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# Family Law—Statute Providing for Matching Religions of Child and Adoptive Parents When Practicable Deemed Inapplicable Where It Would Substantially Delay Placing Child

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is evidentiary in origin. Yet, the right to confront opposing witnesses is affirmed as a fundamental right. The result is that a fundamental right is impaired by a state evidentiary rule. On these grounds, the decision in the instant case is untenable, for the degree of justice a man receives should not be constrained by a state rule which facilitates conviction. The plurality never adequately explained the basis of the decision, and failing this, turned to the "harmless error" doctrine. Their dismissal of the evidence on this ground appears to have been proved patently at variance with the *Kotteakos* test[54] in Justice Marshall's dissent. It is difficult not to have doubts that the evidence may well have swayed the jury, especially in light of the trial judge's charge.[55] Regardless of the weight of the other evidence, *Douglas'* recognition that an accomplice's statements are usually highly prejudicial and potentially very damaging lends credence to the suggestion that Shaw's testimony could well have influenced the jury in reaching its verdict. In this case, the federal rule, both in terms of justice and logic is the sounder, for it places a limit on the time when a defendant can be bound and put in jeopardy by an accomplice's admissions. This point has been declared to be when the conspiracy has ended, that is, when the last overt act has been consummated. The conspiracy has been definitively declared at an end by prior Supreme Court decisions when the conspirators are in custody. The rejection by the Court of imputed conspiracy in *Krulewitch* and the warnings contained in that decision against expanding the doctrine of conspiracy stand as sound judicial policy which casts the decision in the instant case as anomolous. The decision neither answers the essential questions, nor does it serve to clarify existing law in this area. Rather, it has all the earmarks of a Pandora's box waiting to be opened.

NORMAN A. LEBLANC, JR.

FAMILY LAW—STATUTE PROVIDING FOR MATCHING RELIGIONS OF CHILD AND ADOPTIVE PARENTS WHEN PRACTICABLE DEEMED INAPPLICABLE WHERE IT WOULD SUBSTANTIALLY DELAY PLACING CHILD

In this civil proceeding against a mother for neglect of her out-of-wedlock child, the Family Court of New York City was presented with two issues; namely, whether the mother's consent was necessary for an adop-

54. *See supra* note 32 and accompanying text.

55. The charge to the jury in pertinent part reads: *"Slight evidence* from an extraneous source identifying the accused as a participator in the criminal act *will be sufficient corroboration of an accomplice to support a verdict".* Evans v. State, 222 Ga. 392, 394, 150 S.E.2d 240, 244 (1966) (emphasis added).

tion of the child under Domestic Relations Law section 111,[1] and whether section 116 of the New York Family Court Act[2] prohibited placement with persons of a different religious faith than that of the child, or with a duly authorized agency controlled by persons of a different faith. At the time of the action, the putative father was serving a prison sentence on narcotics charges. The mother, an admitted narcotics addict who had repeatedly refused treatment, had served sporadic jail sentences during the last two years on charges of prostitution, theft, and possession of narcotics. She was either unable or unwilling to testify as to the child's whereabouts during these periods. The court found that the child, who had not yet attained the age of three, had been left with various unrelated men and women of questionable character. The mother, although she opposed the adoption, did not wish to retain custody of the child for herself, but rather, wanted custody awarded to one Miss C., whom the court found to be "flagrantly unsuitable." The natural mother had been baptized as a Roman Catholic, but the child had not. Prior to the commencement of this action, a reputable nonsectarian agency had already conducted research on this child's case and had found a couple seeking to adopt a Puerto Rican baby. The prospective father was Protestant and his wife embraced the Jewish faith. Concurrently, a Catholic agency which had explored the chances of the child's adoption by a Catholic couple, had, after five weeks of investigation, reported its inability to assure placement. *Held,* the mother's consent to the adoption is not required pursuant to Domestic Relations Law section 111[3] and the "when practicable" clause of section

1. N.Y. DOM. REL. LAW § 111 (3) (McKinney Supp. 1970) provides that only the natural mother's consent is required for the adoption of her out-of-wedlock child.

2. N.Y. FAMILY CT. ACT § 116 (McKinney 1963) in pertinent part provides:

Section 116. Religion of custodial persons and agencies

(a) Whenever a child is remanded or committed by the court to any duly authorized association, agency, society or institution, other than an institution supported and controlled by the state or a subdivision thereof, such commitment must be made, *when practicable,* to a duly authorized association, agency, society or institution under control of persons of the same religious faith or persuasion as that of the child (emphasis added).

. . . .

(c) In appointing guardians of children except guardians ad litem, and in granting orders of adoption of children, the court must, *when practicable,* appoint only as such guardians, and only give custody through adoption to, persons of the same religious faith or persuasion as that of the child (emphasis added).

3. As to the question of consent, the law in New York has been settled both by statute and case law. New York's Domestic Relations Law Section 111 provides that:

The consent shall not be required of a parent *who has abandoned the child* or . . . who has been judicially deprived of the custody of the child on account of cruelty or *neglect, or pursuant to a judicial finding that the child is a permanently neglected child* . . . (emphasis added).

116 of the Family Court Act concerning similar religious affiliation is inoperative when its application would substantially delay the child's adoption. *In re Efrain C.,* 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (Fam. Ct. 1970).[4]

Of import in the instant case is the resolution of the religious matching question, and here, particular attention must be drawn to the use of the term "when practicable" in Family Court Act section 116. Generally speaking, the statute provides that "when practicable," the court must place a child with either an adoptive agency controlled by persons of the same faith,[5] or with adoptive parents of the same faith.[6] The legislative intent is to insure that the child's faith is preserved and protected.[7] The statute additionally provides that a determination as to the applicability of the "when practicable" provision will be unnecessary:

> [I]f there is a proper or suitable person of the same religious faith or persuasion as that of the child available for appointment as guardian, or to be designated as custodian, or to whom control may be given, *or to whom orders of adoption may be granted; or if there is a duly authorized association, agency, society or institution under the control of persons of the same religious faith or persuasion as that of the child, at the time available and willing to assume the responsibility for the custody of or control over any such child.*[8]

This statutory language permits an interpretation that if an agency controlled by the same religious faith is available, it should be favored over an adoptive couple who, though eligible and willing to adopt the child, are of a different religious persuasion.

Judicial interpretation of the "when practicable" clause is rather meager. *In re Anonymous*[9] involved a mother who had allegedly signed a con-

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*Accord, In re* Adoption of Favro, 44 Misc. 2d 464, 254 N.Y.S.2d 278 (Fam. Ct. 1964); *In re* Anonymous, 23 Misc. 2d 577, 197 N.Y.S.2d 954 (Sur. Ct. 1960); *In re* Adoption of Nuttall, 24 Misc. 2d 588, 208 N.Y.S.2d 271 (Sur. Ct.), *appeal dismissed,* 12 App. Div. 2d 729, 215 N.Y.S.2d 221 (4th Dep't 1969); People *ex rel.* Anonymous v. Anonymous, 19 Misc. 2d 441, 195 N.Y.S.2d 1009 (Sup. Ct. 1959); Adoption of Anonymous, 10 Misc. 2d 1076, 170 N.Y.S.2d 178 (Sup. Ct. 1958); *In re* Marino's Adoption, 168 Misc. 158. 5 N.Y.S.2d 328 (Sur. Ct. 1938).

4. Hereinafter referred to as instant case.
5. N.Y. FAMILY CT. ACT § 116(a) (McKinney 1963).
6. *Id.* § 116(c).
7. *Id.* § 116(d). This section in pertinent part provides:
   > (d) The provisions of paragraphs (a), (b) and (c) of this section shall be interpreted literally, so as to assure that in the care, protection, guardianship, discipline or control of any child his religious faith shall be preserved and protected by the court.
8. *Id.* § 116(e) (emphasis added).
9. 195 Misc. 6, 88 N.Y.S.2d 829 (Sur. Ct. 1949).

sent for adoption of her illegitimate child which she later repudiated. The court upheld her repudiation on the grounds that it was obtained through misrepresentation, misunderstanding and fraud. Although the petitioners for adoption were of a different religious faith than the natural mother or child, the court had established adequate grounds for refusing the adoption, and they never reached the question of how to interpret "when practicable,"[10] but merely reaffirmed the requirement of religious matching, implying that it was mandatory.

The first case to actually grapple with an interpretation of the "when practicable" clause was *In re Santos.*[11] A mother had left her two children to be boarded with a Jewish woman to whom she paid money for their care. When the mother was unable to pay any longer, she requested the woman to either care for them herself, or place the children in a Catholic home, as they had been baptized Catholic. Instead, the woman instructed the children in the Jewish faith, and eventually placed the children in the custody of a Jewish agency. When the mother discovered this fact, she brought an action seeking custody. The trial court, after finding abandonment, awarded custody to the Jewish agency, even though the children's Catholic baptism had been revealed. The Appellate Division, First Department,[12] reversed and held that upon a finding of the mother's unfitness, the children should have been given over to a Catholic agency. The court further held that the "when practicable" provision was mandatory, leaving no room for judicial discretion. The court concluded that as to the preservation and protection of the religious faith of the children they ". . . have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of

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10. The "when practicable" provision here dealt with was as found in the New York Social Welfare Law section 373 which provides:

Section 373. Religious faith

> (1) Whenever a child is committed to any agency, association, corporation institution or society, other than an institution supported and controlled by the state or a subdivision thereof, such commitment shall be made, *when practicable,* to an authorized agency under the control of persons of the same religious faith as that of the child (emphasis added).
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> . . . .
>
> (3) In appointing guardians of children, and in granting orders of adoption of children, the court shall, *when practicable,* appoint as such guardians, and give custody through adoption, only to a person or persons of the same religious faith as the child (emphasis added).

11. 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't), *motion for leave to appeal denied,* 279 App. Div. 578, 107 N.Y.S.2d 543 (1st Dep't 1951), *appeal dismissed,* 304 N.Y. 483, 109 N.E.2d 71 (1952).

12. 278 App. Div. 373, 105 N.Y.S.2d 716 (1st Dep't 1951).

reason."[13] Of course, the possibility that the children, "prior to the age of reason," might not yet have developed a sence of awareness as to the recondite aspects of religion seems not to have been considered by the court at all.

*Santos* stood as law until the decision in *In re Maxwell.*[14] In *Maxwell,* the mother had six children prior to her marital separation in 1950. All but one of these children had been taken away from her by the Canadian authorities and placed either with private families or institutions. The mother then became pregnant and, fearing that she would lose custody of the remaining child, attempted to conceal this pregnancy. She came to Buffalo, New York, to give birth, informed her doctor that she did not want the baby, and requested him to find a home for the child. The couple found by the doctor was Protestant, and their attorney approached the plaintiff-mother with a consent form, which she signed stating that at the time she embraced no religious faith. She later repudiated her consent, alleging that she had not known the contents of the document she had signed, that she was Catholic and that she wanted the child raised in that faith. The trial court found[15] she had abandoned the child and willfully consented to its adoption and, therefore, awarded custody to the respondants on condition that the baby be baptized and educated in the Catholic faith. The New York Court of Appeals,[16] in affirming, found that it was not the consent form that she had signed, but her "callous disregard for the child, her complete indifference to how he was faring"[17] that authorized a waiver of her consent. The opinion went on to say that the religious-matching provisions do "not require a court to deny custody to adoptive parents where a child has been accepted by them following a declaration or representation by the mother, which may or may not be true, that she does not embrace any religious faith."[18] The court concluded:

> The statute calls upon the court to give custody to persons of the same religious faith as that of the child 'when practicable.' *That term is of broad content, necessarily designed to accord the trial judge a discretion to approve as adoptive parents persons of a faith different from the child's in exceptional situations* . . . . The presence in the statute of the words 'when practicable' was to enable the court to relax the requirement in the unusual case such as the one before us.[19]

13. *Id.* at 375, 105 N.Y.S.2d at 718.
14. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).
15. 4 App. Div. 2d 1005, 168 N.Y.S.2d 309 (1957), *aff'd sub nom. In re* Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).
16. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).
17. *Id.* at 433, 151 N.E.2d at 850, 176 N.Y.S.2d at 284.
18. *Id.* at 434, 151 N.E.2d at 850, 176 N.Y.S.2d at 284.
19. *Id.* (emphasis added).

The principle established by *Maxwell* is that if the matching of the child's and adoptive parents' religion will be detrimental to the child's temporal welfare, it cannot be deemed "practicable."

Judge Desmond, in his dissent,[20] reiterated the principles of *Santos.* He was of the opinion that the false statement was irrelevant since the court had a duty to rectify the mistake once the truth concerning the child's religion was revealed. He emphasized that only age[21] and religious affiliation had been singled out for special consideration by the legislature evincing an intent on their part to accord these factors special significance. He also expressed disbelief that there were no eligible Catholic couples who could be found in Buffalo to preclude the placing of this child with a Catholic agency. (It would seem, however, that the question does not revolve around the availability of eligible Catholic couples, but rather, whether they would be willing to adopt this particular child, a point which Judge Desmond seems to ignore).

It should be pointed out that there are important distinctions between *Santos* and *Maxwell.* In the former, the religion of the children was determined to be Catholic not only on the grounds that Catholicism was the declared faith of the mother, but also because the children had been so baptized. In *Maxwell,* however, the mother first expressed that she embraced no faith, and only after approximately a year had passed, did she concern herself with the child, and then make a representation of being a Catholic. In *Santos,* the decision resulted in the relocation of the children with a Catholic agency, although their entire religious training had been in Judaism. *Maxwell,* on the other hand, allowed the adoption over the mother's objection, *only after* the adoptive parents agreed to baptize and educate the child as Catholic. Thus, the court respected the wishes of the natural mother, but at the expense of a cross-religious adoption. What the result would have been had the adoptive parents in *Maxwell* not agreed to raise the child as Catholic is conjectural. Of certainty is the overruling of the iron rule of mandatory interpretation announced in *Santos.*

A number of states have statutes similar or identical to New York's Family Court Act section 116.[22] Likewise, there have arisen varying in-

20. *Id.* at 435, 151 N.E.2d at 851, 176 N.Y.S.2d at 285.

21. New York's Domestic Relations Law section 110 in pertinent part provides: Section 110. Who may adopt; effect of article

> An adult unmarried person or an adult husband and his adult wife together may adopt another person. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse.

22. See GA. CODE ANN. § 24-2423 (1951); MASS. ANN. LAWS ch. 210 § 5B (1958); MO. REV. STAT. § 211.221 (1959); R.I. GEN. LAWS ANN. § 15-7-13 (1956).

terpretations of the religious matching provision by the courts of these states. The Supreme Court of Mississippi, interpreting that state's religious matching provision in the case of *Eggleston v. Landrum*,[23] awarded custody of minor children to a couple who belonged to the Christian Science Church, over the objection of the children's grandmother that the beliefs of said Church prohibit the use of medical care, and thus, would jeopardize the children's welfare. The adoptive parents had had custody for quite some time and, throughout this period, had at all times obtained for the children necessary medical treatment. The court concluded that the religious matching requirement was but one of many factors to be considered, the temporal welfare of the children having the greatest weight. Since the facts showed that the children had not been denied medical care at any time by the adoptive parents because of their religious faith, the court awarded the adoption over the petitioner's objections. *Cooper v. Hinrichs*,[24] an Illinois decision, involved the adoption of twin children born five months after their natural parents were divorced. Both parents consented to the adoption, but the mother later repudiated on the grounds that the adoptive parents were Presbyterians and planned to raise the children as such, whereas they had been baptized Roman Catholic; thus, she argued that to allow the adoption would violate the matching requirement of the Illinois statute. The petitioners were found to be well-qualified as adoptive parents, while charges were brought against the natural mother for unfitness, adultery and habitual drunkenness. The Illinois statute used the terms "shall" rather than "must," and "when possible" rather than "when practicable," and the court interpreted this as evincing a legislative intent to allow judicial discretion when religion is one of the factors. They also stated that the primary consideration was the temporal welfare of the child. The cause was reversed and remanded to the lower court to determine whether the adoption would be in the best interests of the children, with religion an important, but not exclusive, consideration.[25]

Massachusetts, on the other hand, has opted for the mandatory interpretation. *In re Goldman*[26] involved a statute identical to New York's which also provided for religious matching of children and adoptive parents "when practicable." There, the petitioners were Jewish, having custody of twins whose natural parents were both Catholic. Since the children

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23. 210 Miss. 665, 50 So. 2d 364 (1951).
24. 110 Ill. 2d 269, 140 N.E.2d 293 (1957).
25. *See also In re* McKenzie, 197 Minn. 234, 266 N.W. 746 (1936); State *ex rel.* Evangelical Lutheran Kinderfreund Soc. of Minnesota v. White, 123 Minn. 508, 144 N.W. 157 (1913); *In re* Duren, 355 Mo. 1222, 200 S.W.2d 343 (1947); State *ex rel.* Baker v. Bird, 253 Mo. 569, 162 S.W. 119 (1913); *In re* Butcher's Estate, 266 Pa. 479, 109 A. 683 (1920).
26. 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied,* 348 U.S. 942 (1955).

were born out-of-wedlock, the court first imputed the mother's religion to the children. Secondly, the court found there were many eligible Catholic couples who were seeking to adopt children. The court, interpreting "when practicable" as leaving no room for judicial discretion, awarded the children to a Catholic agency, to go to a Catholic couple. The opinion also stressed the fact that the petitioners had dark complexions and dark eyes, while the twins had blue eyes and flaxen hair, thus bringing another factor, physical features, into the decision. Therefore, *Goldman* may be looked at as not only involving the religious consideration, but also the feeling that the parents and children should at least resemble one another.

The decision in the instant case follows *Maxwell* in its declaration that the temporal welfare of the child is the primary consideration. However, the term "when practicable" is given a concreteness never before known. *Maxwell* stood for the principle that if religious matching proves detrimental to the child's psychic and emotional welfare, it cannot be deemed "practicable." The instant case extends this to equate "when practicable" with "no substantial delay," and then defines "substantial delay" as longer than one or two months. To read section 116 (e) any other way, reasons the court, would render it unconstitutional as a violation of the fourteenth amendment guarantee of equal protection[27] as it incorporates the first amendment prohibitions on government interference with or support of religion.[28] The court does recognize the right of the parent to determine his child's religious upbringing, but limits this severely by the superior claim of the child to temporal happiness:

> In relation to adoption, the biological parent's constitutional rights would seem to entitle him at most to express his religious or nonreligious preference as a condition of his surrender of his child for adoption. Other than this limited parental right, there appears to be no ground, consistent with the Constitution, for attributing a religious preference to an adoptive child who is below the age for actual religious training. Certainly it would be unconstitutional to stamp an adoptive child with his progenitor's religion on the basis of any theological doctrine of a congenital transmission of faith. . . . Adoption being a creature of State power and secular law, it would violate the constitutional prin-

27. U.S. CONST. amend. XIV, § 1 provides in part:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28. U.S. CONST. amend. I provides:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

> ciple of State neutrality on religion for the State in its adoptive practices to promote Church interests, or to force a religious identification upon a child.[29]

Thus, the natural parent's religious preference must yield to the child's temporal welfare, for "the State cannot constitutionally enforce the parental religious preferences at the expense of the welfare of the child."[30] The result is a cross-religious adoption absent any restrictions.

*Santos* did more than make religious matching mandatory. It made it an absolute, and like all absolutes, it proved impossible to live with. *Maxwell,* while emphasizing the child's welfare, gave the natural mother's religious wishes undeserved weight. The result was a cross-religious adoption, but with qualifications that were unnecessarily restrictive. The decision in the instant case is the one which should have been reached in *Maxwell. In re Efrain C.* puts the question of religion into proper perspective. It does not ignore the religious consideration, but merely asserts that it is one factor to be considered. It is not, however, to be given the position of primacy to which it had been previously elevated. Such a result seems to be the soundest and most logical. In the first place, imputing the parent's religion to a child by the courts is only a nominal act. To say, for example, that a child is Roman Catholic because his parents are is to declare this child's religion in name only. Unless the child is baptized, he will never be recognized by that faith as a bona fide member, nor will he be entitled to the benefits of that religion. Usually, this will not prove to be a problem, because the natural parents will provide a suitable home life, and will undertake to instruct their children on religion as they see fit, which is their constitutionally guaranteed right.[31] Second, imputing a religion to a child prior to the age at which he can understand theological doctrines does not bestow upon him any understanding of religion. Finally, in the case of a mother who has been judicially deprived of her consent because of her neglect or abandonment of the child, to allow her to exercise such control over the child seems absurd. There is much more to being a parent than giving birth. When a natural mother does not show the least inclination to care for her offspring, how can it be persuasively argued that she should have any rights concerning the child? As the court in *Efrain* points out, the most she should be entitled to is an expression of preference concerning the religion of the child. The importance of *Efrain* is that it causes *Maxwell,* and the law of New York, to come of age. When an attempt to match religions substantially delays the placing of

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29. *In re* Efrain C., 63 Misc. 2d 1019, 1027-28, 314 N.Y.S.2d 255, 264-65 (Fam. Ct. 1970).

30. 63 Misc. 2d at 1028, 314 N.Y.S.2d at 265.

31. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

the child with adoptive parents, it will be deemed as "not practicable." Unlike *Maxwell,* however, the adoptive parents will receive custody of the child without any restrictions or qualifications. Thus, the child's religious training will be determined by his adoptive parents, the same parents who will be responsible for his education, health, safety, indeed, his entire temporal welfare. To allow the natural mother whose affections will never be known by the child to thwart his chance at temporal welfare is inexcusable. One might question whether one or two months is a reasonable limit on "when practicable," but undoubtedly the New York Family Court has taken a progressive step in a most critical area.

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