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# Administrative Law—Judicial Review of Child Custody Proceedings

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# THE COURT OF APPEALS, 1958 TERM

## ADMINISTRATIVE LAW

JUDICIAL REVIEW OF CHILD CUSTODY PROCEEDINGS

Acting in its discretion, the Supreme Court decides questions of child custody, and the exercise of such discretion rarely raises a question of law in the Court of Appeals.[1] The Supreme Court in this area is deemed the successor to the chancellor, and as such does not adjudicate controversies between adverse parties, but acts as *parens patriae,* to do what is best for the interests of the child.[2]

The extent to which such discretion has been effected by legislation authorizing child welfare agencies, was questioned in the recent case of *In Re Jewish Child Care Association.*[3] A *habeas corpus* proceeding had been brought by the Association to regain custody of a child which had been placed by it, with boarding parents. The Supreme Court, despite contrary medical testimony, found it to be in the best interests of the child that she be removed from the foster parents because they had become so emotionally involved with her that they wished to adopt her. The child had been accepted with the full understanding that she was not available for adoption, and that the agency retained legal custody of her. The Court held (4-3), that the Supreme Court's determination did not constitute an abuse of discretion.

The dissent, believing that the emotional stability of the child required her temporary retention by the foster parents, argued that the Supreme Court did not exercise its independent discretion, but reached its determination "because of a mistaken notion that the Court's are bound to accept an administrative policy of the agency as controlling their determination, rather than to exercise their own traditional power and authority in accordance with the evidence."[4] They argued further, that the Supreme Court was influenced by the Agency's contention that it could not function properly if a foster family was in a position to question its judgment.

The legislature has provided in the New York Social Welfare Law that, "any such agency may in its discretion remove such child from the home where placed or boarded."[5] The Court in *People v. Hagstotz,*[6] in discussing the above provision stated that the provision in this section which vests in

1. People v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949).
2. Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903 (1956).
3. 5 N.Y.2d 222, 183 N.Y.S.2d 65 (1959).
4. 6 App. Div. 2d 699, 174 N.Y.S.2d 335 (2d Dep't 1958). The Court stated: "In a proceeding such as this, custody could be determined on consideration only of the superior right of the agency."
5. N.Y. SOCIAL WEL. LAW § 383(2).
6. — Misc. —, 117 N.Y.S.2d 818 (Sup. Ct. 1952); See People v. Covenant of Sisters of Mercy in Brooklyn, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951).

charitable agencies the authority in its discretion to remove a child in its custody from where the child had been boarded, did not leave the Supreme Court powerless to determine what was best for the interests and welfare of the child, once the child had been boarded out by the agency. In that case, however, the child was to be removed from the foster parents for the purpose of giving him to strangers for adoption.

Although the discretion of the Supreme Court in matters of custody has been termed absolute,[7] it is observable that the rights of the natural parent influence this discretion to a great degree.[8] Thus, the majority feels that the lower Court exercised its independent discretion in regarding a removal of the child from these foster parents, while the dissent would question the independency of this exercise, or whether it was in fact exercised.

This case presents the paradoxical conflict between long term agency objectives, which are legislatively endorsed, and immediate concerns of the child's psychological welfare. Granted, no serious argument may be made regarding the broad policy of preparing the child for her eventual return to her parent, but in a situation akin to that present here, where nearly five years have elapsed without any affirmative steps on the mother's part to regain her child,[9] it seems unjust to wrench the child from an environment of love and affection, and place her in still another foster home. The majority would find such to be in the best interests of the child, placing her in a "neutral" environment psychologically speaking, for return to her mother. What of the emotional upheaval facing the child, with an uprooting of her ties with these foster parents? This places her in an emotional limbo awaiting an uncertain return to her mother.

The Court found the custodial right of the parent, as represented by the agency, to be dominant to the interests of these foster parents, thus choosing to uphold the Supreme Court's exercise or non-exercise of discretion in granting the writ of *habeas corpus*. This decision apparently is in the interests of giving full regard to the agency's policies, in the matter, promoting a broad cohesion in administrative functions. To the extent the opinion may be read as not allowing the foster parents to interfere or question the policies of the agency, there may be merit. However it can also be read as stating that since the legislature has clothed the agency with discretionary authority regarding child welfare generally, the Court's discretion in these matters is to this extent restricted. In other words, if the Agency has made determinations of what is deemed best for the child's welfare, the courts must give heed to these determinations, if reasonable. If so read, it appears that the traditional discretion of the courts has been restricted. The two dissenting opinions in

7. *Supra* note 2.

8. In re Livingston, 151 App. Div. 1, 7, 135 N.Y. Supp. 328, 332 (2d Dep't 1912); In re Sanderson, — Misc. —, 143 N.Y.S.2d 520 (County Ct. 1955).

9. In regard to mothers who, although capable of accepting custody, will not do so, nor release their hold through the agency, upon their child, N.Y. SESS. LAWS 1959, c. 449, 450, deals with permanently neglected children.

the instant case seem to discern this danger, and would hold that the lower court abused its discretion in allowing the *habeas corpus* writ.

JUDICIAL REVIEW OF DISMISSAL OF POLICE OFFICER

A policeman of the City of New York may not be dismissed from the force without a hearing before the Commissioner of Police or his deputy.[10] Such a determination is reviewable by the courts in an Article 78 proceeding when "any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner."[11]

In *Grottano v. Kennedy*[12] petitioner's dismissal from the New York City police force was based on two sets of charges of violation of the department rules and regulations. The first set were charges connected with the running of an escort service for local merchants. A hearing on these charges was scheduled for June 4th but was adjourned until June 27th so that the Corporation Counsel could serve a bill of particulars on petitioner, which bill was not served until the morning of June 27th. When on that date petitioner refused to go to trial, against the Commissioner's orders, an additional set of charges for insubordination were preferred for this refusal. On July 11th a hearing was convened on both sets of charges. On advise of counsel defendant refused to participate unless an earlier set of quasi-criminal charges of being a "finger man" in a hold-up were heard first. On refusal of the Commissioner to do so, the petitioner was tried *in absentia*. In the period between the first hearing date and the second, petitioner had applied for retirement to be effective August 2nd. The petitioner was found guilty on the charges and was dismissed from the police force before his pension could take effect.

The Court of Appeals upheld the trial *in absentia* on the escort charges because the petitioner had no right to have the quasi-criminal charges heard first. However, it reversed as to the charges of insubordination for refusal to go to trial on June 27th. The Court gave two grounds for this reversal. First, the Commissioner, when presiding over a hearing such as this, is functioning as a judge, not as the defendant's superior officer and for that reason, refusal to obey his orders is not insubordination. Secondly, it was an abuse of discretion for the Commissioner not to allow an adjournment of the June 27th hearing.

A police officer must yield obedience to the rules and regulations of the department; however, if he disobeys them he is entitled to a fair hearing.[13] One requirement for a fair hearing is that the accused be allowed a reasonable adjournment if necessary for his counsel to represent him.[14] Whether a denial of an adjournment is reasonable, depends on the case to be prepared and on

10. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 434(a) 14.0.
11. N.Y. CIV. PRAC. ACT § 1296.
12. 5 N.Y.2d 381, 184 N.Y.S.2d 648 (1959).
13. Shea v. Valentine, 249 App. Div. 556, 292 N.Y. Supp. 906 (1st Dep't 1937).
14. Bush v. Beckman, 283 App. Div. 1070, 131 N.Y.S.2d 297 (2d Dep't 1954).