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Domestic Relations - Divorce Decree Incorporating Stipulation That Child Shall Be Reared in a Given Religion

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members who are shut out by it.[22] However, its logical application is in cases where it is the only reasonable means of carrying out the general objectives of the testator; and so, it is submitted, in such instances it is a rule of necessary interpretation rather than merely one of "convenience."[23] To avoid the consequences of the rule, the testator (or more properly, the attorney drafting the will) should state clearly when the class is to close.[24]

The writer has attempted to explain the new addition to the long list of rules of construction employed by Wisconsin courts, and to show that judicious use of such rule is sound. It is felt that perhaps often in the past the actual problems of construction have been obscured by the courts' frantic efforts to determine the testator's purpose in cases where his individual intent was elusive.[25] It is suggested that once such intent is determined to be beyond ascertainment with reasonable certainty, the court is most correct in employing such rules of construction as will effectuate the probable intent of the average testator[26] and produce a decision in accordance with sound public policy.[27]

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Domestic Relations—Divorce Decree Incorporating Stipulation That Child Shall Be Reared In A Given Religion—Defendant and her husband agreed upon a property settlement and upon the custody of their children the day before the grant of their divorce decree. This agreement gave the custody of their five year old son to the defendant, and provided that the child be reared in the Roman Catholic religion. The defendant was Protestant and the husband was Catholic. Upon the request of the parties to the divorce, this stipulation was incorporated into the divorce decree. Two years later the husband filed "Information for Contempt" alleging that the defendant has been, and is violating the divorce decree, in that

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[22] See Re Wenmoth's Estate, 37 Ch. Div. 226, 57 L.J. Ch. 649, 57 L.T. 709, 36 Wkly. Rep. 409 (1888).

[23] Annot., 155 A.L.R. 757 (1945).

[24] In Casner, *op. cit.* supra note 16, at 307, it is suggested: "The crying need in this field of law is not for reform of the courts' technique in handling the problem in class gifts . . ., nor reform of the precedents followed by the courts in the solution of the problem of increase in the class membership. Rather the crying need is for draftsmen, educated to the seriousness and difficulties of the task they are employed to perform."

[25] *E.g.*, in *Will of Ehlers*, 155 Wis. 46, 143 N.W. 1050 (1913), where after giving extended cautioning in the use of rules of construction, and belittling their value, the court concludes: " . . . . the intention of the testator should prevail *so far as it can be read out of the language used to express it.*" [Emphasis supplied.] Query as to what the court would do if such intent could not be gleaned from the will, the testator not having anticipated the problem.

[26] See note 10 *supra.*

[27] See note 12 *supra.*

she has not reared their son in the Catholic religion, has refused to do so, and has expressed her intention not to comply with that provision of the decree.

She was found guilty of contempt by the District Court. Upon her appeal to the Iowa Supreme Court it was held that the provision of the divorce decree requiring the defendant to rear the child in the Roman Catholic religion was void for indefiniteness, and that the alleged violation of that provision was not contempt. *Lynch v. Uhlenhopp,* 78 N.W. 2d 491 (Iowa 1956).

In refusing to enforce agreements concerning the religious education and rearing of children, the American courts have given a variety of reasons: the court does not have jurisdiction;[1] it is against public policy;[2] it violates constitutional religious liberty;[3] because of the welfare of the child;[4] that the agreement was not between the parties but was a condition imposed by a higher power.[5]

Many American decisions indiscriminately cite English authorities; as does the case at hand, which cites the leading English case of *Andrews v. Salt,* L.R. 8 Ch. 622 (1873). They are indiscriminate citations because the English decisions arise from a tradition completely foreign to this country. In place of a guarantee of protection of religious liberty. England's policy and law were hostile to the Roman Catholic Church and followed close upon a history of open persecution and supression.[6] Many English cases are markedly distinguishable on their facts; either one of the parties to the agreement was dead,[7] or the child had been trained in another religion for many years.[8]

Although these cases, both English and American, deal with an ante-nuptial contract, which was not directly in issue in the principal case, yet they are relevant and were so considered by the court.[9] If a decree of this kind is not enforceable, not because of contract considerations, but because of those stated in the principal case, will the agreement for the religious education of children afford any more protection whether the agreement is made before or after marriage?

[1] Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910). The theory is that equity does not have jurisdiction when no right of property is involved.
[2] *Ibid.*
[3] Denton v. James, 107 Kan. 729, 193 Pac. 307(1920).
[4] Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920).
[5] *In re* Turner, 19 N.J. Eq. 433 (1868).
[6] White, *Legal Effect of Ante-Nuptial Promises,* American Ecclesiastical Review (1932); 29 H.L.R. 485; Hayes, *A Political and Cultural History of Modern Europe* p. 175 (2d ed. 1932).
[7] *In re* Nevin, 2 Cr. 299 (1891); *In re* Clark, L.R.Ch. Div. 817 (1882); Andrews v. Salt, L.R. 8 Ch. 622 (1873).
[8] *In re* Browne, 2 Ir. Ch. Rep. 151 (1852).
[9] Lynch v. Uhlenhopp, 78 N.W. 2d 491, at 499 (Iowa 1956).

There are few American decisions on this subject, and the question is far from settled.[10] New York has met the issue squarely and has decided that an agreement upon the religious education of children is enforceable.[11]

Ramon v. Ramon, 34 N. Y. S. 2d 100 (1942), was a proceeding of a wife, separated from her husband, seeking support for herself and child. The defendant-father countered with a claim that the wife, by failing to raise their child in the Catholic religion, breached their ante-nuptial contract, in which she (a Protestant) had promised to her prospective husband (a Catholic) that any child born of their marriage would be baptized and educated in the Catholic religion. The court, in upholding and enforcing the contract, looked to the sacred origin of marriage and the consequence of it to a Catholic. The court held that because, to a Catholic, marriage was an indissoluable union that irrevocably changed his status, and because he was obliged to insure the religious education of his children, as a prime duty under his Catholic faith, a Catholic party's contract to accomplish this purpose will be protected under the law.[12]

> "(a) An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a Catholic has thereby irrevocably changed the status of the Catholic party, is an enforceable contract having a valid consideration; (b) the court will take judicial notice of the religious and moral obligations of the parties; (c) the spiritual and Catholic training of a child amid religious persons or institutions of its own faith is paramount over any material considerations . . . ."[13]

With New York in the forefront we have an American precedent which upholds the enforceability of an agreement for the religious education of children.

The *Lynch* case, typifies and spotlights the situation of conflict current on this question. There is a dissent splitting this court five to four.[14]

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[10] 12 A.L.R. 1153.

[11] Weinberger v. Van Hessen, 260 N.Y. 294, at 298, 183 N.E. 429, at 431 (1932), "Agreements between parents for a particular sort of religious upbringing have in general been valid in this country." In re Vardinakis, 160 Misc. 13, 289 N.Y. Supp 355 (1936); Ramon v. Ramon, 34 N.Y.S.2d 100 (1942); Shearer v. Shearer, 73 N.Y.S.2d 337 (1947); Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954); (This case is distinguished by the fact that the child is 12 years old, and he was held therefore, capable of chosing his own religion. Dissent would hold agreement enforceable even upon a child of this age).

[12] The court by way of dicta said that a parent could compel the education as a Catholic of a child baptized as a Catholic, even in the absence of a contract to that effect.

[13] 34 N.Y.S.2d at 112.

[14] Majority opinion by Chief Justice Thompson; Hays, Larson, Peterson, and

As to "indefiniteness," which the majority of the court gave as the principal reason for its decision, but which was never presented as an issue or urged in the lower court or on appeal, the dissent answers in these words:

> "The fact of being reared in the Roman Catholic religion is not so unknown or abstruse as to be ununderstandable."[15]

Then the dissent proceeded to point out that there is a large population of Catholics throughout the country, that thousands of institutions are maintained by them and therefore the defendant could have arranged for the boy's religious instruction without too much difficulty.

To the majority's theory that when the parties agreed upon "religion" they actually had "cultus" in mind, the minority rebutted by showing that the word "cultus" does not appear in the dictionary except in the listing of obsolete words.

Although the majority of the court did not base their decision upon the constitutional question, they considered the decree of the lower court violative of the first and fourteenth amendments of the Federal Constitution, in that it interfered with religious freedom.[16] This contention was answered by the dissent, which asserted that no particular faith is imposed upon the parties, so as to violate the Constitution, when they, by contract, have imposed it upon themselves.[17]

Iowa Code, Sec. 235.3 directs that official agencies when placing children for adoption " . . . . shall take into consideration the religious faith or affiliations of the child or its parents."[18] The dissent contends that there has never been constitutional objection to this stated public policy, why then should there be such objection when the parents themselves have agreed upon the question and have secured its inclusion in the divorce decree.

This case, in presenting either side of the conflict, has synopsized the arguments and attitudes upon a question of particular importance to Roman Catholics. The Catholic contemplating marriage with a non-Catholic must weigh in conscience the probability of enforcing an agreement for the religious education of the children of such marriage with binding law of the Church:

Wennerstrum concur; Dissent by Bliss, in which Garfield, Oliver and Smith concur.

[15] 78 N.W. 2d. at 504.

[16] *Id.* at 500.

[17] *Id.* at 506.

[18] Wisconsin has a similar provision in §48.82(3): "The following persons are eligible to adopt a minor if they are residents of this state; . . . . When practicable, the petitioners shall be of the same religious faith as the natural parents of the person to be adopted."; as do many other states.

"The Church most severely forbids everywhere marriages between two baptised persons, one of whom is a Catholic, the other a member of a heretical or schismatical sect; and if there is a danger of perversion for the Catholic party or the offspring the marriage is forbidden also by Divine law."

Canon 1060.

DAVID A. SCHUENKE

Joinder of Parties: Effect of No-Action Clause Valid in State Where Insurance Contract Made Upon Joinder of Insurer Under Section 260.11(1)—A direct action was brought against defendant non-resident insurer, who had issued an automobile liability policy in Kansas to a Wisconsin taxicab company, for injuries sustained in Wisconsin as a result of the negligence of the taxicab company. This policy contained a "no-action" clause[1] which is recognized as valid in Kansas. Upon motion of insurer to dismiss the complaint against him on the ground that insurer is not a proper party. *Held:* that an insurer is not subject to direct action in Wisconsin by the injured party in view of the *construction* of Wis. Stats. Sec. 260.11 (1)[2] as not permitting direct action in such case before the amount for which the insurer may be liable has first been determined either by agreement or by final judgment against the insured. *Klabacka v. Midwestern Automobile Insurance Co.,* 146 F. Supp. 243 (W.D. Wis. 1956).

The principal case again raises the question of what effect, if any, *Watson v. Emplyoers Liability Assurance Corp.*[3] has had on the Wisconsin decision of *Ritterbusch v. Sexsmith.*[4] In the *Ritterbusch* case the no-action clause was contained in a policy issued in Massachusetts where such clause is valid but the party insured resided in Wisconsin. Our Court held that the no-action clause was effective to postpone di-

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[1] The standard form of such clause reads: "No action shall lie against the company until the amount for which the assured is liable by reason of any casualty covered by this policy is determined by final judgement against the insured or by agreement between the insured and the plaintiff with the written consent of the company."

[2] WIS. STATS. §260.11(1) (1955), the pertinent provision being: ". . . . In any action for damages caused by the negligent operation, management, or control of a motor vehicle, any insurer of motor vehicles, which had an interest in the outcome of such controversy adverse to the plaintiff or to any of the parties to such controversy, or which by its policy of insurance assumes or receives the right to control the prosecution, defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend such action brought by the plaintiff or any of the parties to such action or agrees to engage counsel to prosecute or defend such action, or agrees to pay costs of such litigation is by this section made a proper party defendent in any action brought by the plaintiff on account of any claim against the insured."

[3] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

[4] Ritterbusch v. Sexsmith, 256 Wis. 507, 41 N.W. 2d 611 (1950).