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> with [measures that would greatly reduce] both the opportunities and the temptations to invade the privacy of telephone users. . . .[50]

As the battles rage in the legislative hearings, the courts continue to find picayune distinctions, and to conjure up new interpretations in their application of Section 605. Until some change, as that proposed here, is adopted, Von Jhering's words will continue to echo in the halls of justice:

> The hair-splitting among us has not yet come to an end.[51]

JOSEPH KALK

Enforceability of Prenuptial Promises Concerning The Religious Training of Children

In recent years there has been an increasing amount of litigation concerning the enforceability of prenuptial promises to raise a child in a particular religion. The typical case is a marriage between a Roman Catholic and a non-Catholic[1] in a Roman Catholic ceremony. Before the Catholic Church will recognize such a marriage, the non-Catholic party must agree in writing to raise all children emanating from the marriage according to the precepts of the Catholic Church, and not to interfere with the practice of Catholicism by the other members of the family.[2] There is little doubt that marriage is regarded by the law as a valuable consideration and that marriage is sufficient consideration in exchange for a prenuptial promise.[3] Without the promise, the Catholic party would not be permitted to marry the non-Catholic party.[4]

When a divorce or separation occurs, however, and children of the marriage are in the custody of the non-Catholic party, the non-Catholic party often refuses or neglects to fulfill the promise. The issue of enforceability may arise in several ways: in contempt proceedings over the promisor's failure to comply with a divorce decree which incorporated the prenuptial promise;[5] out of a request for a court order specifying the religion in which the children are to be reared,[6] in habeas corpus proceedings,[7] and in other related proceedings.[8] The majority of the courts of the United States have refused to enforce the contract in such situations, leaving the promisee without relief.[9] The refusal to enforce these promises, however, has not been unanimous. A recent New York

50. J. Wellington Powell, Vice Pres. N.Y. Telephone Co., in the INTERIM REPORT OF THE JOINT LEGISLATIVE COMMITTEE, NEW YORK (March, 1956), App. p. 3.

51. Von Jhering, *In the Heaven of Legal Concepts*, in COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678, 682 (1953).

case did enforce such a promise,[10] and some early cases indicated a willingness to enforce the promises except for procedural obstacles.[11]

The courts have generally based their refusal to enforce these contracts on constitutional grounds and on the difficulty of enforcement. It is suggested that in some instances the courts surrender too easily to these obstacles. The purpose of this note is to examine the obstacles to enforcement and to indicate the reasons for enforcement.

CONSTITUTIONALITY OF ENFORCEMENT

In the recent case of *Hackett v. Hackett*[12] an Ohio Court of Appeals (Cuyahoga County) placed Ohio with those jurisdictions following the

1. But the problem has also arisen concerning prenuptial contracts providing for the education of children in Protestant Sects. *In re* Story, 2 Ir. Rep. K.B.D. 328 (1916); *In re* Maher, 28 Ont. L. Rep. 419 (1913).

2. In Dumais v. Dumais, 152 Me. 24, 122 A.2d 322, 323 (1956), is reported in part an application to the Bishop of Cleveland for dispensation for a mixed marriage:

"I, not a member of the Catholic Church, desiring to marry _____ _____, a Catholic, promise on my conscience:

"1. That I will ever adhere to the divine law that prohibits all divorce. . . .

* * * *

"3. That all children, boys and girls, that may be born of this union, shall be baptized and educated solely in the Catholic religion by me even in the event of death of my Catholic consort;

"4. That all children in the event of dispute, shall be given to such guardians that will assure the faithful execution of my covenant and promise. . . ."

3. 1 WILLISTON, CONTRACTS § 110 (Rev. ed. 1936).

4. C.J.C. Con. 2375 (CODEX JURIS CANONICI). See Papal Encyclical *Casti Connubiins* in FOUR GREAT ENCYCLICALS 75 (1931).

5. Lynch v. Uhlenhopp, 78 N.W.2d 491 (Iowa 1956).

6. Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953).

7. McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A.2d 420 (1957). Father sought writ of habeas corpus to obtain custody of children from his estranged wife, basing his claim on prenuptial agreement that children should be reared in his religious faith.

8. Angel v. Angel, 140 N.E.2d 86 (Ohio C.P. 1956) (request for Sunday visitation rights); Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956), (promise never to seek divorce).

9. *In re* Guardianship of Walsh, 144 Cal. App. 2d 82, 249 P.2d 578 (1953); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953); *In re* Butcher's Estate, 266 Pa. 479, 109 ATL. 683 (1920); Denton v. James, 107 Kan. 729, 193 PAC. 307 (1920); State *ex rel.* Baker v. Bird, 253 Mo. 529, 162 S.W. 119 (1913); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910).

10. Ramon v. Ramon, 34 N.Y.S.2d 100 (N.Y. Dom. Rel. Ct. 1942).

11. Commonwealth v. McClelland, 70 Pa. Super. 273 (1918); *In re* Lamb's Estate, 139 N.Y. Supp. 685, 689 (Surr. Ct. 1912); *In re* Luck, 10 Ohio Dec. 1 (Cir. Ct. 1900).

12. 150 N.E.2d 431 (Ohio App. 1958), *affirming* 146 N.E.2d. 477 (Ohio C.P. 1956).

majority rule. The court held that provisions of a divorce decree, dealing with the promise of the wife to insure that the daughter be reared in the Catholic faith and attend a school affiliated with the Catholic Church, could not be enforced by judicial decree. This provision of the divorce decree was based upon the written separation agreement of the parties.

The court gave as the primary reason for this holding the statement that to enforce such a contract would violate Article I, Section 7 of the Ohio Constitution, which provides in part:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted. . . .

It is necessary to determine the limits of the phrase ". . . nor shall any interference with the rights of conscience be permitted." In finding the contract unenforceable the court appears to have interpreted the phrase to mean that no interference or restriction of any kind or from whatever source is permitted. This construction seems overly restrictive. The constitutional prohibition was probably intended primarily (perhaps exclusively) as a limitation upon state impositions and upon actions by third parties. That it was intended to protect a party from a course of conduct which he himself freely chose by contract or otherwise is unlikely.

The party must, of course, be free to change his own religion as his conscience directs. The enforcement of the prenuptial promises under consideration would not prevent the promisor from repudiating or following any religion. Likewise the child, when sufficiently mature,[13] must be permitted to follow the religion of his choice. The enforcement of the prenuptial promise would concern the child only while he was too young to make an independent choice. What right is then violated by the enforcement of the promise? Not the right of the infant to a free choice, because the infant is himself incapable of making a choice; and not the right to any particular religion, because in the United States the courts have universally held that under law one religion is equal to

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13. OHIO REV. CODE § 3109.04 allows children of fourteen years of age or more to choose which parent they prefer to live with subject to court approval. Generally, there is no fixed age at which a child is of sufficient age to form an intelligent preference. Matter of Vardinakis, 160 Misc. 13, 17, 289 N.Y. Supp. 355, 361 (1936); Weinman, *The Trial Judge Awards Custody*, 10 LAW AND CONTEMP. PROB. 721, 729 (1943).

another.[14] Whatever the religion of the promisee,[15] in law it is a religion of merit.

The enforcement of the promise would restrict only one right, and that is the right of the promisor to choose a religion for the infant. The promisor, however, of his own volition contracted away the right to make an unrestricted choice, and agreed to raise the child in the religion of the promisee. The promisor may be unhappy with the contract, but such is the feeling of many who contract. It does not appear that either the usual state constitution, or the United States Constitution (first and fourteenth amendments) would be violated by the state enforcement of these private contracts. A comparison may be made with the case of *Shelley v. Kraemer*[16] in which the United States Supreme Court held that the state's enforcement of a private contract not to sell property to Negroes would constitute state action in violation of the Fourteenth Amendment. The reason why enforcement of the covenant in the *Shelley* case would be unconstitutional state action, whereas enforcement of the prenuptial promises should not be so regarded, is that in the *Shelley* case the Negro was not a party to the contract; but in the latter situation the party claiming a constitutional violation had himself contracted to do the thing which he now considers an infringement on his freedom. If in the *Shelley* situation a Negro had contracted not to purchase certain property, he could not later deny to the other party the right to enforce the contract. Similarly, the promisor of a prenuptial promise should not be heard to claim an infringement of free choice.

PRACTICALITY OF ENFORCEMENT

Aside from the question of constitutionality, prenuptial promises of this nature[17] are often refused enforcement because of an inadequacy of remedy. There is no satisfactory manner by which a jury could

14. Angel v. Angel, 140 N.E.2d 86, 88 (Ohio C.P. 1956), "The nature of the religions here involved and the doctrines they teach are matters irrelevant to the present inquiry"; Boerger v. Boerger, 26 N.J. Super. 90, 95, 97 A.2d 419, 422 (1953); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

15. With the possible exception of Sects whose practices might be physically dangerous or harmful to the child. See Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. Rev. 333, 352 (1955).

16. 334 U.S. 1 (1948).

17. The Ohio courts, and others are not hesitant to enforce prenuptial promises when the subject matter is of a material nature. In *Robrock v. Robrock*, 167 Ohio St. 479, 150 N.E.2d 421 (1958), the Ohio Supreme Court held enforceable a contractual obligation in a separation agreement adopted by the court's decree, some of the provisions of which would have been beyond its power to impose without the separation agreement; the obligation to continue insurance and the cost of education of the children beyond their twenty-first birthday.

evaluate the injury done to the promisee. Any award of money damages would be inadequate to recompense the promisee for the breach of promise which was of such vital importance to him. Clearly, if any remedy is to be given it is for Equity — the Court of Conscience — to require performance. Here there is the obstacle of the old Equity maxim, "Equity only acts to protect property rights." This maxim is less rigid today than in the past, and many courts search far and wide to find a property interest to protect, when in fact it is personality which requires protection.[18] Especially in the area of domestic relations has the rule been relaxed.[19] In Ohio the court of common pleas has been given equity powers in the domestic relation area by statute.[20]

If a decree of specific performance were ordered, there would be difficulties in enforcement. The parent with the custody of the child could be ordered to have the child attend the religious services of a particular faith and follow all of the exernal requirements. As to these, enforceability would present no real problem; it could easily be observed which church the child was attending. Involved in the religious training of a child, however, are many intangibles. In innumerable ways the custodian of a child has the opportunity to shape the child's religious life. The adult's attitude toward the religion, the degree of fervor and the explanations given to the child have great force in establishing a child's attitude toward a religion. These take place in the privacy of the home, and it would be rather easy for a parent in custody to frustrate the court decree by undermining the ordered religious training.

It would seem, however, that there is a presumption that a party will obey a court decree in good faith even without direct court supervision. Equity should not refuse to act because of the possibility that a devious person will attempt to circumscribe the court's decree. If the parent with custody performs the externals and is neutral toward the intangibles, generally the court's decrees will be successful, though not as successful where the parent supplements the religious training with his own example and instruction.

WELFARE OF THE CHILD

Psychologically, it would seem to be desirable that the child be reared in the religion of the parent with custody. This would lessen the ex-

18. *E.g.,* Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 915 (1907).

19. Metzler v. Metzler, 8 N.J. Misc. 821, 151 ATL. 847 (1930); Note, *Equity's Role in The Protection of of Civil Rights,* 37 IOWA L. REV. 268 (1952); Theobold, *Does Equity Protect Property Rights in the Domestic Relations?,* 19 KY. L. J. 57 (1930); Chafee, *The Progress of the Law,* 34 HARV. L. REV. 388 (1921); Pound, *Interests of Personalitty,* 28 HARV. L. REV. 171, 221-22 (1915).

20. OHIO REV. CODE § 3105.20.

posure of the child to the conflicting desires of the parents. The parent to whom custody is awarded is naturally the one who exercises the greater control and influence over the child. There is a strong view that the party awarded custody should have a free hand in raising the child and in choosing a religion for the child.[21] If this is true, and is to be followed, it should be reconciled with the desirability of equitable enforcement of the prenuptial promises. Apart from the difficulties of enforcing a specific performance decree in this area, equity *should* grant relief. Equity must consider the solemnity and importance of the promise, at least to the promisee. In *Ramon v. Ramon*[22] the court said:

> He (the promisee) had the right to choose for a spouse one who, though not a Catholic, would at least agree not to interfere in the exercise by him of his solemn religious duties, the most important of which would be to see that his children were brought up in the Catholic Faith . . . and to faithfully undertake and discharge all of the Catholic duties, inseparable in a Catholic home.

Equity cannot with impunity refuse to enforce a promise of such far reaching effect, when the promisor was well aware of the importance attached to the contract by the promisee and his church. The desirability of enforcement and practicality of having the parent with custody choose the religion to be followed can be made to mesh to some degree in this manner: when awarding custody of a child of divorced or separated parents the Court should give great weight to the existence of a prenuptial promise to raise the children in a particular religion.

The "welfare of the child" rule in awarding custody of children is widely followed,[23] and some advance it as the only proper consideration. That the welfare of the child is important and to be given consideration is undeniable. That it is in all cases the only thing to be considered is an exaggeration. Of importance is the consideration of what goes to make up the "welfare of the child." In evaluating the parties seeking custody and in seeking to promote the child's welfare the court should look to a prenuptial agreement for two reasons: first, if the child can be placed with the promisee-parent there will be no necessity for litigation to seek enforcement of the contract, nor opportunity for the promisor to breach the contract or frustrate a court decree; secondly, since the welfare of the child depends in good measure on the character of the parent granted custody, the court should carefully consider the re-

21. Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (1953); Plant, *The Psychiatrist Views Children of Divorced Parents,* 10 LAW AND CONTEMP. PROB. 807, 816 (1944).

22. 34 N.Y.S.2d 100 (N.Y. Dom. Rel. Ct. 1942).

23. Dumais v. Dumais, 152 Me. 24, 122 A.2d 322, 324 (1956); Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMP. PROB. 721, 728 (1944).