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Domestic Relations—Religious Upbringing of Children

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all courts had awarded custody to the Commissioner, the Children's Court wished the Commissioner to acquaint the child with the benefits of the operation,[18] whereas the Appellate Division would have required the operation.

The child in question is now fourteen years old. He believes, as does his father, who opposed the operation, that his hairlip and cleft palate can be cured only by "forces in the universe," and that any surgery would have to be completely undone in order to effect a cure. The Court of Appeals *held*,[19] that under the circumstances the trial court's discretion should be respected, since the trial court had first hand knowledge of the facts and could best be relied on for an equitable decision. The Children's Court has jurisdiction to order such an operation,[20] but it believed more harm would result to the child than would be obviated by it because of the boy's mental attitude.[21]

The dissenters in the Court of Appeals believed that the majority was overlooking the main point of the case: that the child *was* (and is) "neglected" according to the law, and the child's wishes are irrelevant. The child's acquiescence in his parent's neglect does not "render it permissible." As did the Appellate Division,[22] the dissenters apparently overlook the fact that the statute provides that "the court *in its discretion* . . . may cause any person within its jurisdiction to be examined,"[23] and ". . . a suitable order *may* be made for the treatment . . . of such child . . ."[24] (emphasis supplied).

Religious Upbringing of Children

In an appeal from an order modifying a judgment of separation, eliminating a condition that the child be brought up in the Roman Catholic religion and instead directing the child be permitted to attend the church of his own choice, and further, if he so chose, to transfer from the parochial school he was then attending to a public school, the modification was upheld, *per curiam;* Judges Desmond and Conway dissenting.[25]

The wife, a Christian Scientist, had entered into an antenuptial agreement to bring up all children in the faith of her husband, a Roman Catholic. In 1949 the

18. Once acquainted with its advantages, the boy may decide for himself to undergo the operation.
19. 309 N. Y. 80, 127 N. E. 2d 820 (1955).
20. N. Y. Children's Court Act § 2 (4), which grants Children's Court jurisdiction of neglected children. A neglected child is defined as one whose parents refuse to provide necessary medical or surgical care.
21. Note 17, *supra.*
22. Note 16, *supra.*
23. N. Y. CHILDREN'S COURT ACT § 24.
24. *Ibid.*
25. *Martin v. Martin,* 308 N. Y. 136, 123 N. E. 2d 812 (1954).

wife was granted a judgment of separation, and awarded custody of the child on condition that he be raised in accordance with the antenuptial agreement. Admitting violation of this condition, the wife requested modification "for the best interests and welfare" of the child. The child, twelve years old at the time of the hearing, testified as to his own wishes on the matter. The Court of Appeals held that, ample evidence being available that the child could testify intelligently, the modification was justified.

The problem of how to treat antenuptial agreements for religious unbringing being a somewhat sensitive one, the issue has seldom been squarely faced in American courts. English courts have refused to enforce these agreements, but on grounds not applicable in this country.[26] American courts have generally held the agreements unenforcable,[27] although a few have indicated a willingness to uphold the agreements, procedural or other difficulties having prevented it in the instant case.[28] In New York three cases, all decided by Fowler, S., have placed a strong emphasis on religious upbringing, but none went so far as to enforce such an agreement.[29]

Basically, it would seem difficult to effect enforcement of these agreements.[30] Monetary damages are neither a satisfactory nor a legally proper remedy.[31] Specific performance is impractical, since the law cannot control the day-to-day home training of the child, although formal training might be controlled in this manner. Divorce and other remedies dealing with the marital status are of doubtful benefit in solving the problem of the child, and because of religious convictions are very frequently valueless to the aggrieved parent. Custody of the child might be effective in the applicable cases,[32] but numerous other factors, even beyond the obvious one of causing the marital breach, make this a poor choice.[33]

26. In England, especially prior to the Statute of 1886, the father had an absolute right to determine the religion of the child, regardless of agreements to the contrary. *Andrews v. Salt,* Law. Rep. 8 Ch. App. 622 (1873), *In Re Nevin,* Law. Rep. 2 Ch. 299 (1891). Even after this statute, which eliminated this absolute right, the rule continued to have its effect in modified form. *In Re Story,* 2 Ir. R. 328, 50 Ir. L. T. 123 (1916).

27. *Brewer v. Cary,* 148 Mo. App. 193, 127 S. W. 685 (1910); *Denton v. James,* 107 Kan. 729, 193 Pac. 307 (1920). See annot. 12 A. L. R. 1153.

28. *In Re Luck,* 10 Ohio S. & C. P. Dec. 1 (1900).

29. *Matter of Wagner,* 75 Misc. 419, 135 N. Y. Supp. 678 (1912); *Matter of Lamb,* 139 N. Y. Supp. 685 (1912); *In Re Mancini,* 89 Misc. 83, 151 N. Y. Supp 387 (1915).

30. For a full discussion of the problems of enforcement, see 50 YALE L. J. 1286 (1941).

31. 5 WILLISTON, CONTRACTS §1340A (rev. ed. 1936). *Contra,* RESTATEMENT, CONTRACTS §341 (1932), which would allow monetary damages for mental disturbance from breach of contract where it is apparent from the contract that such mental disturbance would inevitably arise from a breach.

32. Cases frequently arise when one spouse is deceased and the survivor is breaching the agreement, or in other situations when custody is not an issue.

33. *E.g.,* the mother is generally preferred as guardian, other things being equal; *Abeles v. Abeles,* 164 Misc. 418, 299 N. Y. Supp 206 (1937).

The dissent in the instant case, replying both on prior decisions[34] and the "clean hands" doctrine, bitterly attacked the value of the testimony of a twelve year old in a matter of this sort. Although this position is better founded in strict legal principles, the majority has probably made a more practical compromise with reality. To uphold the agreement would then have forced the court to admit its unenforcability. However harsh the decision may have been on these parties, in fact no more could have been granted the husband by any decision. The legal denouncing of these agreements as unenforcable would have the effect of wreaking havoc upon a fundamental principle behind innumerable mixed marriages,[35] without any legal benefit.

INSURANCE

Contract to Assign Policy

In New York every contract to assign or assignment of a life insurance policy, or promise to name a beneficiary of any such policy, is void unless in writing and subscribed by the party to be charged.[1] In *Katzman v. Aetna Life Ins. Co.*,[2] plaintiff, wife of deceased insured, alleged that she and her husband orally agreed that he should take out a policy on his life, naming her as beneficiary. This he did, and then delivered the policy to her. She alleged also that deceased surreptitiously took the policy from plaintiff's possession and made his sister beneficiary. Plaintiff claimed that she was entitled to the life insurance proceeds as the beneficiary under a constructive trust which she desired to be placed upon the proceeds. The Court, reversing the order of the Appellate Division,[3] *held,* that the action was not barred by the Statute of Frauds;[4] a constructive trust could be imposed if plaintiff proved the facts alleged.

Plaintiff in this case paid at least a substantial part of the premiums each year, paid the burial expenses and had in large part supported her husband for several years during his illness. The majority believed that, assuming the facts

34. The cases relied upon by the dissent, *Bunim v. Bunim,* 298 N. Y. 391, 83 N. E. 2d 848 (1949), and *Weinberger v. Van Hessen,* 260 N. Y. 294, 183 N. E. 429 (1932), are actually somewhat distant from the issues, and themselves rely on rather unstable authority. However, they do constitute at least some precedent, whereas there is no direct precedent available in this state for the majority ruling.

35. Although dispensation for mixed marriages by Catholics is left to the individual Bishops, Codex Juris Canonici (1918) Canons 1040, almost all dioceses require such antenuptial agreements.

1. N. Y. PERSONAL PROPERTY LAW §31, subd. 9 (Statute of Frauds).
2. 309 N. Y. 197, 128 N. E. 2d 307 (1955).
3. 285 App. Div. 446, 137 N. Y. S. 2d 583 (1st Dep't 1955), in which court granted summary judgment to defendant, and dismissed the complaint.
4. Note 1, *supra,*