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FAMILY LAW

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LEGISLATION designed to enable prompt judicial supervision of private adoptions was the most significant advance in domestic relations law this year. The legislature also subjected the contracts and earnings of infants engaged in professional activities to judicial control. Notable Court of Appeals decisions granted an annulment for constructive abandonment through refusal of sexual relations, denied an injunction against divorce proceedings in a foreign nation, and refused to abrogate the old rule against actions in tort by a child against his parent. Probably the most notorious case of the year was the action for debauchery brought by an eighteen-year-old plaintiff against the estate of the late Errol Flynn, whose exploits were apparently much more spectacular off the screen than on it. Correctly dismissing the action as one in the nature of "heart balm" relief, Justice Hofstadter unleashed an invective condemning the current "social malaise . . . especially virulent in the area of entertainment," catering to "sadism and violence" and "adolescent eroticism," and suggesting that perhaps a remedy of social ostracism may have to be used where legal sanction proves insufficient.[1]

I

MATRIMONIAL ACTIONS

Marriage and Annulment.—Where infants in New York do not have their marriage solemnized by a clergyman, is the marriage absolutely void? This portentious question was raised in a bigamy prosecution where the second marriage was solemnized by a justice of the peace while the accused was still a minor. The defendant ingeniously coupled the obviously mandatory language of the 1933 amendment to the Domestic Relations Law abolishing common law marriages[2] with a 1927 amendment requiring that all marriages of infants "shall be solemnized" by a clergyman.[3] The second department properly rejected this defense, holding that the 1927 language was only direc-

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1. Aadland v. Flynn, 27 Misc. 2d 833, 835-36, 211 N.Y.S.2d 221, 223-24 (Sup. Ct., Queens Co. 1961).

2. N.Y. Sess. Laws 1933, ch. 606, amending N.Y. Dom. Rel. Law § 11.

3. N.Y. Sess. Laws 1927, ch. 547, amending N.Y. Dom. Rel. Law § 11(5).

tory, and hence that marriages of minors solemnized other than by a clergyman, though prohibited, are nonetheless valid.[4] Many a marriage could be needlessly voided, with obvious social detriment, if this common sense construction did not prevail.

Conflicting decisions arose this year regarding the validity of marriages entered into by New York minors in sister states. Generally, legality of such marriage in New York "is to be determined by the law of the place where it is celebrated." Two exceptions are recognized involving "cases within the prohibition of positive law and cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law."[5] Thus the validity of the marriage in Georgia of a fifteen-year-old girl without the consent of her parents was upheld,[6] as the New York "positive law"[7] regarding annulment for nonage merely gives the court discretion to annul after taking all the facts and circumstances surrounding the marriage into consideration. This in effect beclouds the first exception above. Another court, choosing to exercise this "discretion," although perhaps less judiciously, refused to recognize the Oregon marriage of a sixteen-year-old girl even though her mother had consented.[8]

In the difficult area involving the probative force to be given to the presumption of the validity of a current marriage where it is challenged by evidence of a subsisting prior one, the rule continues to be that the second marriage will be upheld unless the existence and continuation of the first can be established by definite proof.[9] Thus record evidence of the prior marriage was insufficient without further proof that the marriage was valid and continued undissolved at the time of the second marriage.[10] But when the husband in the first marriage testifies he never was a party plaintiff or defendant to an action seeking dissolution of this marriage and shows record evidence that the wife, continuously resident in New York, had not sought any New

4. People v. Heine, 12 App. Div. 2d 36, 208 N.Y.S.2d 188 (2d Dep't 1960).

5. Matter of Estate of May, 305 N.Y. 486, 490-91, 114 N.E.2d 4, 6 (1953), finding neither exception applicable and upholding the Rhode Island marriage of a New York couple who were uncle and niece even though such kinship would be incestuous in New York.

6. Hilliard v. Hilliard, 24 Misc. 2d 861, 209 N.Y.S.2d 132 (Sup. Ct., Greene Co. 1960).

7. N.Y. Dom. Rel. Law § 7(1).

8. Holland v. Holland, 212 N.Y.S.2d 805 (Sup. Ct., Kings Co. 1961) (no cohabitation occurred after wife had reached age of eighteen).

9. Matter of Dugro, 261 App. Div. 236, 25 N.Y.S.2d 88 (1st Dep't), aff'd mem., 287 N.Y. 595, 38 N.E.2d 706 (1941).

10. McCarter v. McCarter, 27 Misc. 2d 610, 208 N.Y.S.2d 876 (Sup. Ct., Kings Co. 1960).

York dissolution, this is proof, although of a negative variety, and defeats the presumption of the validity of the wife's second marriage.[11]

Separation and Divorce.—In *Diemer v. Diemer*,[12] the Court of Appeals confirmed what had been suspected since *Mirizio v. Mirizio*,[13] that protracted refusal of sexual intercourse for whatever reason (save of course physical ill-health) is sufficient basis for a legal separation. In *Mirizio* the issue had been raised by way of defense to an action by a wife for separation based on nonsupport, and the court's acceptance of the defense did not clearly establish that such contention would be allowed affirmative use. In *Diemer* a Catholic woman married a Protestant in a Protestant ceremony. After several years of religious tension between the couple, the wife refused sexual intercourse unless her husband consented to a Catholic remarriage. After some seven months of this enforced abstinence the husband left the wife and commenced an action for separation, alleging refusal of intercourse as cruelty. The trial court denied the separation, holding the denial of sexual intercourse was not cruel because not "willfully and deliberately intended to inflict mental or physical suffering"[14] and a divided appellate court affirmed. The Court of Appeals, rejecting this determination, enunciated the rule that total denial of sexual relations constituted constructive abandonment and granted the separation.[15]

Chief Judge Desmond and Judge Burke dissented on the procedural ground that the majority had switched the issue from cruelty to abandonment, though this was neither pleaded nor argued, thus—rather *deus ex machina*—presenting an otherwise losing party with a new winning theory.[16] Excess of liberality in this area of matrimonial actions is now the trend.[17] In any event, the law now seems clear: "[A] refusal to have marital sexual relations undermines the essential structure of marriage . . . . This being so, it may not be doubted that a total and irrevocable negation of what is lawful in marriage and unlawful in every other relationship, of what unmistakably and uniquely characterizes marriage and no other relationship, constitutes abandon-

11. In re Estate of Lancaster, 209 N.Y.S.2d 395 (Surr. Ct., N.Y. Co. 1960).

12. 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960).

13. 242 N.Y. 74, 150 N.E. 605 (1926).

14. 149 N.Y.S.2d 146, 149 (Sup. Ct., Queens Co. 1956), aff'd, 6 App. Div. 2d 882, 176 N.Y.S.2d 231 (2d Dep't 1958), modified, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S. 2d 829 (1960).

15. 8 N.Y.2d at 210, 168 N.E.2d at 657, 203 N.Y.S.2d at 833.

16. Id. at 213, 168 N.E.2d at 659, 203 N.Y.S.2d at 835-36.

17. See Traylor v. Traylor, 3 App. Div. 2d 727, 159 N.Y.S.2d 818 (2d Dep't 1957) (mem.) (separation for cruelty granted, affirmed instead on nonsupport and abandonment). See also Mullane v. Mullane, 210 N.Y.S.2d 669, 673 (Sup. Ct., Westch. Co. 1960), and Garfinkel v. Garfinkel, 210 N.Y.S.2d 674, 676 (Sup. Ct., Kings Co. 1960), where the complaints were deemed amended to allege abandonment.

ment . . . ."[18] It is hard to quarrel with this theory. Sexual intercourse, and usually, implicitly, the procreation of children, are the heart of marriage, and the law should not countenance a total refusal of sexual relations, no matter how well motivated.[19] In any event, one practical prophecy can be made: this new avenue to separation by abandonment will be well trodden.[20] It is often much easier, in situations of estrangement, to show protracted refusal of sexual relations—six months will do—than cruelty or nonsupport.

Does a trial court have power to order a husband to quit a matrimonial domicile owned entirely by the wife, pending trial of her action for separation? Section 1164-a of the Civil Practice Act allows such relief where the home is owned as a tenancy by the entirety, but there is no statutory reference to a situation where the home is owned by the complainant spouse. Confronted with several obtuse precedents to the contrary,[21] Justice Meyer has quite rationally exercised such power issuing a temporary injunction based upon Section 878 of the Civil Practice Act and upon a finding of danger to the complainant spouse.[22] The same justice also held there is no abandonment where the parties separate by consent,[23] and the Court of Appeals has affirmed *Ziegler v. Ziegler*,[24] criticized in this Survey last year, which held that a trial court's incidental finding of abandonment as a fact can constitute res judicata in a subsequent action for separation.

Jurisdiction: Validity of Foreign Decrees.—The trend is against the granting of injunctions against foreign dissolution actions. In

18. 8 N.Y.2d at 210, 168 N.E.2d at 657, 203 N.Y.S.2d at 833.

19. For a virtual reversal of roles, see Di Croce v. Di Croce, 27 Misc. 2d 1035, 209 N.Y.S.2d 624 (Sup. Ct., Nassau Co. 1961), where a Catholic husband secured a separation for cruelty because his wife, who converted to a Pentecostal sect, continually harassed him and refused to have sexual relations with him, both on grounds of her new religious beliefs.

20. Cf. Kronenberg v. Kronenberg, 203 N.Y.S.2d 218 (Sup. Ct., Kings Co. 1960), modified on other grounds, 13 App. Div. 2d 682, 213 N.Y.S.2d 811 (2d Dep't 1961) (mem.), where separation was granted on abandonment, marital relations having ceased for two years. The case was decided just after Diemer.

21. See, e.g., Donnelly v. Donnelly, 272 App. Div. 779, 69 N.Y.S.2d 651 (2d Dep't 1947) (provision ordering husband to move from family home struck); Klein v. Klein, 25 Misc. 2d 539, 202 N.Y.S.2d 938 (Sup. Ct., Kings Co. 1960) (order to compel husband to move from family apartment denied); Goodwin v. Goodwin, 172 Misc. 118, 13 N.Y.S.2d 894 (Sup. Ct., Nassau Co. 1939) (owned by wife, injunction denied).

22. Mayeri v. Mayeri, 26 Misc. 2d 6, 208 N.Y.S.2d 44 (Sup. Ct., Nassau Co. 1960). Accord, Budowsky v. Budowsky, 24 Misc. 2d 137, 201 N.Y.S.2d 627 (Sup. Ct., Nassau Co. 1960).

23. Dominick v. Dominick, 26 Misc. 2d 344, 205 N.Y.S.2d 503 (Sup. Ct., Nassau Co. 1960).

24. 9 N.Y.2d 737, 174 N.E.2d 332, 214 N.Y.S.2d 349 (1961) (mem.), affirming 10 App. Div. 2d 270, 198 N.Y.S.2d 875 (1st Dep't 1960) (mem.), 1960 Survey of N.Y. Law, 35 N.Y.U.L. Rev. 1553.

Rosenbaum v. Rosenbaum[25] the Court of Appeals held that no injunction would issue against resort to a Mexican court where the resultant decree would be clearly void, the rationale being that no harm could befall the moving party. Now, in *Arpels v. Arpels* the court has taken a further step proclaiming that "where a foreign divorce is sought, our courts will intrude, even if a serious impropriety would be involved in its procurement, only when the ensuing decree would be entitled to full faith and credit."[26] In *Arpels* both parties were French domiciliaries when married in France and both had maintained substantial contacts there, so it was quite likely that the French divorce sought by the husband would be accorded recognition through comity. Judge Fuld reasoned that either the comity would be awarded so that the wife could not complain of any fraud on which to found the injunction, or that the divorce would be declared void so that she would incur no harm. *Quaere* then why this reasoning should not apply to decrees of sister states as well as to those of foreign nations? The rationale of *Garvin v. Garvin*[27] which granted an injunction against a Virgin Islands divorce was that movant might well fear difficulty in challenging the prima facie jurisdiction of the foreign forum whose decree is entitled to "full faith and credit" and "prima facie weight" under the holdings of *Williams v. North Carolina*.[28] But, if comity has any meaning, this fear, though carrying somewhat less force, is also active with regard to a foreign nation's decree. The sound logic of *Arpels* seriously weakens the sense of *Garvin*, and suggests that in this area the latter's overruling of *Goldstein v. Goldstein*[29] may well have been premature, even in light of the *Williams v. North Carolina* decisions.

The elaborate opinion of Justice Meyer in *Dominick v. Dominick*[30] merits careful attention in connection with the above discussion. Defendant-husband, a nonresident of New York since 1940, commenced an action for divorce in Kentucky. Plaintiff-wife, a New York domiciliary, sued here for separation, simultaneously securing an injunction pendente lite against husband's proceeding with his Kentucky

25. 309 N.Y. 371, 130 N.E.2d 902 (1955).

26. 8 N.Y.2d 339, 341-42, 170 N.E.2d 670, 671, 207 N.Y.S.2d 663, 665 (1960).

27. 302 N.Y. 96, 96 N.E.2d 721 (1951).

28. 317 U.S. 287 (1942); 325 U.S. 226 (1945).

29. 283 N.Y. 146, 27 N.E.2d 969 (1940), denying injunction under the rule of Haddock v. Haddock, 201 U.S. 562 (1906), that the stay-at-home spouse, not personally served, is not bound by such sister state decrees.

30. 26 Misc. 2d 344, 205 N.Y.S.2d 503 (Sup. Ct., Nassau Co. 1960). See also Hoenig v. Hoenig, 24 Misc. 2d 1091, 205 N.Y.S.2d 682 (Sup. Ct., Bronx Co. 1960), where the court refused to issue an injunction pendente lite to New York wife against New Jersey husband seeking a New Jersey divorce.

divorce. Despite the injunction, a Kentucky divorce was obtained. Husband then sought to use the divorce as a defense in the wife's New York action for separation. The court concluded that since the husband was a Kentucky domiciliary, the Kentucky decree was entitled to full faith and credit and hence barred the separation action. The injunction pendente lite could have no effect because it is properly directed only against New York domiciliaries who seek decrees in sister states which lack jurisdiction.

In a case of first impression in New York, standard conflict of laws principles were followed to hold that the Alabama sixty-day waiting period before remarriage after a final decree of divorce is penal in character. Accordingly, this aspect of the Alabama decree need not be given full faith and credit to bar a second marriage in New York within the proscribed time.[31] Of course, a second marriage within the period required for a foreign interlocutory decree to become final is null and void.[32]

II

Separation Agreements and Alimony

Separation Agreements.—The absolute bar of Domestic Relations Law Section 51 against agreements between husband and wife to alter or dissolve the marriage or to relieve a spouse of his obligation to support his wife[33] is undoubtedly salutary, but the actual application can lead to rather strained results. Thus an agreement for the support of the wife out of a specified trust fund, entered into just after an interlocutory decree of divorce is filed, was held void because it might tend to disrupt whatever might remain of this obviously shattered marriage.[34] It would seem that neither the technical subsistence of the marriage until the final decree is entered, nor the remote possibility of conciliation would require this result. The law seems clear though that no agreement however phrased will be countenanced which in any way tends to relieve a spouse of his duty of support until the marriage is irrevocably dissolved.[35] Thus an agreement for nonsupport while

31. Olsen v. Olsen, 27 Misc. 2d 555, 209 N.Y.S.2d 503 (Sup. Ct., Nassau Co. 1960).

32. Sherman v. Sherman, 213 N.Y.S.2d 216 (Sup. Ct., Kings Co. 1961).

33. Under the recent 1960 amendment to § 51, an agreement to relieve the wife of liability for support of the husband where she is possessed of sufficient means and he is incapable of self-support and is or is likely to become a public charge is also prohibited. N.Y. Dom. Rel. Law § 51 (McKinney Supp. 1961).

34. Occhino v. Occhino, 26 Misc. 2d 124, 208 N.Y.S.2d 769 (Sup. Ct., Erie Co. 1960). It should be noted that the award of the court was the same as under the void agreement.

35. See Judge Fuld's language in Haas v. Haas, 298 N.Y. 69, 72, 80 N.E.2d 337, 339 (1948): "[H]owever artful the terms of the agreement, however veiled the design to terminate the . . . obligation, . . . the attempts are doomed to failure." Cf. Kepner

the wife is "employed" at a specified position is void because "employment" is not equivalent to the standard of support imposed by the law,[36] although an agreement for nonsupport while the wife is "self-sustaining" would have been upheld where defined in the light of the financial circumstances and standard of living of the parties.[37]

Even though a marriage is annulled, a separation agreement made prior to the annulment has been properly held to subsist under Civil Practice Act Section 1140-a, which creates a liability for continued support of the wife after annulment, a result dictated by New York's continued adherence to adultery as the sole ground for divorce.[38] An examination before trial as to the present financial status of the husband in an action to set aside a separation contract is not regarded as a matrimonial action and hence is freely granted.[39] But, if the pleadings are such that the examination might well relate to other matrimonial causes of action, then the proper course is to deny the motion with leave to separate out "itemized particular issues" on which an examination before trial would be proper.[40]

Alimony: Counsel Fees.—The fourth department over the dissent of its presiding justice followed the interpretation of Section 1170 of the Civil Practice Act which allows a lump sum settlement to be disregarded when altered circumstances warrant further financial assistance.[41] The second department, over Justice Beldock's dissent, is following a policy of denying alimony pendente lite whenever the husband continues to reside at home and pay the household expenses.[42] The question of whether a husband who sues to alter a prior divorce award must pay his ex-wife's counsel fees was answered in the affirmative by a divided second department.[43] In somewhat the reverse situa-

v. Kepner, 12 App. Div. 2d 204, 209 N.Y.S.2d 681 (3d Dep't 1961), where a separation contract providing that both parties would submit to jurisdiction of a foreign court in divorce proceedings and that the terms of their separation agreement were not to be altered was deemed not contingent on a divorce and hence valid.

36. Mullane v. Mullane, 210 N.Y.S.2d 669 (Sup. Ct., Westch. Co. 1960).

37. See Zuckerman v. Zuckerman, 96 N.Y.S.2d 190 (Sup. Ct., Kings Co. 1950).

38. Dunn v. Dunn, 26 Misc. 2d 22, 213 N.Y.S.2d 96 (Dist. Ct., Nassau Co. 1960).

39. Berkey v. Berkey, 24 Misc. 2d 711, 203 N.Y.S.2d 717 (Sup. Ct., N.Y. Co. 1960).

40. Wilde v. Wilde, 28 Misc. 2d 407, 409, 213 N.Y.S.2d 961, 963 (Sup. Ct., N.Y. Co. 1961); Stahl v. Stahl, 213 N.Y.S.2d 964 (Sup. Ct., N.Y. Co. 1961).

41. Nichols v. Nichols, 11 App. Div. 2d 149, 202 N.Y.S.2d 124 (4th Dep't 1960), following Blaufarb v. Blaufarb, 9 App. Div. 2d 86, 191 N.Y.S.2d 785 (1st Dep't 1959) (all claims waived, alimony awarded because of changed circumstances).

42. Scheideler v. Scheideler, 10 App. Div. 2d 991, 203 N.Y.S.2d 109 (2d Dep't 1960) (mem.); Kronenberg v. Kronenberg, 10 App. Div. 2d 987, 203 N.Y.S.2d 217 (2d Dep't 1960) (mem.).

43. Friou v. Gentes, 11 App. Div. 2d 124, 204 N.Y.S.2d 836 (2d Dep't 1960). Contra, Kleefield v. Funtanellas, 201 N.Y.S.2d 907 (N.Y.C. Munic. Ct. 1960).

tion, an ex-wife defending against an action to have a foreign decree set aside has been denied counsel fees on the ground that she denies the existence of the marriage relationship, whereas Section 1169 of the Civil Practice Act allows counsel fees to the wife only where there is an existing marriage.[44] It should also be noted that the Domestic Relations Court Act has been amended to allow counsel fees to a wife in an action brought on behalf of her children alone.[45]

III

CHILDREN

Adoption.—The most significant event of the year was the passage of legislation governing "private placement" (formerly known as voluntary) adoptions; that is, those adoptions effected by parties other than authorized agencies. Since over 60% of all adoptions in New York are private,[46] this reform has been long overdue. The new act,[47] which does not affect authorized agency adoptions, provides essentially that as soon as the foster parents present a petition for adoption, the judge or surrogate shall order a full investigation, to be completed within thirty days, of the suitability of the adoptive parents. The circumstances by which the foster parents received custody are also to be investigated. Although there must be a six-month waiting period between submission of the petition and entry of any adoption order, this may be concurrent with the normal six-month period required before adoption. A notable feature is that if the judge or surrogate deems the foster parents unsuitable, he may order the child removed from their custody and placed either again with the natural parents or with an authorized agency. Formerly, he could only deny the adoption—leaving the child with the unsuitable applicants.[48]

The new law is a substantial improvement and should be of considerable aid in curbing the activities of "black market" baby operators. Its only noteworthy opposition came from the American Jewish Congress because of the incorporation of the clause that "when practicable" the adoptive parents should be of the same religious faith as that of the child.[49] But the Court of Appeals in *Matter of Maxwell*[50]

44. Swertz v. Swertz, 28 Misc. 2d 904, 211 N.Y.S.2d 252 (Sup. Ct., Erie Co. 1961).

45. N.Y.C. Dom. Rel. Ct. Act § 131 (McKinney Supp. 1961).

46. Memorandum of Joint Legislative Committee on Matrimonial and Family Law, Private-Placement Adoptions, N.Y. Sess. Laws 1961, at 1913.

47. N.Y. Dom. Rel. Law art. VII, especially §§ 115-16 (McKinney Supp. 1961).

48. Hofstadter & Levittan, A Study in Adoption-Initial Investigation and Termination of Parental Rights (pt. 3), 142 N.Y.L.J. No. 60, p. 4, col. 2, n.33 (Sept. 23, 1959).

49. N.Y. Soc. Welfare Law § 373, specifically incorporated in N.Y. Dom. Rel. Law § 110 (McKinney Supp. 1961). See Memorandum of Joint Legislative Committee, supra note 46.

50. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

had already held this provision applicable to private placement adoptions, and if it is only construed, as in that case, with a modicum of discretion, the clause need not prove onerous.

The law may however be criticized to this extent: there is no requirement that an investigation occur as soon as a court in any way has cognizance that a child has been privately placed; rather, this must await such time as the foster parents choose to enter a petition for adoption, so that "a child may remain in the strange home in which he has been placed, good or bad, for years—and even permanently—without any investigation of the home or any supervision of his well-being."[51] It is also unfortunate that the current law did not remove the provision that no consent to an adoption of his child is required from a parent who is civilly dead or has been divorced on the ground of adultery.[52] There is no necessary connection between a parent's criminal record, or his commission of adultery, and a total disinterest in the welfare of his child.[53]

Custody and Support; *Infants' Contracts and Earnings.*—Reported cases this year manifest quite strikingly a trend to continue custody initially granted to a father, not only in the clear cases where the mother remains unfit,[54] but also where she can now provide a home substantially equal. Following last year's exemplary decision of *Lang v. Lang*,[55] one court declared that "the custody of infant children is not to be shifted from parent to parent merely because the noncustodial parent has experienced an improvement in condition, status or character, at least so long as the custodial parent has not been shown to be unfit."[56] This commendable emphasis on stability resulted in the confirmation of the father's custody even where the children exhibited a preference for the mother (having lived six years with

51. Hofstadter & Levittan, supra note 48 (pt. 2), 142 N.Y.L.J. No. 59, p. 4, col. 4 (Sept. 22, 1959).

52. N.Y. Dom. Rel. Law § 111 (McKinney Supp. 1961). But notice to the divorced parent is required so that at least his or her objections can be heard.

53. See Goebel, Family Law, 1960 Survey of N.Y. Law, 35 N.Y.U.L. Rev. 1552, 1560. Adoption over the objection of the father, divorced for adultery, occurred this year in Matter of Adoption of Widrick, 25 Misc. 2d 1078, 212 N.Y.S.2d 350 (Surr. Ct., St. Lawrence Co. 1960). See also Matter of Adoption of Bush, 27 Misc. 2d 705, 213 N.Y.S.2d 480 (Jefferson County Ct. 1961). In both cases, however, there was evidence that could have warranted a finding of abandonment.

54. People ex rel. Rowe v. Rowe, 11 App. Div. 2d 759, 202 N.Y.S.2d 371 (1st Dep't 1960) (mem.); Matter of Ottensman, 22 Misc. 2d 104, 202 N.Y.S.2d 387 (Sup. Ct., Nassau Co. 1960).

55. 9 App. Div. 2d 401, 193 N.Y.S.2d 763 (1st Dep't 1959), aff'd mem., 7 N.Y.2d 1029, 166 N.E.2d 861, 200 N.Y.S.2d 71 (1960), 1960 Survey of N.Y. Law, 35 N.Y.U.L. Rev. 1559.

56. In re Wasserman, 203 N.Y.S.2d 554, 558 (Sup. Ct., Westch. Co. 1960). Accord, De Grace v. Leonard, 29 Misc. 2d 11, 211 N.Y.S.2d 102 (Sup. Ct., Queens Co. 1961); Burns v. Burns, 23 Misc. 2d 130, 205 N.Y.S.2d 448 (Sup. Ct., Tompkins Co. 1960).

the father)[57] or were illegitimate,[58] but failed to prevail when the appellate division deemed the child of too "tender age" not to live with the mother.[59] The rule clearly has no place, however, where the issue is between a parent and a nonparent: the parent must be proven unfit before he loses his basic right to custody.[60] Transfer of a child as punishment for a contempt by the custodial parent was reversed,[61] and the custodial parent was held to have the right to alter the child's religion over the objections of the other parent, a situation always replete with emotional difficulty.[62] In an unusual situation, it was held that although an objecting noncustodial parent can prevent his children from legally changing their name to that of their stepfather, the children do have a common law right to alter their name by customary usage.[63]

Haag v. Barnes[64] posed the question whether an action by a New York mother against the putative Illinois father of her illegitimate child can be defeated by an Illinois contract providing amply for the child's support. The first department held that such a contract should be governed by Illinois law and, since not contrary to New York law, the contract was a bar. In a similar situation involving a Dominican contract, the defense proved to have no merit as there was no provision for child support, the wife merely agreeing to be responsible for the child.[65] As long as the father is a New York resident, the New York courts have ordered child support, even though both mother and child are residents of another country.[66]

Baseball "bonus babies" and Broadway's bombastic brats will in the future have additional agents on their sides—these wearing black robes. A new act,[67] following a similar California model, provides that

57. People ex rel. Fields v. Kaufmann, 27 Misc. 2d 625, 207 N.Y.S.2d 870 (Sup. Ct., N.Y. Co. 1960).

58. Matter of Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct., Nassau Co. 1960).

59. People ex rel. Lohaus v. Lohaus, 12 App. Div. 2d 944, 210 N.Y.S.2d 921 (2d Dep't 1961) (mem.) (8 years old).

60. Matter of Custody of Dailey, 204 N.Y.S.2d 321 (Sup. Ct., Nassau Co. 1960). Cf. People ex rel. Anonymous v. Anonymous, 27 Misc. 2d 190, 210 N.Y.S.2d 698 (Sup. Ct., Kings Co. 1960) (unfit mother did not prevail against nonrelatives after abandonment).

61. Shakun v. Shakun, 11 App. Div. 2d 724, 204 N.Y.S.2d 694 (2d Dep't 1960) (mem.).

62. Paolella v. Phillips, 27 Misc. 2d 763, 209 N.Y.S.2d 165 (Sup. Ct., Suffolk Co. 1960).

63. Matter of "Claire Shipley," 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct., Nassau Co. 1960).

64. 11 App. Div. 2d 430, 207 N.Y.S.2d 624 (1st Dep't 1960).

65. Smith v. Jones, 211 N.Y.S.2d 815 (Ct. Spec. Sess., N.Y. Co. 1961).

66. Matter of Friedmann v. Depicolzuane, 28 Misc. 2d 129, 210 N.Y.S.2d 464 (N.Y.C. Dom. Rel. Ct. 1960).

67. N.Y. Dom. Rel. Law § 74 (McKinney Supp. 1961), added by N.Y. Sess. Laws 1961, ch. 137.

all contracts of infants acting in any way as performing artists or players in a professional sport, whether the infant be a New York resident or a nonresident performing in New York, must be court approved. Once the contract is approved, the infant loses all power to avoid it either before or after he attains maturity. This is desirable to protect promoters and managers who rely heavily on due performance. The court retains, however, a continuing supervision over performance of the contract and may abrogate it totally or order its modification whenever the well-being of the infant requires. Perhaps a more important function of the act is that by which the court may order the setting aside and saving of a substantial proportion of the infant's earnings under a special guardian—ending an anomalous situation, as funds received by an infant as compensation for personal injuries have long been so protected under Section 980-a of the Civil Practice Act.

Parent-Child Suits.—The Court of Appeals missed a golden opportunity to overhaul an antiquated judicial doctrine in *Badigian v. Badigian.*[68] There a three-year-old child was injured through the negligence of his father in leaving the family car unlocked. The legal issue, put badly, was whether to retain the exception-riddled rule that a child cannot sue his parents in tort. Placing its emphasis on the threat to the family unity, the court refused to allow the suit. That a son or daughter over twenty-one can sue, or that an infant can sue for property damage, or where the tort was the product of wanton or willful conduct, or occurred in the course of the parents' business—all presumably without seriously hampering family harmony—did not impress the majority.

Judge Fuld's impressive dissent struck hard at the family unit shibboleth, emphasizing that the present availability of insurance takes the sting out of an intra-family tort action. He observed that the elimination of the action, and thereby of the insurance, may put a family under a severe financial burden. "To tell them that the pains must be endured for the peace and welfare of the family is something of a mockery."[69] The rule of parent-child tort immunity arose in the courts in the late nineteenth century. There is no longer any cogent reason for its survival. The Court of Appeals should have consigned it to the past as it did the charitable immunity rule in *Bing v. Thunig.*[70] Since it declined the opportunity, it is to be hoped that the legislature will do away with this outdated rule.

68. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).
69. Id. at 482, 174 N.E.2d at 724, 215 N.Y.S.2d at 43.
70. 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).