provide fair, constitutional procedures to implement that system.[219] Encompassed in this interest is the state's obligation to prospective adoptive parents, who gain a provisional and limited interest when the private placement adoption process is set in motion.[220] But not until the final adoption decree is issued can adoptive parents claim to have a fundamental liberty interest in the child that equals the liberty interest of natural parents.[221] Until that time, although the state's interests may coincide with those of the prospective adoptive parents, as well as with those of the child and the natural parents, the state is obligated to afford greater procedural protections to natural parents, whose fundamental interests give them a right to greater constitutional protection.[222]

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211. *Santosky*, 455 U.S. at 754.

212. N.Y. Dom. Rel. Law § 114. The change in registration privileges, adopted by The New York Legislature August 6, 1983, may create some changes in the permanency of the severance of parental rights; this subject is beyond the purview of this Note.

213. Lehman v. Lycoming County Children's Serv. Agency, 648 F.2d 135, 163 (3d Cir. 1981) (en banc) (Rosenn., J., dissenting), aff'd, 102 S. Ct. 3231 (1982).

214. 455 U.S. at 753.

215. 99 Misc. 2d 390, 417 N.Y.S.2d 396 (Fam. Ct., Kings County 1979).

216. *Santosky* asserts these state interests in the context of permanent neglect hearings. 455 U.S. at 766-67.

217. Id.

218. See text accompanying note 162 supra.

219. N.Y. Dom. Rel. Law § 109-118-a. See text accompanying note 156 supra for the firm principle that adoption exists only by statute.

220. N.Y. Dom. Rel. Law § 115-b(3)(b),(d); see text accompanying notes 123-35 supra.

221. N.Y. Dom. Rel. Law § 114.

222. In passing the 1972 statute, the legislature sought to equalize the rights of the natural parents and prospective adoptive parents by removing the parental presumption; see text accompanying notes 48-54 supra. As will be argued here, such equality of status infringes upon the natural parents' fundamental right.

Tested according to the *Eldridge* factors, as refined by *Santosky,* private placement adoptions must meet strict standards of due process to protect the private interests of the natural parents. At issue here is the second *Eldridge* factor, a determination of whether there is a risk of erroneous deprivation.[223] Such determination must be made by finding at what precise point the deprivation occurs—when, in fact, the natural parent's rights are terminated. Officially, termination of parental rights occurs when the final adoption decree is issued,[224] but in practice termination occurs when the consent to adoption becomes irrevocable. Thus parental rights are terminated immediately when there is a judicial consent. In the instance of an extrajudicial consent, termination occurs after the specified thirty-day period has elapsed, provided there has been no notice of intent to revoke.[225] When a natural parent attempts to revoke the consent, however, it is far more difficult to determine the precise time of termination. It is essential that this determination be made, however, for at that time of termination of parental rights the natural parent must be safeguarded against the risk of erroneous deprivation.

When the natural parent gives notice of intent to revoke an extrajudicial consent and a revocation-of-consent hearing occurs, the court makes a critical determination. If the court denies "any force or effect" to the natural parent's notice of intent to revoke consent,[226] the parental rights are thereby terminated. On close scrutiny, it is evident that the court's authority to terminate parental rights in this manner is established at an earlier time: at the moment when the consent to adoption is executed. The consent operates as a waiver of the parent's fundamental liberty interest in the child. According to the New York statute, after signing the extrajudicial consent the natural parent has only a *residual* right to a best interests hearing if the pre-adoptive parents have filed a petition for adoption and contest the revocation of consent.[227] At that hearing the prospective adoptive parents are granted privileges equal to those of the natural parent.[228]

The adoption statute attempts to create the fiction that a natural parent's consent continues to be valid despite the fact that the natural parent has notified the court that she has changed her mind and then appears in

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223. The *Eldridge* test is set out in text accompanying note 162 supra. The *Eldridge* test also evaluates the cost of providing an alternative to the challenged procedures; this can be of no concern here, for the alternative procedure of a judicial consent is now provided by N.Y. Dom. Rel. Law § 115-b.

224. N.Y. Dom. Rel. Law § 114.

225. N.Y. Dom. Rel. Law § 115-b(1)(d)(i).

226. N.Y. Dom. Rel. Law § 115-b(3)(d)(iv).

227. If such a petition has not been filed, the notice of revocation may be given force and effect. N.Y. Dom. Rel. Law § 115-b(3)(d)(ii)-(iii).

228. N.Y. Dom. Rel. Law § 115-b(3)(d)(i)-(v). See especially subsection (v), which provides:

court to contest the termination of her parental rights. In fact, if her revocation is denied, the revocation hearing is a hearing for the *involuntary* termination of parental rights.[229] No construction of this legislation can mask the fact that the parent's fundamental liberty interest in the care and custody of her child is thus terminated *without* her *voluntary* consent.

The provisions for the revocation-of-consent hearing have defects of constitutional dimensions. According to *Fuentes v. Shevin,*[230] "[i]f the right

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In such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the parent or parents who consented to the adoption are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

229. See note 55 supra for the procedure of a state-initiated involuntary termination of parental rights; the first step is a fitness hearing. Standards supra note 6, at 156-57, recommends the following procedures for voluntary termination:

8.2. Voluntary termination (relinquishment).

A. The court may terminate parental rights based on the consent of the parents upon a petition duly presented. The petitioner may be either the parents or an agency that has custody of the child. Such a petition may not be filed until at least seventy-two hours after the child's birth.

B. The court should accept a relinquishment or voluntary consent to termination of parental rights only if:

1. The parents appear personally before the court in a hearing that should be recorded. . . . The court should address the parents and determine that the parents' consent to the termination of parental rights is the product of a voluntary decision. The court should address the parents in language calculated to communicate effectively with the parents and determine:

a. that the parents understand that they have the right to the custody of the child;

b. that the parents may lose the right to the custody of the child only in accordance with procedures set forth in Standard 8.3;

c. that relinquishment will result in the permanent termination of all legal relationship and control over the child; or

2. If the court finds that the parents are unable to appear in person at the hearing, the court may accept the written consent or relinquishment given before a judge of any court of record, accompanied by the judge's signed findings. These findings should recite that the judge questioned the parents and found that the consent was informed and voluntary.

C. If the court is satisfied that the parents voluntarily wish to terminate parental rights, the court should enter an interlocutory order of termination. Such order should not become final for at least thirty days, during which time the parents may, for any reason, revoke the consent. After thirty days, the provisions for an interlocutory order for termination of parental rights set forth in Standard 8.5 should apply.

D. Once an order has been made final, it should be reconsidered only upon a motion by or on behalf of the parents alleging that the parents' consent was obtained through fraud or duress. Such a motion should be filed no later than two years after a final order terminating parental rights has been issued by the court.

Id.

230. 407 U.S. 67 (1972).

to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."[231] The notice and hearing requirements mandated by *Fuentes* are not met by the provisions for the revocation of an extrajudicial consent for adoption.

The statute ignores the natural parent's right to adequate notice. In signing the extrajudicial consent, the natural parent retains the residual right to file notice of intent to revoke consent and then to be on equal footing with the pre-adoptive parents at a revocation-of-consent hearing. The thirty-day period within which the natural parent may notify the court of intent to revoke consent begins when the pre-adoptive parents file their petition for adoption.[232] Although logic, fairness, and the rights to equal protection and to due process dictate that the natural parent receive notice when the thirty-day period begins to toll, the statute does not so provide. Instead, the court has complete discretion to decide whether or not notice will be given to the natural parent.[233] In *In re Adoption by Anonymous of Anonymous*,[234] the majority commented on the notice defect but did not reach the question of the statute's constitutionality.[235] Justice Suozzi, in a strong dissent, analyzed the issue and argued that the statute is constitutionally defective:

> It is my view that section 115-b[(1)(d)(i)] of the Domestic Relations Law . . . constitutes a deprivation of the natural parents' right to due process of law by failing to provide them with adequate notice as to when the adoption proceeding is commenced.
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> There is absolutely no provision in the statute affording the natural parents notice as to when the adoption proceeding has been

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231. Id. at 81-82 (quoting Stanley v. Illinois, 405 U.S. at 647: "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." Id.) See also Armstrong v. Manzo, 380 U.S. 545 (1965).

232. N.Y. Dom. Rel. Law § 115-b(3)(b).

233. See N.Y. Dom. Rel. Law § 111, which is entitled "Whose consent is required." Subdivision (1) sets forth the categories of those from whom consent shall be required, which include the natural parents of children born in or out of wedlock. Subdivision (2) lists those from whom consent shall not be required; see note 287 infra. Subdivision (3) is the notice provision:

> Notice of the proposed adoption shall be given in such manner as the judge or surrogate *may* direct and an opportunity to be heard thereon *may* be afforded to a parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders.

Id. (emphasis added).

234. 55 A.D.2d 383, 390 N.Y.S.2d 433 (2d Dep't 1977).

235. Id. at 385, 390 N.Y.S.2d at 435. Specifically, the court stated that "under the facts of this case we need not reach the question of the constitutionality of the statute," id., 390 N.Y.S.2d at 435, but also commented that the "appellants knew that they had at least that *initial 30-day period* within which to revoke their consent." Id., 390 N.Y.S.2d at 435 (emphasis supplied). No construction of the statute or its legislative history warrants the conclusion that by beginning to toll the 30-day period when the natural parent executes an extrajudicial consent, the requirements for the 30-day period can be met.

> commenced by the adoptive parents so as to commence the running of the 30-day period within which they may revoke their consent. The respondents herein, who are the prospective adoptive parents, argue that the consent form, pursuant to statute, sets forth the name and address of the court in which the adoption proceeding is to be commenced (Domestic Relations Law, § 115-b, subd 1, par [a]) and that "[o]rdinary inquiry and diligence would have provided them [the parents] with the date the proceeding commenced." I disagree.
>
> The burden of ascertaining the date on which the adoption proceeding was commenced should not be thrust upon the natural parents. Insofar as the statute herein clearly affects the right of the natural parents to the care and custody of their child, a right deemed "essential," "basic" and "precious," it is incumbent upon the State to provide adequate notice to the natural parents before a child is irrevocably taken away from them. Interestingly enough, it must be noted that the statute herein gives the prospective adoptive parents greater rights in this regard than those afforded to the natural parents. In particular, section 115-b (subd 3, par [b]) provides that when the "court has received or shall receive such notice of revocation, the court shall promptly notify the adoptive parents, by notice in writing to them and to their attorney, of the receipt by the court of such notice of revocation." The adoptive parents can then challenge the proposed revocation. Such a disparity in treatment between the natural parents on the one hand, and the adoptive parents on the other, cannot be condoned.[236]

Similarly, the procedures for the revocation-of-consent hearing do not afford the natural parent adequate protections. By the time the natural parent appears at the revocation hearing, her status has been so diminished by the consent that the hearing cannot be deemed to serve its "full purpose" of protecting her against the deprivation of her rights to her child. The time to prevent that deprivation is at the time of signing the consent, when she still retains her fundamental rights. The United States Supreme Court, in *Fuentes v. Shevin,* demanded adequate procedures for the repossession of a stove and stereo, including the right to a hearing when the "deprivation can still be prevented"; the Court asserted that it "has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."[237] It is not acceptable that rights to household possessions be given greater protection than a parent's right to the care and custody of a child.

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236. Id. at 387-88, 390 N.Y.S.2d at 436 (citations omitted).

237. 407 U.S. at 82 (quoting Bell v. Burson, 402 U.S. 535, 542 (1971)); see also Armstrong v. Manzo, 380 U.S. at 551.

This analysis of the revocation-of-consent hearing demonstrates that, for a parent who decides to revoke consent, there is one critical point in the adoption process: the time of the execution of the consent.[238] In order to evaluate the procedural protections accorded a natural parent who releases a child for adoption, the constitutionality of the consent mechanism must be determined.

IV

An Extrajudicial Consent to Private Placement Adoption Is Not a Valid Waiver

The extrajudicial consent for private placement adoption, as provided by Domestic Relations Law section 115-b,[239] operates as a waiver of a fundamental right: the parent's fundamental liberty interest in the care and custody of a child.[240] The parent's residual right to participate in a revocation hearing, under the conditions specified,[241] does not protect this right. The parental right, because it is a fundamental right, cannot be waived unless specific prerequisites are met.[242] The standards for a waiver of constitutional rights in either a criminal[243] or civil[244] proceeding are clear, and it is equally clear that the extrajudicial consent does not meet those standards.

The three basic prerequisites for a valid waiver are that the waiver be informed, knowing, and voluntary. Two additional procedural requirements, that the waiver be executed in court and be "visible in the record,"[245] are in some instances essential to insure the basic requirements. A waiver of the right to counsel, for example, is valid only if the person who waives the right is fully informed that she is entitled to counsel, knows what the consequences may be if she proceeds without counsel, and makes the waiver voluntarily, that is, without duress, fraud, or coercion.[246] The United States Supreme Court in *Johnson v. Zerbst* held that an accused who is "ignorant of his right"[247] cannot execute a waiver. "The constitutional right of an

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238. For the different mechanisms for judicial and extrajudicial consents, see text accompanying notes 75-107 supra. The consequences of their distinguishing features are discussed in the text accompanying notes 108-23 supra.

239. See text accompanying notes 96-102 supra.

240. The parent's liberty interest is discussed in text accompanying notes 149-158 supra.

241. N.Y. Dom. Rel. Law § 115-b(3)(d).

242. See text accompanying notes 245-52 infra.

243. Brookhart v. Janis, 384 U.S. 1 (1966); Carnley v. Cochran, 369 U.S. 506 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).

244. See text accompanying notes 249-50 infra.

245. United States v. Bailey, 675 F.2d 1292, 1299 (1982); see Carnley v. Cochran, 369 U.S. at 516.

246. See Johnson v. Zerbst, 304 U.S. at 467.

247. Id.

accused to be represented by counsel invokes, *of itself,* the protection of a trial court."[248] This fundamental right to counsel, in other words, may not be waived without the supervision of the court.

The cases that established standards for a valid waiver involved the rights of criminal defendants, but these constitutional protections apply as well to civil proceedings. "[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver'."[249] The United States Supreme Court maintains that in the civil area it does "not presume acquiescence in the loss of fundamental rights."[250] The waiver "not only must be voluntary, but must be [a] knowing, intelligent [act] done with sufficient awareness of the relevant circumstances and likely consequences."[251] Moreover, a waiver of a right may not be presumed from a silent record and therefore should be "visible in the record."[252]

The following analysis demonstrates that an extrajudicial consent to a private placement adoption operates as a waiver but does not meet the standards for a constitutionally valid waiver.

A. A Waiver Must Be Informed and Knowing

The United States Supreme Court, in holding that the right to counsel cannot be waived by a defendant "ignorant of his right,"[253] explained that the trial court has the "protecting duty . . . of determining whether there is an intelligent and competent waiver by the accused."[254] The court thus has the duty to ascertain that the defendant had sufficient information and understood such information, so that the waiver was "informed and knowing."

The Court in *Von Moltke v. Gillies*[255] reiterated "the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to counsel] at every stage of the proceedings."[256] Justice Black, writing for the majority, listed the items the defendant must understand and concluded with the sweeping category of "all other facts essential to a broad understanding of the whole matter."[257] Thus

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248. Id. at 465 (emphasis added).
249. Fuentes v. Shevin, 407 U.S. 67, 95 & n.31 (1972) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).
250. Fuentes v. Shevin, 407 U.S. at 95 & n. 31 (quoting Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937)).
251. Brady v. United States, 397 U.S. 742, 748 (1970).
252. United States v. Bailey, 675 F.2d at 1299; see Carnley v. Cochran, 369 U.S. at 516.
253. Johnson v. Zerbst, 304 U.S. at 467.
254. Id. at 465.
255. 332 U.S. 708 (1948).
256. Id. at 722 (citing Johnson v. Zerbst, 304 U.S. at 463).
257. 332 U.S. at 724.

informed, the accused can waive a right "competently, intelligently, and with full understanding of the implications."[258]

The extrajudicial consent to adoption does not meet the requirement that a waiver be informed. Under the standard for waiver, the natural parents must be told "all other facts essential to a broad understanding of the whole matter."[259] These facts would include a detailed explanation of Domestic Relations Law section 115-b(1), particularly subsections (d)(i) and (ii),[260] which provide that the parent signs an irrevocable consent giving up any and all *parental* rights to the child. The *residual* right to a revocation hearing is a very limited parental right, for it is merely the privilege of being heard on equal footing with strangers, the prospective adoptive parents.[261] The natural parent must therefore be informed that the consent operates as a waiver, and that in executing it the parent irrevocably waives a fundamental liberty interest in the child.

Even if the consent form included all of the above information, or if the natural parent's attorney profferred such explanations, the parent would not be fully informed. In Justice Black's framework, a waiver of a constitutional right can be given intelligently only if all relevant facts are presented and explained.[262] Facts relevant to the extrajudicial consent include: (1) the rights given up; (2) the legal significance of the phrase "irrevocable after thirty days," that is, that it does not give an absolute right to revoke *within* thirty days;[263] (3) that the natural parent has no absolute right to receive notice when the adoptive parents file a petition for adoption and therefore may not be informed when the thirty days begin to toll;[264] (4) the limited nature of the residual right to a revocation hearing;[265] and (5) the probable outcome of a revocation hearing in the event the parent changes her intent and files timely notice of revocation of consent.

In the decade since New York's adoption law eliminated the parental presumption, revocation hearings have followed a pattern that is now predictable. If the natural parent proves that the extrajudicial consent is invalid, the revocation will be given effect and the parent may regain custody.[266] But if the consent is valid, most courts will find that it is not in the

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258. Id. at 727.
259. Id. at 724.
260. See text accompanying notes 99-102 supra.
261. N.Y. Dom. Rel. Law § 115-b(3)(d).
262. See text accompanying notes 255-58 supra.
263. See text accompanying notes 99-102 supra.
264. The natural parent does *not* have a right to notice when the 30-day period begins. See text accompanying notes 233-36 supra.
265. See text accompanying notes 230-37 supra.
266. See, e.g., Dennis T. v. Joseph C., 82 A.D.2d 125, 441 N.Y.S.2d 476 (2d Dep't), appeal denied, 55 N.Y.2d 792, 431 N.E.2d 976, 447 N.Y.S.2d 250 (1981); In re Adoption of E.W.C., 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct., Nassau County 1976).

child's best interest to give effect to the parent's notice of intent to revoke consent.[267] Thus, it would be profoundly misleading to inform a parent of the rights and privileges as set out in Domestic Relations Law section 115-b, without adding the information that, under the statute, as applied by the courts, the residual privilege to participate in a revocation-of-consent hearing is *de minimus*.[268]

The failure of the extrajudicial consent to inform a natural parent adequately is a defect of constitutional dimensions. This type of consent does not satisfy the most elemental requirement for a waiver, "[f]or a waiver of constitutional rights in any context must, at the very *least*, be clear."[269] New York's consent mechanism and its legal consequences are so complex that even attorneys find them difficult to understand and to explain.

Related to the "informed" standard is the requirement that a waiver be "knowing" or "competent." The extrajudicial consent does not insure a knowing waiver.[270] Under the current system, there is no way to assess the parent's "full understanding" of the rights being renounced, for there is no provision for an official inquiry into the parent's state of mind. By contrast, when a parent executes a judicial consent, the judge or surrogate has an opportunity to conduct such an inquiry,[271] and the parent receives protections similar to those accorded defendants who waive the right to counsel or to trial by jury. But when a parent executes the consent out of court, there is no such guarantee that her understanding is complete.

Particular hazards inherent in the time, place, or manner that extrajudicial consents are executed may interfere with a parent's comprehension. If a mother gives consent within a few days of the child's birth, she may be unable to make a fully competent decision; she has had little time to reassess her feelings, or to investigate the alternatives that might enable her to keep her child.[272] Similarly, the surroundings for the execution of the consent

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267. For a typical decision, see supra note 140, discussing the court's method of finding the child's best interests in In re Adoption of Daniel C., 115 Misc. 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984).

268. See text accompanying notes 230-37 supra. The natural parent who executes an extrajudicial consent retains only the residual right to be on equal footing with strangers at a revocation-of-consent hearing.

269. Fuentes v. Shevin, 407 U.S. at 95.

270. See Von Moltke v. Gillies, 332 U.S. at 724.

271. See N.Y. Dom. Rel. Law § 115-b(2) and text accompanying notes 76-92 supra.

272. An expectant mother may make plans for a first child without anticipating the possibility that the birth will produce strong maternal feelings. After the birth, a natural parent may believe that an agreement made before the birth is binding, for example, that the prospective adoptive parents' payments for medical care and maintenance during pregnancy place her under financial and ethical obligations not to change her mind. She may not know that she can make temporary arrangements for foster care.

may be disconcerting, upsetting, or woefully informal;[273] in such circumstances the parent may be unable to make a well-reasoned decision, and may not perceive the gravity of her act.

B. A Waiver Must Be Voluntary

A person who waives a fundamental right must do so voluntarily. As the Court explained in *Johnson v. Zerbst*, "[a] waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege."[274] There must be evidence of a willful, positive act and in the absence of such evidence the courts must "indulge every reasonable presumption against waiver."[275] To establish a waiver a court must determine the "decisive fact . . . the state of the petitioner's mind—his understanding and his intention."[276] It follows logically that the person who waives a right may not do so through an attorney, but must execute the waiver personally,[277] in order to satisfy the *Johnson v. Zerbst* requirement of "intentional relinquishment."[278]

If a consent to adoption is not voluntary and an adoption decree is based on that imperfect "consent," the result is, in fact, an involuntary termination of parental rights.[279] To avoid such a loss of rights, the consent must be intentional,[280] executed personally,[281] and there must be evidence of a positive act. No presumption can be entertained when a waiver of a fundamental right is at issue.[282]

An extrajudicial consent raises the issue of voluntariness at two points: first, at its execution, and second, if the parent files timely notice of intent to revoke consent, at the revocation-of-consent hearing. In such cases parents frequently argue that in giving the initial consent they did not comprehend the finality of their act.[283] They believed they had an absolute right of revocation within the stated thirty-day period, and did not intend to effect

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273. See, e.g., the circumstances described in note 97 supra.

274. Johnson v. Zerbst, 304 U.S. at 464 (emphasis added).

275. Id. (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. at 393 and Hodges v. Easton, 106 U.S. 408, 412 (1882)).

276. Brookhart v. Janis, 384 U.S. at 9 (Harlan, J., separate opinion).

277. Id. The Court found that the defendant had not knowingly or intentionally waived his right to a jury trial; his attorney had done so on his behalf.

278. Id. at 4. *Brookhart* also held that "a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law." Id.

279. See text accompanying notes 224-31 supra.

280. See Johnson v. Zerbst, 304 U.S. at 464.

281. See Brookhart v. Janis, 384 U.S. at 9.

282. Aetna Ins. Co. v. Kennedy, 301 U.S. at 393.

283. See, e.g., In re Adoption of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, ____ N.Y.S.2d ____ (2d Dep't 1984); In re Myers, 8 Fam. L. Rep. (BNA) 2361 (N.Y. Fam. Ct., Westchester County Apr. 12, 1982).

an irrevocable termination of their parental rights.[284] But the natural parent's testimony is difficult to substantiate because the consent is given privately. The evidence of her understanding and the voluntariness of the consent is difficult to prove and also may be veiled by the attorney-client privilege.[285] As with the test of a knowing waiver, the test of voluntariness is subjective, with the determination left to the discretion of the court. The potential risk of error denies the fundamental fairness, certainty and accuracy required by due process.

If a natural parent gives timely notice of intent to revoke consent, the validity of the initial consent must become suspect and cannot, under any logical construction, be considered voluntary. Nevertheless, Domestic Relations Law section 115-b(3) provides that if the court determines that it is in the child's best interests not to be returned to the natural parent, the court may "enter an order denying any force or effect to the notice of revocation of consent."[286] Although the court thus acts as if the consent continued to be voluntary, this is sheer wizardry. The "consent" becomes involuntary when the natural parent notifies the court of her intent to revoke it. If the adoption proceeds, it does so by means of an involuntary termination of parental rights. Although there are statutory provisions for an adoption without the consent of a parent or guardian under certain circumstances, those circumstances do not include a situation where a parent makes a timely attempt to revoke her consent to adoption.[287]

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284. To be knowing and voluntary, the waiver must be understood. See text accompanying notes 253-258 supra.

285. See, e.g., In re Adoption of Daniel C., 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dept 1984) (Gibbons, J., dissenting).

286. N.Y. Dom. Rel. Law § 115-b(3)(d)(iv).

287. N.Y. Dom. Rel. Law § 111(2) provides:

> 2. The consent shall not be required of a parent or of any other person having custody of the child:
>
> (a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or
>
> (b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or
>
> (c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or
>
> (d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or
>
> (e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. . . .

Id. Obviously, this list does not include a parent who changes her mind, attempts to revoke her consent, and is willing and fit to have custody of her child.

C. *A Waiver Requires the Procedural Safeguards of Judicial Supervision and a Visible Record*

In *Johnson v. Zerbst,*[288] Justice Black suggested that there be evidence of a waiver of the right to counsel: "whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."[289] The United States Supreme Court in *Carnley v. Cochran*[290] adopted that suggestion as a requirement that a waiver be "visible in the record."[291] Similarly, Justice Frankfurter in *Brown v. Allen*[292] argued that the validity of a waiver must be resolved by "the application of constitutional principles to the facts as found."[293] Such fact-finding cannot be performed without an official record.

The lack of a formal record of a consent to adoption executed out of court presents practical problems if the consent is contested. The court must confront the difficult task of reviewing unrecorded circumstances in its evaluation of the validity of the waiver. Even when there are witnesses to the consent and the parent is represented by counsel, it may be difficult to determine the facts accurately without an official record. When there is a conflict in the testimony, and particularly when there is a possibility of overreaching or of a conflict of interest on the part of the attorney,[294] the review is even more difficult.

The evidentiary protection that a waiver be "visible in the record" should apply to the consent to adoption. A record would assist the reviewing court to construe the validity of the consent, thereby providing greater safeguards for the parent's fundamental rights.

The safeguards for a valid waiver discussed above can be imposed successfully on the consent to adoption only if that consent is executed in court. Logical and practical considerations demand a judicial procedure, where it is possible to establish a record for review, and where the presiding judge or surrogate can ascertain that the waiver is knowing, informed, and voluntary.

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288. 304 U.S. 458 (1938).
289. Id. at 465.
290. 369 U.S. 506 (1962).
291. Id. at 516. See also United States v. Bailey, 675 F.2d at 1299.
292. 344 U.S. 443 (1953).
293. Id. at 507 (Frankfurter, J., separate opinion).
294. The attorney for a natural parent may confront a serious ethical dilemma if the client challenges the consent as uninformed or involuntary. If the attorney advises the client to waive her attorney-client privilege the attorney may then be compelled to testify against her if their recollections differ; if she remains silent as to their discussions, the attorney may be subjected to a charge of conflict of interest. An obvious solution would be for the parent to have new counsel at the revocation hearing. The issue of conflict of interest is raised by the dissent in In re Adoption of Daniel C., 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984).

A recent New York case involving the waiver of the right to counsel held that relinquishment of such a fundamental right could be made only in the presence of a neutral magistrate who gives the defendant appropriate warnings of the risks of such a course.[295] Similarly, in a consent to adoption, the judge or surrogate must give a parent the appropriate warnings of the risks incurred in executing a consent to adoption.

V

CONCLUSION

The New York Court of Appeals proclaimed the principle that "a right too freely waived is no right at all."[296] But an extrajudicial consent to a private placement adoption is an official procedure for parental rights to be "too freely waived." The Constitution requires that parental rights be protected as "essential, . . . far more precious . . . than property rights," and deserving of special protections as "fundamental liberty interests."[297] Accordingly, the defects of the extrajudicial consent to private placement adoption must be cured by statutory reform.

The critical problem is the execution of a consent out of court, where there is neither official supervision nor an adequate record of the natural parent's waiver of a fundamental right. To remedy this defect, a two-step process would be appropriate. First, the natural parent would sign an instrument for the "transfer of custody,"[298] giving physical custody of the child to the prospective adoptive parents. Within a time period specified in the transfer instrument the natural parent would proceed to the second step, a court appearance for the execution of a judicial consent.[299]

In the judicial procedure for the execution of consent to adoption, the judge or surrogate would question the natural parent, using inquiries such as those suggested by Judge Midonick and now used in the Family and Surrogate's Court of New York County.[300] The natural parent would be apprised of her right to regain custody of the child, questioned about her knowledge of alternatives to adoption, and receive full information on the legal consequences of the consent, particularly the finality of the act. A parent who revealed a lack of settled purpose to release the child for adoption would be informed that she must resolve all doubts within a specified time, in fairness to the prospective adoptive parents and for the well-being of the child. If

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295. People v. White, 56 N.Y.2d 110, 436 N.E.2d 507, 451 N.Y.S.2d 57 (1982).
296. People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).
297. See text accompanying notes 148-55 supra.
298. See note 94 supra for proposed provisions for a "transfer of custody" instrument.
299. See note 94 supra for the proposed notice provisions for the court appearance.
300. See note 82 supra. In these courts either the counsel for the natural parent or the judge or surrogate propounds the questions.

such hesitancy were in evidence, a date would then be set for a second appearance to execute the consent, with the understanding that at that date the natural parent must either act to regain custody of the child or execute the consent to adoption.

New York's Domestic Relations Law section 115-b provides the essential mechanism for an appropriate judicial consent, as outlined here. What is now lacking is a prohibition on consents executed out of court.[301] So long as extrajudicial consents to private placement adoptions remain in use, prospective adoptive families will be under a cloud of uncertainty and impermanence until the final adoption decree is ordered. If the natural parent has a change of heart and attempts to revoke the consent to adoption, the prospective adoptive family will be disrupted and the child's development may be adversely affected.[302] The drafters of the 1972 legislation intended to eliminate such consequences,[303] but as the substantial number of cases brought under the 1972 adoption statutes indicates, the desired results have not been achieved. For the benefit of all the parties involved, therefore, the natural parent should execute a consent only in court with all of the protections required for a valid waiver. The judicial consent would, in fact, accomplish the goal expressed by the framer of the 1972 adoption statutes: "to provide a legal framework within which future adoptions can be undertaken with reasonable guarantees of permanence and with humane regard for the rights of the child, the natural mother and the adoptive parents."[304] By permitting only a judicial consent to private placement adoption, the state would provide appropriate procedures to safeguard the natural parent's fundamental liberty interest in her child.

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301. In New York County the family and surrogate's courts will not accept an extrajudicial consent except in extreme circumstances. If the natural parent resides in another jurisdiction, the consent must be executed in a court in that jurisdiction.

*302. The often lengthy period of litigation may cause untold trauma to all concerned, but especially to the subject child. Consider, for example, the time span in In the Matter of Daniel C., 115 Misc. 2d 130, 453 N.Y.S.2d 572 (Sur. Ct., Westchester County 1982), aff'd, 99 A.D.2d 35, _____ N.Y.S.2d _____ (2d Dep't 1984). The natural mother notified the court of her intent to revoke consent when the infant was three and one-half months old. The revocation-of-consent hearing was held when the child was eight months old, a time when some authorities claim a bonding with psychological parents will have been formed and when, therefore, disruption of that bond may be detrimental to the child. The appellate division heard the appeal when the child was 14 months old; it rendered its opinion 11 months later. The natural mother is now appealing to the New York Court of Appeals. One can only speculate on the impact of this litigation on the emotional well-being of the prospective adoptive family and on the child's development.

303. See text accompanying notes 47-51 supra.

304. Memorandum, supra note 47, at 203-04.

* The New York Court of Appeals affirmed the Appellate Division's decision, with one Justice dissenting, while this Note was being published. The Court of Appeals decision comes when the child is almost three years old and ten months after the Appellate Division's ruling. See New York Court of Appeals, aff'd, #435 (Oct. 30, 1984).

Appendix

N.Y. Domestic Relations Law, Article 7

TITLE III—PRIVATE-PLACEMENT ADOPTION

Sec.

115. General provisions relating to private-placement adoptions.
115-a. Special provisions relating to children to be brought into the state for private-placement adoption.
115-b. Special provisions relating to consents in private-placement adoptions.
116. Orders of investigation and order of adoption.

§115. General provisions relating to private-placement adoptions

1. Except as otherwise provided in this title, private-placement adoptions shall be effected in the same manner as provided in sections one hundred twelve and one hundred fourteen of title two of this article.

2. The proceeding shall be instituted in the county where the adoptive parents reside or, if such adoptive parents do not reside in this state, in the county where the adoptive child resides.

3. The adoptive parents or parent, the adoptive child and all persons whose consent is required by section one hundred eleven of this article must appear for examination before the judge or surrogate of the court where the adoption proceedings are instituted. The judge or surrogate may dispense with the personal appearance of the adoptive child or of an adoptive parent who is on active duty in the armed forces of the United States.

4. The agreement of adoption shall be executed by the adoptive parents or parent.

5. Where the petition alleges that either or both of the natural parents of the child have been deprived of civil rights or are mentally ill or mentally retarded, proof shall be submitted that such disability exists at the time of the proposed adoption.

6. Where the adoptive child is to be adopted upon the consent of some person other than his father or mother, there shall also be presented the affidavit of such person showing how he or she obtained lawful custody of the child.

7. The adoptive parent or parents shall also present an affidavit describing all fees, compensation and other remunerations paid by such parent or

parents on account of or incidental to the birth or care of the adoptive child, the pregnancy or care of the adoptive child's mother or the placement or adoption of the child and on account of or incidental to assistance in arrangements for such placement or adoption. The attorney representing the adoptive parents shall also present an affidavit describing all fees, compensation and other remuneration received by him on account of or incidental to the placement or adoption of the child or assistance in arrangements for such placement or adoption.

8. The petition must be verified, the agreement and consents executed and acknowledged, the proof given and the affidavit sworn to by the respective persons before such judge or surrogate; but where the verification, agreement or consent of an adoptive parent, parent or person whose consent is necessary to the adoption is duly acknowledged or proved and certified in form sufficient to entitle a conveyance to be recorded in this state, (except that when executed and acknowledged within the state of New York, no certificate of the county clerk shall be required), such judge or surrogate may grant the order of adoption *without the personal appearance* of such adoptive parent, parent or person. The judge or surrogate may, in his discretion, dispense with the requirement that the adoptive child appear for examination or join in the petition, where otherwise required. In any adoption proceeding where the judge or surrogate shall dispense with the personal appearance of such adoptive parent, parent, person whose consent is necessary to the adoption, or adoptive child, the reason therefore must be for good cause shown, and shall be recited in the order of adoption.

9. In all cases where the consents of the persons mentioned in subdivision two, three and four of section one hundred eleven of this article are not required or where the adoptive child is an adult notice of such application shall be served upon such persons as the judge or surrogate may direct.

10. The provisions of title two prohibiting the surname of the child from appearing in the papers, prohibiting disclosure of the surname of the child to the adoptive parents, and requiring a separate application for issuance of a certified copy of an order of adoption prior to the sealing of the papers, requiring the filing of a verified schedule, shall not apply to private-placement adoptions; provided, however, that the facts required to be stated in the verified schedule in an agency adoption shall be set forth in the petition.

As amended L.1981, c.283, § 2.

§ 115-b. Special provisions relating to consents in private-placement adoptions.

1. If a duly executed and acknowledged consent to a private-placement adoption shall so recite, no action or proceeding may be maintained by the

consenting parent for the custody of the child to be adopted, and no such consent shall be revoked by such parent if:

(a) The consent sets forth the name and address of the court in which the adoption proceeding is to be commenced; and

(b) A copy of such consent was given to such parent upon the execution thereof; and

(c) The consent was executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced and such consent states that it shall become irrevocable upon such execution or acknowledgment; or

(d) The consent was not executed or acknowledged before a judge or surrogate of the court in which the adoption proceeding is to be commenced, in which case,

(i) Such consent shall, if it shall so state, become irrevocable thirty days after the commencement of the adoption proceeding unless written notice of revocation thereof shall have been received by the court within said thirty days.

(ii) Notwithstanding that such written notice shall have been received within said thirty days, the notice of revocation shall be given effect only if the adoptive parents fail to oppose such revocation, as provided in subdivision three of this section, or, if they oppose such revocation and the court as provided in subdivision three of this section shall have determined that the best interests of the child will be promoted by giving force and effect to such revocation.

2. At the time that a person appears before a judge or surrogate to execute or acknowledge a consent to adoption, the judge or surrogate shall inform such person of the consequences of such act pursuant to the provisions of this section.

3. (a) A parent may revoke his consent to adoption only if it has not become irrevocable under the provisions of this section and only by giving notice, in writing, of such action to the court in which the adoption proceeding has been or is to be commenced. Such notice shall set forth the address of the parent and may, in addition, set forth the name and address of the attorney for the parent.

(b) If, at the time of filing of the petition for adoption, or within thirty days thereafter, the court has received or shall receive such notice of revocation, the court shall promptly notify the adoptive parents, by notice in writing to them and to their attorney, of the receipt by the court of such notice of revocation.

(i) Such notice to the adoptive parents shall set forth that unless, within ten days from the date of such notice the court shall receive from the adoptive parents notice, in writing, of their intention to oppose such revocation by the parents, the adoption proceeding will be dismissed and that, in case of such dismissal, the court will send to the parents and to the adoptive

parents the notice of dismissal, as provided in paragraph (c) of this subdivision.

(ii) Such notice to the adoptive parents shall further set forth that if, within ten days from the date of such notice, the court shall receive from the adoptive parents notice, in writing, of their intention to oppose such revocation by the parents, the court will, upon notice to the parents and to the adoptive parents, proceed, as provided in paragraph (d) of this subdivision, to a determination of whether such notice of revocation by the parents shall be given force and effect and to a determination of what disposition shall be made of the custody of the child.

(c) If the adoption proceeding is dismissed pursuant to the provisions of paragraph (b) of this subdivision,

(i) Written notice of such dismissal shall forthwith be sent to the parent or, if represented by attorney, to the attorney for the parent, and to the attorney for the adoptive parents.

(ii) Such notice of dismissal shall set forth the name and address of the parent, the name and address of the attorney for the parent, if any, the name and address of the attorney for the adoptive parents.

(iii) Such notice of dismissal shall further set forth that if the child is not returned to the custody of the parent within ten days from the date of such notice of dismissal, the court will forthwith upon request, in writing, by the parent or by the attorney for the parent, furnish to said parent or attorney so requesting, the names and address of the adoptive parents.

(iv) Such notice of dismissal shall further state that, in the event the custody of the child is not returned to the parent by the adoptive parents upon request therefor, a proceeding to obtain custody may be instituted by the parent in the Supreme Court or the Family Court.

(d) If, pursuant to the provisions of paragraph (b) of this subdivision, the adoptive parents shall give notice of their intention to oppose the revocation of the parent's consent,

(i) The court shall promptly notify, in writing, the parent or the attorney for the parent, if any shall have been named in the notice of revocation, and the attorney for the adoptive parents, that the court will, upon the date specified in such notice by the court, or as soon thereafter as the parties may be heard pursuant to this paragraph, hear and determine whether revocation of the consent of the parent shall be permitted and, in any event, hear and determine what disposition should be made with respect to the custody of the child.

(ii) The court shall, upon the date specified, take proof as to whether the best interests of the child will be promoted by the return of the child to the parents, or by the adoption of the child by the adoptive parents, or by placement of the child with an authorized agency for foster care with or without authority to consent to the adoption of the child, or by other disposition of the custody of the child.

(iii) If the court shall determine that the best interests of the child will be served by returning custody of the child to the parent or by placement of the child with an authorized agency or by disposition other than adoption by the adoptive parents, the revocation of consent shall be given force and effect and the court shall make such disposition of the custody of the child as will best serve the interests of the child.

(iv) If the court shall determine that the best interests of the child will be served by adoption of the child by the adoptive parents, the court shall enter an order denying any force or effect to the notice of revocation of consent and shall dispose of the custody of the child as if no such notice of revocation had been given by the parent.

(v) In such proceeding the parent or parents who consented to such adoption shall have no right to the custody of the child superior to that of the adoptive parents, notwithstanding that the parent or parents who consented to the adoption are fit, competent and able to duly maintain, support and educate the child. The custody of such child shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

4. Nothing contained in this section shall limit or affect the power and authority of the court in an adoption proceeding, pursuant to the provisions of section one hundred sixteen of this title, to remove the child from the home of the adoptive parents, upon the ground that the welfare of the child requires such action, and thereupon to return the child to a natural parent or place the child with an authorized agency, or, in the case of a surrogate, transfer the child to the family court; nor shall this section bar actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of an adoption consent.

Added L.1972, c.639, § 3; amended L.1973, c.1035, §§ 1 to 3.

5. Notwithstanding any other provision of this section, a parent having custody of a child whose adoption is sought by his or her spouse need only consent that his or her child be adopted by a named stepfather or stepmother.

As amended L.1983, c.218, § 1.