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Contracts for Religious Education of Children

Jack F. Smith*

RECENTLY, IN THE SIXTH APPELLATE DISTRICT OF OHIO (the members of the Eighth District sitting by designation), an interesting decision was rendered in the case of *Hackett v. Hackett*.¹ The facts in that case were as follows: a separation agreement had been entered into by a Catholic husband and a Protestant wife which provided, inter alia, that the wife was to have custody of the child, who was to be brought up in the Catholic faith. The separation agreement was subsequently incorporated into a divorce decree. The wife did not carry out the proviso regarding the religious education of the child, and the husband instituted an action to have the wife held in contempt of court for her disregard of that provision of the divorce decree. The husband's action was denied and he appealed.

The Court of Appeals, speaking through Skeel, J., held that a contract provision that children were to be raised in a particular faith was unenforceable. This decision is in line with the great weight of authority in the United States today.² The majority of cases involve antenuptial agreements which provide

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¹ Gloria T. Hackett v. John W. Hackett, Jr., Lucas County, decided May 19, 1958.

² *McLaughlin v. McLaughlin*, 20 Conn. Sup. 278, 132 A. 2d 420 (1957). "The law is absolutely impartial in matters of religion. A court will not take a child's religious education into its own hands short of circumstances amounting to unfitness of the custodian, and in a dispute relating to custody, religious views afford no ground for removing children from the custody of a parent otherwise qualified." *Donahue v. Donahue*, 61 A. 2d 243 (N. J., 1948). The facts in this case were interesting. The father was born and reared a Catholic, the mother was Jewish. Their marriage was the second for each of them, their respective prior marriages having been terminated by divorce. They were married in a Lutheran Zion Church. At some point, the father embraced Christian Science. Two children were born of the marriage. The boy was enrolled in a Christian Science Sunday School at the age of three and attended on some twelve occasions during the ensuing six years. The girl was baptized a Catholic at the instance of the father, without the knowledge or consent of the mother, while the mother and father were living apart. At the time of the marriage and for some time prior thereto, the children were living with the mother and her father, who was a devout adherent of the Jewish faith. The mother was awarded custody in the divorce proceedings and the father subsequently brought an action to have the children raised in a Christian faith. *Refused*. *Denton v. James*, 107 Kan. 729, 193 P. 307 (1920); *Wojnarowicz v. Wojnarowicz*, 48 N. J. Super. 349, 137 A. 2d 618 (1958).

that any children of the marriage are to be raised in a particular faith.

Usually the religion involved is Roman Catholicism. Roman Catholics are taught that marriage is a sacrament which must be administered by a Roman Catholic priest. The Catholic church frowns upon so-called mixed marriages—where each of the parties is an adherent of a different religion. But, human nature being what it is, there is no way to forestall such a marriage effectively.

When a mixed marriage involves a Roman Catholic, the Catholic, having been taught that he must be married by a priest, requests his parish priest to perform the ceremony. The priest insists upon a talk with the other party to the marriage, and as a condition for his consent secures a promise from the non-Catholic that any children born as issue of the marriage will be brought up in the Catholic faith.

If possible, this promise is reduced to writing in the form of an antenuptial agreement. This explains why the majority of cases involving the religious education of children arise out of the failure of a promisor to abide by the provisions of an antenuptial rather than a separation agreement.³

In the not too distant past, when our society was more of a patriarchy than it is today, the father's wishes as to religious training prevailed. Where the father hadn't made any wishes known as to a particular faith, the courts assumed that he wanted his children reared in his own faith even though he did not actively practice it.⁴

But today the courts of the United States almost uniformly hold that the parent having custody of a child or children can select the religious faith to be taught to the child or children, even though they may have previously promised to rear the child or children in a particular faith.

In practically every decision, holding such prior promises to be unenforceable, the courts cite the First Amendment to the Constitution of the United States and/or the applicable provision of the state Constitution.⁵ The religious freedom guaranteed

³ 50 Yale L. J. 1286 (1940-41).

⁴ 29 Harv. L. R. 485 (1915-16).

⁵ Article I, Section 7, Ohio Constitution, in part provides: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. . . ."

by the Constitution has been upheld also in custody cases, where one parent attempted to show that the religion of the other made that other unfit to have custody.⁶

It is believed, however, that there is a more practical reason for the decisions. How could any court enforce a provision in an antenuptial or separation agreement that a child was to be raised in a particular faith? Children, at least in their more formative years, place more trust and confidence in their parents than they do in strange teachers. If one parent has custody and the courts force that parent to send the child to a particular denominational school or Sunday School, whatever the child learns at that school can very easily be nullified by the actions and teachings of the custodial parent. There is no effective method of insuring, by a court, that a child will be raised in a particular faith which is not followed by the parent having custody. Courts refuse to be placed in the position of issuing vain decrees.

There is also another basis for refusing to judicially enforce contracts regarding the religious education of children in a particular faith. The action is brought on the contract and, as we have seen, specific performance cannot be obtained because such a decree would be a vain act. An action on a contract, if not for specific performance, is for damages. What damages have been suffered by a parent out of custody because the custodial parent has failed to live up to the terms of the antenuptial or separation contract? Even though he may be concerned regarding the eternal salvation of his child's soul, his damage is only mental distress. To collect for that distress would require a judicial holding that his religion was the true religion and that all other faiths were false and leading to eternal damnation. It is hard to conceive of any court in this country rendering such a decision.

One court has refused to enforce a contractual provision regarding the religious education of a child, on the ground that the provision, which was that the child be reared a Roman Catholic, was unenforceable for vagueness.⁷

⁶ *Jackson v. Jackson*, 181 Kan. 1, 309 P. 2d 705 (1957); the mother was awarded custody of three children. The father appealed, claiming that the mother was emotionally upset and a Jehovah's Witness. "Religious freedom, as guaranteed by the Constitution, should be faithfully upheld in determining custody of children of divorced parents, and religious teachings of one of the parents to the children, regardless of how obnoxious the teachings may be to the court, the other parent, or the general public, should not and must not be considered as the basis of making the child custody orders."

⁷ *Lynch v. Uhlenhopp*, 78 N. W. 2d 491 (Iowa, 1956). This case is a master-
(Continued on next page)

Perhaps the best basis for the judicial refusal to enforce a contractual provision that a child be reared in a particular faith, over the objection of the parent having custody, is that the welfare of the child should be the primary consideration of the court.⁸

Ordinarily, there is nothing that leads to more friction in a home than a difference in religion on the part of the occupants of the home. This is the reason why most religions frown upon mixed marriages and why marriage counselors advise against them.

A child's welfare is best advanced by his living in harmony with the parent who has been awarded his custody. He is already disturbed by being deprived of one parent. To enforce a contractual provision regarding his religious education, over the objection of the custodial parent, would add to his disturbance because that objection would necessarily be known to him. If the child followed the religious teachings, there would have to be a lack of harmony between him and the objecting custodial parent.

Interestingly enough, while on the subject of custody, courts have changed custody where the custodial parent made no provision for religious education of the child.⁹

Another basis for the judicial refusal to enforce a contract provision regarding the religious education of a child in a particular faith was utilized in the *Hackett* case—the lack of “consideration” for such a promise.

(Continued from preceding page)

piece of selecting a result and then finding a premise to support it. The parties were married and had two sons. Subsequently, they were divorced after entering into a stipulation that one child was to be awarded to the wife, who agreed to raise him in the Roman Catholic religion. The wife was a Protestant, the husband a Catholic. The husband filed contempt proceedings against the wife, claiming that she had not been complying with the stipulation which was incorporated into the decree. The court said that inasmuch as contempt proceedings were quasi-criminal that the wife could not be held in contempt of an order which was vague, and that the stipulation that the child was to be reared in the Roman Catholic religion was too vague to enforce.

⁸ *Stanton v. Stanton*, 213 Ga. 545, 100 S. E. 2d 289 (1957). The child's welfare usually controls custody rights, while contracts as to religious training do not bind the parent having custody.

⁹ *Murphy v. Murphy*, 143 Conn. 600, 124 A. 2d 891 (1956): When two children were involved, one given into the mother's custody and one into the father's, the mother's later excommunication on remarriage, with no religious education provision for the child in her care, resulted in award of custody of that child to the father.

In the language of Judge Skeel (the members of the Eighth Appellate District sat by designation in the Sixth District): "Certainly it cannot be contended that there was any consideration or benefit flowing to the plaintiff from such promise insofar as the wife's ability to secure a decree in the divorce action was concerned as contended by the defendant. A husband or wife is not entitled to a divorce without judicial proof of some breach of the marital duty as provided by law on the part of a party to such relationship. . . . So that the defendant's claim, that the plaintiff was 'able to obtain a divorce and custody without contest by virtue of the Separation Agreement,' has no foundation in fact or law."

To advert to the Constitutional provisions, both federal and state, which guarantee freedom of religious choice, at what age may one insist upon this freedom? May a child, who is in the custody of a parent complying with the terms of an antenuptial or separation agreement providing for his religious education in a particular faith, insist upon changing his religion? The writer knows of only one case where that question was presented.¹⁰ The majority of the New York court there held that a twelve year old boy, who was being raised as a Catholic by his mother, who had been awarded his custody in accordance with an antenuptial agreement, could attend a church of his own choice. One judge dissented because there was no evidence that the boy was damaged, mentally, physically or in any other way by his religious training, and also on the ground that to permit a youth of twelve to decide what religion he would follow and to make that decision binding on the Supreme Court and his parents did not accord with reason.

The case points up the difficulty of enforcing a contractual provision for the religious education of children in a particular faith. But, at the same time, it is questionable whether a twelve year old boy could resolve a problem which has occupied some of the best minds of all times—which is the best religion or the only religion.

Now and then a case is reported which appears to be a throw-back to the old English rule mentioned at the beginning of this article—that the father's wishes as regards religious training should prevail. Such a case is *Ex Parte Kananack*.¹¹ The wife had obtained a divorce in Florida, prior to which the

¹⁰ *Martin v. Martin*, 308 N. Y. 136, 123 N. E. 2d 812 (1954).

¹¹ 272 App. Div. 783, 69 N. Y. S. 2d 889 (1947).

parties had entered into a stipulation which was made a part of the divorce decree. The pertinent portion of the decree was that the child should be raised or given religious training subject to the approval of both the husband and wife. The husband and wife were of diverse religious beliefs. The husband filed a habeas corpus action in New York to secure custody of the child, and at a hearing before a referee it was provided that the child should attend a certain Sunday School in accordance with the wishes of the wife. The Appellate Division reversed, claiming that as neither party was unfit to have custody of the child, the order which directed attendance by the child at a specified church or Sunday School, contrary to the wishes of the father, was error.

The *Hackett* case involved a separation agreement and the argument that the divorce was uncontested in reliance upon the separation agreement. This argument was struck down by the court, which said that the statutory grounds for divorce still had to be present, so that there was no consideration for the contractual promise to raise the child in a particular faith. Yet, a question arises:

Suppose that it was not the divorce that was uncontested in reliance upon such a contractual promise, but that a wife did not seek custody of a child because of such a promise on the part of a husband. Assuming that she was a fit person, but forebore to assert her right to custody because of that promise, does her forbearance amount to consideration? It is submitted that it does. Even so, the courts probably would still refuse to enforce the proviso regarding religious education.

As has been said, most of the cases involve Catholics, for the reasons mentioned. Where the marriage would not take place at all, except for an antenuptial agreement that any children of the marriage would be reared as Catholics, is the marriage induced by the promise? One New York court has said "yes," and held the contract to be enforceable.¹²

It is clear that the English rule, that the father decides the particular faith in which his children are to be raised, has been almost completely discarded in the United States. Our courts

¹² *Shearer v. Shearer*, 73 N. Y. S. 2d 337 (1947): "Where wife's prenuptial agreement that children of the marriage should receive religious training in husband's religion, was an inducing cause of the marriage, the agreement was an enforceable contract which would be upheld in wife's separation action."

adopt the theory that if the person awarded custody is a fit person, so that a motion for a change of custody does not lie, then that person has the right to raise the child in any religion, regardless of any prior promises.

That is the rule in Ohio as laid down in the *Hackett* case,¹³ and in most states.

¹³ *Angel v. Angel*, 2 Ohio Opinions 2d 136 (1956): "Ohio courts have no authority to order either the person having custody or visitation rights to direct or prevent any particular unobjectionable form of worship or lack of worship, Christian or otherwise."