The Catholic Lawyer

Volume 7
Number 1 *Volume 7, Winter 1961, Number 1*

Article 8

Enforceability of Ante-Nuptial Promises to Raise Children in a Particular Religion

Gordon A. Martin, Jr.

ENFORCEABILITY OF ANTE-NUPTIAL PROMISES TO RAISE CHILDREN IN A PARTICULAR RELIGION†

GORDON A. MARTIN, JR.*

A VEXING PROBLEM which more and more courts have been called on to consider of late is the legal enforceability of an ante-nuptial agreement between a couple to raise their children in a particular religion. This note deals primarily with the most frequent instance of such an agreement, the promises exchanged by Roman Catholic and non-Catholic "that all children of either sex born of this marriage shall be baptized and educated solely in the Catholic religion."[1]

An understanding of the Catholic view of marriage is essential to a thorough consideration of this problem. The marriage of baptized persons is a sacrament[2] and ". . . is regulated by divine law and canon law alone, without prejudice to the competence of the civil authority in regard to the purely civil effects."[3] Many religions frown on mixed marriages.[4]

---

†This article was originally published in 3 N.H.B.J. 18 (1960).

*Member of the Massachusetts Bar; A.B., Harvard; L.L.B., New York University.

[1] Archdiocese of New York Application for Dispensation 2 (undated). Phrasing varies from diocese to diocese, but the substance remains the same and is attested to by both parties. Some dioceses add a clause that the agreement stands even if the Catholic party ". . . should happen to be taken away by death." Brewer v. Carey, 148 Mo. App. 193, 197, 127 S.W. 685, 686 (1910); see Dumais v. Dumais, 152 Me. 24, 25, 122 A.2d 322, 323 (1956).

[2] Canon 1012. WOYWOD, THE NEW CANON LAW 205 (7th ed. 1929).

[3] CICOGNANI, CANON LAW 121 (2d rev. ed. 1947).

[4] "Intermarriage is not countenanced by modern Judaism . . . due . . . to a conviction that unity of religion is essential to the happiness of the home." 5 JEWISH ENCYC. 626, quoted in Ramon v. Ramon, 34 N.Y.S.2d 100, 109 (Dom. Rel. Ct. 1942). Hehman v. Hehman, 13 Misc.2d 318, 319, 178 N.Y.S.2d 328, 330 (Sup. Ct. 1958) notes 1956 resolutions of the Methodist and United Lutheran Churches warning of the dangers of mixed marriage.

The Roman Catholic Church "consents to them reluctantly, and grants a dispensation only for good reasons and provided that the non-Catholic party agrees . . . that any children of the marriage shall be brought up as Catholics. . . ."[5] While the marriage of two baptized non-Catholics, performed as they wish, is considered by the Catholic Church to be fully as much a sacrament as the marriage of two Catholics in their ceremony, a civil or non-Catholic ceremony for a Catholic is considered a nullity, being no more than the form of marriage.[6] Since the Council of Trent decree of 1563, it has been required, barring such exceptions as danger of death or the unobtainability of a priest, that a Catholic be married before the parish priest and two other witnesses.[7] With the ante-nuptial agreement in question a prerequisite to obtaining the dispensation, most practicing Catholics would not attempt marriage without it. Judicial notice has been taken of this fact,[8] and this plus the Catholic's view of the indissolubility of the marriage bond,[9] should even add to the already accepted proposition that marriage is a valuable consideration sufficient for a promise.[10]

While ante-nuptial agreements are as a whole favored by law,[11] clearly no such contract dealing in something as important as a child's religious upbringing should be enforced blindly and without careful consideration. Frequently side issues have obscured the basic issue to be dealt with here, enforcement of the agreed religious training by one of the two parties to the agreement. One court found such an agreement void for indefiniteness.[12] Another ruled against the agreement in part because it felt tuition payments to the parochial school the child had attended constituted monetary contribution to the Church itself.[13] A third interpreted the agreement as trying to govern award of custody which was dealt with by statute in that jurisdiction.[14] A recurring problem has been the standing to sue of a relation or next friend of the deceased Catholic spouse trying to enforce the agreement against the surviving non-Catholic parent.[15] As such a person would not have been a party to the promises exchanged between the man and woman, this difficulty is readily apparent.

The decisions near or on point in this century have fallen into six main areas. (1) The traditional English view of the nineteenth century, well summarized in a 1916 law review note[16] which has come to

[5] SHEED, NULLITY OF MARRIAGE 95 (new ed. 1959).

[6] *Ibid.*

[7] *Id.* at 88-94.

[8] "Adherence to the tenets of his religion are to him of paramount importance; so too its precepts which demand that his child be reared in his faith. In the circumstances the inference may be fairly drawn, indeed the conclusion, that in the absence of such a promise by the wife, he would not have married the plaintiff." Ross v. Ross, 4 Misc.2d 399, 403, 149 N.Y.S.2d 585, 589 (Sup. Ct. 1956); *accord,* Shearer v. Shearer, 73 N.Y.S.2d 337, 358 (Sup. Ct. 1947).

[9] Canon 1013 §2. BOUSCAREN AND ELLIS, CANON LAW 399, 401-02 (1946).

[10] 1 WILLISTON, CONTRACTS §110 (3d ed. 1957).

[11] Roush v. Hullinger, 119 Ind. App. 342, 346, 86 N.E.2d 714, 715 (1949); 4 POMEROY, EQUITY JURISPRUDENCE §1297 (5th ed. 1941).

[12] Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956).

[13] Hackett v. Hackett, 146 N.E.2d 477 (Ohio C.P. 1957), *aff'd,* 150 N.E.2d 431 (Ohio Ct. App. 1958).

[14] Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957).

[15] Brewer v. Carey, 148 Mo. App. 193, 127 S.W. 685 (1910); Commonwealth v. McClelland, 70 Pa. Super. 273 (1918) (dictum).

[16] Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. REV. 485 (1916) and cases cited therein.

be a standard reference, emphasized the paternal right of religious choice for his children, the *patria potestas*. The theory died slowly. Twentieth century courts might concede that the belief was passé, but they still placed at least some reliance upon it.[17] One New York court stated unqualifiedly as late as 1913 that "by the law of this state, it is the father . . . who has the right to determine the religious beliefs of an infant under 14 years of age."[18] Yet "most of the states – even a state as important as New York – [were] still without any decisions on the subject from a court of last resort."[19] Most states are still without such decisions, but the highest courts of Georgia,[20] Kansas,[21] Iowa,[22] Maine[23] and New York[24] have all recently spoken, and there have been numerous lower court decisions. The decisions have varied from holdings of rigid enforceability in two New York lower courts,[25] to findings of unconstitutionality in Connecticut,[26] Ohio[27] and Iowa.[28]

(2) *Ramon v. Ramon,*[29] a 1942 opinion by the Domestic Relations Court of New York City, was first to uphold validity. "An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a Catholic has thereby irrevocably changed the status of the Catholic party, is an enforceable contract having a valid consideration."[30] Of note additionally is the court's statement that as a "clearly established"[31] rule of law ". . . the fact that a child, in violation of the ante-nuptial contract, has for a period of time been brought up in some other religion than that fixed in the ante-nuptial agreement, is not sufficient ground to deprive the respondent of his rights to have the child educated in the religion [so] fixed. . . ."[32] That enforcement beyond a certain age could then be most harmful to the child is not difficult to see, and a court should indeed consider carefully before so enforcing. While the child here, eight years of age, had been removed from Catholic parochial school and sent to Protestant services and Sunday School for an unspeci-

---

[17] *In re* McConnon, 60 Misc. 22, 112 N.Y. Supp. 590 (Surr. Ct. 1908); *In re* Jacquet, 40 Misc. 575, 82 N.Y. Supp. 986 (Surr. Ct. 1903).

[18] *In re* Lamb's Estate, 139 N.Y. Supp. 685, 689 (Surr. Ct. 1912). The court ordered the child to be raised a Catholic in accord with the father's wishes despite the fact that the father himself had chosen to be married by a non-Catholic minister.

[19] Friedman, *supra* note 16, at 498.

[20] Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957).

[21] Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957). While this case dealt with a wife's loss of custody of her child due to her being a Jehovah's Witness, the court readopted its earlier holding in Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920) that following the death of one party to the ante-nuptial agreement, the latter was ". . . merely persuasive . . ." upon the survivor. Denton v. James, *supra* at 736, 193 Pac. at 311.

[22] Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956).

[23] Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956).

[24] Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954) (per curiam).

[25] Ross v. Ross, 4 Misc.2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956); Ramon v. Ramon, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

[26] McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (Super. Ct. 1957).

[27] Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958), *affirming* 146 N.E.2d 477 (Ohio C.P. 1957). The *Hackett* case has been called ". . . the strongest authoritative stand to date against . . . enforceability. . . ." 12 VAND. L. REV. 284, 287 (1958).

[28] Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956) (dictum).

[29] 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

[30] *Id.* at 112.

[31] *Ibid.*

[32] *Id.* at 113.

fied time, she had been placed in a Catholic boarding school at the beginning of the instant proceedings so that the point was not truly at issue.

Recently a second New York court,[33] acting two years after the state's highest court had employed a different test,[34] upheld the agreement, specifically decreeing that [psychologically] the child should be sent to a parochial school or else be permitted to take part in the released time program at his public school.

(3) The test employed by the New York Court of Appeals in 1954 ignored the ante-nuptial agreement and permitted a twelve-year-old boy to choose for himself.[35] The child in the instant case had been baptized a Catholic in accord with the agreement but had then been sent to Christian Science Sunday School at an early age. In 1949 the husband, the Catholic spouse, brought annulment proceedings on the basis of the violated agreement. The wife prevailed in a counterclaim for separation, but the judgment provided that the child be raised in the Catholic religion. Later the wife sought modification of the decree so that the son might attend public school and receive Christian Science training. Basing his decision on the child's wishes, the official referee granted the modification sought.[36] The Appellate Division affirmed 3-2 without opinion.[37] A brief dissenting memo doubted whether a twelve-year-old had sufficient maturity to make such a decision and declared that the mother who had confused him in violation of the agreement and judgment ". . . should be required to fulfill her promise and the earlier direction of the court. The tenets of all religions as well as the law require the observance of a solemn obligation."[38]

A divided Court of Appeals similarly affirmed, stating, per curiam, that there was ample evidence that the boy was old enough to testify intelligently and that modification was in his best interests.[39] Desmond, J., now chief judge of the court, writing for himself and the then Chief Judge Conway, dissented on four grounds:[40] first, that no harm to the boy had been shown from his Catholic religious training, and that the referee had gone beyond his realm in relying entirely upon the child's wishes; second, that reliance on the competency of a twelve-year-old is contrary to *stare decisis,* human experience, and the *parens patriae* public policy of the state as embodied in seventeen statutes and a section of the state constitution; third, that this agreement was as enforceable as any other until harm was shown to the child; and finally that equity could not grant relief to the mother who had created the boy's desires by violating the agreement and the terms of the judgment.

The failure of the majority in the *Martin* case to state whether it was declaring a general rule has left inconsistency in the state's lower courts. In 1956 in the case noted previously[41] the Supreme Court of Erie

[33] Ross v. Ross, 4 Misc.2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956).

[34] Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (per curiam), *affirming* 283 App. Div. 721, 127 N.Y.S.2d 851 (1st Dep't 1954).

[35] *Ibid.*

[36] For excerpts from the referee's report see 1 N.Y.L.F. 247 (1955).

[37] Martin v. Martin, 283 App. Div. 721, 127 N.Y.S.2d 851 (1st Dep't 1954).

[38] *Id.* at 722, 127 N.Y.S.2d at 851 (dissenting opinion).

[39] Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954).

[40] *Id.* at 139-40, 123 N.E.2d at 812-13 (dissenting opinion).

[41] Ross v. Ross, 4 Misc.2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956).

County enforced the agreement and also awarded conditional custody to the Catholic father despite the hostility of the child, eight and a half years old, toward the father and his past recent refusals to attend the latter's church. Yet the Supreme Court of Queens County has twice been governed in its determinations solely by the Court of Appeals holding in *Martin* v. *Martin,* in both instances the only case cited by the court.[42] Thus choice of religion was accorded to a fifteen-year-old girl and a thirteen-year-old boy. Concerning the latter child, the court expressly stated that it would reach a contrary result did it not feel bound by the *Martin* decision.[43] If the rule is to be that any normal twelve or thirteen-year-old can choose his religious future in New York, then we ought also to note that a New York court of an earlier day relied heavily on the views of a ten-year-old in determining his religious upbringing.[44] The ridiculous features of such an arbitrary selection of an age for religious choice are apparent. We see that eight and a half is too young but that ten may be all right. Are we then to split the difference and make nine and a quarter our standard?

(4) Most cases turn on the issue of the child's welfare, generally relying on the principle of welfare in awarding custody of the child and then permitting the one granted custody to determine the child's religious training.[45] A frequently cited Missouri case declares that the right to make such a decision lies "at the foundation of the right of custody itself,"[46] while a recent New Jersey case speaks of the "right" of the non-Catholic to whom custody had been granted, to change not only her own religion at will but also that of the children.

> To invoke the principle of estoppel against the plaintiff because of her ante-nuptial agreement . . . would be to disregard the overriding consideration of what is best for the children and to determine – *arbitrarily* – their future welfare by an act with which they had nothing to do. . . . [I]t would deprive the mother of her *right to change her mind* – to choose a religion which apparently gives her greater spiritual comfort – and to inculcate in the children entrusted to her custody the religious principles which, *for the time being,* seem to her best. (Emphasis added.)[47]

(5) Of the three courts which have dealt directly with the problem of unconstitutionality, two, Connecticut[48] and Ohio,[49] have found it violative of sections of their state constitutions,[50] while Iowa in a 5-4 decision

[42] Hehman v. Hehman, 13 Misc.2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958); Booke v. Booke, 207 Misc. 999, 141 N.Y.S.2d 580 (Sup. Ct. 1955).

[43] Hehman v. Hehman, *supra* note 42, at 321, 178 N.Y.S.2d at 331. See also Comment, 59 COLUM. L. REV. 680 (1959), which notes the ambiguity of the *Martin* holding and the inconsistency in the lower courts, and advocates that New York confer with the award of custody the right to determine the child's religious training.

[44] *In re* McConnon, 60 Misc. 22, 112 N. Y. Supp. 590 (Surr. Ct. 1908).

[45] McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (Super. Ct. 1957); Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956); Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956); Brewer v. Carey, 148 Mo. App. 193, 127 S.W. 685 (1910); Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957).

[46] Brewer v. Carey, *supra note* 45, at 215, 127 S.W. at 692.

[47] Boerger v. Boerger, 20 N.J. Super. 90, 101, 97 A.2d 419, 425 (Super. Ct. 1953).

[48] McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (Super. Ct. 1957). *But cf.* Sullivan v. Sullivan, 141 Conn. 235, 104 A.2d 898 (1954).

[49] Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958).

[50] The sections in question are set forth: "It being the duty of all men to worship the Supreme Being, the Great Creator and Preserver of the

analogized the situation to the restrictive covenant cases, *Shelley* v. *Kraemer*[51] and *Hurd* v. *Hodge*,[52] and stated that judicial enforcement would violate the first amendment as applied to the states by the fourteenth.[53] The dissent rejected this, drawing an analogy of its own to the fact that adoption statutes prescribing that guardians of the same faith as the child be appointed "when practicable"[54] had been held constitutional.[55]

> If religious affiliations may be considered in relation to the custody of the children, without offending Constitutional provisions, there should be no legal objection to incorporating in a divorce decree which awards custody, a provision which both parents have agreed upon and asked the court to include in the decree awarding custody.[56]

(6) The final area and the course advocated by this writer has been adopted by courts in New York and Pennsylvania. In *Shearer v. Shearer*,[57] a 1947 New York Supreme Court decision which has never been overruled, the court declared:

> I am firmly of the opinion that the agreement relating to the religious training of the children entered into by Beatrice Shearer orally and in writing was an inducing cause of this marriage and is an enforceable contract which, in and of itself, should be upheld.
>
> But I am charged with a responsibility even more impelling than the religious rights of this father. The controlling consideration here is the welfare of the children.[58]

The children here involved were three and a half and a little over one. Custody was awarded to the mother, but the Catholic father was to be allowed to take each child to church upon his reaching the age of four, and assuming no contrary agreement was reached in the year thereafter, he might apply for an order that the child be enrolled in a parochial school.

A 1920 Pennsylvania case held in a wholly different situation that non-Catholic custody was not of necessity incompatible with a Catholic education.[59] The parents of the three children here involved, who were

---

Universe, and their right to render that worship, in the mode most consistent with the dictates of their consciences; no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church or religious association." CONN. CONST. art. VII, §1.

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted." OHIO CONST. art. I §7.

[51] 334 U.S. 1 (1948).

[52] 334 U.S. 24 (1948).

[53] Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1958) (dictum). This view was presaged the preceding year in Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 364 (1955), an exhaustive work which has become the basic contemporary reference for the anti-enforcement view. Mr. Pfeffer appeared as amicus curiae for the petitioner in the *Lynch* case.

[54] MASS. GEN. LAWS ch. 210, §5B (1958); N.Y.C. DOM. REL. CT. ACT §88 (3) (1958). For a collection of the many similar state statutes see Note, 54 COLUM. L. REV. 376 (1954).

[55] Petitions of Goldman, 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied,* 348 U.S. 942 (1955). *But see* Pfeffer, *supra* note 53, at 380. Mr. Pfeffer served as counsel for the petitioner in the *Goldman* case. See generally N. Y. Times, Oct. 11, 1959, p. 1, col. 3.

[56] Lynch v. Uhlenhopp, 248 Iowa 68, 93, 78 N.W.2d 491, 506 (1956) (dissenting opinion).

[57] 73 N.Y.S.2d 337 (Sup. Ct. 1947).

[58] *Id.* at 358.

[59] *In re* Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920). This same attitude has been expressed more recently in Commonwealth *ex rel.* Conrod v. Conrod, 165 Pa. Super. 628, 70 A.2d 433 (1950).

six, thirteen and fifteen years of age respectively, were deceased. The court reaffirmed as guardian the children's non-Catholic paternal grandfather. Noting that "the welfare of the child must remain the primary consideration to which all other questions must yield,"[60] the court nonetheless emphasized the ". . . willingness of the guardian to carry out the express wishes of the parents with respect to religious training. . . ."[61]

A perfect instance of circumstances in which enforcement was properly denied is provided in another Pennsylvania case.[62] There two girls, aged twelve and thirteen, had been baptized in accord with the antenuptial agreement, but when insanity confined their mother to an asylum, they were raised for nine years by their non-Catholic paternal grandmother, attending Protestant services and Sunday School, and had developed readily apparent prejudices against their mother's religion. At this belated point a maternal aunt, attempting to act in the stead of the now deceased mother, petitioned that the children be placed in a Catholic home or institution that they might be educated in that faith. The court in rejecting the petition declared:

> There was no reason why in their early infancy, when their minds could have been more readily molded to the reception of the religion of their mother, there should not have been some action taken to this end.
>
> It is not likely that the father would have raised any objection, and, if he had, his stipulation entered into at the time of the marriage would have been a sufficient answer.[63]

We find in these cases a judicial awareness that the welfare of the children involved must ever remain the prime consideration, but that a parent, having freely entered a serious agreement, ought not to be allowed to breach it without good and substantial reason. This writer feels that only a showing that enforcement will be contrary to the child's welfare provides such a good and substantial reason.

These six main patterns having been considered, three questions remain to be answered. Can equity properly act in this type of agreement? Is it practicable for it to act? And, assuming an affirmative answer to the first two, should it act? Clearly the legal remedy of damages is both impossible to determine and utterly inadequate. If there is to be a remedy, it must be specific performance. Yet traditionally equity limited itself to the protection of property rights.[64] The equity concept has steadily broadened, however.[65] Though lip service may still periodically be paid to the property concept, equity today reaches anywhere from injunctions in the labor-management realm[66] to the protection of family relations.[67] There has been little objection on the grounds of improper equity jurisdiction even among those courts refusing to enforce the agreement.[68] Clearly equity can act and has acted to protect the intangible and the personal

---

[60] *In re* Butcher's Estate, 266 Pa. 479, 485, 109 Atl. 683, 685 (1920).

[61] *Ibid.*

[62] Commonwealth v. McClelland, 70 Pa. Super. 273 (1918).

[63] *Id.* at 276.

[64] Note, *Equity's Role in the Protection of Civil Rights,* 37 IOWA L. REV. 268, 270-72 (1952). MCCLINTOCK, EQUITY §148 (2d ed. 1948).

[65] 37 IOWA L. REV. *supra* note 64, at 274, and the cases cited therein; MCCLINTOCK, *op. cit. supra* note 64, §§148-62.

[66] MCCLINTOCK, *op. cit. supra* note 64, §155.

[67] *Id.* §162.

[68] Of the recent decisions refusing to enforce the agreement, only Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956), held it was not a proper subject for equity jurisdiction.

which are ". . . as real and as valuable as any property right."[69]

The question is raised: can such an agreement really be enforced apart from the award of custody? Clearly no one can voice a guarantee in any particular case. However, it is possible for it to work. The writer feels first that the agreement and the likelihood of its being kept should be a consideration, though certainly not a decisive one, in a court's award of custody. It cannot be disputed that religious development is easier when the parent or guardian is of the same faith. Should the custody be awarded to the non-Catholic, enforcement of the agreement is still possible in a number of ways and without subjecting the parent to any personal religious observance. If practicable, the Catholic parent could personally take the child to church and Sunday School. If not, possibly the godparents will be available.[70] There may be a parochial school in the immediate neighborhood or a released time program in the public schools. Failing all else, there will almost invariably be some priest or layman at hand and willing to assist,[71] or a special children's Mass each Sunday at the church.

That education outside the home can be subverted within it is obvious. Possibly a reappraisal of custody might be in order in such a case. For equity, however, to refuse to act for fear of disobedience to its decree would be defeating its very *raison d'être.*

Lastly – should such an agreement be enforced? No thinking person today of any faith wants "an establishment of religion" or an intrusion on "the free exercise thereof." But there is a vast difference between either of these constitutional prohibitions and judicial enforcement of promises voluntarily exchanged by a man and woman prior to marriage.[72] There is, of course, no intrusion on the non-Catholic's right to vary his own religious views at will, but there should be no such *right* as to the children. Both parties have contracted that any children be raised as Catholics. What is sought is enforcement of this promise during the period of the child's legal incompetency. When of age he will have the same right of choice that his parents have and have had.[73]

There is ". . . no constitutional requirement which makes it necessary for govern-

(Continued on page 84)

[69] Ross v. Ross, 4 Misc.2d 399, 403, 149 N.Y.S.2d 585, 589 (Sup. Ct. 1956).

[70] The godparents are selected by the child's parents at the time of the Catholic baptism and serve as his two sponsors. In accord with Canon 769 the sponsor or sponsors assume by that role a responsibility for the spiritual welfare and the religious upbringing of the child. WOYWOD, THE NEW CANON LAW 157 (7th ed. 1929). See Comment, *Rationale of Pre-Nuptial Agreements Providing for the Religious Training of Children,* 34 U. DET. L. J. 632, 637, n. 27 (1957).

[71] "There are in excess of 30,000,000 members of that faith in the United States, and in all parts of the country there are many thousands of churches, schools, hospitals, and other institutions supported by its members; . . . She, no doubt, could . . . have had someone take him where he would receive instructions in the Church of his baptism. The communicants of any religious faith or denomination are eager to add another to their number." Lynch v. Uhlenhopp, 248 Iowa 68, 89, 78 N.W.2d 491, 504 (1956) (dissenting opinion).

[72] One New York court has enforced a post-nuptial agreement that should the wife's action to dissolve the marriage be successful, both parties would appear before a Rabbinate to dissolve their marriage according to the laws of their religion. "Specific performance herein would merely require the defendant to do what he voluntarily agreed to do." Koeppel v. Koeppel, 138 N.Y.S.2d 366, 373 (Sup. Ct. 1954), *referee's reversal on other grounds aff'd,* 3 App. Div. 2d 853, 161 N.Y.S.2d 694 (2d Dep't 1957).

[73] Sullivan v. Sullivan, 141 Conn. 235, 241, 104 A.2d 898, 901-02 (1954).

ANTE-NUPTIAL PROMISES

(Continued)

ment to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[74] Man and woman have freely exchanged solemn promises which by their very substance demonstrate their seriousness. The state in assuming its role as arbitor of domestic controversy ought not lightly regard such promises. When one parent seeks to enforce the agreement, the writer feels the court ought require that the other party assume the burden of showing that the agreed religious upbringing no longer would be in the best interests of the child. Sound judicial discretion can then evaluate this difficult situation in which wholly doctrinaire approaches and artificial standards can but prove inadequate.

> It happens that the respondent seeking herein the protection of the right to the exercise of religious freedom contained in the ante-nuptial contract is a Catholic. But the principle invoked operates to bulwark the right to the exercise of religious freedom of persons of all religions, for its application extends to all.[75]

[74] Zorach v. Clauson, 343 U.S. 306, 314 (1952). Concerning permissible monetary aids to religion see U. S. CONST., amend. 1, 763-64 (Corwin rev. ed. 1952).

[75] Ramon v. Ramon, 34 N.Y.S.2d 100, 112 (Dom. Rel. Ct. 1942).