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JUSTICE DENIED — THE ELLIS CASE

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IN ONE SENSE it may appear quite futile to revisit the now notorious case of *Ellis v. McCoy*.[1] Nothing that is said or written at this time can change or alter the course of events or the result that has been achieved. Whatever the facts, whatever the demands of justice, the McCoy child will apparently remain in the state of Florida in the care of Melvin B. Ellis and his wife, formerly of Brookline, Massachusetts, and presently fugitives from the justice of that Commonwealth. In another sense, however, a review of the facts in the case may serve a very useful purpose. The strange and disquieting fact is that almost from the inception of the case, certain elements in Massachusetts and elsewhere have set out to attack the mother of the child, the courts of the Commonwealth of Massachusetts, and the adoption laws as well, as if to suggest that all three have contributed to some cruel and unusual form of injustice. It is with a view to repel and expose these attacks and to vindicate the law itself that we now examine the *Ellis* case.

What are the facts? Is this a case of a heartless natural mother abandoning her child and years later attempting to uproot her from a happy home? Was there a perversion of justice in the Massachusetts courts? Are the laws of that Commonwealth out of harmony with the laws of her sister states? These and other questions that have been, or may be, asked are best answered by an examination of the facts that have never been hidden from the view of those who cared to examine them. The report of material facts of the Norfolk Probate Court, and the decision of the Supreme Judicial Court of Massachusetts in the case of *Ellis v. McCoy*,[2] set forth the essential facts in complete detail.

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[1] 332 Mass. 254, 124 N.E.2d 266 (1955).

[2] *Ibid.*

In August of 1950, Marjorie McCoy, twenty-one years of age and unmarried, discovered that she was pregnant. She confided in her mother, who, without her knowledge, sought the advice of a Doctor Sands with whom she was acquainted at her place of employment. He in turn contacted a friend of his, a Doctor Silbert, who reported that he had "just the people" to take the expected baby. They were Melvin and Frances Ellis, each of whom had had a previous marriage which ended in divorce. Mrs. Ellis was also the first cousin of Doctor Silbert. Doctor Sands then contacted Marjorie McCoy and her mother and, without revealing the name or religion of the Ellises, reported their offer to adopt the child and pay all of the hospital and medical expenses. Before the child was born, the Ellises, who were of the Jewish faith, knew that Marjorie McCoy was of the Catholic faith. The child was born on February 23, 1951, in a Boston hospital. Less than two weeks later the baby was taken from the hospital directly to the Ellises' home, and on March 5, 1951, Marjorie McCoy signed the adoption petition produced by Doctor Sands. She was at that time completely unaware of the identity and background of the Ellises. On March 27, 1951, she learned for the first time that her child was with a non-Catholic family and in early April demanded that the child be returned to her.[3] It is well to note that the mother demanded the return of her child *within one month* of the child's entrance into the Ellises' home, immediately upon learning that they were non-Catholic. This fact flatly refutes two of the statements frequently made by those who condemn the mother and criticize the court. The first is that the mother abandoned the child or was indifferent to her welfare; and the second is that it was only after a long period of time, and after the Ellises had become attached to the child, that the mother suffered a change of heart. Such statements are simply untrue.

On March 27, 1951, Marjorie McCoy was advised by Attorney Strome, who prepared the adoption petition for the Ellises, that:

1. The petition would not be allowed for at least one year.
2. That she would have no difficulty getting her child back any time before the petition had been allowed.
3. That she would have time to think things over and change her mind.[4]

With regard to the signing by Marjorie McCoy of the petition for adoption, Judge Reynolds of the Norfolk Probate Court wrote:

> Notwithstanding the fact that Marjorie testified that her consent was given willingly and that no one compelled, threatened, or coerced her to consent, I find that she consented to the petition for the adoption of her child by persons unknown to her, *under strong pressure* exerted upon her by both Doctor Sands, and her mother, Mrs. McCoy.[5]

No sooner did Marjorie McCoy learn of the identity of the Ellises from the attorney then representing them, than she confronted Doctor Sands with this information. Again quoting from the report: "The doctor apologized and promised to help her and he agreed with her that the child should be returned before the petitioners should become attached to her. Marjorie told Doctor Sands that she was not going to allow the child to stay with the petitioners. Marjorie was

[3] Ellis v. McCoy, 124 N.E.2d 266, 267 (1955).

[4] Transcript of Record, p. 359, Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955).

[5] *Ibid.*

angry."[6] Early in April of 1951, an agent of the Massachusetts Department of Public Welfare visited the Ellis home. He gave Mrs. Ellis a copy of the adoption laws and advised her that probate judges in general were not allowing petitions where there was a difference in religion. Subsequently, but still in the month of April, 1951, several conferences were held in the office of the Ellises' attorney, but they refused to return the child to her mother.[7] Quoting again from the report:

> The petitioners were determined not to give the child back. Mr. Ellis said he felt he could 'pull strings' and get the petition allowed, and if he could not then he thought of moving out of the Commonwealth to another state where the laws were less stringent. Attorney Strome suggested to the petitioners that they give the child back and not expose themselves to litigation and the uncertainty of the new adoption statutes. This suggestion was a cause for disturbance on the part of the petitioners and the meeting broke up on a "sour note." Attorney Strome said he would wait for three to five days to give the petitioners a chance to show him how the petition could be allowed. Strome did not believe that "strings could be pulled."[8]

Again in May of 1951, Marjorie contacted Doctor Sands and on or about May 25, he telephoned the Ellises and told them that they ought to give the baby back to the mother. They refused, became "abusive," and then terminated the conversation.[9] In the early part of June, Attorney Strome telephoned the Ellises and told them that unless they gave the child back to her mother, he would withdraw from the case. The Ellises then engaged new counsel and on June 26, 1951, Attorney Strome did, in fact, withdraw from the case.[10]

There is perhaps no better way of closing this factual narrative than by quoting at some length from the report of material facts of the Probate Judge for Norfolk County. He found:

> This is a case where the same attorney represented both the Ellises and Marjorie through the intermeddling of a physician. I find and rule that Marjorie should have been advised to seek the benefit of independent advice and counsel long before the time she herself sought a new lawyer in August 1951.
>
> After Marjorie recovered from the shock of her pregnancy and its ensuing childbirth, and after she learned the child was with a Jewish family, she became conscience stricken due to religious scruples and then made a diligent effort to get her child placed in the care of the Catholic Charitable Bureau for the purpose of effecting an adoption by a family of her own religious persuasion.
>
> I find and rule that upon the facts reported herein the consent of Marjorie to the petition for adoption of her child should be nullified and withdrawn.
>
> I find and rule that upon the facts reported herein the welfare of the child will be best served, and, of statutory importance (See Zalis vs. Ksypka 315 Mass. 479 @ 482), the spirit of G. L. (Ter. Ed.) Chapter 210, Section 5B, will be better observed if the petition for adoption be dismissed and the child restored to its mother for the purpose of carrying out her plan to surrender the child to the Catholic Charitable Bureau for her adoption by a Catholic family.[11]

On the basis of the foregoing facts, Judge Reynolds allowed Marjorie McCoy's motion for leave to withdraw and revoke her consent to the petition for adoption filed by the Ellises, and at the same time denied the

[6] *Id.* at 360.
[7] *Id.* at 361.
[8] *Id.* at 361-62.
[9] *Id.* at 362.
[10] *Ibid.*
[11] *Id.* at 364-65.

adoption petition itself. These decrees were entered in the Norfolk Probate Court on June 15, 1953. Refusing to abide by the decision of the court, the Ellises then appealed to the highest court in the Commonwealth, the Supreme Judicial Court. The evidence was reported in full to that court, and arguments were heard on October 4 and 5 of 1954. On February 14, 1955, the Supreme Judicial Court rendered its decision affirming the decrees of the Norfolk Probate Court. In its opinion, in which all of the justices concurred, the court said:

> We think it plain that the judge had the power to allow the respondent's, [i.e., Marjorie McCoy's] motion. This is in accord with the weight of authority elsewhere. It is also our opinion that the findings are sufficient to justify its allowance as a *matter of discretion*. . . . [A] court is "bound to give controlling effect to identity of religious faith 'when practicable.' "[12]

What has been written thus far should dispel any erroneous notions as to the essential facts of the case. It cannot be controverted that within a month from the time her baby was taken into the Ellises' home, and as soon as she became aware of the facts, the natural mother protested and demanded the return of her baby. She has never ceased protesting. The Ellises, however, neither obeyed the decrees of the Probate Court nor the decision of the Supreme Judicial Court, but used every legal device available to them to delay the case and thwart the wishes of the natural mother. Finally, when all legal means had been exhausted, they fled the Commonwealth of Massachusetts, and have remained outside the jurisdiction of its courts. The long period of time that ensued between the date the child was first demanded back from the Ellises by her natural mother, and the final judgment of the Supreme Court, was, as Archbishop Richard J. Cushing of Boston termed it, "the result of a cleverly contrived, wilful and systematic avoidance and evasion of the law." Surely in this case, justice delayed has been justice denied.

The reader may judge for himself whether in the light of the foregoing there was any abandonment of the child by her natural mother. The reader may likewise judge whether the decree of the Probate Court of Norfolk County, affirmed by the Supreme Judicial Court of Massachusetts, was a perversion or miscarriage of justice. The inquiry may still be made, however, as to whether the adoption laws of the Commonwealth, in placing such emphasis upon the religious faith of the child, are out of harmony with the laws elsewhere. Is the Massachusetts law unique? Does it prefer one religion to another. Let us see.

The pertinent section of the adoption laws of the Commonwealth referred to both in the report of material facts of the Probate Court and the opinion of the Supreme Judicial Court reads as follows:

> 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.[13]

The foregoing section was enacted into

[12] Ellis v. McCoy, 124 N.E.2d 266, 268 (1955).

[13] MASS. ANN. LAWS c. 210, §5B (1955).

law in 1950 as a result of the report of a special commission created by the Massachusetts Legislature for the express purpose of examining the adoption laws.[14] Distinguished members of all of the major religious faiths in the Commonwealth served on that commission. They had no difficulty in finding precedent in other jurisdictions for the recommendations that they made. The laws of the following states urge that the religious belief of an adoptive parent be in conformity with either that of the child or of the natural parents: Delaware,[15] Illinois,[16] Louisiana,[17] Maryland,[18] New York,[19] Oklahoma,[20] Oregon,[21] Pennsylvania,[22] Rhode Island,[23] and Wisconsin.[24] Moreover, at least eight other states include similarity of religion as a factor in determining the suitability of a proposed adoption.[25] Furthermore, twenty-eight jurisdictions require, when practicable, that the religion of guardians or foster parents similarly correspond.[26] This requirement also applies to the placement of neglected or delinquent children in twenty-one jurisdictions.[27]

As a specific example of similar adoption requirements, one might cite Section 3 of the Social Welfare Law of the state of New York which provides: "In appointing guardians of children and in granting orders of adoption of the children, the court

[14] Laws of Mass. 1950, c. 737, §3.

[15] DEL. CODE ANN. tit. 13, §911 (1953).

[16] ILL. ANN. STAT. c.4, §4-2 (Smith-Hurd, Supp. 1956).

[17] LA. REV. STAT. ANN. §13:1581 (1951).

[18] MD. ANN. CODE art. 16, §76 (Supp. 1956).

[19] N.Y. SOC. WELFARE LAW §3.

[20] OKLA. STAT. ANN. tit. 20, §824 (Supp. 1956).

[21] ORE. REV. STAT. §419.132 (1955).

[22] PA. STAT. ANN. tit. 1, §1(d) (Purdon, Supp. 1956).

[23] R.I. GEN. LAWS ANN. c.15, §7-13 (1956).

[24] WIS. STAT. ANN. §48.82(3) (West 1957).

[25] COL. REV. STAT. ANN. §4-1-7(e) (1953); Conn. Pub. Acts 1957, No. 203; GA. CODE ANN. §74-411 (Supp. 1955); IOWA CODE ANN. §600.1 (Supp. 1956); N.H. REV. STAT. ANN. c. 461, §2 (1955); N.J. STAT. ANN. §9:3-23 A(4) (Supp. 1956); OHIO REV. CODE ANN. §3107.05 (Baldwin 1953); WASH. REV. CODE §26.32.090 (Supp. 1955).

[26] ALA. CODE ANN. tit. 13, §361 (1940); ARIZ. REV. STAT. ANN. §8-236 (West 1956); ARK. STAT. ANN. §§45-229, 221 (1947); CAL. WELFARE & INST'NS §§551, 552 (1956); D.C. CODE ANN. §11-918 (1951); ILL. ANN. STAT. c.23, §299b(1) (Smith-Hurd, Supp. 1956); IND. ANN. STAT. §9-3217 (Burns 1956); KY. REV. STAT. ANN. §208.250 (Baldwin 1955); ME. REV. STAT. ANN. c.25, §252 (1954); MINN. STAT. ANN. §260.20 (1947); MO. ANN. STAT. §210.160 (1949); MONT. REV. CODES ANN. §10-510. (1947); NEB. REV. STAT. §43-216 (1952); N.J. STAT. ANN. §30:4C-27 (Supp. 1956); N.Y. SOC. WELFARE LAW §3; N.C. GEN. STAT. §110-35 (1952); N.D. REV. CODE §27-1622 (1943); OHIO REV. CODE ANN. §5103.05 (Baldwin 1953); OKLA. STAT. ANN. tit. 20, §824 (Supp. 1955); ORE. REV. STAT. §419.132 (1955); R.I. GEN. LAWS §15-7-13 (1956); S.C. CODE §15-1416 (1952); S.D. CODE §43.0322 (1939); TENN. CODE ANN. §14-1415 (1955); VT. REV. STAT. §9899 (1947); VA. CODE ANN. §16.1-182 (Supp. 1956); W.VA. CODE ANN. §4904(7) (1955); WYO. COMP. STAT. ANN. §58-610 (1945).

[27] ALA. CODE ANN. tit. 13, §361 (1940); ARIZ. REV. STAT. ANN. §8-236 (West 1956); ARK. STAT. ANN. §§45-229, 221 (1947); CAL. WELFARE & INST'NS §§551, 552 (1956); IDAHO CODE ANN. §16-1814(2) (Supp. 1957); IND. ANN. STAT. §9-3217 (Burns 1956); KY. REV. STAT. ANN. §208.250 (Baldwin 1955); ME. REV. STAT. ANN. c.25, §252 (1954); MINN. STAT. ANN. §260.20 (1947); MO. ANN. STAT. §211.140 (1949); MONT. REV. CODES ANN. §10-614 (1947); NEB. REV. STAT. §43-216 (1952); N.J. STAT. ANN. §2A:4-37 (1952); N.M. STAT. ANN. §13-8-55 (Supp. 1957); N.D. REV. CODE §27-1622 (1943); OHIO REV. CODE ANN. §§2151.32, 5103.05 (Baldwin 1953); OKLA. STAT. ANN. tit. 20, §824 (Supp. 1955); S.D. CODE §43.0322 (1939); VT. REV. STAT. §9899 (1947); W. VA. CODE ANN. §4904(7) (1955); WYO. COMP. STAT. §58-610 (1945).

shall, *when practicable* appoint as such guardians, and give custody through adoption, only to a person or persons of the same religious faith as that of the child." The statutes of other jurisdictions might be quoted here but it will suffice to say that the law of the Commonwealth of Massachusetts is consistent with many of her sister states, and that her policy, concerning the rearing of children apart from their natural parents, is that of the majority.

Both before and since the passage of Section 5B of Chapter 210 of the General Laws of Massachusetts, the welfare of the child was, and is, the primary and controlling consideration. The present law does not prevent or prohibit the crossing of religious lines in adoption cases under any and all circumstances. The judges of the probate courts may still in their sound judicial discretion award the child to adopting parents of a religious faith other than that of the child, provided they determine it to be in the best interests of the child. If they do so, however, they are required to state in writing the facts which impelled them to make this disposition of the child. The probate judges now, as heretofore, take into consideration all of the facts and circumstances in adoption cases, such as the economic condition of the applicants for adoption, their reputation in the community, their moral character, their home environment, and the wishes and desires of the natural mother, as well as the religious faith of the child. All that the law does, as the Supreme Judicial Court of Massachusetts has said in more than one case, is to ascribe more weight than was previously given to the religion of the natural parents in adoption proceedings. In thus providing, the Massachusetts Legislature did only what a majority of state legislatures in this country had previously done. The Ellises were not the victims of any unique or unusual laws. The real victims were the natural mother and the child. So, too, is justice itself which has been thwarted and perverted by wilful people who have refused to abide by the law of the jurisdiction that they themselves saw fit to invoke. The actions of the Governor of Florida in refusing to honor the request of the Commonwealth of Massachusetts for the extradition of the Ellises, and of the Florida court which permitted the adoption of the McCoy child by the Ellises, cannot change the essential facts one iota. Such actions merely indicate that at times, unfortunately, we find ourselves living under a government of men – and not of laws.

Finally, and this point must be made because of the position taken by certain "pressure groups" both within and without the Commonwealth of Massachusetts, Section 5B of Chapter 210 of the General Laws in no way violates what is commonly referred to as the principle of separation of church and state. That contention was conclusively disposed of by the Supreme Judicial Court of Massachusetts in the case of *Petitions of Goldman*,[28] when the court, speaking through the Chief Justice, declared:

> It is contended that 5B is unconstitutional as a "law respecting . . . an establishment of religion, or prohibiting the free exercise thereof," contrary to the First Amendment to the Constitution of the United States, and as in some manner contrary to art. 2 of our Declaration of Rights and to art. 11 and art. 46, §1, of the Amendments to the Consti-

[28] 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied sub nom.* Goldman v. Fogarty, 348 U.S. 942 (1955).

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