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Domestic Relations—Custody of Children

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Annulment for Refusal to Submit to Religious Ceremony

Although a religious ceremony is not legally essential to the creation of a valid marriage,[16] it is of primary importance to persons of many faiths, and this fact is recognized and condoned by the law. It is a settled principle, that where one prospective spouse, in order to induce the other to enter a civil marriage, makes a promise of a subsequent religious ceremony without intending to keep it, an annulment will be granted where there has been no consummation by cohabitation.[17]

In *Brillis v. Brillis,*[18] the plaintiff and defendant were civilly married, with an understanding that they would not live together as man and wife until a later religious ceremony was performed. The defendant was an alien, required to leave the United States, who could facilitate his return to this country, as a non-quota immigrant, by such a marriage. The defendant, after his return, refused to undergo the religious ceremony and demanded a large dowry and great financial assistance. Therefore, there was no consummation of the marriage and the plaintiff brought this action seeking an annulment on the grounds of fraud.[19]

The Court of Appeals was unanimously of the opinion that this recorded evidence was sufficient to determine that the defendant never intended to undergo a religious ceremony and, therefore, affirmed the granting of the annulment by the lower courts.[20]

This decision is a recognition, without mentioning the rule, that although post-nuptial events are not grounds for annulment, they reflect the intent of the parties at the time the marriage was entered into.[21]

Custody of Children

In *In Re Maxwell's Adoption,*[22] the natural mother's consent to a private adoption of her illegitimate child was legally insufficient. However, this consent is not deemed necessary under section 111 of the Domestic Relations Law if the parent has abandoned the child.[23] What action constitutes an "abandonment" is the first question presented the Court of Appeals by this case.

16. N. Y. DOMESTIC RELATIONS LAW §11.
17. Watkins v. Watkins, 197 App. Div. 489, 189 N.Y.Supp. 860 (1st Dep't 1921); Aufiero v. Aufiero, 222 App. Div. 479, 226 N.Y. Supp. 611 (1st Dep't 1928); GROSSMAN, NEW YORK LAW OF DOMESTIC RELATIONS, §719 (1947).
18. 4 N.Y.2d 125, 173 N.Y.S.2d 3 (1958).
19. N. Y. CIV. PRAC. ACT §1139.
20. Brillis v. Brillis, 207 Misc. 104, 137 N.Y.S.2d 32 (Sup. Ct. 1954), *aff'd* 3 A.D.2d 662, 158 N.Y.S.2d 780 (2d Dep't 1957).
21. Anonymous v. Anonymous,—Misc.—, 49 N.Y.S.2d 314 (Sup. Ct. 1944).
22. 4 N.Y.2d 429, 176 N.Y.S.2d 428 (1958).
23. N. Y. DOM. REL. LAW §11.

The majority (4-3), using the standard that "abandonment" means "a settled purpose to be rid of all parental obligations and to forego all parental rights,"[24] held that the natural mother abandoned her illegitimate child by her callous disregard for the child and by her indifferences to how he was faring, as evidenced by the facts. This woman, a Canadian, came to Buffalo, using a false name and address, sought an obstetrician to whom she repeatedly informed that she "did not want" the baby and that she "wanted" to be done with the matter" as quickly as possible." At this woman's request, the obstetrician arranged the private adoption of the child. This was all done, pursuant to a plan to conceal the birth of her child from the Canadian authorities. This woman feared that if the Canadian authorities knew of this illegitimate child, they would deprive her of the custody of her legitimate daughter—having already taken five of her six legitimate children from her. On completion of her plan, this woman returned to Canada and manifested not the slightest interest in the welfare of the child, his well-being, or even his continued existence until the time of the adoption proceedings in the Erie County Court.

At the time of the private adoption the mother signed an affidavit that she "did not embrace any religious faith at the time." The custody of the child was taken by those of a Protestant faith. At the time of the adoption proceedings, the natural mother claimed to be a Roman Catholic and that the custody of the child could not be maintained by those of Protestant faith, under subdivision 3 of section 373 of the Social Welfare Law.[25] The mandate of this statute includes the phrase "when practicable," and what affect these words have on the statue is the second question presented to the Court of Appeals by this case.

The majority (4-3) construed "when practicable" to be a term of broad context designed to grant the trial judge a discretionary power to approve as adopted parents, persons of a faith different from the child's in exceptional situations. In this instance the child has been accepted by the adopting parents, in good faith, following the declaration by the natural mother that she did not embrace any religious persuasions. To rule that a trial judge could not exercise discretion in these circumstances would subject foster parents to the risk of having their adoption nullified and the child would be ever subject to the danger of having his formed attachments painfully severed. How may it ever be known that the natural mother has not lied about her religious persuasions?

The dissenters construed "when practicable," in the light of New York's

24. Although the opinion cites no authority, see *In re Cohen's Adoption*, 155 Misc. 202, 279 N.Y.Supp. 427 (Surr. Ct. 1935).

25. N. Y. Soc. Wel. Law §373(3) provides:

> [I]n granting orders of adoption . . . the court shall, when practicable . . . give custody . . . only to . . . persons of the same religious faith as that of the child.

strict "same religion" rules,[26] to be, of necessity, a narrow term and defined "when practicable" to mean that when it is possible to arrange an adoption to foster parents of the same religion as that of the child, adoption to parents of a different religion is prohibited. This is, in substance, the definition of "when practicable" as given in subdivsion 5 of section 88 of the New York Domestic Relations Court Act.

Since courts have disregarded the phrase "when practicable" since 1884, the dissent derives its chief merit on this foundation of settled policy. However, the Court of Appeals was never before given the opportunity to construe the policy of this phrase, and in the writer's opinion has a perfect right to change such policy, if the decision is based on a better foundation that the historical reason.

The strict "same religion" doctrine is based upon the fundamental right of a parent to control the upbringing of a child.[27] After a child is adopted or in the custody of another, this right of initial parent becomes, in reality, a "dead-hand" rule. The defenseless in such situations, unless protected by the courts, are the children. It is this realization that has convinced other jurisdictions that a primary purpose of any adoption law is to safeguard the welfare of the child and on this basis this decision is placed. This case is not a whole-hearted acceptance of such a new policy, because of the vigorous dissent and because of the constant reference by the majority to the most "unusual circumstances" of this case. This decision is indicative of an exception to our strict interpretation policy of the strict "same religion" rule and will probably receive a very restrictive application.

Custody of Children—Per Curiam

In a separation action, the question of justification of physical assaults of husband on wife and his abandonment of her, together with the fitness of the mother for the custody of the minor child were questions of fact for the trial court to determine. The fact that the mother's chosen religion was different from that to which the child had been earlier exposed was not determinative of the custody question.[28]

26. N. Y. Soc. WEL. LAW §373(4) and (5); N. Y. DOM. REL. LAW §112(2).
27. Zorach v. Clauson, 303 N.Y. 161, 100 N.E. 2d 463 (1951), *aff'd* 343 U.S. 306 (1951).
28. Gluckstern v. Gluckstern, 4 N.Y.2d 521, 176 N.Y.S. 352 (1958).