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## LEGISLATION GOVERNING THE RELIGION FACTOR IN ADOPTION PROCEEDINGS

Adoption first became of judicial importance in the United States about the middle of the nineteenth century with the enactment by the Massachusetts legislature, in 1851, of adoption legislation.<sup>1</sup> Prior to this time, adoption had been unknown in the United States, it being unknown at common law.<sup>2</sup> The statutes on adoption in England were enacted in 1926, its birth in that country following much later than in the United States.<sup>3</sup>

Although in derogation of the common law, modern courts have tended to construe the adoption statutes liberally; the strict construction approach giving way to the paramount consideration of the child's best interests and welfare.<sup>4</sup>

The adoption statutes in the United States take on a variety of forms. Most state legislatures have detailed the procedural elements in adoption.<sup>5</sup> Earlier statutes show a decided tendency toward covering the suitability of the proposed adoption generally by merely pointing up the pertinent factors to be considered such as the physical, financial and spiritual well-being of the child. With this type of legislation the courts are free from any legislative mandate in placing emphasis on any single factor; the only mandate being that judicial discretion rest with the best interests of the child.<sup>6</sup>

Recent adoption enactments, however, evidence a desire on the part of legislatures to emphasize the religion element when a child is placed in a foster home. Special provisions in the adoption statutes have been inserted in later statutes concerning the preservation of the child's religion with material factors remaining in the area of elements generally to be considered when deciding the issue of the child's welfare.

The special provisions on religion vary, of course, from state to state. Most statutes which emphasize religion provide that *when practicable a*

<sup>1</sup> Mass. L. (1851) c. 324.

<sup>2</sup> 1 Am. Jur., Adoption of Children §§ 3-10 (1936); 2 C. J. S., Adoption of Children §§ 1-4 (1936). For a complete history of adoption in the United States see *Ross v. Ross*, 129 Mass. 243 (1880).

<sup>3</sup> Adoption of Children Act (1926) (16 & 17 Geo. 5, c. 29) § 8.

<sup>4</sup> *Ashlock v. Ashlock*, 360 Ill. 115, 195 N.E. 657 (1935); *Waller v. Ellis*, 169 Md. 15, 179 Atl. 289 (1935); *In re Jaren's Adoption*, 223 Minn. 561, 27 N.W. 2d 656 (1947); *Fletcher v. Flanery*, 185 Va. 409, 38 S.E. 2d 433 (1946); *In re McFarland*, 223 Mo. App. 826, 12 S.W. 2d 523 (1928) (wherein the court held for strict construction but modified it to the extent that it should not be so narrowly construed as to defeat the intent of the law).

<sup>5</sup> 54 Col. L. Rev. 376 (1954). Statutory Appendix.

<sup>6</sup> 23 A. L. R. 2d 701 (1952); 1 Am. Jur., Adoption of Children § 47 (1936); 2 C. J. S., Adoption of Children § 6 (1936).

child *must* be placed for adoption with persons of the same religious faith as that of the child<sup>7</sup> or the natural parents.<sup>8</sup> Illinois, and other states, provide that this *shall* be done *whenever* possible.<sup>9</sup> The wording of some statutes is slightly different from the above. The Tennessee law recites that the children "are" to be placed with persons of the same religion "as far as is practicable."<sup>10</sup> Minnesota requires that the court "shall" place the child in the same religious atmosphere "so far as it deems practicable."<sup>11</sup>

Only a few jurisdictions have had litigation on these exact provisions. These include Massachusetts, Minnesota, Missouri, New York and Pennsylvania.<sup>12</sup> Both mandatory and discretionary constructions have been decided upon. In upholding them the courts do not view them as tending toward the establishment of a religion since they endeavor to protect only the right the child has to the preservation of his religious heritage.<sup>13</sup> It is interesting to note the judicial interpretations, particularly, in view of the general treatment accorded religion earlier.

The Supreme Judicial Court of Massachusetts recently has decided three cases directly involving the Massachusetts provision for the safeguarding of the religion of the child. The statute, enacted in 1950, reads:

In making orders for adoption the judge *when practicable must* give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother. If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition. . . .<sup>14</sup>

The first case interpreting the statute was *Petition of Gally*.<sup>15</sup> In that case the petitioners for adoption were of a different religion than that of the mother of the child. In all other respects the court found the petitioners to be highly reputable and qualified persons to adopt a child. The child's mother consented to the adoption. The court granted the decree, holding that in this instance it was not "practicable" for the court to place the child with persons of the child's faith. In support of its view the court pointed out that no person of the faith of the child's mother was seeking

<sup>7</sup> Ann. Laws Mass. (Supp., 1953) v. 6, c. 210 § 5B.

<sup>8</sup> N.Y. Dom. Rel. Law (McKinney, 1941) c. 14, § 115.

<sup>9</sup> Ill. Rev. Stat. (1953) c. 4, § 4-2; Penn. Stat. Ann. (Purdon Supp., 1954) tit. 1, § 4.

<sup>10</sup> Tenn. Pub. Acts (1949) c. 127.

<sup>11</sup> Minn. Stat. (1949) § 260.01-34.

<sup>12</sup> See 54 Col. L. Rev. 376 (1954). Statutory Appendix.

<sup>13</sup> 1 Am. Jur., Adoption of Children §§ 3-10 (1936); 2 C. J. S., Adoption of Children §§ 5-7 (1936).

<sup>14</sup> Ann. Laws Mass. (Supp., 1953) v. 6, c. 210 § 5B; Emphasis added.

<sup>15</sup> 329 Mass. 143, 107 N.E. 2d 21 (1952). An earlier case was decided on other grounds, *Krakow v. Dept. Public Welfare*, 326 Mass. 452, 95 N.E. 2d 184 (1950).

to adopt the child and that there was no evidence that in the future any such person would offer to do so. Practicality, the court said, is the test and when it is "practical" the court must give religion controlling weight.

Commenting on the legislative intent, the court said that the legislature did not intend that religion be necessarily the chief consideration or a fortiori, the sole guide. In considering the history of the religion factor in adoption in that state, the court quoted the leading case of *Purinton v. Jamrock*<sup>16</sup> wherein it was held to be the general policy of Massachusetts to secure for a child the right to be brought up in the religion of his parents where this is reasonably practicable.

It appears then that the *Gally* case turned essentially on the fact that there was no person brought to the attention of the court of the same faith as that of the child and who also was seeking to adopt the child. No change in the weight to be accorded religion was noticed by the majority, though, as the dissent points out, at the time of the *Purinton* case no statute emphasizing religion was in effect. The dissent argues that the statute lays down a general rule that virtually treats the type of cases where the petition is allowed to persons of a different faith to be the exception. This appears to be the more reasonable view, at least, with the spirit if not the letter of the statute.

The next case in that jurisdiction was *Petitions of Goldmans*.<sup>17</sup> In that case a Catholic mother gave her consent to the adoption of her twins by qualified Jewish petitioners. The children were to be raised in the Jewish faith. The petition for adoption was denied, the court holding that in this case it would not be "practicable" to place the child with persons of a different faith. In support of this holding the court made a finding that many Catholic couples were seeking to adopt Catholic children through the Catholic Charities Bureau.

The court when discussing its decision in *Petition of Gally*<sup>18</sup> noted that that case came up on appeal entirely on documentary evidence and that they were in as favorable a position as the probate judge to review the case but that in the instant case the evidence was to a great extent oral and that the court was bound by the rule that findings based on parol evidence can be reversed only if they are plainly wrong.

The essential difference in the *Gally* and *Goldman* cases appears to be the finding in the former case that no Catholic couples were brought to the attention of the court that sought to adopt Catholic children and in the latter that the Catholic Charities Bureau could direct the court to potential adopters of the same faith as that of the children.

With the decision in *Ellis v. McCoy*,<sup>19</sup> it appears that the decision in the

<sup>16</sup> 195 Mass. 187, 80 N.E. 802 (1907).

<sup>17</sup> 121 N.E. 2d 843 (Mass., 1954); noted in 4 De Paul L. Rev. 307 (1955).

<sup>18</sup> 329 Mass. 143, 107 N.E. 2d 21 (1952).    <sup>19</sup> 124 N.E. 2d 266 (Mass., 1955).

*Gally* case has to some extent been weakened. In this case, the court permitted a Catholic mother to withdraw her consent to an adoption by Jewish petitioners after the mother learned that the children were to be raised in the Jewish faith. While the petitioners were of the highest calibre, the court said that it was sure that some Catholic home could be found for the children. This was the finding that it was "practicable" to place the children with persons of the same faith.

Noteworthy in this case is the court's attitude concerning the availability of persons wishing to adopt children. While no persons were brought to the court's attention as such, as in the *Gally* case, the court looked beyond this and expressed certainty that potential adopters of the same faith could be found.

Viewing the three decisions as a whole, it appears that the "when practicable . . . must" statute of Massachusetts is taking on the complexion of being mandatory. In view of the earlier treatment given religion in that jurisdiction, this interpretation seems proper.

New York, by the terms of its statute, has left little room for judicial discretion. It is from the New York enactments that Massachusetts modeled its statute. The New York law reads as follows:

In making orders for adoption . . . *when practicable* the court *must* give custody only to persons of the same religious faith as that of the foster child. . . .<sup>20</sup>

A provision of the Social Welfare Code reads:

In appointing guardians of children, and in granting orders of adoption of children, the court *shall, when practicable*, appoint [guardians or grant orders of adoption to persons of the same faith as that of the child]. The provisions of . . . this section shall be so interpreted as to assure that in the . . . adoption (of children) *its religious faith shall be preserved and protected*.<sup>21</sup>

In *Adoption of Anonymous*,<sup>22</sup> the petitioners for adoption were of a different religious faith than that of the child's mother. Otherwise, the petitioners met all the requisites of a qualified adoptive family. The mother wished that the child be returned to her and the court so decreed. The court noted that that jurisdiction had adopted "a definite and positive policy" regarding the issue and must give custody "when practicable" only to persons of the same religious faith.

A later New York case, though involving custody only, left no doubt about the construction of the New York laws. In *In re Santos*,<sup>23</sup> the mother and children were Catholic. Through circumstances the children were committed to a Jewish adoption committee in contemplation of

<sup>20</sup> N.Y. Dom. Rel. Law (McKinney, 1941) c. 14, art. 7, § 113; Emphasis added.

<sup>21</sup> N.Y. Social Welfare Law (McKinney, 1941) art. 6, § 373, subdiv. 1-4; Emphasis added.

<sup>22</sup> 195 Misc. 6, 88 N.Y.S. 2d 829 (Surr. Ct., 1949).

<sup>23</sup> 278 App. Div. 373, 105 N.Y.S. 2d 716 (1st Dep't, 1951).

adoption. In recommitting the children to an agency of the child's faith which they agreed should have been done at first the court stated "on the facts presented herein, the legislative mandate leaves no area for judicial discretion";<sup>24</sup> "when practicable" a commitment to an agency of the child's faith "must" be made. It is significant to note that in the states there are usually agencies of the child's faith willing to accept them which eases a finding of practicability.

In *In re Santos*,<sup>25</sup> of controlling weight was the legislative declaration that the statute shall be construed so as to "preserve and protect" the child's religion.

It appears that while the courts of Massachusetts and New York are deciding the chief issue of the best interests and welfare of the child, religion because of the statute has been considered of controlling weight.

Of those states with statutes analogous to those cited above and which have been interpreted, not all take on aspects of being mandatory. The statute of Pennsylvania provides that "*whenever possible*" the petitioners "*shall*" be of the same religious faith as the natural parents of the child to be adopted.<sup>26</sup> In *Adoption of Royer*,<sup>27</sup> the court after stating the rule that the welfare of the child is the paramount consideration held that differences between the religious faiths of the adopting parents and the natural parents would not alone be the controlling factor in granting or denying an adoption.<sup>28</sup> The approach is discretionary, the court finding no decree of compulsion in the words "whenever possible . . . shall."

Minnesota has taken a position similar to the Pennsylvania court by placing controlling emphasis on the best interests and welfare of the child. This element, it should be noted, is controlling in all jurisdictions, but some jurisdictions, e.g., Massachusetts and New York, permit religion to weigh heavily whereas in Minnesota and Pennsylvania religion is only a factor to be considered.

The Minnesota code reads:

The court in committing any child or appointing a guardian for him . . . *shall* place him *so far as it deems practicable* in the care and custody of some individual holding the same religious belief as the parents of the child or with some association which is controlled by persons of like religious faith with the parents.<sup>29</sup>

<sup>24</sup> *Ibid.*, at 718.

<sup>25</sup> 278 App. Div. 373, 105 N.Y.S. 2d 716 (1st Dep't, 1951).

<sup>26</sup> Penn. Stat. Ann. (Purdon Supp., 1954) tit. 1, § 4; Emphasis added.

<sup>27</sup> 34 Del. Co. 402 (1947).

<sup>28</sup> See *Commonwealth v. McClelland*, 70 Pa. Super. 273 (1918) (the children were of the Protestant faith and the court refused to commit them to a Catholic institution); *Adoption of Cornman*, 169 Pa. Super. 641, 84 A. 2d 360 (1951); *In re Grove's Adoption*, 28 Pa. Dist. 988 (1918); *In re Saunder's Adoption*, 1 Pa. D. & C. 541 (1922).

<sup>29</sup> Minn. Stat. (1949) § 260.20; Emphasis added.

The case of *In re McKenzie*<sup>30</sup> left no doubt as to the Minnesota view. In that case neither the child's mother nor the father was able to care for the child. The father petitioned that the child be committed to the care of the state which in turn placed the child with a Protestant couple. When this couple sought to adopt the child after rearing it for four years, the State Board of Control refused its consent adhering to a rule forbidding adoption of children by persons of a faith different from the child. This consent was withheld notwithstanding important factors that the petitioners had the child baptized a Catholic and promised to rear the child in this faith. In addition, the petitioners were highly qualified as potential adopters. The Supreme Court of Minnesota held that the consent was unnecessary and stated tersely: "to blindly follow such a rule after placing the child for support . . . is unreasonable and falls within the definition of caprice."<sup>31</sup>

Clearly, the reason for the rule failed. The religion of the child was to be preserved.

Other legislatures have not handled the religion element as definitively as the jurisdictions cited above. The "practicable" features of the latter statutes have not been incorporated in others. The law in Missouri provides that a child *shall* not be placed with a guardian of a faith different from that of the child's parents where another "suitable" person is available to adopt the child.<sup>32</sup> The Supreme Court of Missouri in *In re Duren*<sup>33</sup> favored a discretionary interpretation of the act and deemed it to be advisory only in judicially extending it to adoption. In that case a minor was sought to be adopted by the minor's aunt and uncle who were Catholics. The child's grandmother intervened and maintained that she was a Protestant as were the parents of the child. The adoption was granted. A potent factor in the disposition of the case was that the father before his death had placed the child with the petitioners with knowledge that their religion differed from the child's. The decision hinged on another provision of the Missouri statute which requires that court approval be given or withheld as the welfare of the child sought to be adopted may in the opinion of the court dictate.<sup>34</sup> It appears that singular emphasis will not be placed on religion though the child's religion may be subrogated.<sup>35</sup>

The Supreme Court of Mississippi recently, in *Eggleston v. Landrum*,<sup>36</sup>

<sup>30</sup> 197 Minn. 234, 266 N.W. 746 (1936). <sup>32</sup> Mo. Rev. Stat. (1949) c. 453, art. 5 § 2.

<sup>31</sup> *Ibid.*, at 238 and 748.

<sup>33</sup> 355 Mo. 1222, 200 S.W. 2d 343 (1947).

<sup>34</sup> Mo. Rev. Stat. (1949) c. 453, §453.030.

<sup>35</sup> See *State v. Bird*, 253 Mo. 569, 162 S.W. 119 (1913); *Matter of Clements*, 12 Mo. App. 592, *aff'd* on other grounds, 78 Mo. 352 (1883); *In re McFarland*, 223 Mo. App. 826, 12 S.W. 2d 523 (1928).

<sup>36</sup> 210 Miss. 645, 50 So. 2d 364 (1951).

reversed the decision of the trial court which had denied an adoption solely because the petitioners were students of the Christian Science Church. While the Mississippi code does not, in terms, provide for the religion factor, it states that the court may decree an adoption if the "interest and welfare" of the person sought to be adopted would be "promoted."<sup>37</sup> In weighing the factors the court pointed out that the child had been given all the medical attention that the child needed and that the petitioners promised the court that, in all cases in the future, medical care would be provided when necessary. This factor, in addition to the fact that the child's parents consented, controlled the decision.<sup>38</sup>

Like Mississippi, the California statute does not, in terms, provide for the consideration of religion singularly; and the legislative mandate is that the adoption be in the best interests of the child and this alone is the guide.<sup>39</sup> Wisconsin also leaves the prerogative of the issue within judicial discretion.<sup>40</sup> A contrast to this type of legislation is seen in the Rhode Island statute. It is unique in the United States, it being, in terms, the only mandatory statute. The statute provides: "If there is a proper or suitable person of the same religious faith or persuasion as that of the child available to whom orders of adoption may be granted" then this controls the decision. If no such person is available then the court must place the child with persons of the same faith "when practicable."<sup>41</sup> As yet, this statute has not been construed.

Other states have "advisory" legislation which lists religion as an element which the court must entertain in its place among other factors in the exercise of judicial discretion. These states can be classified as "best interest and welfare" states along with those states not, in terms, providing for religion. The Ohio statute provides that the suitability of the adoption of the child be determined "by taking into account racial, religious and cultural backgrounds" of petitioners and the child.<sup>42</sup> Delaware provides that a report be filed after an authorized investigation. The report must include information on the religious affiliations of petitioners in addition to a summary as to the suitability of the prospective home in-

<sup>37</sup> Miss. Code (1949) § 1269.

<sup>38</sup> See *Fowler v. Sutton*, 75 So. 2d 438 (Miss., 1954).

<sup>39</sup> Civ. Code Cal. (Deering, 1949) c. 2, §§ 221-230; see *Adoption of McDonald*, 43 Cal. 2d 447, 274 P. 2d 860 (1954); *In re Sharon's Estate*, 179 Cal. 447, 177 P. 2d 83 (1918); *Evan's Estate*, 106 Cal. 562, 39 Pac. 860 (1895); *In re Johnson's Estate*, 98 Cal. 531, 33 Pac. 460 (1893); *Adoption of Lingol*, 107 Cal. App. 2d 457, 237 P. 2d 57 (1951).

<sup>40</sup> Wis. L. (1947) c. 218; The investigatory procedure of Wisconsin provides that inquiry be made of the pastor of the church to which petitioner may belong; See *In re Adoption of Tschudy*, 267 Wis. 272, 65 N.W. 2d 17 (1954); *In re Jackson*, 210 Wis. 642, 231 N.W. 158 (1930).

<sup>41</sup> R. I. Laws (1946) c. 1772.

<sup>42</sup> Ohio Rev. Code (1953) c. 31, § 31.0705E.

cluding the suitability of the religious affiliations.<sup>43</sup> The religion emphasis here may be overshadowed by a provision in the code that the placement be for the best interest of the child.<sup>44</sup> The laws of these states are ideally suited to give much latitude to the courts.

In 1945, Illinois revised its adoption statutes and in so doing made a provision for the preservation of the the child's religion. The statute reads:

The court in entering a decree of adoption *shall whenever possible* give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child.<sup>45</sup>

This provision has not been construed. Historically, Illinois has placed the welfare of the child as the primary consideration.<sup>46</sup> Recently, in *Dickholtz v. Littfin*,<sup>47</sup> the court stated that the revisions in the Illinois law were intended to provide enlargement of the scope of judicial discretion with a view toward the promotion of the welfare of the child. It appears unlikely that anything but a discretionary interpretation will be had. Pennsylvania, with identical "whenever possible"—"shall" features has taken this view.

Because of the unavailability of cases decided on the statutes, it would be presumptuous to draw any conclusions. However, certain observations may be made. From a view of the cases involving the "when practicable . . . must" features it appears that they take on overtones of being mandatory. At least, it is clear that the statutes have succeeded in their evident intent of emphasizing religion. This type of statute is the only one that has effectively done so. Through an examination of the cases dealing with what amounts to "when practicable . . . shall" statutes and including the "whenever possible . . . shall" statutes, it appears that the courts uniformly favor a discretionary interpretation and adhere to the standard of the "best interests and welfare" of the child. These states do not recognize that the statutes require that religion be given more weight than before the statute in ascertaining what is best for the child. Finally, there are those statutes which list religion as an element and those statutes which do not, in terms, provide for religion. The results are the same; namely, that the guide is the welfare of the child and religion takes its place among the other factors. This construction appears to be consistent with the statute and the legislative intent.

<sup>43</sup> Del. Rev. Code (1935) c. 88, § 3551.4.

<sup>44</sup> *Ibid.*

<sup>45</sup> Ill. Rev. Stat. (1953) c. 4, § 4-2; Emphasis added.

<sup>46</sup> See *McConnell v. McConnell*, 345 Ill. 70, 177 N.E. 692 (1931); *Jackson v. Russell*, 342 Ill. App. 637, 97 N.E. 2d 584 (1951); *Hill v. Allabaugh*, 333 Ill. App. 602, 78 N.E. 2d 127 (1948); I. L. P., Adoption § 48 (1953).

<sup>47</sup> 341 Ill. App. 400, 94 N.E. 2d 89 (1950).