Matching for Adoption: A Study of Current Trends

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MATCHING FOR ADOPTION: A STUDY OF CURRENT TRENDS*

Theoretically, the primary purpose of adoption procedures¹ is to serve the best interests of the child.² Unfortunately, the application of matching requirements sometimes contravenes this principle by precluding or significantly delaying adoption. Matching refers to the practice of placing a child with adoptive parents who, based upon a number of factors,³ are similar⁴ to the child's biological parents.⁵ Although uniformly applied by adoption agencies and courts 10 to 20 years ago, many matching criteria are employed less frequently and rigidly today.⁶

* This article is a student work prepared by the St. Thomas More Institute for Legal Research.

¹ Adoption is solely a creature of statute, for at common law no right of adoption existed. In re Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923). Adoption proceedings are controlled by state rather than federal legislation, and by state court and agency determinations. For a discussion of how highly developed an institution adoption is in the United States, see Baran, Pannor & Sorosky, Adoptive Parents and the Sealed Record Controversy, 55 SOCIAL CASEWORK 531 (1974).

² The best interests of the child test was first formulated almost a century ago in Chapsky v. Wood, 26 Kan. 650, 654 (1881), a custody proceeding, wherein the court stated, "the paramount consideration is, what will promote the welfare of the child?," and can be found in numerous legislative and judicial determinations regarding adoption proceedings. A publication containing a series of standards formulated by the Child Welfare League of America for agency use, states that "[t]he primary purpose of an adoption service is to help children.

³ While both courts and agencies consistently advocate primary concern for the child, it is questionable whether this concern is always carried out in practice.

⁴ For a discussion of various matching factors, including religion, race, nationality, physical characteristics, and age, see Comment, Adoptions for the Hard to Place: The Role of the Court and the Trend Against Matching, 25 U. MIAMI L. REV. 749 (1971).

⁵ Elizabeth S. Cole, director of the North American Center on Adoption, described matching in terms of the "as though born principle." Personal interview with Elizabeth S. Cole, director of the North American Center on Adoption, New York, New York, Oct. 9, 1975.

⁶ The distinction between "biological parents," a term designating those who have physically parented the child, and "psychological parents," designating those with whom the child has established a close, loving, parent-child relationship, was postulated in J. GOLDSTEIN, A. FREUD & S. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 16-20 (1973) [hereinafter cited as GOLDSTEIN]. In this article, the applicable terms as distinguished and defined in Beyond the Best Interests of the Child shall be utilized. The authors of this work stress unqualified concern for the welfare of the child.

⁷ In the past, it was common practice to attempt to match according to hair and eye coloring, I.Q. level, and temperament. These criteria are considered less relevant today. Johnson, The
There are presently three primary matching criteria: race, religion, and age. This article will attempt to present an objective overview of the trends and viewpoints found in the area of adoptive matching.

THE RACIAL FACTOR

"[A] white home is not a suitable placement for Black children and . . . is totally unnecessary."

"Transracial adoption is a solution for many children now, and . . . should [not] be discouraged."

Whether a child of one race should be adopted by parents of a different race is a highly controversial question. This issue is directly affected by the large number of nonwhite children available for adoption, the correspondingly large number of white parents seeking to adopt, and the apparent scarcity of nonwhite adoptive parents. As a result of these factors, nonwhite children frequently must be placed with white families.

Interracial adoption, which in the vast majority of cases involves the placement of black children with white parents, has provoked a variety of responses. For example, the Association of Black Social Workers, an organization vehemently opposed to transracial adoption, maintains that white families are unable to prepare a black child to cope effectively with our "racist" society. The organization insists that interracial adoption

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2 Vieni, Transracial Adoption is a Solution Now, 20 SOCIAL WORK 419, 421 (1975).

3 See Chimezie, Transracial Adoption of Black Children, 20 SOCIAL WORK 296 (1975) [hereinafter cited as Chimezie].


5 Due to the paucity of decisional law in the area, this article will not cover the problems posed by the adoption of Vietnamese babies by American couples. For a recent study of this phenomenon, see Johnson, The Business in Babies, N.Y. Times, Aug. 17, 1975, § 6 (Magazine), at 11.

6 National Association of Black Social Workers News, Jan. 1973, at 1, col. 1. An opposing view was expressed in Commonwealth ex rel. Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243 (1973), wherein the court, adopting portions of the dissenting opinion in the lower court, noted:

"[I]n a multiracial society such as ours racial prejudice and tension are inevitable. If . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such."

may result in the black child's lack of ethnic identification and survival.\textsuperscript{13}

It is uniformly agreed that it is in the best interests of a black child to be placed in a black home if one is available.\textsuperscript{14} Yet, because of the shortage of such homes in comparison to the disproportionate number of black children awaiting adoption, such an arrangement is not always possible. As a result of this disparity, many believe interracial adoption to be a necessity.\textsuperscript{15} The only available alternative is either an extended stay in an institution or a series of placements in foster homes. In light of the unanimous agreement among child experts that a stable home life with its attendant security and continuity\textsuperscript{16} is essential to a child's emotional and psychological well-being,\textsuperscript{17} it is apparent that neither alternative provides a satisfactory solution.

Interestingly, some opponents of interracial adoption do not believe that relatively few black parents are seeking to adopt. They insist that suitable black homes are in fact available and attribute the apparent

\textsuperscript{13} Neal, Black Adoption Program, New York Chapter News, Association of Black Social Workers, Jan. 1975, at 1, col. 1; National Association of Black Social Workers News, Jan. 1973, at 1, col. 1. See also Chimezie, supra note 9, at 298.

\textsuperscript{14} See, e.g., L. Grow & D. Shapiro, Black Children—White Parents (1974), which states that "no one disputes the preferability of a black home for a black child." Id. at 239.

\textsuperscript{15} The position of the Child Welfare League of America, which recommends standards for adoption services to voluntary agencies, is described in the following statement:

Although the Child Welfare League has always stressed the desirability of placing children with families of the same racial or ethnic background, it has also taken the position that a child should not be deprived of a family because of the unavailability of one of the same race. Preface to id. at 1.

\textsuperscript{16} As was stated by one court, "[o]rphanages are all well and good but they do not provide a real home . . . ." In re Baker, 117 Ohio App. 26, 28, 185 N.E.2d 51, 53 (1962).

\textsuperscript{17} See Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 VAND. L. REV. 1207 (1969), wherein the author states:

Any psychiatrist or psychologist, experienced parent, grandparent, or teacher will state that when there has already been one upheaval in the child's life due to divorce or some other misfortune, the first and foremost requirement for the child's health and proper growth is stability, security, and continuity . . . .

Id. at 1208-09, quoted in In re S, 538 P.2d 947, 948 (Ore. Ct. App. 1975). Dr. A. Watson, a psychiatrist and professor of law, has noted that stability "is practically the principal element in raising children, especially pre-puberty ones." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS OF SPECIAL COMMITTEE ON UNIFORM DIVORCE AND MARRIAGE ACT 98 (1968). Dr. H. Modlin of the Menninger Foundation emphasized the importance of "constancy of mothering" and the need for family and a sense of belonging in his remarks at the 1963 proceedings of the American Bar Association's Family Law Section. 1963 ABA FAMILY LAW SECTION 39. For further discussion of the importance of a stable home environment, see J. Bowley, MATERNAL CARE AND MENTAL HEALTH 101 (1951); H. Clark, THE LAW OF DOMESTIC RELATIONS 326 (1968); D. Dietz, CHILD WELFARE: SERVICES AND PROSPECTIVES 101-10 (1969); A. Watson, PSYCHIATRY FOR LAWYERS 197 (1968); Stone, Children Without Roots, 27 SOCIAL SERV. REV. 144 (1953); Freud, Cindy, in J. Goldstein & J. Katz, THE FAMILY AND THE LAW 1051, 1053 (1965).
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scarcity to the allegedly discriminatory practices of adoption agencies.\textsuperscript{18} Agencies are criticized for the use of inferior recruitment methods in their search for black adoptive parents and application of higher standards to black couples.\textsuperscript{19} Although this argument may have some validity, the fact remains that until agencies cease to discriminate against blacks, if in fact they do so discriminate, more black babies will be available for adoption than can be matched with black parents. The absolute preclusion of interracial adoption, as advocated by certain groups, would appear to be a harsh penalty to impose on black children.\textsuperscript{20}

A solution to this problem may lie in a reevaluation by the agencies of their primary goal, which should be, without qualification, the best interests of the child. Since any delay in placement is detrimental to the child,\textsuperscript{21} agencies should make a conscious effort to recruit more black parents while concurrently placing children ready for adoption in available homes without delay and regardless of racial differences. In the event black parents cannot be found, it would appear that placement of a black child with white parents is preferable to institutional or foster home care.\textsuperscript{22}

The issue of race in adoption proceedings is presently affected by two basic types of legislation. A statute may either make no mention of the weight to be given the racial factor, or prohibit racial discrimination entirely. A third variety of legislation, specifically prohibiting interracial adoptions, has been invalidated as a denial of the fourteenth amendment guarantee of equal protection.\textsuperscript{23}

\begin{footnotesize}
\begin{enumerate}
\item E.g., Complaint for Plaintiff at 8, Child v. Beame, Civil No. 75-336 (S.D.N.Y., filed Apr. 23, 1975), appearing in 173 N.Y.L.J., Jan. 24, 1975, at 1, cols. 5-6.
\item As explained in Grossman, A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 Buffalo L. Rev. 303 (1968), if even one child in an interracial home finds love and acceptance where he might have found neither, and if he grows to a sounder maturity as a result, then interracial adoption and custody placements will have served a useful purpose in American society.
\item See In re Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967), wherein a black man petitioned to adopt his two white daughters although the applicable Texas statute, ch. 177, § 8 [1931] Tex. Laws 302 (repealed 1973), provided: “No white child can be adopted by a negro person, nor can a negro child be adopted by a white person.” A similar statute, ch. 428, § 4 [1947] Tex. Laws 428 (repealed 1973), provided: “No white person can be adopted by a negro person, nor can a negro person be adopted by a white person.” Undoubtedly influenced by a desire to legitimize the children, the Gomez court granted the adoption petition. Although it
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Although a state may not bar interracial adoptions, race still remains a relevant factor in most jurisdictions.\textsuperscript{21} At least six jurisdictions presently require a statement in the adoption petition indicating the race of one or all of the parties.\textsuperscript{23} In In re De F.,\textsuperscript{24} the petitioners refused to comply with statutory regulations mandating that certain racial and religious information be supplied on the adoption petition, alleging that this requirement was unconstitutional. Since the requested information was readily available, the court deemed the petition amended so as to include such information and thereby avoided the constitutional issue. Thus, the constitutionality of statutory provisions demanding a statement of race remains subject to question.

The majority of jurisdictions, including those requiring racial information, do not indicate in their legislation what weight should be given the racial factor, but rather leave such considerations to the discretion of agencies and courts. The judicial view of the racial factor is exemplified by would have been possible to limit the holding to the particular facts of the case, the court chose to invalidate the statute on the ground that under the fourteenth amendment no state may make a distinction in the treatment of persons based solely on race. The court maintained:

\begin{quote}
No State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color . . . No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth amendment freedoms.
\end{quote}


Several years later, a federal court invalidated a similar statute forbidding racially mixed adoptions. Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972). In Compos, the pertinent statute provided that "[a] single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." No. 288, § 2, [1948] La. Acts. In general, the Supreme Court has struck down statutes that discriminate on the basis of race. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (prohibition of interracial marriage); McLaughlin v. Florida, 379 U.S. 184 (1964) (interracial cohabitation prohibition); Bolling v. Sharpe, 347 U.S. 497 (1954) (prohibition of racial segregation in public schools). In Bolling, the Court stated that: "Classifications based solely on race must be scrutinized with particular care; since they are contrary to our traditions and hence constitutionally suspect." Id. at 499 (footnote omitted).

\textsuperscript{21} See, e.g., Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956); Comment, Race as a Consideration in Adoption and Custody Proceedings, 1969 U. Ill. L.F. 256.


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decisions such as In re a Minor,\textsuperscript{27} wherein the court explained that the racial factor, although significant, could not exclusively determine the child's welfare.\textsuperscript{28} The Minor court permitted a black stepfather to adopt the illegitimate white child of his wife since the adoption was in the best interests of the child. Similarly, in In re Baker,\textsuperscript{29} wherein the adoption involved a child of mixed nationality, the court noted that "under ordinary circumstances, a child should be placed in a family [of] the same racial, religious and cultural backgrounds . . . ."\textsuperscript{30} Nevertheless, since the child's background made placement difficult,\textsuperscript{31} the court permitted a Japanese woman and her Caucasian husband to adopt a child of English and Hispanic ancestry.

New York, which requires neither a statement nor an investigation of the race, color, or ethnic origins of the parties involved,\textsuperscript{32} is typical of such jurisdictions. Agencies and courts often impose their own standards when weighing the racial factor. In two well-known decisions,\textsuperscript{33} the Family Court of New York County severely criticized both the Department of Welfare and the adoptive agencies for their laxness in finding certain children permanent homes. In the first case, In re Bonez,\textsuperscript{34} the court related the lengthy history of an agency's treatment of a child who had been in the agency's custody for 4 years, during which time no legal steps were taken to free her for adoption. The agency had continually requested extensions from the court in its search for a family similar to the child "in coloring and cultural descent."\textsuperscript{35} Finally, the court ordered the child removed to the custody of another agency which had agreed to provide an adoptive home without further delay. In its opinion, the court noted the harmful effects of delayed placement, specifically mentioning both the possible irreparable damage to the child, a likelihood which unfortunately is often overlooked, and the extra expense to the taxpayer.\textsuperscript{36}

Finding a forum in In re P,\textsuperscript{37} for a discussion of the equal protection rights of children, the Family Court of New York County urged that adoption policies and practices be reexamined and modified to provide equal services for children regardless of race, color, or religion. If such modifica-

\textsuperscript{27} 228 F.2d 446 (D.C. Cir. 1955).
\textsuperscript{28} Id. at 448.
\textsuperscript{29} 117 Ohio App. 26, 185 N.E.2d 51 (1962).
\textsuperscript{30} Id. at 28, 185 N.E.2d at 53.
\textsuperscript{31} Id. at 27, 185 N.E.2d at 52.
\textsuperscript{32} The only statutory or state constitutional requirements for matching in New York are those dealing with religion. See note 65 infra.
\textsuperscript{33} In re P., 52 Misc. 2d 528, 276 N.Y.S.2d 257 (Family Ct. N.Y. County 1966); In re Bonez, 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Family Ct. N.Y. County 1966).
\textsuperscript{34} Id. at 1088, 272 N.Y.S.2d at 595.
\textsuperscript{35} Id. at 1089, 272 N.Y.S.2d at 596.
\textsuperscript{36} 52 Misc. 2d 528, 276 N.Y.S.2d 257 (Family Ct. N.Y. County 1966).
tions were not implemented, the court warned, "the racist and religious barriers to equal services . . . will continue to deny [children] the equal protection to which they are entitled."38

Children currently in agency facilities and foster homes in New York City have brought a class action suit against the administrators of the child-care agencies. In *Child v. Beame*,39 the plaintiffs, represented by the New York Civil Liberties Union, claim that they are being denied placement in adoptive homes because of administrative procedures that result in unnecessarily long stays in foster homes. They allege that agency administrators apply arbitrary, inconsistent, and unrealistic standards in evaluating nonwhite parents and in classifying nonwhite children as nonadoptable.40 Plaintiffs also contend that interracial adoptions are discouraged, thereby decreasing the availability of adoptive homes for the majority of prospective adoptees in need of placement, *viz* nonwhite children.41 Basing their claim upon constitutional and statutory grounds, plaintiffs allege: First, a denial of equal protection and due process under the fourteenth amendment; second, a denial of a permanent and stable home under both the first and ninth amendments and Title IV of the Federal Social Security Act;42 and third, that the agencies' procedures result in cruel and unusual punishment under the eighth amendment. In the event the litigants in *Beame* prove successful, it may establish a constitutional right in New York that will mandate procedures facilitating placement for homeless children of all races.

Although most jurisdictions leave the racial factor to the discretion of the agencies and courts, a specific prohibition of discrimination can be found in one state. In 1972, the legislature of Kentucky enacted a statute that precluded denial of an adoption petition "on the basis of the religious, ethnic, racial, or interfaith background of the adoptive applicant."43 This seemingly liberal mandate is qualified, however, by the last sentence of the statute, which permits a denial of the adoption if it would be "contrary to the expressed wishes of the natural parent(s)."44 Hence, if the parents specify a preference for, or against, placement with adoptive parents of a particular race or religion, that request, according to the statute, must be

38 Id. at 533, 276 N.Y.S.2d at 262.
40 Complaint for Plaintiff, Child v. Beame, Civil No. 75-336 (S.D.N.Y., filed Apr. 23, 1975), appearing in 173 N.Y.L.J., Jan. 24, 1975, at 1, cols. 5-6; Memorandum of Law in Opposition to Motion to Dismiss the Complaint for Plaintiff, id. The nonwhite children, those most likely to be denied their constitutional and federal statutory rights, allegedly comprise a special subclass of plaintiffs. Id.
41 Id.
44 Id.
followed. Only in the absence of any stated parental preference does the statute preclude denial of an adoption petition on the basis of race. Whether the qualification declared in this provision can withstand constitutional attack on equal protection grounds is unknown at this time, for the courts have not yet handed down any decision interpreting this legislation.

THE RELIGIOUS FACTOR

The most significant factor utilized by agencies in their placement determinations and by courts in their decisions to approve or deny adoption petitions, has been, and continues to be, religion. In fact, numerous statutory directives require that a petition state the religion of the parties to the adoption.43

There exist two sharply divided schools of thought concerning the relative importance to be placed on the child’s temporal and spiritual welfare. Proponents of religious matching contend that parental religious affiliation must be maintained in order to ensure what they consider to be a primary concern in adoption—the child’s spiritual well-being. Those opposed to religious matching, however, argue that the daily secular needs of the child must take priority.

Emphasizing the importance of temporal interests, supporters of the latter philosophy often insist that religion is a matter of education, rather than genetics, and is therefore an extraneous factor in most adoption proceedings.44 They feel that religion should be considered only in the case of a child who is old enough to have an awareness of his or her religious identification.45 When a child is placed for adoption, normally either the biological parents have consented voluntarily to the adoption or their consent has been deemed unnecessary because of incapacity, abandonment, or neglect.46 After the adoption order has been issued, all the rights and obligations of the biological parents are assumed by the adoptive parents.49

45 Md. Ann. Code art. 16, § 67 (1973) codifies this concept by providing that religion is to be a factor only if the child has a sufficient religious background. Maryland is, however, the only state to make this distinction.
47 See, e.g., id. § 117.
Thus, it is claimed that since all other rights of the biological parents are relinquished, so also should the right to require a particular religious upbringing.

The traditional school of thought, adhering to the ancient maxim "religio sequitur patrem," posits that the religion of the child is prima facie that of the parents. Proponents of this view demand that a child be placed with adoptive parents of his or her religious faith. While insisting that religion remain a prime consideration in adoption proceedings, advocates of this theory also recognize the need to maintain concern for the temporal best interests of the child.

Whatever one's position on the relative importance of maintaining a child's religious affiliation, courts can be criticized for sometimes overlooking already formed parent-child attachments. When a child who has been living with prospective parents for a considerable period of time is removed solely because of a lack of religious matching, an existing parent-child relationship is destroyed. Fortunately, courts are becoming increasingly aware of the damaging effects which such a removal can have upon the child.

The religious factor can be examined within the framework of two possible approaches: the mandatory approach, in which religion is thought to be controlling, and the discretionary approach, wherein religion is considered relevant, but not determinative.

In In re Goldman, the Supreme Judicial Court of Massachusetts followed a mandatory approach in denying an adoption petition by a Jew-

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23. See, e.g., Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907), wherein the court declared: "[T]he parents' religion is prima facie the infant's religion, and the infant should be brought up in that religion and protected against disturbing influences from persons of a different religious faith. . . ." Id. at 200, 80 N.E. at 805 (citation omitted) (emphasis added). For example, the quotation in note 51 supra concludes with a highly significant reservation: "[B]ut the infant's welfare must be first of all regarded and its requirements must be treated as paramount." 195 Mass. at 200, 80 N.E. at 805 (citations omitted) (emphasis added).

24. See, e.g., In re Maxwell, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958), wherein the court expressed concern over "wiping out a relationship between foster parents and child which originated in good faith and has continued for the entire four and a half years of the youngster's life." Id. at 434, 151 N.E.2d at 852, 176 N.Y.S.2d at 284-85. The importance of a stable home life is discussed in note 17 and accompanying text supra.

ish couple who had cared for two 3-year-old children of Catholic parentage since they were approximately 2 weeks old. The pertinent state statute provided that "[i]n making orders for adoption, the judge when practicable must give custody to persons of the same religious faith as that of the child." The Massachusetts court interpreted the term "when practicable" as a legislative mandate to place children with adoptive parents of the same religion if such parents were available, and consequently affirmed the trial court's holding that it would not be in the children's best interests to be adopted by parents of a different faith.

The Massachusetts statutory language has since been amended to delete the words "when practicable" and to add the directive that in an adoption proceeding all relevant factors are to be considered. The present provisions indicate that if a parent specifically requests that the child be placed with adoptive parents of the same religion, that request should be granted, provided that it is in the best interests of the child. This statute has not yet been interpreted by the courts, but the manifest legislative intent seems to require that the interests of the child take precedence over parental religious preferences. As a result of these amendments, religion

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In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.

If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceedings.

(emphasis added).

56 It should be noted that the petitioners in this case were dark complexioned with dark hair whereas the children had blond hair and blue eyes, a fact which may have affected the decision. 331 Mass. at 649, 121 N.E.2d at 844.

A few years earlier, in In re Gally, 329 Mass. 143, 107 N.E.2d 21 (1952), the same Massachusetts court, in passing upon an adoption petition, stated that it was "bound to give controlling effect to identity of religious faith 'when practicable'..." Id. at 149, 107 N.E.2d at 25 (emphasis added). Nevertheless, in Gally, the court concluded that because of the particular facts, viz, a 2-year-old in poor health who had been in the petitioners' care for a considerable time, it would not be practicable to limit custody to parents of the same faith as that of the child. Id. The Gally quotation was cited several years later in Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955). In Ellis, a 4-year-old girl was removed from the home of a Jewish couple with whom she had lived since birth after her biological mother, a Catholic, revoked her consent to the adoption upon learning of the religion of the adoptive couple. Although the court remarked on the obvious hardship of its decision to the petitioners, it made no mention of the hardship inflicted on the child. Id. at 259, 124 N.E.2d at 269.


presumably will no longer be a controlling factor in placing children in adoptive homes in Massachusetts.

Although the mandatory approach still enjoys some vitality, the majority of jurisdictions now subscribe to a discretionary theory and regard religion as a significant, but not controlling, factor.\(^{59}\) This approach was followed by the New Jersey Supreme Court in In re "E," where in the court focused on the adoptive parents' lack of religious affiliation rather than on a difference between their faith and that of the child. The court maintained that while a petitioner's religion should be relevant as a guide in considering moral and ethical fitness,\(^{60}\) it is not controlling.\(^{61}\)

It should be noted that since identical statutory language may be interpreted differently in various states, the approach taken in jurisdictions with similar statutes may yet vary greatly. Thus, the term "when practicable,"\(^{62}\) which was definitively construed as a mandatory directive in Massachusetts,\(^{63}\) remains the subject of continual debate in New York.\(^{64}\)

\(^{59}\) See, e.g., Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957).


\(^{61}\) 59 N.J. at 50, 279 A.2d at 792. Chief Judge Weintraub, in his concurring opinion, agreed with the result reached by the majority but contended that neither inquiry nor investigation into the religious views of adoptive parents should be made. Id. at 58, 279 A.2d at 797 (Weintraub, C.J., concurring).

\(^{62}\) Id. at 48, 279 A.2d at 791.

\(^{63}\) "Practicable" has been defined as "that which may be done, practiced, or accomplished, that which is performable, feasible, possible . . . ." BLACK'S LAW DICTIONARY 1335 (rev. 4th ed. 1968). In In re Gally, 329 Mass. 143, 107 N.E.2d 21, 25 (1952), "practicable" was found to mean "feasible—capable of being put into useful practice."

\(^{64}\) See notes 54-56 and accompanying text supra.

By far the most extensive system of legislative regulation in the area of religious matching is found in New York: the State Constitution, the Domestic Relations Law, the Family Court Act, and the Social Services Law all employ the "when practicable" directive. N.Y. CONSTR. ART. VI, § 32 provides:

When any court having jurisdiction over a child shall commit it or remand it to an institution or agency or place it in the custody of any person by parole, placing out, adoption or guardianship, the child shall be committed or remanded or placed, when practicable, in an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.

(emphasis added). N.Y. DOM. REL. LAW § 113 (McKinney Supp. 1975) provides in pertinent part: "In making orders of adoption the judge or surrogate when practicable must give custody only to persons of the same religious faith as that of the adoptive child . . . . ." (emphasis added). N.Y. FAMILY CT. ACT §§ 116(a)-(b) (McKinney 1975) provide that whenever a child is placed by the court in an institution or by an institution in a home, placement must be "when practicable . . . . [w]ith persons of the same religious faith or persuasion as that of the child." (emphasis added). N.Y. SOC. SERV. LAW § 373 (1)-(3) (McKinney 1976) provides that placement of a child in an institution or a home must be "when practicable" to "persons of the same religious faith as that of the child." (emphasis added). This provision further explains that the aforementioned subsections of the Social Services Law "shall be so
The phrase was first considered by the New York Court of Appeals in In re Maxwell, wherein the court stated that the religious affiliation requirements allow a judge "discretion to approve as adoptive parents persons of a faith different from the child's in exceptional situations." In Maxwell, the unusual facts were that the biological mother had originally signed an affidavit of nonbelief, but later claimed to be Catholic. Moreover, the Protestant adoptive parents, with whom the child had been living for over 4 years, agreed to have the child baptized and educated as a Catholic. Under these circumstances, it may be argued that the case does not in fact represent a true cross-religious adoption, and therefore the holding must be limited to those instances where the adoptive parents consent to raise the child in the biological parents' religion.

If Maxwell is to be accepted as the judicial prescript of New York State, it is curious that the discretionary interpretation it seemed to establish was not applied in Starr v. De Rocco. The Starr court, finding relatives of the same faith as the child to be suitable parents, refused to allow the child to remain with other relatives of a different faith despite their promise to raise the child in his own religion. A strong dissent argued that a sufficient reason for rejecting the relatives with the same religious affiliation as the child's was that they resided in the town where the tragic murder-suicide deaths of the child's biological parents had taken place. The majority apparently did not find this a sufficiently exceptional situation.

In 1970, New York enacted statutory provisions designed to "so far as consistent with the best interests of the child, and where practicable, be applied so as to give effect to the religious wishes . . . of the parents." It

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." Id.


4 N.Y.2d at 434, 151 N.E.2d at 850, 176 N.Y.S.2d at 284 (emphasis added). In a vigorous dissenting opinion, Judge Desmond argued for a mandatory interpretation of the statutory language. Id. at 435, 151 N.E.2d at 851, 176 N.Y.S.2d at 285 (Desmond, J., dissenting).

Id. at 432, 151 N.E.2d at 849, 176 N.Y.S.2d at 282. The Court had first decided that the mother's conduct constituted abandonment and thus dispensed with the need for her consent. See N.Y. Dom. Rel. Law § 111 (McKinney Supp. 1975).

An unwarranted extension of Maxwell occurred in In re Anonymous, 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Family Ct. Dutchess County 1965), wherein the court erroneously referred to Maxwell as standing for the proposition that an unwed mother affiliated with the Protestant religion could lawfully consent to her child's being raised in the Jewish faith. Id. at 929, 261 N.Y.S.2d at 441.


Id. at 1012, 250 N.E.2d at 241, 302 N.Y.S.2d at 836 (Jasen, J., dissenting).

Ch. 494, §§ 1-2, [1970] N.Y. Laws (codified at N.Y. Soc. Serv. Law § 373(7) (McKinney 1976); N.Y. Family Ct. Act § 116(g) (McKinney 1975)). These statutes further provide that "[r]eligious wishes of a parent shall include wishes that the child be placed in the same
is still uncertain as to how these amendments will be interpreted and reconciled with preexisting statutory language. The new statutes do not establish specific guidelines and may well result in subjective and conflicting interpretations.

Subsequent to these amendments, an attempt to define the words "when practicable" was made in In re Efrain C., wherein a New York family court declared religious matching to be "practicable" only if it neither precludes nor substantially delays adoption. In Efrain C., the illegitimate child of a Catholic mother was placed with a nonsectarian agency that had found an adoptive home composed of a Protestant father and a Jewish mother. Recognizing that no Catholic agency could guaran-

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71 Although the court did not specifically define substantial delay, it concluded that a delay in excess of 1 or 2 months would be detrimental. 63 Misc. 2d at 1026, 314 N.Y.S.2d at 263.

72 The State of New York delegates its responsibility towards homeless children to volunteer child-care agencies which receive public funding, most of which are established and maintained on religious bases. A current suit, Wilder v. Sugarman, Civil No. 73-2644 (S.D.N.Y., filed June 14, 1973), challenges the validity of New York's statutory scheme, attacking the procedure as a violation of the establishment and free exercise clauses of the first amendment, the cruel and inhuman treatment clause of the eighth amendment, and the due process and equal protection clauses of the fourteenth amendment. The Wilder plaintiffs allege that the number of voluntary agencies is insufficient to provide for the number of Protestant children in need of placement and that the Catholic and Jewish agencies discriminate in favor of children of their respective faiths. Thus, the plaintiffs, who are predominantly black and Protestant, contend that they are being denied equal services and criticize the New York City practice of maintaining a child welfare system that is controlled by agencies organized along religious lines. They further argue that the New York State regulations requiring the placement of a child in an agency of his or her religious faith are unconstitutional. Complaint for Plaintiff at 11, id.

Plaintiff's contention that the statutes are actually mandatory is supported by In re Glavas, 203 Misc. 590, 121 N.Y.S.2d 12 (Dom. Rel. Ct. N.Y. County 1953), where the court declined to interpret the "when practicable" statutory language as an attenuation of the requirements of religious matching, stating: "It is mandatory, therefore, that, when practicable, a child should be placed in the custody of persons or agencies of the same religious faith or persuasion as that of the child." Id. at 591-92, 121 N.Y.S.2d at 14.

The strength of the religious matching requirement is indicated by the existence of a statute requiring a statement by the court or other official body of the reasons for a placement with an agency or persons of a religious affiliation different from that of the child. N.Y. Soc. Serv. Law § 373(5) (McKinney 1976) provides:

If letters of adoption of a child are granted to a person or persons whose religious faith is different from that of the child or if a child is committed to an agency, association, corporation, society or institution, which is under the control of persons of a religious faith different from that of the child, the court, public board, commission or official shall state or recite the facts which impelled such disposition to be made
the court declared that it would be constitutionally impermissible to allow the State to enforce the religious wishes of the biological parent where such enforcement would be detrimental to the child’s welfare. The court stated:

It is clear that the State unconstitutionally denies to a child the equal protection of the laws—specifically his right to equal protection of his welfare—if it deprives him of the opportunity for a beneficial adoption because of his birth to a parent of a particular religion or religious preference.7

The 1970 New York amendments are especially significant because they direct conformity, not with the child's religion, but with the requested religious preference of the parents. Thus, the statutes seemingly incorporate the traditional principle, “religio sequitur patrem.”77 After the enactment of these amendments, New York courts continued to follow the discretionary approach. In In re Child,78 the court held that a difference in religion between the petitioners and the child is not sufficient reason to deny adoption if the child's best interests would be served by the adoption. Moreover, the court indicated that the child's best interests must prevail over the preferences of the biological parents.79 Subsequently, in Dickens v. Ernesto,80 the New York Court of Appeals described religion as a relevant but neither controlling nor exclusive factor.81

contrary to the religious faith of the child or to any person whose religious faith is different from that of the child and such statement shall be part of the minutes of the proceeding, and subject to inspection by the board or an authorized agency.


Whether the Wilder court will be persuaded by the constitutional attack on New York's current system of religious matching is, of course, open to speculation. That court has already ruled that the system does not on its face violate the establishment clause. Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) (three-judge court). As of yet, however, no decision has been reached as to whether the system is unconstitutional in its application. If this challenge is sustained, the impact and implications would be tremendous, for the entire system of child-care services in New York would seemingly have to be reorganized along nonsectarian lines. It should be noted that this case must be distinguished from Child v. Beame, Civil No. 75-336 (S.D.N.Y., filed Apr. 23, 1975), discussed in text accompanying notes 39-42 supra, in that Wilder deals primarily with the placement of children in agencies, whereas Beame deals with the placement of children by agencies in homes.
Disputes over the age factor usually do not arise in cases where the parents are considered too young, but instead, where it is alleged that they are too old to create an ideally matched family. The problem arises when the ages of the prospective parents and the child are considered too disparate, as when adults in their fifties and sixties petition to adopt a young child. An argument frequently made is that no one beyond child-bearing age should be permitted to adopt a child. Theories which advocate the preclusion of adoptions by older couples are based primarily upon doubts about the capabilities of people in their fifties to cope with a small child and to manage an adolescent in their sixties. According to this line of reasoning, the adoptive couple will create the image of grandparents, rather than, as intended, parents. In addition, the greater susceptibility of an older parent to death or serious illness increases the risk that the child will experience the damaging emotional effects which events of this kind may produce. Since recent judicial decisions indicate a steady erosion of age differential matching requirements, it would appear that courts are no longer persuaded by these theories.

No legislation can be found prescribing a maximum age for adoptive parents. There are, however, statutes which require a minimum age difference between the adoptive parents and the child. Nine jurisdictions have enacted statutory limitations on comparative ages. In seven of these states, the adoptive parent must be at least 10 years older than the adoptee, and in the other two states, 15 years is the minimum differential. Only one state has a statute authorizing adoption "regardless of age." In the vast
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majority of jurisdictions, legislation does not provide for any mandatory age difference.

In no other area is the practice of matching less stringently enforced by the courts than in that of age differences. Older couples are now no longer foreclosed from adopting a young child simply because of an age gap, especially when the child has been living with them for a considerable time prior to the adoption petition. When evaluating the couple as prospective parents, courts no longer look only at the ages of those concerned, but also take into account other material factors. For example, one New York court was strongly influenced by such factors as the good health, financial security, and other apparent qualifications of the petitioners. After specifically noting that New York had no statute providing for age requirements, the court approved an adoption petition by a husband and wife aged 59 and 47 respectively.

New York is not the only jurisdiction which, with increasing frequency, has refrained from denying adoptions for reasons of the adoptive parents' age. The Supreme Court of Wisconsin recently granted an adoption petition by the paternal grandparents, aged 59 and 53, of an illegitimate child who had resided with them since birth. The court criticized the trial court for its failure to give sufficient weight to the child's best interests and for its overemphasis on the petitioners' age and health. Employing the term "psychological parents" to explain the grandparents' relationship to the child, the court expressed awareness of the damaging effect removal from the grandparents' home would have had upon the child.

CONCLUSION

This article has attempted to present an objective view of the trends and controversies surrounding the use of matching requirements in adop-

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See, e.g., In re Michelle Lee T., 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (Ct. App. 1975) (petitioners aged 71 and 55); In re Duke, 95 So. 2d 909 (Fla. 1957) (en banc) (petitioners aged 48 and 63); In re Brown, 85 So. 2d 617 (Fla. 1956) (petitioners aged 57 and 53); Madsen v. Chasten, 7 Ill. App. 3d 21, 286 N.E.2d 505 (1972) (petitioners aged 53 and 58).


In re Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973).

Id. at 551-53, 210 N.W.2d at 871-72. The term "psychological parents" was first articulated in GOLDSTEIN, supra note 5. It is interesting to note that in dealing with the age factor courts have relied to a considerable extent upon the theories postulated in this invaluable treatise. See, e.g., In re Michelle Lee T., 44 Cal. App. 3d 699, 706-08, 117 Cal. Rptr. 856, 860-61 (Ct. App. 1975); In re S, 538 P.2d 947, 948-49 (Ore. Ct. App. 1975). In In re S, the court stated that if age were the only factor militating against approval of an adoption, it "usually would be considered overcome by need of the child for continuity of the only parental relationship he has had." Id. at 948. See also In re McClure, 536 P.2d 112 (Ore. Ct. App. 1975); In re Ellenwood, 532 P.2d 259 (Ore. Ct. App. 1975).
tion proceedings. It is clear that the utilization of matching criteria, particularly the criteria of race and religion, remains an important part of the adoption process. There does exist, however, a general trend toward greater flexibility in the application of these standards, particularly in those cases where the strict application of matching requirements would preclude or significantly delay adoption.