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NOTES

RELIGIOUS CONSIDERATIONS IN AWARDING CUSTODY OF CHILDREN

In a case now before the Supreme Court of Iowa¹ the question was presented as to whether a mother, who was a Protestant, could be compelled to raise her child, of whom she was awarded custody, in the Roman Catholic faith because of an agreement between her and her former husband that was incorporated in the divorce decree. The purpose of this note will be to examine the position of the Pennsylvania courts on the question of religion in awarding custody.

Pennsylvania, Professor Freedman points out, is the only jurisdiction that forbids deciding the question of custody in the divorce proceeding itself.² Thus the problem of a religion being specified in the divorce decree cannot possibly arise in Pennsylvania since it would totally exceed the power of the court. In order to decide this issue, which is not infrequently of paramount importance to everyone concerned, it is necessary to bring a habeas corpus proceeding.³ The question, therefore, is just what regard should be had for religion by the court that takes jurisdiction of the habeas corpus proceeding.

Clearly it would be a deplorable practice for any court to act in a manner which would tend to create a legal preference for any religious group, and such action would doubtless be declared unconstitutional by either the Pennsylvania or the federal courts because of the constitutional provisions covering such matters.⁴ On the other hand, for clearly apparent reasons, it would be equally abominable to proceed with no concern whatsoever for the spiritual welfare of the child. To ignore religious considerations completely would clearly not be in the best interests of society. The courts in this commonwealth seem to be in complete agreement that such matters must be carefully considered when

¹ Lynch v. Uhlenhoop. This case was not decided at the time of this writing.

² FREEDMAN, LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA § 717 (1939).

³ Gard Appeal, 356 Pa. 378, 52 A.2d 313 (1947).

⁴ The United States Constitution in Article I provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . ."

The Constitution of Pennsylvania recites in Section 3: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

called upon to decide custody of a child. Judge Wright of Pennsylvania's Superior Court has recently stated:

"Religion is an important matter and should be given consideration, but it does not determine the right of custody."⁵

This language seems to enunciate the trend which is apparent in all the decisions in this jurisdiction.

The general consideration used in awarding custody is the welfare of the child. In Pennsylvania the legislature has decreed that in deciding questions of custody the courts should consider the matter from the viewpoint of what would best serve the welfare of the child.⁶ It is unquestionably true that religious guidance is essential to the welfare of a child. In *Butcher's Estate*⁷ the court pointed out:

"The welfare of the child must remain the primary consideration to which all other questions must yield. Its interest is paramount and the court must consider not only the spiritual and temporal welfare but the minor's further training, education and morals, and the ability of the proposed guardian to best take care of the child in each and all of these respects."

Obviously, therefore, the religious well being of the child must be considered, but still the problem of just what weight should be attributed thereto arises.

In the case of *Commonwealth ex rel. Stack v. Stack*⁸ the court seems to have put considerable emphasis on the faith in which the children were baptized. In this case the mother had custody of the children, who were baptized in the Roman Catholic faith, and educated in that religious persuasion for some years. The mother had also agreed to accept that faith at the time of her marriage but was, after the separation, training the children in the Protestant faith. The Superior Court adopted the statement of the trial judge that the children should continue to pursue their Roman Catholic education until they were old enough to decide such matters for themselves. A case some years earlier appears to have reached a different decision. In *Commonwealth ex rel. Kelley v. Kelley*⁹ the father was a Roman Catholic and the mother was a Protestant. The lower court's order placed the child in the custody of his father on the theory that since he had been baptized a Roman Catholic it

⁵ Com. ex rel. *Donie v. Ferree*, 175 Pa. Super. 586, 106 A.2d 681 (1954).

⁶ Act of June 26, 1895, P.L. 316, § 2, PURDON'S PA. STAT. ANN. tit. 48, § 92.

⁷ 266 Pa. 479, 109 Atl. 683 (1920), per Frazer, J.

⁸ 141 Pa. Super. 147, 15 A.2d 76 (1940).

⁹ Com. ex rel. *Kelley v. Kelley*, 83 Pa. Super. 14 (1924).

was now incumbent that he be brought up in that persuasion. The Superior Court reversed this order and in so doing noted:

"There is nothing in the law that requires this. . . . There is no reason why a child should be given to either parent solely because of such parent's adherence to a particular sect. If the permanent welfare of the child would be best conserved by awarding it to the care of its mother, the fact that the child, at the instance of the father, was baptized by a Catholic priest would not be a determining factor."

In a case which is considerably more recent than either the *Stack*¹⁰ or *Kelley*¹¹ cases, *Commonwealth ex rel Kuntz v. Stackhouse*,¹² the parents of the child in question had been murdered and the paternal grandmother and a maternal aunt and her husband both sought custody of the child. The trial court concluded that the moral fitness and material advantages of both homes were equal and based his decision on religion and relationship.¹³ The appellate court, evidently feeling that it was best to have the child reside some distance from the scene of the atrocious and evidently highly publicized murders, reversed the lower court and went on to say:

"We have no concern with committing the child to any particular creed or denomination. Our sole concern is that the home to which we assign it shall provide proper spiritual and material benefits and blessings."

All of the foregoing cases stress the importance the courts place on the welfare of the child. However, in the *Kelley*¹⁴ and *Stack*¹⁵ cases the litigation involved the child's parents and in the *Kuntz*¹⁶ case the parents were both deceased and the litigation was between close relatives. This raises the question of just what the outcome would be if the litigation were between a parent of one religious conviction and an outsider or lesser relative of some other spiritual opinion. The case of *Commonwealth ex rel. Shamenck v. Allen*¹⁷ covers this problem fully. In that case the mother had custody of a child when she suffered a fatal heart attack; at that time a maternal aunt, a Protestant, took the child to live with her. The aunt was educating her in the Protestant faith. The father, a Roman Catholic, wished to obtain custody. However, it seems that the child was quite frightened of him probably because of somewhat

¹⁰ See note 8 *supra*.

¹¹ See note 9 *supra*.

¹² 176 Pa. Super. 361, 108 A.2d 73 (1954).

¹³ Ross, J., pointed out that the trial judge correctly recognized that no statute requires that a child's custody be given to one of the same religious creed as that of the parent who baptized the child. Nevertheless, the trial court was of the opinion that the requirement of the Adoption Code was applicable by analogy and awarded custody on this analogy. This was error.

¹⁴ See note 8 *supra*.

¹⁵ See note 9 *supra*.

¹⁶ See note 12 *supra*.

¹⁷ 179 Pa. Super. 155 (1955).

violent arguments she overheard when the parents were living together. President Judge Smith wrote the lower court opinion¹⁸ and described several instances in which the child displayed fright when she was in the presence of her father. Both President Judge Smith of Dauphin County and Judge Ervin of the Superior Court recognized that ordinarily a parent is entitled to the custody of his child, but they both, in very excellent opinions, realized that it would not be a wise decision to gamble with the welfare and happiness of this child even despite the differences in religious viewpoints. Obviously this case puts strong emphasis on the welfare of the child.

In summary, it appears that the courts of Pennsylvania are more concerned with the welfare of the child than they are with seeing it raised in any particular religious group. Nevertheless, they clearly recognize the fact that some sort of religious up-bringing is not only necessary but is, in fact, essential to the welfare of the child and to the interests of society as a whole. The moral and material benefits of the person to whom the child is to be awarded are of the utmost importance, but religious training is considered also although it alone will not determine who will get custody of the child. In reference to this, the faith in which a child has been baptized and instructed is often quite important. Perhaps the whole problem is best summed up in these words:

"The paramount consideration in cases of this nature is at all times the welfare of the child, which includes its physical, intellectual, moral and spiritual well-being, and all other considerations are subordinate."¹⁹

FRANK S. SEIDERS, JR.

¹⁸ The lower court opinion appears in 67 Dauph. 313 (1954).

¹⁹ Ross, J., in Com. ex rel. Kuntz v. Stackhouse. See note 10 *supra*.