

10-1-1958

Domestic Relations—Custody of Children—Per Curiam

Buffalo Law Review

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Evidence Commons](#), and the [Family Law Commons](#)

Recommended Citation

Buffalo Law Review, *Domestic Relations—Custody of Children—Per Curiam*, 8 Buff. L. Rev. 143 (1958).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol8/iss1/84>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

COURT OF APPEALS, 1957 TERM

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 subdivision 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 than 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).