Adoptive Parent Versus Natural Parent: Serving the Gordian Knot of Voluntary Surrenders

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ADOPTIVE PARENT VERSUS NATURAL PARENT: SEVERING THE GORDIAN KNOT OF VOLUNTARY SURRENDERS*

And so they wrangled before the king. "This one says," the king observed. "My son is the one who is alive; your son is dead," while the other says, "that is not true! Your son is the dead one, mine is the live one." "Bring me a sword" said the king; and a sword was brought into the king's presence. "Cut the living child in two," the king said "and give half to one, half to the other." At this the woman who was the mother of the living child addressed the king, for she burned with pity for her son. "If it please you, my lord" she said "let them give her the child; only do not let them think of killing it!" But the other said, "He shall belong to neither of us. Cut him up." Then the king gave his decision. "Give the child to the first woman," he said, "and do not kill him. She is his mother." All Israel came to hear of the judgement the king had pronounced, and held the king in awe, recognizing that he possessed divine wisdom for dispensing justice.¹

Although the legal process of adoption was never recognized by the common law,² the Court of Equity in England, exercising the king's

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¹ 1 Kings 3:23-28 (The Jerusalem Bible).

² See In re Thorne, 155 N.Y. 140, 143, 49 N.E. 661, 662 (1898).

Although in the nations of continental Europe that adopted the Roman legal system, the Roman process of adoption was maintained, adoption was strictly a statutory creature in countries with a common-law tradition. H. Clarke, The Law of Domestic Relations in the United States 602-03 (1968) [hereinafter Clark]; In re Thorne, supra. It was not until 1851 that Massachusetts became the first common-law jurisdiction to recognize adoption by statute. See Ross v. Ross, 129 Mass. 243, 262 (1880). Prior to this legislation, children in certain instances were transferred as a chattel was transferred. This was done without any legal proceeding, although it sometimes had the sanction of law. Clark 603. New York did not enact an adoption statute until 1873. An Act to Legalize the Adoption of
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prerogative as *parens patriae* had the power to protect children and to act for their welfare and in their best interests.\(^3\) Within the scope of this power was the discretion to exercise a supervisory scrutiny or even possibly control over children's custody.\(^4\) Primarily, the right to custody and control of a child resides in the natural parent.\(^5\) However, the parental right to custody of the child is not an absolute or an inalienable right.\(^6\) Hence, the state acting as *parens patriae* is able, in certain limited circumstances, in the best interests of the child, to restrict or even terminate by vari-

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\(^3\) See *In re Spence*, 41 Eng. Rep. 937, 938 (Ch. 1847) (The court held that jurisdiction over the custody of a child was not solely limited to cases involving the child's property); Eyre v. Shaftesbury, 24 Eng. Rep. 659 (Ch. 1722) (holding the Crown "the supreme guardian and superintendent of all infants"); Falkland v. Bertie, 23 Eng. Rep. 814 (Ch. 1696) (special delegation of crown's power—*parens patriae*—to the court).


\(^6\) Gordon at 215 n.1.

Minor Children by Adult Persons, *Laws of New York* ch. 830 (1873). However, before this legislation, several charitable societies were permitted under their charters (granted by the legislature) to place children for adoption. *In re Thorne*, 155 N.Y. at 144, 49 N.E. at 663. In fact, the birthplace of the common law—England—did not recognize adoption by legislative enactment until 1926. For a detailed account of the history of adoption law, see Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743 (1956).

While this article does not deal with adoption per se, a definition of the relationship will provide a clearer perspective from which to view the issues raised herein:

Adoption is the legal process by which a child acquires parents other than his natural parents and parents acquire a child other than a natural child. As a result of the adoption decree the legal rights and obligations which formerly existed between the child and his natural parents come to an end, and are replaced by similar rights and obligations with respect to his new adoptive parents.

CLARK 602.


\(^3\) See *In re Spence*, 41 Eng. Rep. 937, 938 (Ch. 1847) (The court held that jurisdiction over the custody of a child was not solely limited to cases involving the child's property); Eyre v. Shaftesbury, 24 Eng. Rep. 659 (Ch. 1722) (holding the Crown "the supreme guardian and superintendent of all infants"); Falkland v. Bertie, 23 Eng. Rep. 814 (Ch. 1696) (special delegation of crown's power—*parens patriae*—to the court).

For a more recent American case, see *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925), in which Judge Cardozo stated:

He [the chancellor] acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate and careful parent'.

*Id.* at 433, 148 N.E. at 626.

\(^4\) Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); *In re Spence*, 41 Eng. Rep. 937 (Ch. 1847) [Court acknowledged its right to interfere to protect a child]; Eyre v. Shaftesbury, 24 Eng. Rep. 659 (Ch. 1722).

Compare the powers of the equity court acting as *parens patriae* in custody cases to the power exercised by the Hebrew King Solomon. 1 Kings 3:16-28. Although his method may have been unduly harsh, he succeeded in uncovering the true mother of the living child or at least the one with the child's own interest at heart. See generally *People v. Beaudoin*, 126 App. Div. 505, 110 N.Y.S. 592 (3d Dep't), aff'd, 193 N.Y. 611, 86 N.E. 1129 (1908).


Parental rights today generally include: control, custody, natural guardianship, determination of living standards, of religion, of education, earnings, inheritance and the right to notice and appearance at judicial proceedings involving their children. . . . Coupled with rights are parental responsibilities for care, support, guidance and supervision.


There are several theories which attempt to explain the basis of these parental rights. See *id.* for a discussion of several of the theories advanced and the relevant authorities. See also *In re Livingston*, 151 App. Div. 1, 7, 135 N.Y.S. 328, 332 (2d Dep't 1942); Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954).
ous judicial proceedings the relationship which exists between the parent and the child. These situations may be characterized as involuntary terminations of custody. Conversely, it is within the legal competence of a natural parent to voluntarily surrender his right to the custody and control of his child—either temporarily


10 Early statutory schemes for the transfer of the custody of children proceeded much as the transfer of chattels and without judicial supervision. Clark 603.

In early England, a father could sell into slavery a son under seven years of age. 2 F. Pollock & F. Maitland, The History of English Law 436 (2d ed. 1968). However, there is a basic conflict among the authorities as to whether or not a parent can transfer the legal custody of a child to another. While some jurisdictions held that in the absence of a statute any attempt to permanently transfer custody was invalid as against public policy, e.g., Stickles v. Reichardt, 203 Wis. 579, 234 N.W. 728 (1931), other jurisdictions have held that such a transfer is valid, e.g., Enders v. Enders, 164 Pa. 266, 30 A.2d 129 (1894). For further treatment of this question, see 67 C.J.S. Parent and Child § 11(d) (1950).

The New York Court of Appeals has observed: A father unable to provide for his infant child, may transfer the custody, control and the right to the services thereof to another, subject to the right of a court of equity to interfere in the interest of the child. The mutual promises, therefore, of the parties to the instrument before us furnished an adequate consideration to support it.

Middleworth v. Ordway, 191 N.Y. 404, 411, 84 N.E. 291, 293 (1908). See In re Donnelly, 70 Misc. 584, 129 N.Y.S. 120 (Sup. Ct. Kings County 1911) (court adhered to the rule in Middleworth but interfered for the interest of the child and returned custody to the mother); cf. In re Thorne, 155 N.Y. 140, 49 N.E. 661 (1898) (Court recognized the existence of private agreements of custody transfer without the sanction of law, but refused to give the indenture the authority which it purported to exercise as an adoption). Some states, however, require judicial supervision and consent to all
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or permanently—to an individual or an agency willing to accept custody and able


Since all American jurisdictions now recognize adoption by statute, as a matter of course they take cognizance of voluntary surrenders.

In New York, this parental power to surrender custody is recognized in the Social Services Law. 1. Method. The guardianship of the person and the custody of a . . . dependent child may be committed to an authorized agency either by an order of the surrogate or judge of the family court . . . or by a written instrument which shall be known as a surrender, and signed:

(a) if both parents shall then be living, by the parents of such child, or by the surviving parent, if either parent of such child be dead; (c) . . . or if such child is born out of Wedlock, by the mother of such child;

2. Terms. Such guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms; for such time and subject to such condition as may be agreed upon by the parties thereto. If one of the purposes of such surrender is the adoption of such child from such authorized agency the instrument shall make specific provision therefor and it may recite that the authorized agency is thereby authorized and empowered to consent to the adoption of such child in the place and stead of the person signing the instrument, and that the person signing the instrument waives any notice of such adoption; it may also provide for the absolute surrender of such child to such authorized agency . . .

3. [Describes the nature and form of the surrender instrument].

N.Y. SOC. SERVICES LAW § 384(1),(2),(3) (McKinney 1966).

4. Upon petition by an authorized agency, a surrogate or judge of the family court may approve such surrender, on notice to such person as the surrogate or judge may in his discretion prescribe. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require the approval of a surrender by a surrogate or judge for such surrender to be valid.


Although this statute only takes cognizance of surrenders made to authorized agencies, a parent can surrender his child to an individual for adoption. N.Y. DOM. REL. LAW §§ 115-16 (McKinney Supp. 1970); People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, 271 App. Div. 672, 68 N.Y.S.2d 238, 239 (2d Dept 1947).


Furthermore, section 111 of the New York Domestic Relations Law (McKinney Supp. 1970), which enumerates the consent necessary for an adoption, provides that [t]he consent shall not be required of a parent . . . who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law. . .

In other words, a parent who surrenders his child to an agency to be placed for adoption is in effect executing a carte blanche consent to future adoption (qualified by the agency's right to consent). On the other hand, in the case of a surrender to an individual for adoption, the natural parents' consent is still required for adoption. People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, 271 App. Div. 672, 68 N.Y.S.2d 238, 239 (2d Dept 1947).

Thus, in comparison with other jurisdictions, a
to care for the child. This action could be termed a voluntary termination of the parental right to custody. However, the scope of this article will be limited to a consideration and analysis of a parent’s power to revoke or withdraw—prior to a final decree of adoption—his voluntary permanent surrender of custody of the child (with a view to adoption) and the concomitant problems. The core problem is whether a parent has such a power of consent revocation and if he does, to what extent it may be exercised in defeating a prospective adoption.

In their considerations of the existence and the extent of this power of revocation, the courts and legislatures of various jurisdictions have formulated several disparate approaches. However, from the resulting potpourri of cases and statutes dealing with the subject, three distinct rules emerge. Although none of the three approaches deny the existence of a possible parental power of revocation, they do differ as to the extent of its effectiveness as a legal consequence of its exercise in a given situation. In order to appreciate the precise distinctions, an examination of the approaches as applied is necessary.

Historically, the first approach which the courts adopted in the absence of a statutory norm was the rule of absolute revocability (as a matter of right). Within the scope of this approach, a parent who had consented to an adoption was considered to have as a matter of right an absolute power—at any time prior to the final decree of adoption—to revoke his consent to that adoption. In the exercise of this power, the parent was not required to establish any legal reason for the revocation. As the

New York surrender to an agency for the purpose of adoption can be considered as a consent to an adoption. But see note 42 infra.

The obligations of parenthood and the law limit this power to surrender the custody rights of the child. The parent must either provide for the child himself or otherwise have another assume the duties and responsibilities of custody. See, e.g., N.Y. Soc. Services Law § 384 (McKinney 1966). Otherwise, if the parent simply attempts to avoid his obligations, the child would be considered neglected or abandoned. See, e.g., N.Y. Soc. Services Law § 371(2) (McKinney Supp. 1970); Id. § 371(4) (McKinney 1966). If the child is neglected or abandoned, the state may commit the child to an authorized agency without the defaulting parent’s consent in effect an involuntary termination of custody. See, e.g., N.Y. Soc. Services Law § 384(5) (McKinney Supp. 1970). See generally Gordon.

For discussion of parental attacks upon final decrees of adoption, see Note, Attacks on Adoption Decrees by Natural Parents to Regain Custody, 61 Yale L.J. 591 (1952).

Comment, Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564 (1961) [hereinafter Legal Doctrine]. [This comment provided an exhaustive survey of the cases and statutes which concern the parental right of revocation].

Although states generally fall into one category or another, an important consideration will often be to whom is the parent surrendering the child—an individual or an authorized agency. See, e.g., People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc’y, 271 App. Div. 672, 68 N.Y.S.2d 238, 239 (2d Dep’t 1947). The difference can sometimes be crucial to the outcome of the case.

For future discussion, the concept of consent to adoption will include surrenders of custody with a view toward adoption. See note 11 supra.

For a compilation of the authorities which espouse this rule, see Annot., 138 A.L.R. 1038 (1942).

See, e.g., In re White’s Adoption, 300 Mich.
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Michigan Supreme Court observed in In re White's Adoption,20 "[n]either the lack of proof of fraud or undue influence nor the respective advantages in favor of or against adoption is controlling of the result."21

A critical evaluation of this language would disclose that the court in following this rule did not perceive this power as a privilege to be exercised only within the grant of its discretion. Rather, it appears that the power was regarded as an absolute right appurtenant to parenthood. Thus, it was capable of being exercised arbitrarily at the will of the parent with the courts merely mechanically acknowledging the revocation as a fait accompli.

The legal justification for this rule was expressed in terms of a highly technical jurisdictional distinction that parental consent being necessary to an adoption, withdrawal of such consent before the final decree had “vested” any right to the child in the adoptive parents deprived the court of jurisdiction to decree the adoption.22

Therefore, while the consent operates to confer jurisdiction upon the court for the adoption proceeding, until the decree there has been no alteration whatsoever in the parent’s “vested” right to the child. The relationship could be terminated and the vested rights transferred only through the vehicle of the final decree of adoption issued by the court. Although the term “vested” engenders conceptions of property rights,23 the primitive notion of a child as constituting the property of the parent has been repeatedly condemned by the courts.24 For example, in answer to a

It is our opinion that under the circumstances of this case, no vested rights having intervened, the natural mother had the right to withdraw her consent to the adoption during the 90 days while the probate court still had control over the matter by a rehearing. In re White's Adoption, 300 Mich. 378, 384, 1 N.W.2d 579, 581 (1942) [allowing revocation until the rehearing date expires after final decree]. Contra, Bailey v. Mars, 138 Conn. 593, 87 A.2d 388 (1952) (parent cannot deprive court of jurisdiction by withdrawing consent).

“Vested Rights” have been defined as [r]ights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect being lawful in themselves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.


20 300 Mich. 378, 1 N.W.2d 579 (1942); In re Nelms, 153 Wash. 242, 279 P. 748 (1929) [viewing the consent as a valid contract which could be revoked by the natural parent and recognizing that such parent might have to answer for the breach of contract with damages]. But see People ex rel. Anonymous v. Saratoga County Dep't of Public Welfare, 30 App. Div. 2d 756, 291 N.Y.S.2d 526 (3d Dep't 1968) (considered surrender a contract under court supervision).

21 Id. at 384, 1 N.W.2d at 581.

22 Katz, Judicial and Statutory Trends in the Law of Adoption, 51 GEO. L.J. 64, 89 (1962) [hereinafter Katz] [footnotes omitted].

The Michigan Supreme Court utilized similar language.

23 “Vested” is defined as “[h]aving the character or giving the rights of absolute ownership.” Id. at 1734 (4th ed. 1957).

24 While the right of the natural parents to the custody of their children is not a proprietary
mother’s claim of the unqualified right to revoke her consent to her child’s adoption, a New York court retorted that

[...] neither the natural mother nor the foster parents have any rights in the foster child, which are in any way similar to property rights, which the courts would be required to enforce.²⁵

However, it cannot be denied that courts recognizing an absolute right of revocation are, in fact, emphasizing the parent’s rights above all other considerations.²⁶ In the context of any attempted consent revocation there are several interests that are involved—the interest of the child, the adoptive parents, the natural parents and society.

Yet, when confronted with these diverse

right in the same sense as if the child were a chattel, and while it is accompanied by a corresponding duty which arises from the relation of parent and child, it has ever been regarded, even in primitive civilization, as one of the highest natural rights.


It is noteworthy that the language employed admonishes that if it were a property right, the court would be bound to enforce it. This notion is inconsistent with the rejection of the concept of a property right by courts espousing the absolute right to revocation rule.

Another New York court rejected the concept in even stronger terms:

A child is not a chattel to be bought or sold, directly or indirectly, and may not be delivered as if it were either an animate or inanimate gift.


interests and interrelationships, these courts automatically react by invoking the paramount right of the parent to custody as controlling, not considering that it might be in derogation of the child’s best interests. By their deference to this “vested” right, these courts have ignored the long recognized power of equity courts to interfere in the best interests of the child.²⁷ By this rule, they allow the biological predicate to prevail over even the most intense of human relationships which may develop—upon which the psychological as well as physical well-being of the child may depend. It has been observed that

[...] the mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, and confidence, is considered essential for a successful development, and is the basis of what may be termed psychological parenthood . . . rather than the biological events which may precipitate such a relationship which many psychologists identify as the *sine qua non* of successful personality development.²⁹

²⁷ See note 3 supra.

²⁸ In most jurisdictions, after the requisite consent has been given the child is physically transferred to the prospective new home. The prospective adoptive child and adoptive parents are given the opportunity to adjust to one another and to interrelate before the adoption is finalized. The length of time of this required residence varies. In New York, the child must reside in the prospective home six months before a decree of adoption will be issued. See, e.g., *N.Y. Dom. Rel. Law* § 112(6) (McKinney Supp. 1970).

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Thus, in the situation where the child resides, either pursuant to statute\(^30\) or private agreement, with the prospective adopting parents prior to the adoption, strong psychological bonds tend to emerge. Yet under the rule of absolute revocability, regardless of these developments in the child’s life, the court will be constrained to capitulate to the parent’s revocation as a matter of law. The possible psychological repercussions upon the child, potentially serious, are totally disregarded by the courts in their quest for the mechanical application of this rule. The dangers have been recognized by some courts. The New York Court of Appeals has observed:

While the circumstances of a particular case must be strong in order to overcome the so-called paramount right of the parent, yet where the circumstances of a particular case contains such evidence, the best interests of the infants must be the guiding principle. The surroundings and associations of the young have so great an affect upon their outlook and so form the basis of their future development that nothing should prevent the courts from considering the human aspects of the question.\(^31\)

Thus, in spite of an endless variety of possible situations in which the child might be, the rule will be blindly applied to all circumstances in like manner in contradiction to all the methods recognized by modern psychology. The only bar is a final court decree of adoption. At this juncture, it should be borne in mind that these approaches only apply to situations in which the parent has already voluntarily surrendered the child’s custody and consented to adoption. Where there has been no change in the status of the relationship, \textit{i.e.}, no surrender or consent, it is presumed, in all jurisdictions, that the natural parent’s custody of the child is in the child’s best interests.\(^32\)

Although the absolute right approach was once the rule in a majority of American jurisdictions,\(^33\) most jurisdictions have adopted a more flexible approach to the problem.\(^34\) Illustrative of this trend is the approach of Minnesota. Once a firm adherent to the rule of absolute revocation,\(^35\) Minnesota has, by recent legislative enactment, embraced the discretionary rule.\(^36\) The statute clearly states that

\[ \text{[a]fter a petition has been filed [for adoption], the consent to the adoption may be withdrawn only upon the order of the court after written findings that such withdrawal is for the best interest of the child.}\]

Yet in spite of this trend, the absolute right approach has not been abandoned. As recently as 1966, the highest court of one of the nation’s most populous states—Penn-

\(^{30}\) See note 28 supra.


\(^{34}\) Annot., 156 A.L.R. 1011 (1945).

\(^{35}\) In re Baby Girl Larson, 252 Minn. 490, 91 N.W.2d 448 (1958); In re Adoption of Anderson, 189 Minn. 85, 248 N.W. 657 (1933); State ex rel. Platzer v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921).

\(^{36}\) For authorities on the discretionary rule, see Annot., 156 A.L.R. 1011 (1945).

sylvania—reaffirmed its adherence to the rule. In *In re Adoption of Hunter*, the Pennsylvania Supreme Court found it “well settled . . . that a parent’s consent to an adoption may be withdrawn at any time prior to the entry of a final decree of adoption.”

However, some other jurisdictions which adhere to this rule have attempted to limit the time within which the absolute right may be exercised, in an obvious effort to reduce the possible hardships upon all the parties concerned. For instance, the state of Hawaii allows the absolute right of revocation to be exercised until the child is

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39 Id. at —, 218 A.2d at 767; see also *In re Adoption of Gunther*, 416 Pa. 237, 206 A.2d 61 (1965).

40 N.C. Gen. Stat. § 48-11 (1966) provides:

Consent not revocable.—No consent described in G.S. 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree or a final order of adoption when entering of an interlocutory decree has been waived in accordance with the provisions in this chapter. Provided a petition to adopt has not been filed, any parent(s) who has surrendered a child for adoption to a licensed child-placing agency or the state department of public welfare shall have the absolute right to revoke the surrender within thirty (30) days from the date of the execution of the surrender or within ninety (90) days from the date of the execution of the surrender if the surrender was executed to a person other than a licensed child-placing agency or the state department of public welfare by appearing in chambers before the chancellor or circuit judge before whom the surrender was executed, or his successor in office, and presenting to him the original and two (2) copies of the revocation of said surrender . . .

[statutory form] . . .

It shall be the duty of the court to attach the original copy of the revocation of the surrender to the original copy of the surrender and to mail within three (3) days a copy of the revocation to the state department of public welfare, a copy to the licensed child-placing agency or the person(s) to whom the child was surrendered for adoption. If a petition to adopt has been filed prior to the revocation of a surrender, the court in which the petition to adopt has been filed shall have jurisdiction to determine what is for the best interest of the child. If a petition to adopt has not been filed when the surrender is revoked, the court before whom the surrender was executed and revoked shall have jurisdiction to determine what is for the best interest of the child. If a petition to adopt has been filed when the surrender is revoked, the court before whom the surrender was executed and revoked shall have jurisdiction to determine what is for the best interest of the child. If a petition to adopt has been filed when the surrender is revoked, the court before whom the surrender was executed and revoked shall have jurisdiction to determine what is for the best interest of the child. If a petition to adopt has been filed when the surrender is revoked, the court before whom the surrender was executed and revoked shall have jurisdiction to determine what is for the best interest of the child.
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placed with the adoptive parents. Other jurisdictions, apply the absolute right rule to consents to individuals (as distinguished from agency surrenders).

surrender was executed and revoked to show cause why it is not for the best interest of the child to be returned to the parent(s), naming the natural parent(s) party defendant(s). When any person other than a licensed child-placing agency or the department, as set out above, files a petition to show cause why the child should not be returned to the parent(s), the petition must be filed in triplicate, the original filed with the clerk of the court with a copy sent to the state department of public welfare and one (1) copy sent to the county director of public welfare of the county in which the petition is filed. Upon the filing of the petition, the court shall order the county director of the department of public welfare of the county in which the petition is filed to investigate the petitioner(s), the natural parent(s) and any circumstances or conditions which may have a bearing on what is for the best interest of the child and of which the court should have knowledge. The department of public welfare shall report on all matters set out by the court in the order of reference within sixty (60) days upon receipt of a copy of the petition. The report shall not be opened to inspection by anyone except the court or on an order of the court duly entered on the minute book. The department of public welfare shall have the right to intervene for the purpose of introducing proof as to what is for the best interest of the child. The court shall award the guardianship of the child in accordance with the child's best interest.

Both the North Carolina and the Tennessee statutes, therefore, employ a combination of approaches.

Unlike statutes (note 40 supra) which rely on time periods, the Hawaii law is concerned with the happening of an event which might have several implications.

Although the absolute right continues to exist, once the child is placed with a view to adoption, the revocation is at the discretion of the court. Hawaii Rev. Laws § 331-2 (1955).

In spite of these attempts at equitable adjustments of the absolute right rule, the


M. PAULSEN, W. WADLINGTON & J. GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 724 (1970) [hereinafter PAULSEN].

In People ex rel. Anonymous v. Rebecca Talbot Perkins Adoption Soc'y, 271 App. Div. 672, 68 N.Y.S.2d 238 (2d Dep't 1947), the appellate court noted the distinction between a surrender to an individual and to an agency for adoption. It pointed out that [s]urrender of custody of a child by a parent to an individual as an incident of adoption by the latter, whether or not by written instrument, is without statutory cognizance. Id. at 673, 68 N.Y.S.2d at 239 (inferring that consent was still necessary for a later adoption).

It further stated:

In other words, save for the provision of the . . . [Social Services Law § 383] . . . , the surrender agreement irrevocably transfers guardianship and custody.

Id. at 674, 68 N.Y.S.2d at 240. See In re Anonymous, 60 Misc. 2d 854, 858, 304 N.Y.S.2d 46, 51 (Sur. Ct. Suffolk County 1969):

The consent of a parent to adoption must be an existing valid consent at the time of the adoption.
A noticeable trend in recent years, as in the case of Minnesota,\textsuperscript{42} has been in the direction of the discretionary approach.\textsuperscript{44} The discretionary approach is now the rule in a majority of jurisdictions.\textsuperscript{45}

The distinctions between the absolute right and discretionary approaches are pronounced. Under the discretionary rule, the parent's right to revoke is sharply curtailed. Unlike under the absolute right rule, the mere exercise of the act of revocation is in itself without legal consequence upon the consent. Thus, the parent's act cannot terminate the surrender or the consent.\textsuperscript{46}

Thus, some courts in New York have considered the agency surrender irrevocable. For instance, Justice McGivern stated:

When an authorized agency is involved, the utter finality of the surrender, barring fraud, mistake, over-reaching or misrepresentation, has become fixed in our law.

People ex rel. Skokas v. McCarthy, 7 Misc. 2d 963, 965, 164 N.Y.S.2d 198, 201 (Sup. Ct. N.Y. County 1957). As authority for that statement, Justice McGivern cited People ex rel. Harris v. Commissioner of Welfare, 188 Misc. 919, 70 N.Y.S.2d 389 (Sup. Ct. N.Y. County 1947), which stated that "such a surrender doubtless may be revoked for facts and upon grounds which would reach a court to revoke any kind of a contract." \textit{Id.} at 922, 70 N.Y.S.2d at 393.

\textsuperscript{43} \textit{Minn. Stat. Ann.} § 259.24(6) (1971). For a recitation of the statute, see note 36 and accompanying text \textit{supra}.

\textsuperscript{44} Annot., 156 A.L.R. 1011 (1945).

\textsuperscript{45} \textit{Katz, supra} note 22, at 88. As one commentator has noted: "[A] survey of current law . . . discloses that . . . revocation at the discretion of the court, now has the most adherents." \textit{Legal Doctrine} at 564-65.

\textsuperscript{46} In fact, in several states if the parent permanently surrenders custody to an authorized agency, the parent's consent is not necessary for any adoption because the agency is considered to have custody. Thus, the agency has the right to consent to the adoption. \textit{See, e.g., N.Y. Dom.}

Furthermore, the purported revocation is not considered to have the effect of depriving the court of the jurisdiction to act.\textsuperscript{47} In fact, it is only at the discretion of a court of competent jurisdiction that the parent's revocation acquires any legal effect.\textsuperscript{48} Therefore, it is for the court to decide whether or not the revocation is to be allowed to occur. As the New York Court of Appeals pointed out in \textit{People ex rel. Scarpetta v. Spence-Chapin Adoption Service},\textsuperscript{40}

The discretionary rule allows the court leeway to approve revocation of the surrender when the facts of the individual case warrant it. . . .\textsuperscript{50}

Thus, the courts which employ this approach do not react in Pavlovian fashion.


The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon the consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance to an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate the child. The name of such child shall not be changed while in the custody of an authorized agency.


\textsuperscript{50} \textit{Id.} at 190, 269 N.E.2d at 790, 321 N.Y.S.2d at 69.
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to every parental attempt at revocation as they would be bound to do under the absolute right rule. Within the scope of its discretion, the court is able to consider the various factors present within the confines of each individual set of circumstances. The inherent flexibility of this rule allows the court to decide each case on the basis of the factors it deems to be controlling in the particular situation. Contrasting it with the other approaches, the New York Court of Appeals, in Scarpetta, remarked that the discretionary rule "avoids the obvious dangers posed by the rigidity of the extreme positions." However, to be an effective instrument of justice, the discretionary power of a court must be exercised within the framework of rational, readily-identifiable criteria. Few can emulate Solomon.

There is one more approach which must be considered. In contradistinction to the extent of parental power exerciseable under the absolute right rule, some jurisdictions attempt to preclude any parental challenge to the act of consent. The consent is considered to be an irrevocable act on the part of the parent. For instance, the Illinois statute provides that

[a] consent to adoption by a parent, including a minor, executed and acknowledged in accordance . . . [with the Act] . . . or a surrender of a child by a parent, including a minor, to an agency for the purpose of adoption shall be irrevocable. . . .

Yet the shield of irrevocability is not impenetrable. The power of equity remains available to prevent injustice by strict adherence to the law. Thus, in these jurisdictions, it is within the power of the courts, either under equitable principles or under statute, to revoke the consent upon a showing by the parent that the consent was induced by fraud, duress, misrepresentation.

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51 Id. (footnote omitted).
52 See note 1 and accompanying text supra.
55 ILL. ANN. STAT. ch. 4, § 9.1-11 (Smith-Hurd 1966). The Illinois Act applies to consents to individual adoptions and surrenders to agencies.
56 People ex rel. Harris v. Commissioner of Welfare, 188 Misc. 919, 70 N.Y.S.2d 389 (Sup. Ct. N.Y. County 1947) states that [a] surrender doubtless may be revoked for facts and upon grounds which would lead a court to revoke any kind of a contract. . . . [citing Zimmerman v. Cohen, 236 N.Y. 15, 139 N.E. 764 (1923)].
57 In Zimmerman, the Court defined the term irrevocable contract as a contract which cannot be revoked at the will of one party to it, but can only be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract or provision of a contract.
60 Id. But see McGraffin v. Family & Children's
tion.\textsuperscript{64} mistake or overreaching.\textsuperscript{62} The Illinois statute, for example, continues that the consent is irrevocable "unless it shall have been obtained by fraud or duress and a court of competent jurisdiction shall so find."\textsuperscript{63} However, the limitations on the exercise of this power are precise. The alleged misconduct must fall within one of the delineated categories for a court to interfere with the consent.

The Illinois Supreme Court recently observed that

\begin{quote}
[m]ere advice, argument or persuasion is not duress or undue influence if the individual acts freely when he executed the questioned documents though the same would not have been executed except for the advice, argument or persuasion.\textsuperscript{64}
\end{quote}

A Florida court has succinctly stated:

\begin{quote}
[s]uch documents should not be executed without a full knowledge of their effect, nor should a court permit such consents to be set aside for frivolous or inconsequential
\end{quote}

Thus, within the scope of the irrevocable consent rule, if the characterization of the misconduct does not fit the well delineated boundaries set out by the courts, the consent will be considered irrevocable. If there is no normative basis for the courts to act, they are without discretion.

As was the case with the absolute right rule, the irrevocable consent approach has been criticized on the ground that harsh results often occur because of its rigidity.\textsuperscript{66} This criticism has been especially strong in cases where the surrendering mother is an unwed mother. One commentator offered this astute observation:

\begin{quote}
At the time her child is born the unwed mother is usually emotionally distraught: Also, unwed mothers are often seriously neurotic and have difficulty making decisions based on realistic considerations. This mother is particularly vulnerable to efforts, well-meaning or unscrupulous, to persuade her to signed consent. Such consents may be executed under circumstances not amounting to legal fraud or duress; but their truly voluntary nature may be questioned.\textsuperscript{67}
\end{quote}

Thus, once again it is the inflexibility of

\textsuperscript{64} People ex rel. Drury v. Catholic Home Bureau, 34 Ill. 2d 84, 93, 213 N.E.2d 507, 511 (1966).


\textsuperscript{65} In re Adoption of Arnold, 184 So. 2d 192, 194 (Dist. Ct. App. Fla. 1966).


\textsuperscript{67} Legal Doctrine at 570 [The footnotes which cited sociological treatises are omitted].
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the rule which subjects innocent parties to harsh results.

It would seem that the most effective approach in any attempt to achieve an equitable result in each case would be the discretionary rule. The rigid formulas dictated by the other two approaches were often the occasion for hardship and inequitable results in individual cases. The absolute right rule can cause uncertainty and insecurity in prospective adoptive parents, while the irrevocable consent rule can preclude an innocent parent from his rightful claim to custody because the circumstances of his case do not qualify under the limited exceptions permitted by the rule.68 A rule whereby the courts can assess each situation individually constitutes a more viable alternative. Among the approaches, only the discretionary rule presents any hope for equitable consideration of the interests of all concerned—natural parent, adoptive parents, child and society. Although this approach is not without fault, its advantages outweigh its disadvantages. A closer examination of this approach will facilitate a better understanding of it within the judicial context.

In order for the discretionary approach to be effective, it is necessary for the courts applying it to establish a standard. Two divergent sets of criteria have been utilized as directional standards.

In the earlier cases, the courts employing the discretionary approach often grounded their decisions in terms of a parental right test.69 The nature of the test may be inferred from its name. Under this test, the court emphasized the primary natural right of the biological parent to custody of the child.70 In Bradley v. Bennett,71 the Alabama Supreme Court set forth the precise formula:

“When an infant child or minor is out of the possession and custody of the father, and habeas corpus is resorted to by the latter to obtain such custody, it does not follow as a matter of right that the prayer of the petitioner will be granted. The court is clothed with a sound discretion to grant or refuse relief, always to be exercised for the benefit of the infant primarily, but not arbitrarily, in disregard of the father's natural right to be preferred. If the father be reasonably suitable and able to maintain and rear his child, his prayer should be granted. If, on the other hand, he be unsuitable or unable properly to care for his offspring, the court should grant no relief in the premises, but leave the parties in statu quo.”72

It will be noted, however, that unlike the absolute right rule, this parental right test involved only a presumption on the part of the court. It was not an uncompromising standard. As the Bradley court stated, the presumption “should not be allowed to overturn weightier considerations.”73 It was

68 See note 67 supra.
69 E.g., Bradley v. Bennett, 168 Ala. 240, 53 So. 262 (1910) (courts quoted parental right test but held against natural parent); Kirkbridge v. Harvey, 139 Ala. 231, 35 So. 848 (1904). See People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); In re Jewish Child Care Ass'n, 183 N.Y.S.2d 65 (1959) (superior right of agency over foster parents to custody; dissent argued that the child's interests should be primary).
70 Id.
71 168 Ala. 240, 53 So. 262 (1910).
72 Id. at 241, 53 So. at 263.
73 Id.
rebuttable by an affirmative showing of the unfitness of the natural parent\(^{74}\) seeking to revoke the transfer of custody. Thus, although the natural parent brought the habeas corpus proceeding,\(^{75}\) the burden of coming forward with proof of parental unfitness fell upon the party attempting to retain custody under the surrender and consent to adoption.\(^{76}\) While this test involves a presumption in favor of the natural parent as a procedural device, its effect upon the discretionary rule can be substantive in nature.\(^{77}\) Under this test, the presumption may prove to be impossible to rebut. If the parent is not shown to be unfit, the presumption of the parent’s right is controlling.\(^{78}\) Thus, only the surrenders and consents of unfit natural parents would, in effect, be held valid by a court employing this presumption. The use of this test would cause as much uncertainty and insecurity among prospective adoptive parents as the absolute right rule. Since it does not involve some of the more important and relevant considerations and interests, the scope of the test, as a basis for the exercise of discretion, is too narrow for effective utilization of the discretionary power.

The second version of the discretionary approach, which developed later, is the so-called best interests test. The criterion of this test is simply the best interests of the child. Yet this simple definition has caused some consternation among judges.

What is for the best interests of this child? In answering such a question judges feel their inadequacy. . . . The first consideration is the well being of the child . . . But are there no other criteria?\(^{79}\)

There are other criteria. In spite of its simple definition, the test involves the analysis of the complex and intricate set of factors and interrelationships which surround each individual child. Though the test is simple to define, discerning a child’s best interests is not a simple matter. Compared to the confined limitations of the parental right test, the best interest test provides a broad scope of inquiry—all informational data relevant to the well being of the child. The weight of this data has been deemed by various courts to be controlling. As a New York court observed,

\[\text{[i]t is now too well settled to require forti-}\]

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\(^{74}\) See *In re* Thorne, 240 N.Y. 444, 148 N.E. 630 (1925). There, the Court stated:

Her right as a parent . . . to the care and custody of the child becomes superior to that of all others unless it should be shown anew by the child’s relatives or custodians that she is an unfit person to exercise such guardianship.


\(^{75}\) Habeas corpus is a proper remedy to determine custody between parent and non-parent. *Id.* at 467, 113 N.E.2d at 803.

\(^{76}\) See People *ex rel.* Anonymous v. Anonymous, 10 N.Y.S.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1961). In this case the court emphasized that the presumed parental right to the child fails when the parent is shown to be unfit. See generally Wilson v. Mitchell, 48 Colo. 454, 111 P. 21 (1910). The court develops at length the natural rights of the parent to custody and the limitations on the power of the state to subordinate those rights.


\(^{78}\) Id.

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fication by extended citation from cases that, in determining to whom the custody of an infant of tender years shall be con-
fided, the paramount and controlling con-
sideration is the welfare of the infant. To this all other considerations must be sub-
ordinated including the wishes of the par-
tents. . . . Of course a father or a mother
has a strong natural claim to the custody
and companionship of a child, but even
this must give way where it clearly appears
that the child's welfare requires a different
disposition of its custody.80

As a test, it simply provides a standard
against which the circumstances of a given
situation may be measured. The standard
is the child's well-being—physical and
psychological. Yet in weighing the factors81
affecting the child's best interests, the rele-
vant factors have no order of importance
within the scheme of the best interests test.
The child's physical and psychological en-
vironment82 and its relative stability as a
context for his development must be
weighed heavily in any consideration of his
interests.

One court attempted to set forth the
relevant criteria:

Among other pertinent factors which must
be considered are the age of the child; the
periods of time the child has spent with his
natural parents, at the institution and with
his foster parents; the effects, if any, of
removing the infant from the agency or his
foster home; and the affection, economic
and psychological well-being and the cul-
tural advantages which the infant can
reasonably anticipate from the foster par-

Thus, the court must view the totality of
the child's existence—the complex of inter-
relationships and dependencies which de-
velop—and make a decision as to which
factors are to be weighed most heavily in
each situation.84 The measure of the factors

80 In re Meyer, 156 App. Div. 174, 176, 141
N.Y.S. 123, 124 (1st Dep't 1913). See generally
People ex rel. Sisson v. Sisson, 271 N.Y. 285,
2 N.E.2d 660 (1936).
81 The factors may include the physical, psycho-
logical and mental development of the child.
For a general discussion of such factors, see
E. HURLOCK, CHILD DEVELOPMENT (4th ed.
1964) and A. JERSILD, CHILD PSYCHOLOGY (5th
82 The New York Court of Appeals has noted:
The surroundings and associations of the young
have so great an effect upon their outlook and
so form the basis of their future development
that nothing should prevent the courts from
considering the human aspects of the question
presented.
In re Bock, 280 N.Y. 349, 353, 21 N.E.2d 186
(1939).
The controlling principle in all cases being the
welfare of the child which . . . involves proper
care and nurture, suitable environment, health-
ful surroundings, and education, mentally and
morally.
In re Gustow, 220 N.Y. 373, 376, 115 N.E. 995
Colo. 454, 111 P. 21 (1910).
83 People ex rel. Grament v. Free Synagogue
Child Adoption Comm., 194 Misc. 332, 338, 85
N.Y.S.2d 541, 546 (Sup. Ct. N.Y. County 1949)
(Judge Botein).
84 Id. The court continued that
[a]n evaluation of only the above mentioned
factors in the proceeding tilts the scale heavily
on the side of the prospective adoptive parents.
Id. at 338, 85 N.Y.S.2d at 546.
Another New York court stated:
In the circumstances and considering the pre-
sent home life being afforded the infant by the
prospective adoptive parents, the Trial Justice
decided that the best interests of the child
would not be promoted by return to his
mother.
against the ever present standard will fluctuate on the basis of the facts of each case. With all the tools of modern medicine and contemporary psychological methodology, the test, as a criterion for the exercise of discretion, provides an effective means for assessing an individual situation and considers the single most important interest within the framework of the situation—the child. Some courts in viewing this procedure consider it too elongated. The courts employ a procedural short-cut. While not abandoning the best interests test, these courts impress upon every set of circumstances a presumption that the custody of the child in the biological parent is in the best interests of the child. While this may be true while the child is still in his parent’s custody, a different situation arises “[o]nce the custody of the natural parent is terminated, this presumptive significance loses a great deal of its vigor.” Yet the courts, in order to lighten their task, have applied this presumption even to cases where the parent terminated his custody and later seeks to regain custody. While courts employing this procedural presumption still claim to be acting in the child’s best interests, they are, in effect, applying the parental rights tests. Their inquiry is no longer objective. The presumption, by procedurally shifting the burden, affects the substantive rules. This presumption dilutes the realm of objective inquiry and places the burden on the adoptive parents. Thus, as with the parental right test and the absolute right rule, this presumption of best interests adversely affects the adoptive system—agencies and prospective adoptive parents. Prospective adoptive parents may become wary of becoming involved in costly litigation and the possibility of heartbreak—losing a child they have come to love and consider as their own.

Recently, the New York Court of Appeals employed such a presumption. In *People ex rel. Scarpetta v. Spence-Chapin Adoption Service,* the natural mother was seeking to regain the custody of her child after she had surrendered it, pursuant to statute, to an authorized agency for adop-

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86 *People ex rel. Grament v. Free Synagogue Child Adoption Comm.,* 194 Misc. 332, 337, 85 N.Y.S.2d 541, 545 (Sup. Ct. N.Y. County 1949) (When the natural parent has custody, the presumption of parental right must be overcome); *but see People ex rel. Kropp v. Shepsky,* 305 N.Y. 465, 113 N.E.2d 801 (1953).


90 N.Y. Soc. Services Law § 384 (McKinney 1966). The mother executed a written instrument to the agency wherein she stated:

Finding that I am unable to provide a suitable home for said child and feeling that the welfare of the child will be promoted by its adop-
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The child had been placed with prospective adoptive parents.\(^91\)

...\(^\text{tion or by its being placed in foster care, the undersigned . . . voluntarily, unconditionally and absolutely surrender, transfer and commit said child to the custody, control, care and management of the Spence Chapin Adoption Service . . . with the understanding that said child may be adopted by person or persons as said agency in its discretion may select . . .}

Record on Appeal at 57.

The child was born on May 18, 1970. The mother voluntarily surrendered her to the agency on May 22, 1970 for foster care. On June 1, the mother executed a formal surrender, with a present consent to any future adoption. On June 18, the child was placed with foster parents; on June 23, the mother asked for the child's return. It was not until November 16, 1970 that the supreme court ordered the child returned to the mother. People ex rel. Scarpetta v. Spence Chapin Adoption Service, No. 34102 (Sup. Ct. N.Y. County, Nov. 16, 1970). The child remained with the adoptive parents until the appeal ended on April 7, 1971.

After the Court of Appeals decision, the prospective adoptive parents left the jurisdiction and fled to Florida with the child. The mother followed them and brought an action in the Florida courts to regain the custody of her child from the adoptive parents pursuant to the decree of the New York court. The Florida trial court, however, refused to be bound by that decision and found that it was in the best interests of the child that she remain with the prospective adoptive parents. The Florida District Court of Appeal, Third District, affirmed the lower court findings. It concluded that the New York decision was not entitled to full faith and credit under the Constitution. See Note, Ford v. Ford: Full Faith and Credit to Child Custody Decrees?, 73 YALE L.J. 134, 138 (1963); Comment, Conflicting Custody Decrees: In Whose Best Interests? 7 DUQ. L REV. 262 (1968-1969). Later, in denying a rehearing, the Florida appeals court stated that since the child had remained with the adoptive parents throughout the proceedings in New York with the mother's approval, a change of circumstances had occurred, i.e., the development of a strong relationship between the child and adoptive parents. No. 745 (Nov. 30, 1971). Accord, People ex rel. Wessell v. New York Foundling Hosp., 34 App. Div. 2d 947, 312 N.Y.S.2d 234 (Ist Dep't 1970) (mem.) (subsequent marriage of unwed mother considered a change of circumstances).

The court also mentioned that appeals faith and credit under the Constitution. See Note, Ford v. Ford: Full Faith and Credit to Child Custody Decrees?, 73 YALE L.J. 134, 138 (1963); Comment, Conflicting Custody Decrees: In Whose Best Interests? 7 DUQ. L REV. 262 (1968-1969). Later, in denying a rehearing, the Florida appeals court stated that since the child had remained with the adoptive parents throughout the proceedings in New York with the mother's approval, a change of circumstances had occurred, i.e., the development of a strong relationship between the child and adoptive parents. No. 745 (Nov. 30, 1971). Accord, People ex rel. Wessell v. New York Foundling Hosp., 34 App. Div. 2d 947, 312 N.Y.S.2d 234 (Ist Dep't 1970) (mem.) (subsequent marriage of unwed mother considered a change of circumstances).

The lower court reasoned that

\[\text{[t]he issue here is not whether the petitioner can rescind the surrender of her child, but whether the child's best interests are served by its return to its natural mother . . . rather than with prospective adoptive parents.}\]

This court determined that the placement of the child with adoptive parents was rather hasty; that the mother had acted quickly and consistently,\(^93\) motivated solely by her concern for the well-being of her child,\(^94\) and that the natural mother was a fit parent. Upon these findings, it ordered the child returned to the natural mother.\(^95\)
The appellate division unanimously affirmed the decision. The Court of Appeals in such a case has limited review of questions of law. However, instead of merely affirming the findings, the court engaged in a protracted discussion of the area of revocation of surrender and consent. After acknowledging the discretionary power of the New York courts to order a change of custody even after a permanent surrender of custody, the court proceeded to formulate a test whereby the best interests of the child could be determined. Although the natural mother in the case had offered evidence why the child should have been returned to her, the Court of Appeals deemed it necessary to establish a presumption. It held that the natural parent's right to be so important "that in determining the best should be handled quickly to avoid any further hardships to the parties."

In so doing the court held, interestingly, that "[t]his disposition must be confined in its effect to the case immediately before us." The court said she acted quickly to regain custody by applying to respondent agency, offering to demonstrate, as she did later at Special Term, "that the interest of such child will be promoted thereby, and that such parent is fit, competent and able to duly maintain, support and educate such child."

Id.

for experience teaches that a mother's love is one factor which will endure, possibly endure after other material advantages and emotional attachments may have proven transient." The court added that the primacy of status thus accorded the natural parent is not materially altered or diminished by the mere fact of surrender under the statute, although it is a factor to be considered by the court.

Finally, the court concluded that to give the fundamental principle meaning and vitality, we have explicitly declared that "[e]xcept where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who takes or withholds a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent."

The court also discussed what it would consider to be sufficient unfitness or improper motivation seeking the return of the child to rebut the presumption of parental custody as the child's best interests. As authority for its establishment of a presumption, the court cited a case which dealt with a private placement of a child for adoption and not the surrender to an interests of the child, it may counterbalance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents. . . . For experience teaches that a mother's love is one factor which will endure, possibly endure after other material advantages and emotional attachments may have proven transient."
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agency. Although a mother must consent to an adoption after a private placement,\(^{105}\) in an agency surrender the statute\(^{106}\) provides for the agency’s consent and not the parent’s. An agency surrender can only be undone pursuant to statute.\(^{107}\) The statute provides that the surrender may be undone by the court in the interests of the child and if the parent is fit.\(^{108}\) It establishes no presumptions. In fact, although there is a means provided for a surrender to become irrevocable,\(^{109}\) as to all who had notice, the same statute provides that lack of such judicial approval does not invalidate a written surrender.\(^{110}\) In interpreting the surrender statute, other New York courts have placed the burden of proof of defeating the surrender upon the mother.\(^{111}\) The Appellate Division, First Department, has stated that sections 383 and 384 of the Social Services Law, read together, declare that a parent who commits her child to an authorized agency by a voluntary, duly executed and acknowledged surrender instrument “shall not be entitled to the custody” of the child except on court order “determining that the best interest of the child will be promoted thereby and that the parent is fit, competent and able to duly maintain, support and educate such child.”\(^{112}\)

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\(^{105}\) See note 42 supra.

\(^{106}\) See note 42 supra.


\(^{109}\) Id. § 384(4) (McKinney Supp. 1970).


This language was quoted in the per curiam opinion by the Court of Appeals affirming the decision. 23 N.Y.2d 925, 246 N.E.2d 358, 298 N.Y.S.2d 508 (1969).

In fact, in this case the Court of Appeals had more leeway because the appellate division had reversed a lower court finding that the best interests of the child would be served by returning the child to the natural mother.

As the appellate division pointed out:

The deed was done. It cannot be undone unless judicial scrutiny can find coercion. . . . or that the best interests of the child would dictate a return. 31 App. Div. 2d at 65, 295 N.Y.S.2d at 532-33. Other New York courts have spoken of the surrender in even stronger terms. See note 42 supra.
As an earlier New York court noted,

it is not revocable at the will or upon the mere whim or caprice of the parent or merely because the parent has experienced a change of mind or heart.\textsuperscript{113}

The statute is clear. The best interests of the child are to prevail. There is no statutory presumption of parental custody in the child's best interests where a parent has surrendered the child.\textsuperscript{114} It is a creature of a strained judicial statutory interpretation. It in many respects defeats the primary purpose of the best interest test. Obviously, an unfit parent or a parent with improper motives is incapable of maintaining the presumption in his favor. This is not the purpose of the law or the intent of the Legislature. The New York Court of Appeals has effectively emasculated the statutory test.\textsuperscript{115}

Not all jurisdictions applying a best interests test under the discretionary rule follow the New York approach. For instance, Massachusetts\textsuperscript{116} places the burden upon the natural parent seeking to revoke the surrender and consent. In a recent case, the Supreme Judicial Court of Massachusetts has pointed out that in their jurisdiction "the mother has . . . the heavy burden of showing that she is entitled to set aside her consent."\textsuperscript{117}

Movements have begun in New York to legislatively modify the Court of Appeals ruling,\textsuperscript{118} but these attempts have not been

\textsuperscript{113} People \textit{ex rel.} Harris v. Commissioner of Welfare, 188 Misc. 919, 922, 70 N.Y.S.2d 389, 393 (Sup. Ct. N.Y. County 1947).

\textsuperscript{114} People \textit{ex rel.} Grament v. Free Synagogue Child Adoption Comm., 194 Misc. 332, 85 N.Y.S.2d 541 (Sup. Ct. N.Y. County 1947).

\textsuperscript{115} N.Y. SOC. SERVICES LAW § 383(1) (McKinney 1970).


\textsuperscript{117} \textit{Id.} at —, 271 N.E.2d at 625.

\textsuperscript{118} Both houses of the New York Legislature passed a bill which would have altered the effect of the decision, but it was vetoed by the Governor.

The Governor outlined the effect of the bill in his veto message:

The bill would establish a period during which a natural parent would have the absolute right to revoke an agreement surrendering a child to an authorized adoption agency or to withdraw consent to a private placement. In cases of an agency adoption the period would terminate 30 days after surrender or upon placement with an adoptive family, whichever is later. Subsequent to that period the only grounds for reversing that surrender would be fraud, duress or coercion. In a private placement the period would run until 30 days after notice to the natural parent of commencement of judicial proceedings to make the placement permanent. The voluntariness and providency of the consent would be reviewable by the court upon, the appearance of the natural parent.

\textit{Veto Message of the Governor—A. 4225-C Memorandum No. 213 (July 6, 1971).}

The Governor noted that there is now no absolute right to revoke in cases of authorized agency surrender. He stated his reasons for vetoing in these terms:

[Despite efforts] to minimize potentially harmful changes of custody . . . I am persuaded the bill would unduly limit the discretion of courts to consider all aspects of a situation in determining and protecting a child's best interests. On the one hand, the 30 day limit could foreshorten the opportunity for a distraught parent to change his or her mind in the cool
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successful. The Scarpetta parental custody presumption is becoming ingrained in light of day; on the other hand, the absolute right for 30 days could upset long-standing placements—in each case to the detriment of the child's best interests—and the court would be powerless to protect those interests fully.

Id.

However, in May, 1972 Governor Rockefeller signed into law an altered version of the same bill. The new law specifically rejected the natural parent presumption created by the Court of Appeals, stating that in using the best interests test to determine custody “... there shall be no presumption that such interests will be promoted by any particular custodial disposition.”

The new law continues that:

no action or proceeding may be maintained by the surrendering parent or guardian for the custody of the surrendered child or to revoke or annul such surrender where the child has been placed in the home of adoptive parents and more than thirty days have elapsed since the execution of the surrender or where the purpose of such action or proceeding is to return the child to or vest the child's custody in any person other than the parent or guardian who originally executed such surrender. This subdivision shall not bar actions or proceedings brought on the ground of fraud, duress or coercion in the execution or inducement of a surrender.


For a discussion of relevant social considerations, see Katz, Community Decision-Makers and the Promotion of Values in the Adoption of Children, 4 J. Fam. L. 7 (1964).

The Scarpetta case also refused to allow the prospective parents the right to intervene. 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S. 2d 65 (1971).

The Legislature also passed a bill, signed into law by the Governor, which overruled the court on this point. Prospective adoptive parents may now intervene as interested parties in any attempt to revoke a surrender by a natural parent. L. 1971, ch. 1142, at 2157, eff. Sept. 1, 1971, amending N.Y. Soc. Services Law § 384 (McKinney 1966).

After a period of separation from the biological parent and care by a third party, the child may learn to look upon the latter as his biological parent; any prior relationship with the biological parent may deteriorate to the point where it is not only supplanted but also incapable of resuscitation. Where this has happened, the change in custody based solely on biological relationship might, by disrupting the existing relationship of psychological parenthood, work considerable emotional harm upon the child.


122 Id. at —, 277 A.2d at 571.

123 Id.


125 114 N.J. Super. 584, 277 A.2d 566, 571-72.
The search for a child’s best interests should be the concern of the courts; there is no reason to employ harsh presumptions—often to the detriment of the child.

After considering these tests and their relative impact upon the exercise of judicial discretion, it becomes obvious that the paramount concern should be the best interests of the child. He is the one most affected by any disposition. It is he alone who may suffer the irreparable injury of transfer. The court should be able to decide from an objective review of the situation what the needs of the child are within any situation. The solution to the problem of the New York presumption is not revocable or irrevocable periods of time but the return of the discretionary power to the court free from the bondage of presumptions. Solomon’s answer was not a healthy solution, but it was an effective means by which to uncover the child’s best interests. Modern courts, aided by psychologists and doctors, should be able to readily discover such interests. Whatever the natural right of the parent prior to termination of custody, upon termination of custody in favor of an individual or an agency the gauntlet is passed to the state to protect its helpless citizens. As of yet the best method for the child’s protection is for the courts to act in his best interests. It is in this way that the natural rights of the child will be most likely to prevail.