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## Domestic Relations—Parent-Child—Custody: Parent-Stranger

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VIII. DOMESTIC RELATIONS

A. Parent-Child

*Custody: Parent-Stranger*

The New York Court of Appeals was again faced with a problem of the rights of a parent to her child in opposition to a non-parent in *Peopel ex rel. Knopp v. Shepsky*.<sup>1</sup> The petitioner, the mother of an illegitimate child, signed a consent to have her child placed with a lawyer for adoption. According to the testimony of two witnesses, the mother contended that she had only placed the child to be boarded out and that she was not placing the child for adoption. Two weeks after the child had been placed, she requested the return of her child. The child was not returned and she sued out a *habeas corpus*. The court gave the child back to the parent.

The custody of a child is usually a question for the Supreme Court, Special Term and the Appellate Division,<sup>2</sup> and rarely does it present a question of law for the Court of Appeals.<sup>3</sup> The instant case provides a question of law, *i. e.*, the right of a court to transfer a child, except for the gravest reasons, from the natural parents to a stranger. Usually the court will look to the best interests of the child in determining to whom custody should be given.<sup>4</sup> However, this has no place in consideration when the contest is between the parent and a nonparent. The claim of the parent is superior to that of all others in regard to the care and custody of the child.<sup>5</sup> Of course a child will not be given to a parent when that parent is unfit to care for him.<sup>6</sup> The mere factual determination as to who can provide the best surroundings for the child is not sufficient to grant custody to a stranger.<sup>7</sup> This is even true where the parent has initially given her consent to the custody of the child.<sup>8</sup> The burden of proof of the unfitness of the parent rests upon the nonparent.<sup>9</sup> Although the parent can

1. 305 N. Y. 465, 113 N. E. 2d 801 (1953).

2. *Bunim v. Bunim*, 298 N. Y. 391, 83 N. E. 2d 848 (1949).

3. *People ex rel. Porinoy v. Strasser*, 303 N. Y. 539, 104 N. E. 2d 895 (1952).

4. *People ex rel. Pryne v. Walts*, 122 N. Y. 238, 25 N. E. 266 (1890).

5. *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505, 110 N. Y. Supp. 592 (3rd Dep't) *aff'd* 193 N. Y. 611, 86 N. E. 1129 (1908).

6. *Matter of Benning*, 303 N. Y. 775, 103 N. E. 2d 375 (1952); see also *Matter of Gustow*, 220 N. Y. 373, 115 N. E. 995 (1917), Where the parent was "a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards his child" may have the child taken from him.

7. See note 5 *supra*; the grandparents were able to better provide for the child than the mother, but the court held that there was no reason to take the child from the mother.

8. *Matter of Bistany*, 239 N. Y. 19, 145 N. E. 70 (1925).

9. *Matter of Back*, 280 N. Y. 349, 21 N. E. 2d 186 (1939).

## THE COURT OF APPEALS, 1952-53 TERM

still claim the child even after legal adoption has been granted,<sup>10</sup> the burden then rests upon the parent to show that the child's welfare will be advanced by having the child returned to her.<sup>11</sup>

In the instant case there was no showing that the mother was unfit to care for her child. In fact, to the contrary there had been evidence introduced on the trial to show her fitness. Since the order of adoption of the child had already been vacated in a previous proceeding because of the lack of consent of the mother, it was natural that the court gave the custody of the child to the mother.

### *Abrogation of Adoption*

In New York, to effectuate an abrogation of an adoption there must be a finding that "due regard to the interests of both (the child and the foster parents) requires that such adoption be abrogated."<sup>12</sup> In order for a parent to obtain the abrogation, he must show that the child has been guilty of the willful desertion or a misdemeanor or ill behavior. The law goes on to state that when such an abrogation is sought, notice must be given to the agency which was a party to the adoption, or if no agency was involved, to the board or commission or official with the jurisdiction over the poor. If no such agency or institution shall appear on the return of such process, then a special guardian shall be appointed by the court.<sup>13</sup>

In *In re Adoption of Eaton*,<sup>14</sup> the parents of an adopted person, their daughter, were seeking the abrogation of adoption on the ground of desertion. The daughter had attained majority, had married, left home and had not been heard of since. In the action she appeared by counsel. The court held that once the adopted person had attained majority, no longer could there possibly be an abrogation of the adoption.<sup>15</sup> The court looked into the provisions of § 118 of the Domestic Relations Law to interpret the intent of the statute and found that it applied only to minor children. First of all, the violations upon which the abrogation can be sought pertain only to infractions of those duties which are owed by a child to a parent during infancy. Further, the agency which was a party to the adoption must be present to insure that

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10. *People ex rel. Pickle v. Pickle*, 215 App. Div. 32, 213 N. Y. Supp. 70 (4th Dep't 1925).

11. *Matter of Thorne*, 240 N. Y. 444, 148 N. E. 630 (1925).

12. DOM. REL. LAW § 118.

13. *Ibid.*

14. 305 N. Y. 162, 111 N. E. 2d 431 (1953).

15. The court did not express itself or determine the abrogation of an adoption procured by fraud or any other infirmity in connection with the adoption itself. See *Myer's v. Myer's*, 197 App. Div. 1, 188 N. Y. Supp. 527 (1st Dep't 1921).