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# Family Law—Custody of Child—Natural Parent vs. Foster Parents

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that the methods employed by the Mexican Court to produce evidence were so effective as to make the evidence conclusive. The proper resolution of this conflict would involve extensive statistical inquiry into the error quotient of the Mexican records examiners. At what point does the effectiveness of records examiners reach a standard of excellence such that their certificates can be called conclusive when opposed by the plaintiff's evidence? This exact sort of dispute will be necessary in a case where the trial judge decides that there is an issue of fact. However, the Court of Appeals has decided against making such dispute inevitable. When, as in the instant case, it is unnecessary further to investigate at trial the conclusiveness of the defendant's evidence because of the weakness of the plaintiff's evidence, the trial court may grant summary judgment unfettered by a restrictive interpretation of Rule 113, sudivision 4.

*A. D.*

## FAMILY LAW

CUSTODY OF CHILD—NATURAL PARENT VS. FOSTER PARENTS

The natural mother of a five-year-old boy born out of wedlock brought a habeas corpus proceeding against the foster parents to obtain custody of her son. To overcome the primary right of a natural parent to her child, the foster parents argued that the mother had abandoned the boy and was unfit to assume the obligations of parenthood. On appeal from an order of the Appellate Division which reversed a dismissal of the writ by Special Term, *held*, reversed, two judges concurring, one dissenting.[1] Upon the facts disclosed, the natural parent both abandoned the child and was unfit to raise the boy; therefore, the presumption that it is in the child's best interest to be raised by the parent failed. *People ex rel. Anonymous v. Anonymous*, 10 N.Y.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1961).

This delicate and much publicized area of litigation is controlled by long-established rules which courts utilize in deciding whether the natural or foster parents have better claim to the child. The natural parent has a primary right to the child,[2] but obviously the law must protect the child's interest; therefore, the foster parents are allowed to prove that it is not in the best interest of the child to be raised by the natural parent. This can be done by showing that the natural parent has abandoned the child, *i.e.*, "has shown a settled purpose to be rid of all parental obligations and to forego all parental rights,"[3] *or* that, based upon conduct and behavior, the natural parent is unfit to raise the child.[4]

In the instant case, the foster parents proved both abandonment and

1. 14 A.D.2d 41, 217 N.Y.S.2d 374 (2d Dep't 1961); reversing 27 Misc. 2d 190, 210 N.Y.S.2d 698 (County Ct. 1960).
2. People ex rel. Kropp v. Shepsky, 305 N.Y. 466, 113 N.E.2d 801 (1953).
3. Matter of Maxwell, 4 N.Y.2d 429, 433, 151 N.E.2d 848, 850, 176 N.Y.S.2d 281, 283 (1958).
4. People ex rel. Kropp v. Shepsky, supra note 2.

unfitness. The natural mother gave the child up four days after his birth, and from that time until three years later when she commenced the present proceedings, the mother never made any inquiries about the boy, although she could easily have learned the identity of the foster parents. It is to be noted that the mother was married shortly after giving birth to the child, and, therefore, could have offered the child a home during this three-year period. The mother's character was thoroughly discredited by evidence of her sexual activities which, of course, led to the birth of the child when the mother was only fourteen years old. Further, a married man testified that he and this girl indulged in both normal and abnormal sexual relations after she was separated from her husband and only one year before she instituted these proceedings. The dissent, emphasizing the mother's youth and the illegal methods used by the foster parents to obtain the child, claimed that abandonment had not been proved. Declaring that the testimony of the married man was discredited and that the mother's promiscuous acts occurred in the distant past, the dissent further concluded that the unfitness of this girl to assume the obligations of parenthood had not been proved.

The main thrust of this case is, of course, devoted to an analysis of the facts presented. As previously stated, the fundamental rules in this area are established, and neither the majority nor the dissent deviated from these rules. To question the interpretation of either the majority or the dissent would be senseless. Whether a particular girl, who has been sexually promiscuous, could now be a fit mother is a question that cannot be answered by reliance upon hornbook rules. In no other area will a judge's decision be based so greatly on a desire to find an equitable and just result. Perhaps only the concurring opinion by Judge Froessel can be intelligently analyzed. He declared that "if after a reasonably sufficient time relator has mended her ways, and in the meanwhile by her visitations and otherwise has manifested a genuine interest in her child, she is by no means foreclosed from instituting new proceedings for custody."[5] The child is now five years old and knows no other parents than his foster parents. If the child were taken even now from his home and given to a mother he has never known, his reaction would almost certainly be adverse. A reasonable time for the mother to mend her ways would have to be a period of at least one or two years. During this time, the child's ties with his foster parents would obviously grow stronger. If, when he is six or seven, the boy is torn from his family, the shock will be even greater. If Judge Froessel's view had been adopted by the majority, the foster parents would have lived in the fear that someday *their* child would be taken from them. Rather than face this torment, it would have been better for these people to award the custody of the child to the mother now.

*Bd.*

5. People ex rel. Anonymous v. Anonymous, 10 N.Y.2d 332, 337, 179 N.E.2d 200, 202, 222 N.Y.S.2d 945, 948 (1961).