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Domestic Relations--Adoption--Religious Beliefs of Child and Foster Parents (Petition of Gally, 107 N.E.2d 21 (Mass. 1952))

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erty owned by corporations organized in neutral countries. Consequently, enemies could not avoid seizure of their property by incorporating under the laws of neutral countries.[19]

Under Section 9 of the original Act, any non-enemy has a right to recover confiscated property from the Alien Property Custodian upon proof of "any interest, right or title." [20] In two suits involving assets of a corporation whose stock had been seized by the Alien Property Custodian, the courts declined to pierce the "corporate veil" and ruled that the United States acquired only the rights of a stockholder, which do not include title to the property of the corporation.[21]

In the instant case, the Court has recognized a severable interest of the stockholders in specific assets of the corporation. The right to intervene was not decided upon any derivative or representative foundation, as was the issue in the district court.[22] No legal title having been asserted, the Court has apparently decreed an equitable interest sufficient.

The majority opinion speaks of "an interest [of the stockholders] in the assets proportionate to their stock holdings . . ." [23] but neither defines the interest nor cites authority for its recognition. Justice Reed, in the dissenting opinion, asserts that the Court has disregarded the corporate entity in declaring a present interest of stockholders in the physical property of an unliquidated corporation. Since a stockholder has such a severable interest under the provisions of this legislation, query: Would such an interest be recognized in actions for relief from other confiscatory acts of the Government, such as the exercise of the right of eminent domain [24] over corporate property?

DOMESTIC RELATIONS — ADOPTION — RELIGIOUS BELIEFS OF CHILD AND FOSTER PARENTS.—Petitioners in this adoption proceeding had obtained the necessary records,[1] and the consent of the natu-

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[19] *See* Kaufman v. Societe Internationale, 72 Sup. Ct. 611, 612 (1952).

[20] 40 STAT. 411, 419, 50 U. S. C. APP. § 9 (1946). See Standard Oil Co. of N. J. v. Markham, 57 F. Supp. 332 (D. C. S. D. N. Y. 1944); Pflueger v. United States, 121 F. 2d 732 (D. C. Cir.), *cert. denied*, 314 U. S. 617 (1941).

[21] Schering Corp. v. Gilbert, 153 F. 2d 428 (2d Cir. 1946); Knitting Machine Corp. v. Hayward Hosiery Co., 95 F. Supp. 510 (D. C. Mass. 1950).

[22] Societe Internationale v. McGrath, 90 F. Supp. 1011 (D. D. C. 1950).

[23] Kaufman v. Societe Internationale, 72 Sup. Ct. 611, 614 (1952).

[24] "In the ordinary condemnation case the award in favor of the owners of the land condemned stands in lieu of the land. . . . [O]nly those who had an estate in the land have an interest in the fund which takes its place." Oliver v. United States, 156 F. 2d 281, 283 (8th Cir. 1946).

[1] ANN. LAWS MASS., c. 210, § 5A (1950) (requires investigation by, and report from, welfare agency).

ral mother.[2] The Probate Court denied the petition because the petitioners' religious affiliations differed from those of the child's natural parents.[3] On appeal, the Court reversed, and *held* that the adoption statute does not require that a child's custody be given *only* to those of the same religious belief as the child's natural parents.[4] *Petition of Gally,* 107 N. E. 2d 21 (Mass. 1952).

The practice of adoption[5] was part of ancient Roman law,[6] under which, it ". . . was an act by which a person undertook to rear the child of another, and appoint such child as his heir."[7] Subsequently, the countries of continental Europe, which derived their systems of jurisprudence from the Roman law, gave adoption legal recognition.[8]

The right of adoption was unknown to the common law,[9] and exists today only by virtue of statute in both England[10] and the common law jurisdictions of the United States.[11] Massachusetts was one of the first such jurisdictions to enact an adoption statute,[12] and New York followed suit some years later, in 1873.[13] Although adoption statutes are in derogation of the common law, and hence should be strictly construed,[14] the modern tendency is to construe them liberally, so as to favor the child.[15]

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[2] ANN. LAWS MASS., c. 210, § 2 (1950) (requires consent of the natural parent).

[3] The decree indicated that this conclusion was reached ". . . in view of the provisions of . . ." ANN. LAWS MASS., c. 210, § 5B, added in 1950, which provides in substance that, when practicable, adoptive parents *must* be of the same religion as the child. Petition of Gally, 107 N. E. 2d 21, 23 (Mass. 1952).

[4] Ronan, J., dissenting.

[5] "Adoption has been defined to be the act by which the relations of paternity and affiliation are recognized as legally existing between persons not so related by nature." Matter of Session, 70 Mich. 297, 38 N. W. 249, 253 (1888).

[6] *See* Appeal of Woodward, 81 Conn. 152, 70 Atl. 453, 458 (1908); Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585 (1906).

[7] *See* Ballard v. Ward, 89 Pa. 358, 361 (1879).

[8] *See* Ross v. Ross, 129 Mass. 243, 262 (1880); Matter of Thorne, 155 N. Y. 140, 143, 49 N. E. 661, 662 (1898).

[9] *See* Matter of Taggart, 160 Cal. 493, 213 Pac. 504, 506 (1923); Betz v. Horr, 276 N. Y. 83, 86, 11 N. E. 2d 548, 550 (1937); Matter of Carrol, 219 Pa. 440, 68 Atl. 1038, 1039 (1908).

[10] 16 & 17 GEO. 5, c. 29 (1926).

[11] Matter of Thorne, *supra* note 8; *see* Matter of a Minor, 144 F. 2d 644, 646 (D. C. Cir. 1944); Matter of Cohen, 155 Misc. 202, 205, 279 N. Y. Supp. 427, 432 (Surr. Ct. 1935).

[12] Laws of Mass. 1851, c. 324; *see* Ross v. Ross, 129 Mass. 243, 252 (1880).

[13] Laws of N. Y. 1873, c. 830; *see* United States Trust Co. v. Hoyt, 150 App. Div. 621, 624, 135 N. Y. Supp. 849, 851, 852 (1st Dep't 1912).

[14] "As the law of adoption is in derogation of the common law, nothing can be assumed, presumed or inferred, and what is not found in the statute law is a matter for the Legislature to supply and not for the courts." Matter of Monroe, 132 Misc. 279, 281, 229 N. Y. Supp. 476, 478 (Surr. Ct. 1928); *see* Krakow v. Dep't of Public Welfare, 326 Mass. 452, 95 N. E. 2d 184, 186 (1950).

[15] " 'The prevailing tendency at the present time is in the direction of liberal

The paramount consideration in adoption proceedings is the "welfare of the child." [16] Would-be foster parents must therefore be financially and emotionally secure, and possess good character, and be willing to support, educate, and rear the child as if it were their own.[17] The consideration given to the religion of the parties depends upon the policy of the state, and the construction of the local adoption statute. In Massachusetts, for example, prior to the enactment of the statute construed in the instant case, religion was merely an incidental factor to be taken in conjunction with the material elements in determining what was best for the child's welfare.[18] The court had complete discretion regarding religion.[19] New York, on the other hand, attaches great weight to the religion of the child, considering also, of course, the usual criterion of the child's general welfare.[20]

Many states have enacted statutes expressly emphasizing the importance of the child's religion.[21] New York, one of these states, has construed its statute as a legislative mandate leaving no area for judicial discretion.[22] In 1950, Massachusetts enacted a similar law, providing that the judge, when practicable, must give custody of the child only to persons of the same religion as the child.[23]

The instant case is the first to construe this recent Massachusetts law.[24] In effect, the instant opinion states that this statute does *not*

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construction' of such acts to promote the legislative purpose." Matter of Jaren, 223 Minn. 561, 27 N. W. 2d 656, 660 (1947). "Since these statutes confer a beneficial interest they are to be liberally construed. . . ." Fletcher v. Flanary, 185 Va. 409, 38 S. E. 2d 433, 434 (1946).

[16] *See* Krakow v. Dep't of Public Welfare, *supra* note 14; see 2 C. J. S. 425, n. 52 (1952), for cases cited.

[17] *See* Ross v. Ross, 129 Mass. 243, 262 (1880).

[18] Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802 (1907).

[19] *Id.*, 80 N. E. at 805.

[20] Matter of Anonymous, 195 Misc. 6, 88 N. Y. S. 2d 829 (Surr. Ct. 1949); Matter of Korte, 78 Misc. 276, 139 N. Y. Supp. 444 (Co. Ct. 1912); *cf.* Matter of Crickard, 52 Misc. 63, 102 N. Y. Supp. 440 (Surr. Ct. 1906); Matter of Jacquet, 40 Misc. 575, 82 N. Y. Supp. 986 (Surr. Ct. 1903).

[21] ILL. REV. STAT. c. 23, § 299b1 (1951); IOWA CODE §§ 232.24, 235.3 (Barlow & Faupel, 1950); MINN. STAT. § 260.20 (1949); MO. REV. STAT. §§ 211.140, 457.170 (1949); NEB. REV. STAT. § 43-216 (1943); N. Y. DOM. REL. LAW § 113; N. Y. SOC. WELF. LAW § 373(3, 4, 5); N. Y. C. DOM. REL. CT. ACT §§ 86(3), 88; OHIO CODE c. 8, § 1639-33 (Baldwin, 1948); PA. STAT. ANN. tit. 11, § 252 (Purdon, 1933).

[22] Matter of Santos, 278 App. Div. 373, 105 N. Y. S. 2d 716 (1st Dep't 1951). N. Y. C. DOM. REL. CT. ACT § 88(4) provides that the child's ". . . religious faith shall be preserved and protected by the court." "To this, the children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason." *Id.* at 375, 105 N. Y. S. 2d at 718.

[23] ANN. LAWS MASS., c. 210, § 5B, added by Laws of Mass. 1950, c. 737, § 3.

[24] Krakow v. Dep't of Public Welfare, 326 Mass. 452, 95 N. E. 2d 184 (1950), would have been the first to construe this law had not the petition been denied for failure to comply with Section 5A, which required a public welfare report. The New York policy against the adoption of children by

make it mandatory on the court to give custody of the child *only* to those of the same religion.[25] The dissenting opinion points out that since the pertinent Massachusetts and New York statutes regarding the religious consideration are nearly identical, and since the Massachusetts statute was patterned after that of New York, it should be given the same interpretation as in New York—namely, that the religion of the child be considered with as much, if not more, emphasis than its material welfare.[26]

The majority opinion is not sound. The court is the protector of the child, and its primary concern is the child's welfare. It is inconceivable, therefore, that a judge may jeopardize the religion of a helpless child by permitting its adoption into a family of different religious affiliations. As evidenced by the instant decision, the court is in effect claiming that it has the same prerogative of uninhibited discretion *now,* as it had *before* the new statute was added.[27] Does the law exist for naught? Yes, if the judge may disregard the mandate and freely pursue his own course.

As the dissent implied, the spiritual benefit of retaining one's own religion is of a higher nature, and greater value to a child, whether or not he now realizes it, than the material benefits he may reap by adoption into a wealthy family of different religious beliefs.[28] Although that family may sincerely offer him the best in life, the fact remains that the child's religion may be torn from him. The universal standard in adoption proceedings, "the welfare of the child," should therefore be construed to include its *spiritual* as well as its material welfare. The legislature apparently felt that no man, or body of men, has the right to expose a child to the possible loss of its original faith, by allowing its adoption into a family of different religious affiliations: the child is to be reared in the faith into which it was born.

EQUITY—INJUNCTION—PROPERTY RIGHT IN USE OF MARITAL NAME.—Defendant-husband obtained an *ex parte* Mexican divorce,[1]

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those of a different religious belief, was responsible for petitioners' failure to obtain the necessary report.

[25] See Note, 23 A. L. R. 2d 701 (1952), and cases collected therein.

[26] *See* Petition of Gally, 107 N. E. 2d 21, 29, 30 (Mass. 1952).

[27] The statutory use of the phrase, "when practicable," may have induced the court to assume that it should exercise its discretion according to the attendant facts and circumstances, and decree accordingly. *Id.,* 107 N. E. 2d at 25.

[28] *See id.,* 107 N. E. 2d at 28.

[1] Following principles of comity, the court determined the plaintiff's marital status by holding this decree void, inasmuch as it was procured by a New York resident on a twenty-four hour visit.