

4211

ILLEGITIMATE CHILD—MOTHER A MINOR—CAN NOT LEGALLY TRANSFER PERMANENT CUSTODY OF CHILD TO COUNTY CHILD WELFARE BOARD—SECTION 3070-17b G. C.

SYLLABUS:

A minor mother of an illegitimate child can not legally transfer permanent custody of said child to the County Child Welfare Board pursuant to sub-section (b) of Section 3070-17, General Code.

Columbus, Ohio, December 30, 1948

Hon. Ralph J. Bartlett, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

I am in receipt of your communication which states:

“Will you please give this office your opinion whether, under sub-section (b) of Section 3070-17 of the General Code, a minor mother of an illegitimate child can legally transfer permanent custody of her child to the County Child Welfare Board?”

"I wish to call your attention to the fact that under the adoption statutes (sub-section (2) of the General Code Section 10512-14) such a parent can give her consent to the adoption of her child."

The pertinent portions of Section 3070-17, General Code, are:

"The child welfare board shall, subject to the rules, regulations and standards of the division, have the following powers and duties for and on behalf of children in the county deemed by the board to be in need of public care or protective services:

"* * * (b) To enter into agreements with the parent, guardian or other person having legal custody of any child, or with the division, or another department or any certified organization within or outside the county or any agency or institution outside the state, having legal custody of any child, respecting the custody, care or placement of any such child or any other matter, deemed to be in the interests of such child, provided that the permanent custody of a child shall not be transferred by a parent to the board without the consent of the juvenile court. * * *"

It is to be noted that there is no provision in this section which explicitly allows a minor mother of an illegitimate child to sign an agreement for permanent custody.

Section 10512-9, et seq., General Code, provides for the adoption of children. Section 1352-12, General Code, permits parents to place children with the State Department of Public Welfare. The pertinent portion of Section 1352-12, General Code, provides:

"The parents, parent, guardian or other person or persons having the custody of a child, may enter into an agreement with any public, semi-public or private association or institution of this state established for the purposes of aiding, caring for or placing children in homes, and which has been approved and certified by the division of charities, department of public welfare, placing such child in the temporary custody of such institution or association; or such parent, guardian or other person *may make an agreement surrendering such child into the permanent custody of such association or institution*, to be taken and cared for by such association or institution, or placed in a family home."

(Emphasis added.)

It is a general rule of law that parents have the paramount right to the custody and enjoyment of their children. In the case of an illegitimate child, this right of custody is in the mother.

It is a well established rule of statutory construction that a statute which is enacted in derogation of the common law shall be strictly construed. Volume 3 of the Third Edition of Sutherland Statutory Construction at page 164 states :

“Where it is claimed that a statute imposes a duty or burden, or establishes a right or benefit which was not recognized by the common law, the statute will be given a strict interpretation to avoid the change asserted. This rule of statutory interpretation has received wide adoption, and is employed where there is reasonable doubt whether the change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed. *A statute may take away a common law right, but there is always a presumption that the legislature has no such intention.*”
(Emphasis added.)

This rule of statutory construction has been adopted and followed in the State of Ohio. The third branch of the syllabus in *State, ex rel. Morris v. Sullivan*, 81 O. S. 79, provides :

“Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.”

The common law and the law as codified in the General Code of Ohio has always provided that minors are to be protected in their contractual relationships. It could be plausibly argued that an agreement made pursuant to the provisions of sub-section (b) of Section 3070-17, General Code, would be a contract. For purposes of answering the question propounded by you in your request, I do not feel that it is necessary to ascertain whether this agreement is clothed with all the attributes of a contract. If it were said that such an agreement was a good and binding contract, then clearly pursuant to Section 8023, General Code, such contract would be voidable by the minor mother of an illegitimate child. Section 8023, General Code, provides :

“All persons of the age of twenty-one years and upward, who are under no legal disability, shall be capable of contracting respecting goods, chattels, lands, tenements, and any other matter or thing which may be the legitimate subject of a contract, and, to all intents and purposes be of full age.”

If such an agreement made pursuant to sub-paragraph (b), Section 3070-17, General Code, was found not to be a contract, there would be some doubt as to its validity. In any event, such an agreement would be voidable at the option of the minor mother of the illegitimate child unless this agreement was subsequently ratified or some other provision of the law carried out in which the mother lawfully released her right to custody of the child.

If this agreement were found to be binding on the minor mothers of illegitimate children, such a holding would lead to abusive practices. Such a situation concerns young girls who would be subjected to social pressure for a nine-month period which would certainly prevent such persons from clearly analyzing all the consequences of their acts. In addition to this social pressure, permanent custody agreements could be presented to such a mother shortly after the birth of the child when she would be subject not only to social pressure but to physical disabilities which would prevent her from adequately appreciating the rights and privileges which she may be surrendering. Minor mothers of illegitimate children seldom have funds sufficient to defray the expenses attendant to the birth of the child. The condition would lead to economic pressure.

The General Assembly, when it enacted the Adoption Code, Section 10512-9, et seq., General Code, made many provisions which afforded a parent or parents protection of their lawful rights. It is to be noted that Section 10512-20, General Code, a section of the Adoption Code, provides for a modification of the interlocutory order of adoption for good cause. As can be readily seen, this would allow a minor mother of an illegitimate child time in which she would be able to appreciate fully the consequences of her act. You direct my attention in your request for my opinion to sub-section (2) of Section 10512-14, General Code. The pertinent portion of this section provides:

“No final decree or interlocutory order of adoption shall be entered by the court unless there shall be filed with the court written consents to the adoption, verified or acknowledged as follows:

* * *

“(2) By each of the living parents, *adult or minor*, except as follows:

“(a) The mother of an illegitimate child shall be considered for purposes of this section to be the sole parent and may give such consent alone, in which case the consent shall state that it is

given by the mother by virtue of the fact that she is the sole parent; provided however, that if a mother is a married woman, notice of the adoption proceeding shall be given in such manner as the court may direct, to her husband whose consent shall not be necessary to the adoption unless he is the natural father of such child; provided further, that if the father is a married man, notice of the adoption proceedings shall be given in such manner as the court may direct to his wife, whose consent shall not be necessary to the adoption unless she is the natural mother of such child; if such mother is physically unable to appear in open court to execute such consent, she may execute such consent in the presence of the next friend; * * *

(Emphasis added.)

I arrive at this conclusion, being fully aware of the provisions of the holding of my predecessor in Opinions of Attorney General for 1930, Vol. 1, page 356. The syllabus of this opinion states:

“A mother who is a minor under 21 years of age may lawfully give her consent to the adoption of her child, under the provisions of Section 8025 of the General Code, and may also surrender such child under Sections 1352-12 and 1352-13, General Code.”

It is to be noted that in the course of this opinion, reference is made to Section 8025, General Code. Section 8025, General Code, provided for the adoption of children prior to the enactment of the Adoption Code, Section 10512-9, et seq., General Code. Said section did not specifically provide that a minor parent could grant adoption of a child. The reason given for the conclusion stated above is found on page 358 of said opinion:

“* * * It is a matter of common knowledge, of which the Legislature would take notice, that it is not unusual for minors to be parents. It is therefore believed that if it had been intended that persons in such a status were to be excepted from the general provisions of the sections under consideration, authorizing parents to give consent, the Legislature would have stated said exception.
* * *

I can not agree with this conclusion of my predecessor. Since, however, the specific question considered in said opinion is not now before me, I find no reason why the same should be overruled by me.

It is to be noted that Section 10512-14, General Code, now makes specific reference to the fact that a minor mother of an illegitimate child can place said child for adoption. The General Assembly, when enacting

the Adoption Code, saw fit to grant specifically this right of surrendering custody of children to a minor mother. There can be no doubt that the General Assembly has the right to grant this privilege to a minor individual if it sees fit. The fact that it has expressly done so in connection with adoption and not as to surrendering permanent custody is significant and is readily explainable on the ground that adoption is a formal judicial proceeding where a court must give its final sanction only after careful consideration of the interests of the child and all other persons including the mother. Whereas, the surrender of permanent custody is an act that may be performed without any advice or protection whatsoever and as already pointed out, under circumstances that preclude the exercise of a mature or wise judgment.

Respectfully,

HUGH S. JENKINS,
Attorney General.