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Article 9

Adoption - Constitutionality of "Same Religion" Statute

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However, the last clause of the statute, "unless a different disposition shall be made or directed by the will," eliminates its application in favor of the grandchild since the will directed a gift over to Sarah's children and, if none, to her surviving brothers and sisters.

Also, it is probable that section 238.13 would not be applied to prevent lapse of the gift over to the surviving brothers and sisters, although to them no different disposition was made and they were survived by issue, since the will expressly provides that the brothers and sisters must "survive" the testator. It could be argued that in every case of a devise it is presumed that the devisee will survive the testator; and that, therefore, the word "surviving" adds nothing in essence to the will. However, since Wisconsin courts hold so firmly to the expressed intent of the testator, and since none of the brothers or sisters survived the testator, it is doubtful whether the anti-lapse statute would apply.

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Adoption — Constitutionality of "Same Religion" Statute — Petitioners, husband and wife, sought to adopt twin children. The judge made findings of fact, concluding that it would not be for the best interest of the Catholic twins to be adopted by a Jewish couple and dismissed the petition. General Laws (Ter. Ed.) c. 210, 5B, inserted by St. 1950, c. 737, 3, is 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."

The court found that the mother and the "natural father" of the twins were Catholic. The petitioners, who were found to be financially and physically equipped to bring up the twins and to intend to care for them to the best of their ability, were of the Jewish faith and intended to bring up the twins in that faith. The court found that the mother of the twins consented to the adoption and knew that the petitioners were Jewish and was satisfied that the twins should be raised in the Jewish faith. The court also found that many Catholic couples were available with whom the twins could be placed. *Held*: The findings of the lower court were proper, and the statute involved was constitutional and not contrary to the First Amendment to the Constitu-

tion of the United States nor to art. 2 of the Declaration of Rights or art. 11 and art. 46, 1, of the Amendments to the Constitution of the Commonwealth of Massachusetts. *Rouben Goldman & another, Petitioners, 121 N.E. 2d 845 (Mass. 1954).*

The problem presented in this case can be approached from two points of view. The first point of view is the purely legal one of what the law is. The second approach is the ethical or moral one of what the law should be.

As to the purely legal problem there is in the first instance a question of the interpretation of the statute and, secondly, once the meaning of the statute has been interpreted, whether the statute is constitutional.

The rule in such cases prior to the enactment of the statute, as followed by the court in the earlier *Purinton* case[1] was:

> "generally, in the absence of specific, applicable statutory provision, the court will not allow a difference of religion to defeat an adoption that it feels will serve the welfare of the child, which is the paramount consideration governing the discretion of the court in adoption proceedings."[2]

The statute was interpreted in the *Gally* case,[3] where the court said:

> "It does not seem to us that when the Legislature inserted section 5B it intended to cast aside the familiar and obviously pertinent criteria which had been so long employed in determining questions of child custody . . . . There is, however, a certain element of compulsion upon the judge indicated by the word 'must'. But the compulsion operates only 'when practicable'.
> "The phrase, 'if the court shall find it practicable,' implies a legal discretion, the exercise of judgment based upon the whole evidence of all the facts that affect the question of practicability within the usual and ordinary sense of the word. The question, therefore, depends upon the circumstances of each particular case.
> ". . . All the familiar tests are therefore still to be considered. Each case is to be determined on its own facts. The difference is that, whereas before the new statute there was no definite rule binding upon the judge in any set of circumstances as to how much weight was to be given to any one of the several as against the others, he is now bound to give controlling effect to identity of religious faith 'when practicable,' but not otherwise."[4]

Thus it would seem from an interpretation of the above quotations

[1] Purinton v. Jamrock, 195 Mass. 187, 189, 80 N.E. 802, 805; 18 L.R.A., N.S. 926 (1907).
[2] See Note, 23 A.L.R.2d 701 at p. 702.
[3] Petition of Gally, 329 Mass. 143, 107 N.E.2d 21 (1952).
[4] *Ibid.*

that whether the judge shall give custody to those who are not of the same religious faith is a determination of fact which it is proper for the lower court to make and which, when made, will not be reversed unless plainly wrong. This is the position the court takes in the principal case. The judge's criterion is "when practicable" as to when an adoption of a child of one religion by those of another religion who seek to adopt may be approved under the statute. The court reasons also that the lower court is, as are all triers of fact, in a better position to determine this than the appellate court would be.[5] Therefore, as far as interpretation goes, the one here seems reasonable and not open to attack since it allows the trial judge sufficient leeway to protect the interests of all parties concerned.[6]

The next question in an analysis of what the law is, is to determine whether the statute is constitutional. The ground upon which constitutionality is attacked is that the phrasing violates the First Amendment of the Constitution of the United States as regards "establishment of religion, or prohibiting the free exercise thereof"[7] as made applicable to the states by the 14th Amendment.[8] The argument would seem to be that since the court decided that the religion of the twins involved in the principal case was Catholic, this was an establishment of religion for them, and, hence, unconstitutional. This would seem to be but a semantic equivocation. What the court did here was to determine what the religion of the twins factually was, or, in other words, what religion had been established for them by the parents. A determination of such a fact, as here, is certainly not in contravention of the First Amendment.

Another First Amendment problem is raised by the claim that to determine the twins' religion as Catholic is to interfere with the religious freedom of the natural mother who has consented to the changing of their religion. In this respect it is important to remember that, according to the findings of fact here, at no time did the mother do any more than consent to the change of religion and did not herself try to change that religion. It is apparent that there is a distinct difference between giving consent or merely not objecting to a change of religion and the affirmative act of performing the necessary requirements to change the religion. Or to put the matter in another way, the statute or the act of the court did not prohibit the mother

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[5] See also Petition of Darte, 122 N.E.2d 890 (1954).

[6] For an excellent discussion of the question here see Note, *Religion as Factor in Adoption Proceeding,* 23 A.L.R.2d 701. and *Religion as a Factor in Adoption, Guardianship and Custody,* 54 COLUM. L. REV. 376.

[7] U.S. CONST. AMEND. I.

[8] Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947); McCollum v. Board of Education, 333 U.S. 203 (1948).

from changing the religion of the child. She at no time sought to exercise a right to change it. Consequently the child was still a Catholic.

The court, however, chooses to answer this objection on a different ground by showing that since, by presentment of the petition, the natural mother had renounced her parental claim to further determining their religion, and her freedom was gone as a result of her free act, and not as a result of the operation of the statute.

The constitutional religious problems raised by the statute were handled by the court in these words:

> "All religions are treated alike. There is no 'subordination' of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered. It is argued that there is interference with the mother's right to determine the religion of her offspring, and that in these cases she has determined it shall be Jewish. Passing the point that so far as concerns religion she seems to have consented rather than commanded and seems to have been 'interested only that the babies were in a good home,' there is clearly no interference with any wish of hers as long as she retains her status as a parent. It is only on the assumption that she is to lose that status that 5B becomes operative. The moment an adoption is completed all control by the mother comes to an end."

Thus the court here feels that the statute is not in contravention of the provisions forbidding interference with the freedom of religion under various applicable constitutions. It appears that this view is probably the one most likely to stand since from a purely common sense viewpoint there is apparently no favoritism nor "establishing of any religion."[9]

Therefore, it would seem from a purely legal point of view, the decision in this case was proper and reasonable and one quite likely to be followed in construing such a statute.

The second view to be considered in the analysis of this decision is the question of what the law should be. Is it morally proper for the state to determine by positive law that a child proffered for adoption should be adopted, "when practicable," by those of the same religious faith as the child? The writer feels that this is a proper statute under the moral law.

In reasoning to this conclusion, it is to be noted that the status of

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[9] However, some courts have taken a more cautious view as to the effect of such statute: see State v. Bird, 253 Mo. 569, 162 S.W. 119 (1913); State *ex. rel.* Evangelical Lutheran Kinderfreund Society of Minnesota v. White, 123 Minn. 508 (1913); *In re* Duren, 355 Mo. 1222, 200 S.W.2d 343, 170 A.L.R. 391 (1947); *In re* Walsh's Estate, 100 Cal. App. 2d 194, 223 P.2d 322 (1950).

the relation between the adopted child and the adoptive parent will never be the exact equivalent of the relation between the child and the natural parent. This is true because the relation of the natural parent and the child springs from the very nature of mankind, expressed in marriage which is the source of the legitimate procreation of all children. The relation of the natural parent and child, and their rights and duties, are based on the fact of natural generation in the married state. In general this parental right is a fundamental one and must be protected in the same way as are the rights to life and liberty. These rights cannot be taken away except upon the justification of the common good. On the other hand, the relation of the adoptive parent and the child is in general a pure creature of the positive law. In fact, in early English common law the right to adoption was unknown. In the United States it is said to exist only by virtue of statute.[10] This is reasonable because, although the act of adoption is one that is extremely useful and salutary and charitable, there is no necessity for it arising from the very nature of man himself.

Once it has been established that the adoptive relation arises purely from legal statute and is not based on the nature of the parent and child, and further, that the natural parental relation is a moral necessity, then it follows that certain rights and duties do not arise from one that is not a morally necessary one. Hence there is nothing in the statute offensive to the natural law.

It is the contention here that one of the rights of the parent flowing from the natural relation is to choose a religion for a child and to bring him up in that religion. This is a necessary right for the proper moral and spiritual development of the child.

A very difficult question arises as to whether the natural parent can affirmatively change the religion of the child once that it had been established. This question will not presently be discussed because it is not at issue under the facts here. Here we are concerned with the right of the adoptive parents to change the religion of a child placed under their care. The right to change the child's religion would not seem necessarily to flow from the adoptive relation because it should be presumed that, since the child has a religion which, if followed, would insure proper moral and spiritual development, there is no compelling reason for a change. Of course, if the natural parent has not created a religious status for the child, the statute does not apply.

Therefore, by the above process of reasoning, the conclusion is reached that there is nothing contrary to the moral law to insist that a child of one religion be adopted by those of the same religious faith,

[10] 1 AM. JUR., *Adoption of Children* § 3, p. 622.

unless there is some strong reason making it not "practicable." This also seems to conform with a common sense view of the matter.

Thus it is submitted that this decision is both proper and reasonable, both legally and morally, and is one that should be followed in the case of similar statutes.

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