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Adoption - Statute Providing Adopting Parents be of Same Religion as Child Upheld in Uncontested Proceeding

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CASE NOTES

ADOPTION—STATUTE PROVIDING ADOPTING PARENTS BE OF SAME RELIGION AS CHILD UPHELD IN UNCONTESTED PROCEEDING

Petitioners, a Jewish husband and wife, sought to adopt a boy and girl, twins, whose mother and "natural father" were Catholic. The twins were in the custody of the petitioners from the time they were two weeks old until the time of the adoption proceedings. There was no opposition to their petitions. Evidence indicated that the petitioners were possessed of sufficient economic means and had a good home, that they were fond of the twins and that they gave them adequate care. The judge, after making his own findings of fact, determined that it would not be "practicable" to decree adoption because this would not be to the best interests of the children, so the petitions were dismissed. The basis for refusal was the Massachusetts statute which requires, when practicable, that custody must be given only to persons of the same religious faith as that of the child.[1] The Massachusetts Supreme Judicial Court upheld the judge's action and thus precluded the petitioners from becoming foster parents of the twins. *Petitions of Goldmans*, 121 N. E. 2d 843 (Mass., 1954).

For purposes of discussing this case, it is perhaps only of historical and parenthetical significance to briefly indicate that at Common Law adoption was non-existent and that it exists only by virtue of statutes in the United States.[2]

The Massachusetts statute, which was apparently the motivating factor for denial of the petitions, reads as follows:

> 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 and such statement shall be made part of the minutes of the proceedings.[3]

This same court, two years previously, in *Petition of Gally*[4] involving similar, but not identical circumstances, permitted adoption of a child born of a Catholic mother, by a non-Catholic couple, reversing the lower court's denial of the

[1] Mass. L. Ann. (Supp., 1953) c. 210, § 5B.

[2] Ashland v. Ashlock, 360 Ill. 115, 195 N.E. 657 (1935). For an abbreviated history of adoption, see 2 C.J.S., Adoption of Children § 2 (1936).

[3] Mass. L. Ann. (Supp., 1953) c. 210, § 5B.

[4] The Petition of Gally, 329 Mass 143, 107 N.E. 2d 21 (1952).

petition. There, also, the petition was uncontested and it was purely a matter of judicial discretion as to whether or not the petition should be denied. The case, which included a strong dissent, caused considerable comment, at least from law review writers.[5] The same statute was under consideration, and the majority interpreted it to mean that while the religion of the child must have more weight ascribed to it now, because of the statute, than it did previously in adoption proceedings, the best interest of the child was still the prevailing criterion in considering the suitability of prospective foster parents.

The dissent in *Petition of Gally* argued that because the legislature saw fit to enact such a statute, the religious element in determining the welfare of the child now became of primal importance, and since the Massachusetts statute was modeled after the New York statute,[6] it should be given the same judicial construction as that given the New York enactment. The construction rendered by the New York courts has been that the statute is a mandatory direction leaving no room for judicial discretion.[7] Thus the dissent argued that where the petitioners adhere to a religious belief other than that of the child, permitting the adoption would be the exception rather than the rule. Even without alluding to the New York interpretation of the statute, this conclusion could easily be inferred from a reading of the statute in its entirety.

The court in the instant case was unable to disregard the *Gally* case; however, the sole distinguishing feature which the court found (or at least discussed) for justifying the *Goldman* decision was the fact that the *Gally* case came up entirely on documentary evidence and that the court was therefore in as favorable a position as was the probate judge in making findings of fact. The instant case was adjudicated by the trial judge largely upon oral evidence and the elements which entered into the final decision were elements of fact and embraced all relevant circumstances.

Apparently the court is referring to the fact that in the *Gally* decision the sole source of information relative to the suitability of the petitioners as foster parents was a very favorable report by the department of public welfare to the Probate Court concerning the health, education and economic status of the petitioners and it mentioned, somewhat incidentally, that the petitioners were of a different faith than the child. In the instant case, the judge made a thorough investigation into all of the above factors, which were just as favorable to the petitioners as they were in the *Gally* case; however, during hearings he further found that there were many Catholic couples in and around Lynn, Massachu-

[5] See, for example, 32 B.U.L. Rev. 448 (1952); 28 Ind. L.J. 401 (1953); 28 Notre Dame Lawyer 29 (1953); 27 St. John's L. Rev. 141 (1952).

[6] N.Y. Domestic Relations Law (McKinney, 1941) § 113; N.Y. Social Welfare Law (McKinney, 1941) § 373.

[7] In re Santos, 278 App. Div. 373, 105 N.Y.S. 2d 716 (1st Dep't, 1951). It should be noted, however, that this is a case dealing with commitment of a child and is not one involving adoption. Nevertheless, the statute controlling both aspects is the same. See also In re Adoption of Anonymous, 195 Misc. 6, 88 N.Y.S. 2d 829 (Surr. Ct., 1949).

setts, the place of adoption, enjoying equally fine family life, reputation and material status who had filed applications with the Catholic Charities Bureau for the purpose of adopting twins of the Catholic faith. There is no indication in the *Gally* case of an inquiry having been conducted to determine the possible existence of alternative foster parents adhering to the same religious convictions as the child.

Comparing the two cases then, it appears that the only time it becomes mandatory for a court to deny the petition of one holding a religious belief other than that of the child is when there are persons holding the same belief as the child and in substantially the same position as the petitioners with respect to other matters which the judge may consider essential in providing for the best interest of the child. Also implied in this policy is the presumption that the alternative foster parents would be willing to adopt the particular child in question. Others may disagree with this conclusion, but objectively speaking this appears to be the only purpose of the statute, because without it the judge in determining the suitability of prospective foster parents would be guided by the standard non-statutory principle of selection—to promote and preserve the child's welfare.

Since the policy of the courts has always been to grant or deny petitions pursuant to this principle, which included a consideration of the religion of the foster parent and child,[8] the statute does nothing more than codify one element in the concomitant of variables which a judge considers in determining whether his action is for the best interest of the child. The statute then does not guarantee, as does the New York statute, that in the adoption of any child "its religious faith shall be preserved and protected."[9]

The constitutional validity of the Massachusetts statute was questioned in the instant case on the grounds that it violated the provisions of the First Amendment respecting an establishment of religion and prohibiting the free exercise thereof.[10] The court dismissed this objection by pointing out that under the statute all religions are treated alike; that there is no subordination of one sect to another; that no burden is placed on anyone for the maintenance of religion and no exercise of religion is required, prevented, or hampered.

The precedent cited by the court for this position was the *Zorach* case[11]

[8] Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907).

[9] The words in quotation marks are the words of the New York Social Welfare Law, op. cit. supra note 6, subsection 4 which reads: "The provisions of subdivisions 1, 2, and 3 of this section shall be so interpreted as to assure that in the care, protection, adoption, guardianship, dicipline and control of any child, its religious faith shall be preserved and protected." Massachusetts has no such counterpart in its act.

[10] "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. Amend 1.

[11] Zorach v. Clauson, 343 U.S. 306 (1952). The New York Education Law permitted the public schools to release students during school hours, on written request of their parents, so that they may leave the school building and grounds to attend religious instruction or devotional exercises. The United States Supreme Court ruled that this law did not prohibit the "free exercise" of religion, nor was it a law "respecting the establishment of a religion."

which softened the effects of the controversial *McCollum* decision[12] where the United States Supreme Court held that the Constitution prevented the favoring of any religion because of the wall of separation between the Church and State. It appears that the court correctly disregarded the *McCollum* decision because the statute makes no provision for impartial assistance in the promotion of some project having primarily religious objectives sponsored jointly by religious and public representatives and using public funds or property as was the situation in this particular case. For similar distinguishing reasons the scope of the *Zorach* case was perhaps inappropriately applied because the statute makes no provision for religious instruction of any kind. The statute, because it is interpreted not to be a mandatory directive, merely provides for taking cognizance of a child's faith in adoption proceedings. Even if the statute were construed as mandatory, it would be a somewhat strained argument to hold that it tends toward the establishment of religion because as the Massachusetts court points out if the child has no religion, the statute does not apply. Conversely where the child is established as having a religious belief, such faith would be protected as to his particular case and the operation of the statute would not go toward the fostering of any one particular religious belief over another.

Illinois, by statute, recognizes the importance of the religion of a child in three different instances. The provision relating to adoption provides: "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."[13] The other two occasions when the religious belief of the child is considered a significant factor is in the committing of neglected and delinquent children[14] and in the placing of children in homes.[15] There are no Illinois decisions interpreting any of these provisions, which is somewhat surprising, considering the fact that the one dealing with neglected and delinquent children is over a half century old. The Illinois provisions all utilize the word "shall" rather than "must" as do the New York and Massachusetts statutes. Whether this difference is significant enough to disregard Massachusetts and New York decisions in deciding whether the wording requires mandatory or discretionary construction is a matter of conjecture.

[12] McCullom v. Board of Education, 333 U.S. 203 (1948).

[13] Ill. Rev. Stat. (1953) c. 4, § 4–2.

[14] Ill. Rev. Stat. (1953) c. 23, § 211 provides: "The court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith of the parents of the said child."

[15] Ill. Rev. Stat. (1953) c. 23, § 299 b (1) provides: "Whenever a child is placed in a family home by a child welfare agency, such placement, shall, when practicable, be to, with or in the custody of a person or persons of the same religious faith as that of the child. Whenever a child is placed in a child welfare agency, such placement shall, when practicable, be to, with or in the custody of a child welfare agency under the control of persons of the same religious faith as that of the child."

Generally speaking, other jurisdictions with similar enactments[16] have ruled that such statutes do not operate as legislative mandates,[17] and it may be that Illinois would take this position contrary to the New York courts. Of course neither Illinois nor Massachusetts has a provision similar to New York which provides that a child's religious faith shall be preserved and protected. It is difficult, however, to see why one is required.[18]

In conclusion, it appears that on the basis of the cases discussed herein, the position of the majority of the courts is that although the religion of any child will be recognized and considered, it will not be guaranteed or protected. Moreover, statutes relating to the religion of the child and foster parent create merely one element given consideration in adoption proceedings. The logic of such a position is questionable and inconsistent with any moral philosophy which recognizes the importance of a child's religion.[19]

[16] For a comprehensive list of states with enactments in this particular area, see 54 Col. L. Rev. 376 (1954).

[17] See for example In re Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920); In re Walsh's Estate, 100 Cal. App. 2d 194, 223 P. 2d 322 (1950). For an editorial discussion of the matter see 22 A.L.R. 2d 696 (1952) and 23 A.L.R. 2d 701 (1952).

[18] The Petition of Gally, 329 Mass. 43, 107 N.E. 2d 21, 29 (1952). This is the argument of Judge Ronan in his dissenting opinion.

[19] It is interesting to note that a proceeding on application for an extension of time to file for a writ of certiorari was denied by Mr. Justice Frankfurter, 75 S. Ct. 257 (1954). In the opinion he stated: "Feeling as strongly as I do that compassionate consideration for the feelings and interests of the various parties involved in this litigation calls for its earliest disposition here, I deem it important that steps be taken to have the petition before the Court as soon as may be, with due regard to the Commonwealth's right to respond." However, when the petition did come before the Court, certiorari was unanimously denied, 348 U.S. 942 (1955).

ATTORNEY AND CLIENT—BANK FOUND GUILTY OF UNAUTHORIZED PRACTICE OF LAW

Defendant bank, authorized under the National Banking Act[1] to act generally in a fiduciary capacity as to estates and trusts, had two full-time employees who were licensed attorneys. These attorney-employees looked after all trust and estate matters and prepared and submitted all orders, petitions, and other instruments necessary in the probate and chancery courts. Suit was brought by the Arkansas Bar Association to enjoin the bank from engaging in the unauthorized practice of law. The supreme court of the state held that the bank's probating, through licensed attorneys, of estates and trusts in which it was named executor, administrator, or other fiduciary, constituted unauthorized practice of law and it affirmed and enlarged the injunction granted.[2] *Arkansas Bar Ass'n v. Union Nat'l. Bank*, 273 S.W. 2d 408 (Ark., 1954).

[1] 38 Stat. 261, 262, 265 (1916), 12 U.S.C.A. § 248 (1945).

[2] The Chancery Court had rendered a decree in part favorable to the bank when it refused to restrain the bank's probating a will in which it was executor, or its preparation and present-