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Disclosure, The Religious Factor in Choice of Adoptive Parents, Right to Travel

RECENT DECISIONS AND DEVELOPMENTS

Disclosure

Canon 6 of the Canons of Professional Ethics provides *inter alia:*

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another requires him to oppose.[1]

This statement, unqualified by any other part of the Canon, reasonably implies that with full disclosure and consent an attorney may represent any and all conflicting interests. However, the legal profession in interpreting Canon 6 has placed various limitations on the applicability of the consent exception. It is evident, therefore, that Canon 6 does not clearly reflect the actual ethical standard which is presently applied to conflicting interests.

In the recent case of *Jedwabny v. Philadelphia Transportation Co.*[2] the Supreme Court of Pennsylvania refused to apply the consent exception. In a suit for personal injuries and property damage arising out of an automobile-street car collision brought by the car owner-driver and two passengers, the defendant-transportation company joined the plaintiff-owner as an additional defendant. The attorney retained by co-plaintiffs also acted as attorney for defendant-owner. Joint verdicts were rendered in favor of plaintiff-passengers against the co-defendants and the plaintiff-owner's suit was dismissed. The trial judge, on his own motion, then ordered a new trial because of the conflict of interests since it was not determined that a full disclosure had been made to all parties. The Supreme Court, without considering the question of full disclosure, affirmed, holding that because of the existing conflict of interest the attorney could not represent both the co-plaintiffs and defendant-owner.[3]

The invocation of limitations on the consent exception is usually based on the broad grounds of public policy. It has often been declared that an attorney may not act on both sides of a litigation:[4] for example, because of the possibility of collusion, an attorney may not represent both the husband and wife in a divorce action.[5] The consent exception is also rejected where the

[1] Canon 6, CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION.

[2] 390 Pa. 231, 135 A.2d 252 (1957) *cert. denied,* 355 U.S. 966 (1958).

[3] The Court quoted the pertinent part of Canon 6 and subsequently stated: "The foregoing canon applies to cases where the circumstances are such that possibly conflicting interests may permissibly be represented by the same attorney. But, manifestly, there are instances where the conflicts of interest are so critically adverse as not to admit of one attorney's representing both sides. Such is the situation which this record presents." Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 135 A.2d 252, 254 (1957). This statement by the Court clearly refers to the consent exception of Canon 6 since the Court applied the remainder of the quoted Canon in determining the case.

[4] Bose v. Wehrli, 186 Misc. 325, 60 N.Y.S.2d 213 (Sup. Ct. 1945). See also American Box & Drum Co. v. Harron, 44 Cal. App. 2d 370, 112 P.2d 332 (1941) where the court implied the same rule. The court wrote: "In the absence of litigation, existing or contemplated, an attorney is not precluded from representing adverse parties providing his employment is within the knowledge and with the consent of each and he deals fairly with both." *Id.* at 334.

[5] Todd v. Rhodes, 108 Kan. 64, 193 Pac. 894 (1920) (dictum). See also DRINKER, LEGAL ETHICS 128 (1953).

conflict is antagonistic[6] or the attorney's position is such that if he acts beneficially towards one party, that act tends to the detriment of the other.[7] This was clearly exemplified in the case of *Gillette v. Newhouse Realty Co.*[8] wherein the court stated,

> The rule that an attorney may not by his contract of employment place himself in a position where his own interests or the interests of another, whom he represents, conflict with the interests of his client . . . is designed . . . to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties or between his own interests and those of his client. . . .[9]

The consent exception is sometimes inapplicable because of the status of the individual rather than the peculiarity of the situation. A public officer can not represent conflicting interests since a public interest is involved and the public can not consent.[10] The Committee on Professional Ethics and Grievances of the American Bar Association has stated that ". . . it is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice."[11] It has also been held that in the case of a minor the consent exception is ineffectual since the minor is incapable of giving consent.[12]

The Chicago Bar Association, in view of these various limitations, has amended its Canon 6 and eliminated the consent exception.[13] However, the elimination of the consent exception raises the inference that under the amended Canon an attorney may *never* represent conflicting interests. Thus, since it is generally held and has been clearly stated that "it is not always improper or unlawful for an attorney at law to represent conflicting interests,"[14] the Chicago Bar Association has taken an extreme position. It has removed one undesirable aspect of the Canon but created another, and the amended Canon continues to inaccurately reflect the law. Apparently the Chicago Bar Association view has been rejected by the American Bar Association since the Committee on Professional Ethics and Grievances has on several occasions refused to recommend the deletion of the consent exception from Canon 6.[15]

In the ordinary case, objective moral values will provide a standard against which to gauge the legal ethics of particular activity. However, *Jedwabny* illustrates an exception — an isolated area in which objective moral norms do not furnish a ready criterion. In such instances, the wisdom and experience of the legal profession furnish precautionary rules to preclude

[6] See, *e.g.*, Field v. Moore, 189 App. Div. 709, 713, 178 N.Y. Supp. 842, 846 (1st Dep't 1919) (dictum).

[7] See, *e.g.*, Matter of Sielcken, 162 Misc. 54, 66, 293 N.Y. Supp. 721, 734 (Surr. Ct. 1937) (dictum).

[8] 75 Utah 13, 282 Pac. 776 (1929).

[9] *Id.* at 779.

[10] See, *e.g.*, Opinions 16 and 34, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 89, 119 (1957); DRINKER, LEGAL ETHICS 120 (1953).

[11] Opinion 77, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 183 (1957).

[12] *In re* Pfiffner's Guardianship, 194 S.W.2d 233 (Mo. 1946).

[13] See DRINKER, LEGAL ETHICS 120 (1953).

[14] Eisemann v. Hazard, 218 N.Y. 155, 159, 112 N.E. 722, 723 (1916). See also DRINKER, *op. cit. supra* note 13. There is dictum in a New York case which states that an attorney may properly represent several partners in the formation, conduct and dissolution of a partnership, or a widow in her dual capacity of executrix and beneficiary, or a creditor of an estate in his capacity as administrator. Matter of Sielcken, 162 Misc. 54, 66, 293 N.Y. Supp. 721, 735 (Surr. Ct. 1937).

[15] Decision 296, OPINIONS OF THE A.B.A. COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 643 (1957).

attorneys, whose moral conduct is beyond reproach, from nevertheless finding themselves in difficult and anomalous situations.

The object of the Canons of Professional Ethics is to establish a more definite statement of the accepted rules of professional conduct, easily accessible and in simple form.[16] The Canons thereby serve a two-fold purpose: first, as a guide to law students and attorneys, second, as a declaration by the profession to the public of the ethical standards required of its members. In both cases it is essential that the Canons be clear and unequivocal.

It is suggested that Canon 6 be amended to include the recognized limitations upon the consent exception. Canon 6 would then reflect the actual attitude and standard of the profession and clearly state the *accepted rule of professional conduct* concerning conflicting interests.

The Religious Factor in Choice of Adoptive Parents

In a recent New York case,[1] a child born to appellant, a Catholic, was surrendered by her to respondents, non-Catholics, who subsequently obtained an order of adoption. The appellant contested on the two grounds that the order violated Section 111 of the Domestic Relations Law[2] because she had legally withdrawn her consent before the adoption proceeding and that it violated Section 373(3) of the Social Welfare Law which states in part that ". . . in granting orders of adoption . . . the court shall, when practicable, . . . give custody . . . only to . . . persons of the same religious faith as that of the child." The foster parents agreed to have the child baptized in the Catholic faith and educated in Catholic schools. The Court of Appeals affirmed the decision of the lower court giving the child to the foster parents. The Court found that appellant had abandoned the child, making her consent under Section 111 unnecessary.[3] In construing the language of Section 373(3) the Court held that it contained no absolute requirement that the faith of the foster parent be that of the child.

Adoption was unknown at common law; it is purely a creature of statute.[4] Today all of the states have adoption statutes.[5] Of the considerations in determining the suitability of foster parents, one of the most important is the matching of the religious faiths of the foster parents and the child.[6] In the United States this element has been given three different treatments. In some states it has been considered the decisive factor, requiring absolute refusal of the adoption petition where the religious faith

[16] See DRINKER, LEGAL ETHICS 25 (1953).

[1] *In re* Maxwell's Adoption, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958). The decision was four to three.

[2] N.Y. DOM. REL. LAW § 111, which states in part that consent is required "of the parents or surviving parent. . . . The consent shall not be required of a parent who has abandoned the child. . . ."

[3] See note 2 *supra*.

[4] See Asch, *A Critical Appraisal of Adoption in New York State*, 20 BROOKLYN L. REV. 27-28 (1954).

[5] See Note, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L. J. 715 (1950). The first state to have an adoption statute was Massachusetts in 1851. The last state was Texas in 1925. New York passed its first statute concerning adoption in 1873. *Id.* at 725.

[6] Aside from the Catholic viewpoint of this practice of matching religions, it is considered desirable practice by social workers. See Note, *Moppets on the Market: The Problem of Unregulated Adoptions, supra* note 5. See generally Leen, *Justice Denied – The Ellis Case*, 4 CATHOLIC LAWYER 83 (Winter 1958).

of the child differs from that of the prospective parents.[7] More often, however, it has been treated as one of the many considerations in determining the fitness of the prospective parents, without being given conclusive weight.[8] However, most states accord this element no consideration at all. This is indicated by the lack of religious protection statutes in those jurisdictions.[9]

It is the settled public policy of the State of New York to protect the religious faith of children. This is evidenced by Section 18 of Article 6 of the State Constitution which provides for the placement of children with families or institutions of the same religious persuasion, by the early treatment of the problem by the courts,[10] and by the enactment of a number of statutes safeguarding the religion of the child.[11]

The instant case poses two important problems concerning the protection of an adopted child's religion: first, the effect of the Catholic mother's misconduct on the child's right to be brought up in that religion, and second, whether the mandate of Section 373(3) of the Social Welfare Law[12] is obeyed when a Catholic child is placed in a home wherein another religion is practiced, even though there is a promise to baptize the child in the Catholic faith and to send him to Catholic primary and secondary schools.

According to Catholic philosophy and theology we have a duty to worship God.[13] As a corollary, one has the moral right to fulfill that duty. A Catholic fulfills this duty through the practice of his religion. Therefore he has a right to practice his religion, which cannot be affected by the misconduct

[7] *Decisive treatment:*
New York – see N. Y. CONST. art. 6, § 18; N. Y. DOM. REL. LAW §§ 113, 117; N. Y. SOC. WELFARE LAW §§ 373(3), (4); N. Y. C. DOM. REL. CT. ACT. § 88(3). See also *In re* Santos, 278 App. Div. 373, 105 N.Y.S. 2d 716 (1st Dep't 1951); *In re* Anonymous, 195 Misc. 6, 88 N.Y.S. 2d 829 (Surr. Ct. 1949); *In re* Korte, 78 Misc. 276, 139 N.Y. Supp. 444 (County Ct. 1912).
Rhode Island – R. I. GEN. LAWS § 15-7-13 (1956) (If a suitable person of the same faith is available, then "same faith" adoption is mandatory).

[8] *Discretionary treatment:*
California – CAL. WELFARE & INST'NS CODE §§ 551, 552, 1524 (1956); *Colorado* – COLO. REV. STAT. ANN. § 4-1-7(e) (1953); *Connecticut* – CONN. GEN. STAT. § 6867 (1949); *Delaware* – DEL. CODE ANN. tit. 13, § 911 (1953); *Georgia* – GA. CODE ANN. § 74-411(6) (Supp. 1955); *Iowa*–IOWA CODE ANN. § 600.1 (1950); *Louisiana* – LA. REV. STAT. tit. 13, § 1581 (1956); *Maryland* – MD. ANN. CODE art. 16, § 67 (Supp. 1957); *Massachusetts* – MASS. ANN. LAWS c. 210, § 5B (1957); *Michigan* – MICH. COMP. LAWS § 27.3178(545(e)) (Supp. 1957); *New Hampshire* – N. H. REV. STAT. ANN. § 461.2 (1957); *New Jersey* – N. J. STAT. ANN. § 9:3-23 (1957); *Ohio* – OHIO REV. CODE ANN. § 3107.015(e) (1958); *Oklahoma* – OKLA. STAT. ANN. tit. 20, § 824 (Supp. 1958); *Pennsylvania* – PA. STAT. ANN. tit. 1 § 1(d) (Supp. 1957); *Washington* – WASH. REV. CODE § 26.32.090 (1957); *Wisconsin* – WIS. STAT. § 48.82(3) (1955).

[9] Those states not listed in notes 7 & 8 *supra* have no such statutes.

[10] See *In re* Miller, 179 N.Y. Supp. 181 (County Ct. 1919); *In re* Korte, 78 Misc. 276, 139 N.Y. Supp. 444 (County Ct. 1912).

[11] N. Y. DOM. REL. LAW §§ 113, 117; N. Y. SOC. WELFARE LAW §§ 373(3), (4).

[12] Section 373(4) requires that it be ". . . interpreted as to *assure* that in the care, protection, adoption, guardianship, discipline and control of any child, its religious faith shall be *preserved* and *protected*." (Emphasis added.)

[13] AQUINAS, SUMMA THEOLOGICA, I-II, q. 94, art. 3, which says in part that "all acts of virtue are prescribed by natural law"; *id.*, II-II, q. 81, art. 2: ". . . [R]eligion is a virtue. . . ." Therefore it is safe to say that acts of religion are prescribed by natural law. Also, in *id.*, II-II, q. 81, art. 7, it is said that while the external act of divine worship is secondary to internal acts of religion, it is necessary to the virtue of religion. See also Cox, LIBERTY, ITS USE AND ABUSE, 121-27, 157-68 (1946).

of any party, even that of his natural mother.

The compliance of the majority of the Court of Appeals with the mandate of the statute is but a token: it is not sufficient, for it does not adequately preserve and protect the religious faith of the child. The potentially dangerous effects of the home atmosphere in this case are apparent. It is, at best, indifferent and, at worst, hostile. Full compliance with the spirit of the statute requires a home in which the child is given opportunity for the full practice of his religion, one in which there is neither hostility nor inconsistent influence. Such considerations are especially important in this case, where the faith to be protected is that of a young child. It follows that full compliance would be achieved only by placement in a home where the Catholic religion is faithfully practiced, one which can adequately preserve and protect this young faith.

In its opinion, the Court declares that by any other holding ". . . the foster parents would ever run the risk of not being able to adopt the child, and the child ever subjected to the danger of having attachments formed painfully severed. . . ."[14] This statement indicates that the Court was swayed by considerations such as the length of time the child had been with the petitioners and the finding of the lower court that the natural mother had deliberately abandoned the child at birth. It is hoped that in future cases the authority of the instant case will be restricted to its facts, and that the Court will comply with the mandate of Section 373.

[14] *In Re* Maxwell's Adoption, 4 N.Y.2d 429, 434, 151 N.E.2d 848, 850, 176 N.Y.S.2d 281, 284 (1958).

Right to Travel

In *Kent v. Dulles*[1] petitioner's application for a passport was denied by the State Department on the grounds of his pro-communist activities and his refusal to sign an affidavit concerning his past and present membership in the Communist Party. The district court's dismissal of petitioner's application for declaratory relief was affirmed by the court of appeals.[2] The United States Supreme Court reversed, holding that when Congress authorized the regulation of passports by the Secretary of State, it did not grant him unbridled discretion. The Court stated that the right to travel is a "liberty" protected by the Fifth Amendment from abridgement without due process of law. Congressional delegation of the power to regulate the exercise of that liberty must be narrowly construed.

International travel is a natural right[3] protected by the Constitution.[4] It is also a natural right within the Natural Law which ". . . does indeed imply the existence of some human rights which are absolute and inalienable, such as . . . locomotion. . . ."[5] It is of course limited or subject to restriction by considerations of the common good and the exercise by others of their legitimate rights. It is not, however, morally restrictable by arbitrary or capricious dictates of a state.[6] Travel was early recognized by the courts as one of those "liber-

[1] 357 U.S. 116 (1958) (5-4 decision).

[2] Kent v. Dulles, 248 F.2d 600 (D.C. Cir. 1957).

[3] See Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955); see generally 3 CATHOLIC LAWYER 85 (Jan. 1957).

[4] Kent v. Dulles, 357 U.S. 116, 125 (1958).

[5] Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259, 263 (Oct. 1955).

[6] 3 CATHOLIC LAWYER 85, 87 (Jan. 1957).

ties" protected by the Constitution.[7] Since the passport is presently a requisite for travel abroad,[8] the regulations for its issuance are now, in effect, the regulations for the exercise of that liberty.

The evolution of the passport can be traced from a mere certificate of attestation of United States citizenship[9] to its present importance as a necessity for exit[10] that can be issued only by the State Department.[11] The Secretary's power to grant or deny passport applications is of a discretionary nature.[12] It is the Secretary's exercise of this discretion that has been questioned in many of the recent cases.[13] State Department practice has been held inadequate both procedurally[14] and substantively[15] in satisfying due process.

In the instant case the Court, by narrowly construing congressional delegation of regulatory power, apparently restricts permissible grounds for denial of a passport by the Department to questions of citizenship and allegiance, and participation in illegal conduct. It bases these limitations upon prior administrative practice.[16]

The case, in effect, terminates the effort of the State Department to deny passports to individuals of questionable loyalty.[17]

In its opinion the Court does not specify the constitutionally permissible limitations upon the right to travel.[18] It does, however, treat the right as so basic that, even in the face of the present threat to national secur-

[7] See Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). This case is distinguishable from the instant case in that interstate rather than international travel was involved; nevertheless in *Crandall* the Court recognized the right of travel as coming within the purview of the Fifth Amendment.

[8] Pres. Proc. No. 2523, 6 Fed. Reg. 5821 (1941).

[9] See Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 699 (1835).

[10] See note 8 *supra*.

[11] 44 STAT. 657 (1926), 22 U.S.C. § 211(a) (1952).

[12] 22 C.F.R. § 51.75 (1958).

[13] See, *e.g.*, Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Nathan v. Dulles, 129 F. Supp. 951 (D.D.C. 1955).

[14] See, *e.g.*, Nathan v. Dulles, *supra* note 13 in which the court held that the plaintiff was entitled to a hearing. The procedure to be used in the presence of State Department deficiencies in this area was indicated in subsequent hearings. See Dulles v. Nathan, 225 F.2d 29, 30 (D.C. Cir. 1955). See generally Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47, 68 n. 127 (1956), which describes the Passport Office procedure in Kamen v. Dulles, Civil No. 5799-53, D.D.C., July 8, 1955. "Dr. Kamen's passport was revoked in 1947 without notice or hearing. Numerous efforts between 1947 and 1953 to secure a passport met with a 'best interests' answer. His application of September, 1952 was not acted upon until his mandamus suit in December 1953 resulted in the formation of the board [the theretofore nonexistent Board of Passport Appeals], a hearing before it, and an adverse decision of the Secretary of State in April, 1954. His petition for rehearing in June, 1954 was not acted upon until March, 1955 and then adversely. He instituted another suit on March 14, 1955, D.C. Civil No. 1121-55, D.D.C., and received his passport four months later."

[15] See, *e.g.*, Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955), where the court held that membership in an organization on the Attorney General's list was not of itself sufficient grounds on which to base a refusal to issue a passport.

[16] Kent v. Dulles, 357 U.S. 116, 128 (1958).

[17] See *Communist Use and Abuse of Passports, Hearing Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary United States Senate*, 85th Cong., 2d Sess. (1958), in which Robert D. Johnson, the Chief of the Legal Division of the State Department Passport Office testified as to the effects of the *Kent* case on pending passport applications. He stated that with the exception of one individual (who was awaiting trial in a contempt proceeding), passports were immediately issued to all applicants, approximately seventy in number, eleven of which were in litigation under the regulations. *Id.* at 4.

[18] Kent v. Dulles, *supra* note 16, at 129. "Thus we do not reach the question of Constitutionality. . . ."

ity, extension beyond existing limitations will be scrutinized to determine whether it amounts to deprivation of liberty without due process.

Thus, the *Kent* case poses many problems in this area of passport regulation which, consequently, involve the right to travel. As Jaffee declares, ". . . the constitutional approach begs the paramount issue . . . not how far we can go . . . but precisely what our policy should be."[19] The group we intend to prevent from traveling, and the standard of adjudging a particular individual as fitting within this group are necessary determinations.[20] Complicating the matter is the problem of safeguarding the sources of information used by those investigating passport applications, disclosure of which would in some cases be inimical to the security of the nation.

In order to remedy this situation, the House of Representatives has recently passed legislation[21] similar to those regulations of the State Department[22] which were the basis for the original denial of the passport to the petitioner in the instant case. If passed, the bill will expressly delegate to the Secretary the regulatory power which the Court in the *Kent* case held he lacked. The Court expressly reserved decision on the question of constitutionality.[23] Its stressing of the right to travel as such a basic right, indicates that any curtailment, even by Congress, will be carefully considered in its relation to due process requirements.[24]

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[19] Jaffee, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 22 (Oct. 1956).

[20] See Jaffee, *supra* note 19, who states that "nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable rules of malefaction. It has simply one facet of our tactic of domestic security. . . ." *Id.* at 18. He continues, ". . . despite the heavy risks of maladministration, the United States is, in my opinion, justified in denying passports to persons whose journey abroad is *presumptively* in furtherance of the Communist 'conspiracy'." *Id.* at 27 (emphasis added). Although unfavorably disposed towards the use of secret evidence urged by the government as necessary to avoid disclosure of secret materials, he "does not . . . urge upon the reader the absolute rejection of the secret dossier." *Id.* at 28. In conclusion, he draws the line for passport denial at "demonstrable Communist involvement" or "other cases of similar danger" but finds "intolerable" basing denial on a bureau determination that granting a passport would be contrary to "the interests of the United States." *Ibid.*

[21] H.R. 13760, 85th Cong., 2d Sess. (1958).

[22] 22 C.F.R. §§ 51.101-.170 (1958).

[23] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[24] *Id.* at 130: "To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect."