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DePaul College of Law

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COMMENTS

PARENTS' RIGHT TO PRESCRIBE RELIGIOUS EDUCATION OF CHILDREN

The right to control the religious education and training of minor children usually presents itself for determination in guardianship, adoption and custodial proceedings incidental to the decease or divorce of the parents. The problem of determining who shall control the religious education of the children is of particular significance where the divorced parents, being of different religious beliefs, are vying for this right. Either because of the basic differences in religions or because of the animosity generated in the divorce proceedings manifesting itself in this divergence of desire, parents enter courtrooms with preconceived notions as to the religion in which their children are to be tutored. The courts of this country and England have been confronted with this paradox—a true paradox when one recognizes the individual natural right of the parents of a child to determine the church in which tenets the child will be reared—and have attempted to solve it in various ways. It shall be the purpose of this comment to discuss the different views adopted by the courts in solving the question as to who, of the natural parents, shall control the religious training and education of minor children.

In nineteenth century England,¹ the question had long been settled in favor of the father. He had the paramount and absolute right to control the religious education of his children during his life.² The insistence by the English courts of that era that a child should be brought up in his father's religion is illustrated by this quotation:

In no case, that I am aware of, where the father has been alive, has the court disregarded his wishes concerning the religious education of his children, unless . . . he has been . . . of such bad conduct that the court . . . altogether . . . deprive him of the custody of his children.³

¹ Prior to this time there was an absence of litigation in the English courts on the part of parents to protect any parental rights involving the religious education of their children. As early as 1590, the Elizabethan government suppressed all religious education other than that of the Church of England, and by 1699 it was a crime punishable by life imprisonment for any Papist to teach school. Friedman, *The Parental Right To Control the Religious Education of a Child*, 29 *Harv. L. Rev.* 485 (1916).

² *In Re Scanlan*, L.R. 40 Ch. 200 (1888); *In Re Clarke*, L.R. 21 Ch. 817 (1882); *Re Agar-Ellis*, L.R. 10 Ch. 49 (1878); *Hawksworth v. Hawksworth*, L.R. 6 Ch. 539 (1871); *In Re Newbery*, L.R. 1 Ch. 263 (1866); *Austin v. Austin*, 34 *Beav.* 257 (1865); *In Re Hunt*, 2 *Con. & L.* 373 (1843); *Talbot v. Shrewsbury*, 4 *My. & Cr.* 672 (1840).

³ *In Re Newton*, L.R. 1 Ch. 740, 748 (1896); *In Re McGrath*, L.R. 1 Ch. 143 (1893).

Upon the death of the father, in the absence of any expression of his desire, it was presumed that he would have wished that the child be raised in his religion, although, he, in fact, may have neglected or abandoned its precepts.⁴ Thus, in the case of *Hawksworth v. Hawksworth*,⁵ the court ruled against the surviving mother's wishes as to the religious training of the child and sustained the unpracticed faith of the deceased father as the faith in which the child was to be educated. Recognizing the peculiarity of this principle, the court said:

It seems a strange extension of the father's rights when he is in the grave, to allow his expressed wishes, and still more his merely presumed wishes to override the rights of the living parents.⁶

Nevertheless, the court applied the rule against which it spoke so directly.⁷

Strictly speaking it was not an arbitrary rule which the English courts applied. It was the father's expressed or presumed wish which the court enforced on the not uncommon rationale that the father is the head of the household, exercising the absolute right and undertaking the responsibility nature gave him through the birth of the child, for the interest of the child, the family and the public welfare. The courts would not interfere with the choice of the father unless his right had been abandoned,⁸ or his religious,⁹ moral,¹⁰ or political¹¹ opinions considered detrimental to the child's welfare.

This harsh rule was enforced even when the result was to ". . . create a barrier between a widowed mother and her only child; to annul the mother's influence on her daughter on the most important of all subjects,

⁴ Re Foulds, 12 Ont. L.R. 245 (1906); In Re Grey, 2 Ir. 684 (1902); In Re Scanlan, L.R. 40 Ch. 200 (1888).

⁵ L.R. 6 Ch. 539 (1871).

⁶ *Hawksworth v. Hawksworth*, as cited in Friedman, 29 Harv. L. Rev. 485, 490 (1916).

⁷ "There may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case . . ." *Hawksworth v. Hawksworth*, as cited in Friedman, 29 Harv. L. Rev. 485, 490 (1916).

⁸ Friedman, op. cit. supra note 1.

⁹ *Andrews v. Salt*, L.R. 8 Ch. 622 (1873); *Thomas v. Roberts*, 19 L.J. 506 (1850); *Lyons v. Blenkin*, Jac. 245 (1821).

¹⁰ In *Re Besant*, L.R. 11 Ch. 508 (1879); *Shelley v. Westbrook*, Jac. 266 (1821). The poet, Shelley, was denied custody of his children from their maternal grandmother because he was a self-declared atheist.

¹¹ *De Manneville v. De Manneville*, 10 Ves. 52 (1804).

with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man. . . ."¹²

In time, new development of thought and the harshness of prior decisions in settling the rival claims between members of different faiths led to the passage of the Guardianship and Infants' Act.¹³ It had the effect of abolishing the superior right of the father, and established the principle that the infant's welfare is of paramount importance and consideration.

It is interesting to note that a Canadian case contemporaneous with the old English cases held that a mother, having the right to bring up the child, had also the right to prescribe its religious education without considering the father's desire.¹⁴

In the United States, the resolution of any controversy concerning religious education of children stemming from rival beliefs cannot be disposed of by the courts through the favoring of one religious faith over another. Liberty of religious worship is a fundamental right of American citizenship protected by the Constitution.¹⁵ "The law knows no heresy, and is committed to the support of no dogma. . . ."¹⁶ The state ". . . looks with an equal eye upon all forms of so-called Christianity, and subjects no one to any disability for rejecting Christianity."¹⁷ Also ". . . all Christian denominations stand on the same footing in the eye of the law."¹⁸ Thus, the nature of religions involved in litigation is immaterial.

The convenient but harsh *religio sequitur patrem* of the early English cases has received little support in the United States. Some jurisdictions have, however, adopted this rule. The Supreme Court of Florida has relied on the old doctrine, saying:

. . . he, . . . as their father, has the legal right . . . to have them educated in any religious faith that he sees proper, whose tenets do not inculcate violation of the laws of the land.¹⁹

¹² *Hawksworth v. Hawksworth*, L.R. 6 Ch. 539, 540 (1871).

¹³ 15 & 16 Geo. 5, c. 45 § 1 (1925). "Where in any proceeding before any court . . . the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration . . . the claim of the father, or any right at common law possessed by the father, in respect of such . . . upbringing . . . superior to that of the mother . . ."

¹⁴ *Ex Parte Ham*, 27 L.C. Jur. 127 (1883).

¹⁵ U.S. Const., First Amendment.

¹⁶ *Watson v. Jones*, 13 Wall. 679, 728 (1871).

¹⁷ *In Re Doyle*, 16 Mo. App. 159, 166 (1884).

¹⁸ *In Re Turner*, 19 N.J. Eq. 433, 435 (1868).

¹⁹ *Hernandez v. Thomas*, 50 Fla. 522, 528, 39 So. 641, 645 (1905). Critically examined in *In Re Flynn*, 87 N.J. Eq. 413, 100 Atl. 861 (Ch. Ct., 1917).

Citing an early English case, *In Re Jacquet*²⁰ held that, even contrary to his own wishes, a guardian must raise his ward as a Catholic, in accordance with the natural father's direction. The court said: "I believe the welfare of infants is best promoted by bringing them up in the faith of their fathers."²¹ Also, in the case of *In Re Lamb's Estate*²² the lower New York court again followed the English common law rule.²³ Today, New York has supposedly abrogated its former common law view and the rights of parents are, in the absence of misconduct, held to be equal in regard to the care, nurture, education and welfare of the children.²⁴ In cases of parental dispute the welfare of the child has been considered of paramount importance.²⁵ But the highest tribunal in New York has held that the question of a child's religious education is purely an internal affair of the home, where the courts should not venture. In *People ex rel. Sisson v. Sisson*,²⁶ where a disagreement arose between the parents over the education of their child, the court said:

The court cannot regulate by its processes the internal affairs of the home. Dispute between the parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children.²⁷

In a subsequent lower New York case it was held that the religious upbringing of children is a matter of public policy of such dignity and stature that where the parents cannot agree, the court has the duty of determination.²⁸ This decision renders slightly dubious the outcome of future litigation in New York on this problem.

In a recent New Jersey case,²⁹ where custody of minor children was

²⁰ 40 Misc. 575, 82 N.Y. Supp. 986 (Surr. Ct., 1903).

²¹ *In Re McCannon*, 60 Misc. 22, 25, 112 N.Y. Supp. 590, 592 (Surr. Ct., 1908).

²² 78 Misc. 325, 139 N.Y. Supp. 685 (Surr. Ct., 1912).

²³ *Ibid.*, at 690. The court, quoting Blackstone, said, "The father, even yet, in contemplation of our common law, is priest and king in his own household. . . . Even if he is an unworthy father, . . . he retains a right to regulate the religious training of his infant child."

²⁴ New York Domestic Relations Law, c. 19, § 81 (1909). Also N.J. Laws, 2 Comm. St., § 21, p. 2810 (1902).

²⁵ *Shearer v. Shearer*, 73 N.Y.S. 2d 337 (S.Ct., 1947); *In Re Vardinakis*, 160 Misc. 13, 289 N.Y. Supp. 355 (Dom. Rel. Ct., 1936).

²⁶ 271 N.Y. 285, 2 N.E. 2d 660 (1936).

²⁷ *Ibid.*, at 287 and 661.

²⁸ *Shearer v. Shearer*, 73 N.Y.S. 2d 337 (S.Ct., 1947).

²⁹ *Donahue v. Donahue*, 142 N.J. Eq. 701, 61 A. 2d 243 (Ct. Ap., 1948).

awarded in a divorce proceeding to the mother who thereafter raised her children in accordance with her religious faith, chancery refused to interfere on application of the father, holding:

Under what circumstance, if any, a court would be justified in intervening with respect to the religious training selected by a parent having custody need not here be considered. . . . Intervention in matters of religion is a perilous adventure upon which the judiciary should be loathe to embark."³⁰

The Supreme Court of Kansas in applying the "hands off" doctrine held that aside from teachings subversive of decency and morality ". . . the courts have no authority over that part of a child's training which consists in religious discipline. . . ." ³¹ The reluctance of the courts to project themselves into so personal and controversial an area is perhaps understandable.³²

There is a third view, which might be considered the middle-of-the-road position, wherein courts consider the question of religious education from the standpoint of what is best for the child. In *Purington v. Jamrock*,³³ the Supreme Judicial Court of Massachusetts, in dealing with a custody dispute between a father and a mother, the parties being of different religious beliefs, said:

But in such a case as this it is not the rights of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child. The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance against them, ordinarily they will be decisive.³⁴ If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded. The court will not itself prefer one church to another, but will act without

³⁰ *Ibid.*, at 703-704 and 245. See Herr, *Marriage, Divorce and Separation*, § 83, p. 632 (1950).

³¹ *Denton v. James*, 107 Kan. 729, 732, 193 Pac. 307, 311 (1920). See, for the nonsectarian character of our governmental system as applied to religious education: *People v. Strasser*, 303 N.Y. 537, 104 N.E. 2d 895 (1952); *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E. 2d 463 (1951); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. State of Nebraska*, 262 U.S. 399 (1923); *In Re Blackburn*, 41 Mo. App. 622 (1890); *In Re Doyle*, 16 Mo. App. 159 (1884).

³² To a petition for an order specifying what religious faith an infant was to be brought up in, the court replied, "I find no authority . . . in the United States sustaining the exercise of such a power. The whole trend of the American decisions . . . seems to limit the cognizance which the court may take of the religion of the parents to the function of appointing guardians and awarding custody of infants." *In Re Flynn*, 87 N.J. Eq. 413, 423, 100 Atl. 861, 865 (Ch. Ct., 1917). Cf. *Ex Parte Kananack*, 272 App. Div. 783, 69 N.Y.S. 2d 889 (S.Ct., 1947). See 2 Nelson, *Divorce and Annulment* (2d ed., 1945), § 15.13, p. 183.

³³ 195 Mass. 187, 80 N.E. 802 (1907).

³⁴ The parents' faith is *prima facie* the infant's religion. *F. v. F.*, 1 Ch. 688 (1902). Also cases cited notes 18, 20, 22 *supra*.

bias for the welfare of the child under the circumstances of each case. This is the fair consensus of judicial opinion, although a difference of circumstances has caused the use of different expressions and the reaching of different results in the different cases.³⁵

This view represents the great weight of authority in the United States and England today.³⁶

However, in applying the principle that the court's action is to be governed by the best interests of the child, what binding force and effect should be given an antenuptial agreement between the parents as to the religious education of prospective children?

In one view, no mere agreement as to the religious education of children, whether it be made before³⁷ or after³⁸ marriage, is binding and it is always open to the acceding parent to change his mind, as it is his privilege to inculcate in his children those religious principles which, at any time, seem best to him. Some decisions base this fundamental principle, i.e., the right of a parent arbitrarily, and perhaps capriciously to change his mind, on public policy. Accordingly, a parent should not be held to bind himself irrevocably to an agreement relinquishing control over his children's religious education and this right is vested in the parent for the benefit of his children.³⁹ Other authorities, predominantly English, rest their decisions on practical considerations arising out of family life.⁴⁰

The opposite position was taken by a lower New York court in *Ramon v. Ramon*,⁴¹ which enforced the antenuptial agreement, without considering the question of the child's welfare, on the basis that the husband was entitled to the wife's consortium which included any obligations the wife had taken upon herself (antenuptial agreement) when she

³⁵ *Parington v. Jamrock*, 195 Mass. 187, 199-200, 80 N.E. 802, 805 (1907).

³⁶ *Boerger v. Boerger*, 97 A. 2d 419 (N.J., 1953); *Gerst v. Gerst*, 349 Ill. App. 201, 110 N.E. 2d 470 (1953); *Nye v. Nye*, 411 Ill. 408, 105 N.E. 2d 300 (1952); *Mehrhoff v. Moore*, 348 Ill. App. 224, 108 N.E. 2d 791 (1952); *Cory v. Cory*, 70 Cal. App. 2d 563, 161 P. 2d 385 (1945); *Parks v. Cook*, 180 S.W. 2d 64 (Mo. Ct. App., 1944); *People v. Woolston*, 135 Misc. 320, 329 N.Y. Supp. 185 (S.Ct., 1929); *Re Butcher's Estate*, 266 Pa. 479, 109 Atl. 683 (1920); consult, also, 36 Col. L. Rev. 678 (1936).

³⁷ *Brewer v. Cary*, 148 Mo. App. 193, 127 S.W. 685 (1910); *Re Nevin*, 2 Ch. 299 (1891); *Re Walsh*, L.R. Ir. 13 Eq. 269 (1884); *Andrews v. Salt*, L.R. 8 Ch. 622 (1873); *In Re Clarke*, L.R. 21 Ch. 817 (1882); *In Re Newton*, L.R. 1 Ch. 740 (1896); *Re Agar-Ellis*, L.R. 10 Ch. 49 (1878).

³⁸ *Condon v. Vollum*, 57 L.T.N.S. 154 (1887); *D'Alton v. D'Alton*, L.R. 4 Prob. Div. 87 (1878); *Vansittart v. Vansittart*, 4 Kay. & J. 62 (1858); *In Re Besant*, L.R. 11 Ch. 508 (1879).

³⁹ Case cited note 35 supra.

⁴⁰ *In Re Browne*, 2 Ir. Ch. Rep. 151 (1852).

⁴¹ 34 N.Y.S. 2d 100 (N.Y.C. Dom. Rel. Ct., 1942).

entered into the marital union.⁴² The *Ramon* case was cited by the New York Supreme Court in *Shearer v. Shearer*,⁴³ but the court made its position clear when it said that it was charged with a responsibility more impelling than the religious rights of the father. The controlling consideration was the welfare of the children. The court then determined that the children's welfare would best be served by enforcing the prenuptial agreement.

In determining what considerations will best serve the interests of the child, the preference of the child carries some weight, but is not conclusive.⁴⁴ The court privately examines the child in chambers, with the consent of counsel, to determine, if possible, the predilection of the child. The limitations of such an interview are obvious, as are its dangers, among them that of influenced judgment. Age and capacity on the part of the child to make a rational judgment are important considerations.⁴⁵

In retrospect, the modern principle that the best interests and welfare of the child are of paramount consideration permits the courts to exercise their discretion in a manner that will meet the circumstances of each case. This approaches justice more closely than do rigid doctrines under which the court either directs the child to be raised in its father's religion (the former English rule) or finds that it cannot deal with the problem at all (the *Sisson* doctrine).

FEDERAL ESTATE TAX LAW—TRANSFERS IN CONTEMPLATION OF DEATH

Those portions of the Federal Estate Tax law which have provided for the taxation of transfers made in contemplation of death have always been the subject of a large part of the litigation involving estate tax liability.

This subject has also been a source of constant frustration to the Congressional Committees who from the beginning have realized that large amounts of money and property were being withdrawn from the operation of the estate tax by gifts inter vivos under circumstances which clearly indicated that, but for the gifts, all of those amounts would have been taxed as a part of the donors' estates and that by far the greater number

⁴² *Weinberger v. Van Hessen*, 260 N.Y. 294, 183 N.E. 429 (1932); *People ex rel. Rich v. Lackey*, 139 Misc. 42, 248 N.Y. Supp. 561 (1930); *Matter of Mancini*, 89 Misc. 83, 151 N.Y. Supp. 387 (S. Ct., 1915); *In Re Luck*, 10 Ohio S.&C.P. (1899); *Denton v. James*, 107 Kan. 729, 193 Pac. 307 (1920); consult *Williston on Contracts*, § 1744 A, p. 4939.

⁴³ 73 N.Y. S. 2d 337 (S.Ct., 1947).

⁴⁴ *Callen v. Gill*, 7 N.J. 312, 81 A. 2d 495 (1951).

⁴⁵ Cf. *Hawksworth v. Hawksworth*, L.R. 6 Ch. 539 (1871); *Richards v. Collins*, 45 N.J. Eq. 283, 17 Atl. 831 (1889); *Weinman, The Trial Judge Awards Custody*, 10 *Law & Contemp. Prob.* 721 (1944).