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Domestic Relations--Enforceability of Antenuptial Contracts Concerning the Religious Training of Children

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officers as to a "business invitation," but on the narrower criterion of what constitutes the commission of an offense "in the presence" of an officer. In *Giannini* v. *Garland,* the court held:

> [I]f the officer by his presence becomes informed through any of his senses of material elements of the particular crime, which has a tendency to produce in the minds of a reasonably prudent person that it is morally certain that the principal fact occurred, the offense may be considered as having been committed in his presence, although he did not discover all of the elements necessary to the completion of the offense. . . .[17]

This construction might have proved a safer and more workable guide to future decision.

Conclusion

From an examination of the cited authorities, one must conclude that the court has narrowly distinguished this case from a line of previous cases with which it could have been soundly coupled. The characterization of the officers as customers rather than trespassers seems strained, particularly in the light of the provisions of the Criminal Code which do not provide for an arrest without a warrant for misdemeanors on reasonable belief. Certainly while a different holding might have engendered cries of unnecessary protection of the criminal element, it should be noted that there was no showing that a warrant could not have been obtained, or any suggestion that the delay would have allowed the quarry to escape. As to the argument that such protection unduly frustrates effective law enforcement, the Supreme Court has answered through Mr. Justice Jackson that:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.[18]

Donald D. Harkins

DOMESTIC RELATIONS—ENFORCEABILITY OF ANTENUPTIAL CONTRACTS CONCERNING THE RELIGIOUS TRAINING OF CHILDREN—A Protestant woman and a Catholic man, in contemplation of marriage, entered into a contract whereby they agreed that their children should be

[17] 296 Ky. 361, 366, 177 S.W. 2d 133, 135 (1944). Cf. Weaver v. McGovern, 122 Ky. 1, 90 S.W. 984 (1906); Dilger v. Commonwealth, 88 Ky. 550, 11 S.W. 651 (1889).

[18] United States v. Di Re, 332 U.S. 581, 595 (1948).

reared in the religious faith of the husband. In a subsequent divorce action the wife was awarded custody of their three minor children. On appeal to the Supreme Court of Georgia, the husband argued that even though the wife might be awarded custody of the children the antenuptial contract should be enforced. *Held:* Since the right of custody itself in divorce actions in Georgia is determined solely on the basis of the welfare of the child[1], contracts concerning the religious training of children are not binding on the court. *Stanton* v. *Stanton*, 213 Ga. 545, 100 S.E.2d 289 (1957).[2]

Under the Canon Law of the Catholic Church,[3] no priest can officiate at a marriage between a Catholic and a non-Catholic in the absence of an agreement between the parties providing, among other things, that any children born of the marriage will be reared in the Catholic religion.[4] Yet, a large proportion of the children born of marriages between Catholics and Protestants are reared as Protestants.[5] Probably the strongest reason for this contravention of the antenuptial contract is that the young couple, eager to become man and wife, do not fully realize the import of the agreement. Then, when the matter comes up as to how the children shall be educated in matters of religion, it is the parent who has taken the initiative in such matters who determines the religion of the children. Since it is usually the mother who accepts the responsibility for the religious training of the children,[6] litigation is more likely to arise in a situation where

[1] Ga. Code Ann. sec. 74-107 (1935).

[2] Although the issue as presented is of first impression in Georgia, it has been considered in a few other states and the courts are generally in accord with the principal case. McLaughlin v. McLaughlin, 20 Conn. Supp. 278, 132 A. 2d 420 (1957); Lynch v. Uhlenhopp, 78 N.W. 2d 491 (Iowa 1956); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910); Boerger v. Boerger, 26 N.J. Super. 90, 97 A. 2d 419 (1953); Martin v. Martin, 308 N.Y. 136, 123 N.E. 2d 812 (1954); annot., 12 A.L.R. 1153 (1921); see also Friedman, "The Parental Right to Control the Religious Education of a Child," 29 Harv. L. Rev. 485 (1916); Pfeffer, "Religion in the Upbringing of Children," 35 B.U.L. Rev. 333 (1955). Contra, Shearer v. Shearer, 73 N.Y.S. 2d 337 (Sup. Ct., 1947); Ramon v. Ramon, 34 N.Y.S. 2d 100 (N.Y. Dom. Rel. Ct. 1942); see also dictum in In re Luck, 10 Ohio Dec. 1, 4 (Cuyahoga County Probate Court 1899).

[3] Ramon v. Ramon, 34 N.Y.S. 2d 100, 102 (N.Y. Dom. Rel. Ct. 1942).

[4] "The Church may never permit Catholics to marry those of other religious professions except under the twofold condition that the Catholic party will be undisturbed in the free exercise of his or her religion, and that all the offspring shall be brought up in Catholicism." Elmer, The Sociology of the Family, 192 (1945). An example of the type of contract involved is set out complete in Peterson, Education for Marriage, 402 (1956).

[5] From a study made by Judson T. Landis, it was discovered that more than half of the children involved were raised as Protestants. Landis, "Marriages of Mixed and Non-mixed Religious Faith," 14 Amer. Sociological Rev. 401, 405 (1949). Baber found in his study that children were raised as Protestants in the ratio of three-to-one. Baber, Marriage and the Family, 103 (1953).

[6] Baber, op. cit. supra note 5, at 104.

both parties have strong religious convictions and the mother is the non-Catholic.[7]

At common law the rule was that the religion of the father determined the religion in which the child would be educated.[8] This rule was enforced even after the father's death and even though the effect was:

> [T]o create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly to inflict severe pain on both mother and child.[9]

What is the nature of the relationship created between mother and child when the mother is a non-Catholic and she is ordered by the Court to raise the child as a Catholic? In a recent case, the Supreme Court of Iowa was called upon to review a judgment that a divorced wife was guilty of contempt in failing to comply with the provision of a divorce decree that the children "shall be reared in the Roman Catholic Religion." The Court held that this provision was too indefinite for enforcement:

> What constitutes "rearing" a child in the religion or cultus of this church, or of any church? Must he be taken to church once a week, or once in two weeks, on Sunday? If mid-week services are held, must he be taken to them? Is it required that he attend catechism class? Must he attend a parochial school if the particular denomination in question maintains such schools? What fast days must be observed, what Lenten observances followed? Would it be sufficient if the child be required to conform to a part of these things, and if so which part? Or are all of them required? The difficulty would be the same, no matter what church might be named in such a decree as the one now before us.[10]

Perhaps the Iowa court went to the extreme in propounding its exhaustive list of questions, but it is generally recognized that Protestants do not understand the fundamental concepts of the Catholic faith. It has been said that people who have different religious beliefs and practices walk different paths.[11] A recent article in the Catholic publication, *America*, calls up some of the more important distinctions in the Catholic faith which Protestants generally fail to comprehend:

[7] In all the reported cases here examined in which the issue has been directly between living parents, the mother has been non-Catholic.

[8] 1 Schouler, Marriage, Divorce, Separation, and Domestic Relations, sec. 776 (6th ed. 1921).

[9] Hawkesworth v. Hawkesworth, L.R. 6 Ch. 539, 540 (1871).

[10] Lynch v. Uhlenhopp, 78 N.W. 2d 491, 497 (Iowa 1956).

[11] Schmiedeler, Marriage and the Family, 201 (1946).

> Catholics are amazed to find quite intelligent Protestants confusing papal infallibility with impeccability, honor with adoration with regard to the saints and the Blessed Virgin Mary, sacramental absolution (which pre-supposes true repentance) with license to sin.[12]

Again in *America,* an article concerning the importance of Catholic schools points out other misunderstandings:

> [M]ost non-Catholics do not understand Catholic schools simply because they do not understand the Catholic Church. . . . They do not appreciate the power of such profound theological doctrines as that of the divinely commissioned teaching Church, the concept of "Mother Church," the heritage of supernatural revelation.[13]

Would it be in the best interests of the child to demand that his mother educate him in a religion other than that of the mother? Could she be expected to impart to the child something which she does not understand? There is the possible argument that she could leave the matter of the religious education to the agencies of the Church. Certainly the Church could do a great deal of good, but at its best it is not an adequate substitute for the training which should be given by a child's parent. "[T]he matter of rearing a child in any religion is commonly, and we believe properly, thought to be a matter of cooperation between church and home."[14] And, again in *America* an editorial reads:

> Parents who leave it to the parish school to teach their children catechism are making a real mistake. . . . The absence of a parent-child-catechism relationship could not be made up by all the sisters and brothers in the world. Not even the pastor, officially charged by the Church with the religious education and guidance of all the souls in his parish, can suitably substitute for the parents.[15]

Thus, if such a contract is enforced, the mother is faced with the position of trying to inculcate into her child the discipline of a religion which she cannot hope to understand. At most the religious training of the child will be inadequate. It is impossible to estimate the damage that can be done to the child. Can he hope to understand why his religion should be any different than that of his own mother? It would appear that it would be fruitless for the Court to attempt to determine the right of custody solely on the basis of the child's welfare when the Court is bound by an ante-nuptial contract to decree that the child be brought up in a certain religion. The Superior Court of New Jersey has put it this way:

[12] Knight, "State Regulation of Independent Schools," 93 Amer. 263, 265 (1955).
[13] McManus, "How Good are Catholic Schools?" 95 Amer. 522, 526 (1956).
[14] Lynch v. Uhlenhopp, 78 N.W. 2d 491, 497 (Iowa 1956).
[15] 93 Amer. 259 (1955).

> The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. The mother, who lives with the child more than six days a week, as contrasted with the father's limited visitation of a few hours on Sunday, is the one who actually rears the child and shapes its moral, mental, emotional and physical nature. To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare.[16]

Ohio[17] and New York are the only states in which Courts have expressed any favor toward the enforceability of the contracts. The Domestic Relations Court, City of New York, in an opinion handed down in 1942, held that an antenuptial contract concerning the religious training of children was enforceable on the ground that there was a property right created in the Catholic party upon the execution of the agreement between the parties.[18] There was no indication in the report that any consideration had been given to the welfare of the child concerned. However, the New York Court of Appeals has, in a later decision, ruled that such contracts are unenforceable *when it is shown* that enforcement will be detrimental to the welfare of the child.[19]

It would appear that the majority view adopted by the Georgia Court is more in keeping with the American concepts of separation of Church and State and freedom of religion.[20] The Courts should not presume that the welfare of the child will be unimpaired if the child's custodian is forced to rear him in a religion other than that of the custodian. The contract should be disregarded altogether. The question of religious training should be considered at the custody

[16] Boerger v. Boerger, 26 N.J. Super. 90, 97 A. 2d 419, 427 (1953).

[17] The Cuyahoga County Probate Court in granting custody of two orphaned children, of a deceased Catholic mother and Protestant father, preferred their uncle by marriage on the father's side to an uncle on the mother's side, but, expressed the opinion that if the issue had been between father and mother, the court would be bound to enforce the contract. In re Luck, 10 Ohio Dec. 1, 4-5 (1899). But see Hackett v. Hackett, 146 N.E. 2d 477 (Ohio 1957) where the Court of Common Pleas of Lucas County, Division of Domestic Relations, held that such contracts are *void.*

[18] "The ante-nuptial agreement made by respondent and petitioner clearly contemplated the preservation of the spiritual rights and status of the respondent and those of his prospective children. These rights though spiritual and intangible became for all purposes just as real, protective and enforceable as pertained to any physical property." Ramon v. Ramon, 34 N.Y.S. 2d 100, 104 (N.Y. Dom. Rel. Ct. 1942).

[19] Martin v. Martin, 308 N.Y. 136, 123 N.E. 2d 812 (1954), affirming 283 App. Div. 721, 127 N.Y.S. 2d 851. A divided court felt that the welfare of the child would be impaired if the contract were enforced.

[20] This paper has not been concerned with the constitutional issue, but for the proposition that the contracts are unconstitutional, see Lynch v. Uhlenhopp, 78 N.W. 2d 491, 500 (Iowa 1956). For the proposition that failure to enforce the contracts is unconstitutional, see Ramon v. Ramon, 34 N.Y.S. 2d 100, 112 (N.Y. Dom. Rel. Ct. 1942).

hearings along with other circumstances which cause the Court to award custody. Then when custody is determined, the custodian should normally be left free to decide in what religious faith the child will be raised. The court's duty would be fulfilled by considering whether any religious training would be made available to the child and the importance of a particular kind of religious training in relation to the other circumstances of the case.

Billy R. Paxton

PLEADING—STATUTE OF LIMITATIONS—RELATION BACK OF AN AMENDMENT CHANGING THE DEFENDANT—Plaintiff brought an action against the individual members of the Harlan County Board of Education, alleging that he was injured by the gross negligence of a truck driver who was an employee of the board acting within the scope of his employment.[1] After the defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted, plaintiff amended his complaint making the Harlan County Board of Education defendant.[2] However, the amendment was made more than one year after the alleged injury.[3] The circuit court dismissed the original complaint for failure to state a claim upon which relief could be granted and dismissed the amended complaint as barred by the statute of limitations. Plaintiff appealed to the Court of Appeals of Kentucky. *Held:* Affirmed. *Gilbert* v. *Harlan County Board of Education,* 309 S.W.2d 771 (Ky. 1958).

County boards of education in Kentucky are quasi municipal corporations.[4] Members of a county board of education are individually liable for tort injuries resulting (1) from their failure to perform a specific ministerial act involving no discretion which is expressly required by statute and (2) from their failure to exercise ordinary care to employ a person qualified to perform the work for

[1] The defendants in the original complaint were named as follows:
> "James Green, (the truck driver) James Cawood, Supt. Carson Coleman, Board Member, Paul Graham, Board Member, Caleb Creech, Board Member, Dr. S. H. Rowland, Board Member, J. S. Hensley Board Member of the Harlan Educational Board."

Gilbert v. Harlan County Board of Education, 309 S.W. 2d 771 (Ky. 1958).

[2] The amended complaint designated the defendants as follows:
> "Harlan County Board of Education Consisting of James Cawood, Supt. and Carson Coleman, Paul Graham, Caleb Creech, Dr. S. H. Rowland, J. S. Hensley Board Members."

Id. at 771-72.

[3] The Statute of Limitations for such actions is one year. Ky. Rev. Stat. sec. 413.140(a) (1956).

[4] "Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued. . . ." Ky. Rev. Stat. sec. 160.160 (1956). See also, Board of Education of Kenton County v. Talbott, 286 Ky. 543, 549, 151 S.W. 2d 42, 45 (1941).