The Catholic Lawyer

Volume 11
Number 1 *Volume 11, Winter 1965, Number 1*

Article 13

# Religious Belief Held Irrelevant in Child Custody Case

new trial.[30] Courts also recognize, however, that there is a level below which the actions of the attorney cannot fall or the due process requirement will be violated.[31]

Upon a defendant's conviction, the defense counsel might well be expected to attempt to secure a new trial. However, the state cannot be expected to provide a forum when mere bad judgment of counsel, or a failure of trial tactics, has resulted in the defendant's evidence on the main trial not being adequately introduced or exploited.[32]

If the Court in the instant case had allowed a new trial merely because the defense counsel had not diligently established the mental incompetence of a material witness, other attorneys might follow suit. By obtaining a new trial as a result of a subsequent finding of the witness' insanity, the defense counsel's position will invariably be enhanced at the expense of a successful prosecution. At the new trial the prosecutor's case will have already been exposed and the defense attorney would receive the ultimate benefit resulting from his failure to perform effectively at the first trial. Substantial justice can be best achieved when the lawyer performs his moral, if not legal, obligation by utilizing his best learning, ability and skill in his duties toward his clients.[33] In this regard, all the available evidence and issues must be presented to the jury. It appears that this was not done in the present case and it is quite possible that the Court granted a new trial because of the counsel's inadvertence. While the Court distinguished the *Salemi* case from the instant decision, it failed to clarify the incongruous result that a diligent defense precludes a new trial, while a non-enthusiastic defense justifies a new trial. Also to be clarified is the question of whether a new trial would have been granted if the trial court had informed the jury of the material witness' mental condition when counsel failed to do so sufficiently.

[30] Tompsett v. State, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).
[31] See, *e.g.*, United States v. Handy, 203 F.2d 407 (3d Cir. 1953).
[32] *Cf.* Giaramita v. Flow Master Mach. Corp., 234 N.Y.S.2d 817 (Sup. Ct. 1962).
[33] See A.B.A. CANONS OF PROFESSIONAL ETHICS, Canon 15; WARVELLE, ESSAYS IN LEGAL ETHICS § 247 (2d ed. 1920).

**Religious Belief Held Irrelevant in Child-Custody Case**

Although she attended a church, the appellant-wife in a child-custody case considered herself an agnostic, since she had some doubt as to the existence of a deity. The trial court found both parties able parents, but awarded custody to the husband, principally on the ground that a home in which a firm faith in a deity is expressed is preferable to one in which doubt, skepticism, or agnosticism is professed. The Supreme Court of Wisconsin reversed, *holding* that a religious belief is not a relevant consideration in awarding child custody unless that belief is inimical to the welfare of the child. *Welker v. Welker*, 129 N.W.2d 134 (Wis. Sup. Ct. 1964).

At common law the father had a paramount right to the custody of his minor

children.[1] Today, however, the "best interests" test is employed to determine custody, the primary consideration being the welfare of the child.[2]

The trial court enjoys a broad range of discretion in determining the best interests of the child and it considers many factors in reaching its decision. The moral and financial fitness of the parents, the preference of the child, and the age, health, and sex of the child are principal factors.[3]

The doctrine of religious neutrality in custody cases has its roots in English law.[4] During the seventeenth and eighteenth centuries, Protestantism was the established religion in England, and the courts, rather than being neutral, promoted the Church of England.[5] Early in the nineteenth century, however, the courts of England began to take a more liberal view. In the case of *Lyons v. Blenkin*[6] it was held that the court would look with equal favor on all religions. The latter position gradually evolved into the doctrine of religious neutrality, accepted by both English and United States courts.[7]

The Supreme Court of the United States has apparently adopted a general policy of religious neutrality. For example, in *Watson v. Jones,*[8] the Court stated that "the law knows no heresy and is committed to the . . . establishment of no sect."[9] On other occasions the Court has indicated that the first amendment requires the state to be neutral in its relations with groups of religious believers and non-believers.[10] It has also struck down laws and governmental practices which tend to favor one religion over another, or religion over non-religion.[11] The neutrality policy was stated clearly in the *Watson* case:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not . . . infringe personal rights, is conceded to all.

Although the Supreme Court decisions require religious neutrality, authority is divided on the question of whether religion

---

[1] Porter v. Porter, 60 Fla. 407, 53 So. 546 (1910).

[2] This is the test in substantially all jurisdictions. For a collection of the cases see 17A AM. JUR. *Divorce and Separation* § 818 (1957).

[3] Note, *Religion—A Factor in Awarding Custody of Infants,* 31 So. CAL. L. REV. 313, 314 n.7 (1958).

[4] See Lyons v. Blenkin, Jac. 245, 37 Eng. Rep. 842, 844 (Ch. 1821).

[5] An example of the intolerance of the period is the case of Preston v. Ferrard, 4 Bro. P.C. 298, 2 Eng. Rep. 202 (H.L. 1720), wherein a Catholic widow was deprived of the custody of her child solely on the basis of her religious belief. The court awarded custody to a Protestant so that the child might be raised in the Protestant faith.

[6] *Supra* note 4.

[7] While English courts operated under the rule that all religions were equal, they also operated under the common-law rule that the father had a paramount right to control the religious education of his children. *In re* Agar-Ellis, 10 Ch.D. 49 (1878). This rule of *religio sequitur patrem* prevailed until Parliament enacted the Guardianship of Infants Act, 15 & 16 Geo. V, c. 45 § 1 (1925). This act abolished the rule of *religio sequitur patrem* and declared that the welfare of the child is the paramount consideration in custody proceedings. From this time the religion of the father was no longer controlling, and a true policy of religious neutrality was established.

[8] 80 U.S. (13 Wall.) 679 (1871).

[9] *Id.* at 728.

[10] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[11] In Torcaso v. Watkins, 367 U.S. 488 (1961), the Court struck down a statute which required an affirmation of belief in God as a prerequisite to holding public office. A state-sponsored school prayer was declared unconstitutional in Engel v. Vitale, 370 U.S. 421 (1961), and the Court reversed a Florida decision that would have allowed Bible reading in public schools in Dade County Bd. of Pub. Instruction v. Hume, 143 So. 2d 21 (Fla. Sup. Ct. 1962), *rev'd,* 347 U.S. 487 (1963).

may be considered as a factor in a custody award. The minority view is that religion can be considered only when the religious teachings would be inimical to the welfare of the child.[12] Where the religious teachings of the parents are not subversive of morality and decency, the court may not consider religion as a factor in determining a custody award.[13]

The majority rule permits the trial judge to consider religion in making the determination of custody. While the factor of religion may be considered, it can not be singularly controlling, but must be considered with the other determinatives, *e.g.*, age, sex and health.

The minority position is illustrated by the Supreme Court of Kansas in *Jackson v. Jackson,*[14] where it stated that:

> Aside from teachings subversive of morality and decency, and some others equally obnoxious, the courts have no authority over that part of a child's training which consists in religious discipline, and in a dispute relating to custody, religious views afford no ground for depriving a parent of custody who is otherwise qualified.

In *Jackson,* the husband and wife had separated, and the wife, a Jehovah's Witness, had been awarded custody of their minor children. The husband moved for change of custody, alleging that the children would be raised in a manner which would tend to make them unpatriotic citizens in that their mother's religion would require them to refuse to accept military service and to claim the status of a conscientious objector. The trial court, after receiving testimony and exhibits as to the tenets of Jehovah's Witnesses and the possible effects of such beliefs on children, transferred custody of the children to the husband. On appeal, the Supreme Court of Kansas reversed, holding that the trial court had abused its discretion in allowing the matter of religion to become an integral part of its decision. The minority would require that a custody award be made free from considerations of religion.

The majority view was clearly verbalized in the *Oelberman Adoption Case,*[15] wherein the court stated that "religion is an important matter, and should be given consideration, but does not determine the right to custody." The child in question, born out of wedlock, was given to the care of a couple by the mother. Thereafter, the mother and putative father married and sought to regain custody of the child. In denying the parents' request, the court mentioned in passing the fact that the child would be given *religious training* in its foster home.[16]

The case of *Shearer v. Shearer*[17] indicates that New York follows the majority view in allowing the trial judge to consider religion as a factor in custody proceedings. The court awarded custody of the child to the non-Catholic mother, but the Catholic father was given the right both to take the child to Catholic church services and to see that the child received religious instructions. The court, in referring

[12] Refusal, on religious grounds, to have children vaccinated was held to be inimical to their welfare in Cude v. State, 377 S.W.2d 816 (Ark. Sup. Ct. 1964). Refusal, on religious grounds, to allow blood transfusions was held to be inimical to the child's welfare in State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

[13] Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957).

[14] *Id.* at —, 309 P.2d at 711, quoting Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920).

[15] 167 Pa. Super. 407, 74 A.2d 790 (1950).

[16] *Id.* at —, 74 A.2d at 794. (Emphasis added.)

[17] 73 N.Y.S.2d 337 (Sup. Ct. 1947).

to the father's religious beliefs, noted that *to him and his church, the religious upbringing of children is both a matter of an infant's spiritual welfare and of sound public policy.*[18] The matter of religion was not controlling in the *Shearer* case, but, in accordance with the majority position, was considered by the court; this is clearly shown by that part of the custody award which allowed the father to supervise the religious upbringing of the children.

The Court in the instant case reasoned that since the first amendment protects both the right to believe *and* the right to disbelieve, it could *not* consider the matter of religion in determining the custody of a child without violating the doctrine of religious neutrality. For this reason, the decision of the trial court, allowing religion to be a factor in its determination, was reversed.

The minority viewpoint, adopted here, lessens the importance of the accepted tests of "best interests" and "welfare of the child" since an elimination of religion as a factor may result in an award of custody which is not in the child's best interests. To arrive at an award which will be in the best interests of the child, the court must consider all the relevant factors. In some instances the child's prior religious training may be a factor, since a change in such training may, under certain circumstances, result in traumatic psychic consequences.[19] If the court cannot consider the factor of religion, the award may result in psychic injury to the child and thus frustrate the very purpose of the "best interests" test.

This does not mean that in every case dealing with diversity of religion the child should be awarded to the parent of the same religion. But since each case involves a different factual situation, a rule barring religion as a factor in determining custody would prevent the court from considering a factor upon which, under certain circumstances, the best interests of the child might depend. The rule limits the scope of the court's inquiry, and in so doing may limit the effectiveness of the court's determination regarding the best interests and welfare of the child.

The majority view appears to be the better approach since it allows the court a wider scope of inquiry in its determination of the award. It is interesting to note, however, that as a practical matter, religion *may* influence the determination of a custody award even in jurisdictions which follow the minority view. Where evidence is introduced to show that one party's religious views might be subversive of morality and decency, even if it is found that the evidence does not establish this fact, the religious beliefs of at least one of the parties will have been made known to the trial judge. This knowledge will influence the judge's determination to some degree, even if he is not permitted to openly state that the religious factor was considered. The broad discretionary powers of the trial judge will enable him to assign some non-religious factor as a reason for the award, even though the religious issue may in fact have been important, if not controlling.

---

[18] *Id.* at 359. (Emphasis added.)

[19] Pfeffer, *Religion In The Upbringing Of Children*, 35 B.U.L. REV. 333, 371 (1955).