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A Separation of Church and State In Ontario Adoption Procedure

by GERALD STUART TUCK and ROBERT BURNSIDE BURGESS*

The Ontario Deputy Minister of Welfare has been quoted recently as saying that "150 years of humane legislation has given Ontario a Bill of Rights for children unsurpassed in any other jurisdiction".¹ He was referring to the *Ontario Child Welfare Act*,² which despite this praise still contains several anomalies which, it is submitted, render the operation of the adoption portion of the Act ineffective. The highly praised reforms made in the Act over the past six years, while very progressive in the spheres of property law and status, nevertheless have not, by themselves, been responsible for any increase in the number of adoptions in Ontario—a major object, one would assume, of any such legislation. The distressing fact remains that many children, admirably suited for adoption, remain unplaced in Ontario.

With this new positive legal protection for both adoptive parent and adopted child created by the Act, why then are there so many unplaced children in this province, especially in view of the fact that there is a surplus of parents wishing to adopt a child? In Metropolitan Toronto alone at the Metropolitan Children's Aid Society there were 2230 children in the Society's care, of whom 1694 were permanent wards and hence legally adoptible.³ Of these 1694 children, only 170 were under the age of four years, the age at which children cease to be readily adoptible. Furthermore, the majority of these 170 children were in institutions for the emotionally disturbed, or mentally or physically retarded. Others were already placed with adoptive parents, but were waiting for the statutory six month probationary period to elapse, so that their adoption would become final. It can be seen from these figures that since less than ten per cent. of the children at the agency were under the age of four years no substantial problem exists in the placement of infants at this agency.

There were 767 final adoption orders granted during 1960 as a result of placements made by the Metropolitan Children's Aid Society.

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¹ James S. Band, Deputy Minister of Welfare for Ontario as quoted in the *Toronto Globe and Mail*, Sept. 7, 1957.

² R.S.O. 1960, c. 53.

³ These statistics were obtained from Miss Florence Schill, Public Relations Director of the Metropolitan Toronto Agency in a personal interview with her on January 20, 1961.

When this figure is looked at in conjunction with the 170 children under the age of four remaining, it can be seen that there is a rapid rate of infant turnover at this agency. The remaining 1524 wards who were over the age of four years were in care as a result of being adjudged "neglected" under the provisions of section 17(9) of the *Child Welfare Act*. Hence, many of these were over the age of four when they came into care. Approximately twenty per cent. of all wards come under the care of the Society in this way; however the feeling that a child is best looked after in his own home, if possible, is serving now to reduce this total.⁴ Also, prior to the inclusion in the Act in 1954 of what is now section 17(15) a great many unwed mothers took excessive advantage of the existing provision for temporary committment. Prior to that time mothers would leave their children in the temporary care of the Society for periods sometimes extending to several years before consenting to allow the child to become a permanent ward and hence adoptible. In such cases, the children by the time they were legally adoptible were too old to be wanted. At present with the provision that temporary wardship cannot exceed a period of two years, the children that the Society has for adoption are becoming younger when first they enter permanent wardship. The backlog of children resulting from the misuse of the pre-1954 provision has not yet reached the age of 18 years and therefore many of them still remain in the care of the Metropolitan Children's Aid Society.

The number of older children at the Metropolitan agency should be expected to decrease in the future,⁵ although the general problem of placing and handling the over four year old is bound to remain when one realizes that the demand for such children is negligible.⁶ Metro C.A.S. certainly at present does not have any appreciable problem placing their infants—using that term to signify the under four group.

The Catholic Children's Aid Society encounters the same difficulty in placing older children, but there is a difference here, in the fact that many of these older children first came into care as infants but were not adopted. This can be seen from the fact that only 295 adoptions were completed during 1960 by the Catholic C.A.S. and 29 of these were placed with American parents.⁷ There were, in January 1961, 1126 permanent wards there out of the 1480 children under care. The rate of turnover at the Catholic agency was therefore, as

⁴It should be noted that both agencies have set up Protection Departments to visit these homes regularly to implement these policies.

⁵The total of the Metropolitan C.A.S. is swelled by the fact that they get the custody, usually, of those children of mixed racial background and others difficult to place such as Negroes and Indians. The Catholic C.A.S. gets relatively few of these children.

⁶The attitude of our society seems to favour overwhelmingly the adoption of infants. Unless a change in public opinion comes to pass, these older children will always be hard to place.

⁷All the statistics pertaining to the Catholic C.A.S. were obtained from Miss Zihlman of the agency's Public Relations office, during a personal interview on January 11, 1961.

computed on the basis of total adoptions completed against children available for adoption only 23.4 per cent. per year. At the Metropolitan agency the turnover rate was 45.3 per cent. Does this mean that "adoptible" children at the Catholic C.A.S. are not getting the same chance for adoption as similar children at the Metro C.A.S.? Although no exact figures as to the number of Catholic C.A.S. wards in the under-four category are available, Catholic C.A.S. officials indicate that a great number of 1126 permanent wards were under the age of four years. It seems to be a proper inference that a considerable number of "adoptible" wards of the Catholic C.A.S. are not being adopted. As indicative of the existence of such a problem a Catholic agency official indicated that although their present campaign for foster homes⁸ had met with some success, they were still forced to contravene section 31 of the *Child Welfare Act* with regard to the placement of Catholic infants in the care of Protestant foster parents temporarily.⁹ No other admission could more strikingly demonstrate the imbalance between Catholic C.A.S. wards available for adoption and Roman Catholic parents wishing to adopt.

On the other hand Miss Schill of the Metropolitan C.A.S. said the most conservative figure she could give was a ratio of three prospective Protestant parents whose applications were approved for every infant that became available for adoption. In a recent article on the subject, dealing with adoption in Canada as a whole, it was said, "Catholic agencies have four children for every home they can find. This means that while Catholic children go begging each year, eight hundred Protestant or Jewish couples are turned down, another two thousand give up and withdraw applications, and thousands more wait in line".¹⁰ The article emphasized these figures by referring to the plight of a Catholic nun who understandably wished to remain anonymous, but felt that it was unfortunate that religion could not be suspended for a little while until all the children were placed.¹¹

In the light of the above figures it would seem fair to suggest that under present Ontario law many adoptible Ontario wards are being denied an opportunity to be adopted. What happens to these infants? Those not suffering from defects requiring institutional care are placed in foster homes under a system of temporary parenthood.¹² From numerous interviews with social workers the impression was

⁸1960 was proclaimed by James Cardinal McGuigan to be Catholic Adoption Year in Toronto.

⁹The practice of placing Roman Catholic Children in Protestant foster homes is known by the Metropolitan C.A.S. to exist, yet this practice is apparently condoned in the interests of child welfare.

¹⁰*Is Our System of Child Adoption Good Enough?* Robert Walker in MacLeans, Sept. 26, 1959, p. 15.

¹¹*Ibid.* It is also pointed out that in 1958 there were some 25,000 wards in the care of Children's Aid Societies and similar organizations throughout Canada; hardly an encouraging figure.

¹²Contrary to public belief most foster parents do not adopt the children in their care. They are told by agencies that their custody will only be temporary. They are permitted by section 32(3) of the *Child Welfare Act* to adopt children in their care if the court feels it is in the best interests of the child.

conveyed to the writers that the foster parent plan is not nearly as desirable, nor as beneficial to the welfare of the child, as being adopted and acquiring permanent parents of its own. While no figure was made available on the average number of different foster homes in which each unadopted child was placed, it is not, it seems, unusual for a child to have lived in upwards of ten foster homes during its wardship. While undoubtedly the majority of these foster parents hold the welfare of the child in high regard, it is also true that many of these foster parents would not pass the stringent screening and matching processes required of adopted parents by either agency. Indeed, at the Catholic Children's Aid Society it was suggested that many foster parents are primarily motivated by the financial advantages of foster parenthood.¹³

The denial of the opportunity of adoption to many such infants and the treatment subsequently accorded them would seem to refute Welfare Minister Cecile's statement that, "It appears the legislation has stood the test of time remarkably well; we shall continue to act with the welfare of the child as our primary objective".¹⁴

It is suggested by the authors that the instrumentality of religion and its pressures is the main reason for the imbalance in the number of prospective parents that wish to adopt infants and the number of infants adopted each year. Is this based on policy or law?

In Ontario, the *Child Welfare Act* never deals expressly with the requirements of consistency in the religions of the adopted child and the adopting parents. It does, however, in sections 31(1) and 31(2) under Part II of the Act which is headed "Protection and Care of Neglected Children" contain deeming sections imputing a religious faith to the child. These sections are as follows:

- 31(1) A child shall be deemed to have the same religious faith as his father unless it is shown that an agreement has been entered into in writing, signed by his parents, that he be brought up in the same religious faith as his mother.
- (2) An illegitimate child shall be deemed to have the religious faith of his mother.¹⁵

Provisions such as the above are customary in most North American jurisdictions to ascertain a legal religion for each infant; this ascertained, statutes may then go on to prohibit adoption outside this legal religion. Ontario has gone beyond the traditional "deeming" provision of section 31(1) and (2) by further enacting that:

- 31(3) A Protestant child shall not be committed under this Part to the care of a Roman Catholic Children's Aid Society or institution, and a Roman Catholic child shall not be committed under this Part to a Protestant Children's Aid Society or institution, and a Protestant child shall not be placed in the foster care of a Roman Catholic

¹³ Miss Zihlman of the Catholic Agency expressed this opinion during the interview January 11, 1961.

¹⁴ Welfare Minister Louis Cecile as quoted in the *Toronto Globe and Mail*, Sept. 7, 1957.

¹⁵ R.S.O. 1960, c. 53.

family and a Roman Catholic child shall not be placed in the foster care of a Protestant family, and where a child committed under this Part is other than Protestant or Roman Catholic, he shall be placed where practicable with a family of his own religious faith.

- (4) Subsection 3 does not apply to a child detained in a place of safety in a municipality in which there is only one children's aid society.
- (5) Notwithstanding anything in this section the judge may have regard to the wishes of the child in determining what order ought to be made as to religious faith.¹⁶

No regulations are found in the Consolidated Regulations of Ontario to assist in the interpretation or application of these subsections. Clearly the above subsections only regulate expressly (a) the placing of children under the care of a Children's Aid Society and (b) the placing of children within a foster home of his own faith. Even these subsections apparently should apply only in those municipalities where there is more than one Children's Aid Society.^{16A} At any rate it is quite clear that religion is not expressly mentioned in connection with adoption as such, although it is quite possible that the legislature intended religion to play an important part in adoptions. The wording of the statute is so nebulous that the intention is not all discernible.

There is no other statute law controlling the religious factor in adoption, nor is there any case law relevant to an interpretation of these subsections. The common law historically did not recognize the practice of adoption so that there is no doctrinal position with respect to the question of religion and the adopted child. It should be pointed out, however, that despite this apparent lack of legal sanction, present adoption practice would indicate that this section is given a lay interpretation forbidding adoption across religious lines. Would our courts sustain this lay interpretation?

Manitoba has a similar section in their *Child Welfare Act*.¹⁷ The 1959 Manitoba case of *Re Blunderfield and Jamieson*¹⁸ provides an insight into how the courts of Ontario might interpret section 31 of the *Ontario Child Welfare Act*. In that case an unmarried Roman Catholic mother consented to have her child adopted by the infant's grandparents who were of the Protestant faith. The infant had been duly baptized as a Roman Catholic but was, however, placed privately in the home of the grandparents. After a few months had elapsed, the mother sought to have her consent vitiated and have the child returned to her on the ground that she never had the capacity to consent to an adoption across religious lines. The Manitoba Court of Appeal was forced to place an interpretation on section 131(a) of the *Manitoba Child Welfare Act*, which like the Ontario section 31 does not expressly mention "adoption", but deals exclusively with "placing in the care of", a phrase customarily used only for placement in foster homes. It reads as follows:

¹⁶ *Ibid.*

^{16A} In all communities except the four with separate facilities, as envisaged by the Act, it has been the practise to have one C.C.A.S. official associated within each C.A.S.

¹⁷ R.S.M. 1954, c. 35.

¹⁸ (1959), 27 W.W.R. 1; 17 D.L.R. (2d) 583.

- 131 "No child being dealt with under this act. (a) Being a Roman Catholic child shall be placed in the care of a Protestant society, or in a Protestant family, home or institution."

Williams, C.J.Q.B. delivering the judgment said,¹⁹ "The child is a Roman Catholic child; it is such by the preference of the mother shown when she had it baptized. There is nothing in the act giving her the power to alter her preference.²⁰ It is made once and for all and the mother lost the power to consent to the child being placed in a Protestant family". The mother was duly awarded custody of her child by the court. Since this case dealt with an adoption, the ratio would seem to be that a mother is powerless to consent to an adoption across religious lines.²¹ If the Ontario statute were interpreted the same way, certainly no adoption made by an agency would be allowed to contravene Roman Catholic-Protestant boundaries. At the present time in Ontario private adoptions are being made so that religious lines are crossed and it may be that section 31 does not prohibit this practice when the adoption is arranged privately. This, at best, indicates great inconsistency.

Even if section 31 in Ontario would not be as narrowly interpreted by a court as its counterpart in Manitoba, its very existence exerts, in our opinion, a profound influence on adoption practice. Let us scrutinize it from a legal standpoint. Subsection 3 of section 31 deals expressly with Roman Catholics, Protestants and "those other than Protestants or Roman Catholics". It would seem from the section that this latter somewhat nebulous category does not deserve the "protection" granted the two larger groups—for they are only to be placed with their own religious faith where it is practicable. Practicable to whom, the society or the child? What could the criteria for the practicability be when the two larger groups are protected in so mandatory a fashion? The statute by its narrowness in referring only to two religions does not afford equal protection to all religions—if such protection is to be desired.

For example, into what category would a Greek Catholic child fall? It certainly would not be included in any accepted definition of Protestant, and yet it is not a Roman Catholic. Is it to be consigned to that third group of "others" and be adopted by a family that is not Greek Catholic? The same reasoning could apply to Mennonites, Jews, Moslems, Christian Scientists, Jehovah's Witnesses and all such other religious groups which are clearly not Roman Catholic and probably not Protestant, in accepted terms. The statute, it appears, was drafted without equal regard for minority religious beliefs.

¹⁹ *Ibid.* p. 591.

²⁰ Is this decision to be taken to mean that under no circumstances could a mother change the religion of her child? That is, if she were Protestant at the time of the child's birth, but after the birth of her child she was converted to Catholicism would she be denied a right to raise her child in the Catholic faith?

²¹ *Quaere*: Since no final adoption order to our knowledge has ever been upset in Canada, what would have happened in this case if the final adoption order had been granted before the mother commenced litigation?

In the light of the general intentions of the statute (with which the authors do not necessarily concur) what is to become of an illegitimate child born of a mother who is agnostic, that is, does not ascribe to any religious faith? Subsection 2 of section 31 deems that a child shall have the religious faith of his mother. If he thus be deemed agnostic he could not, following subsection 3 of section 31, be legally placed in any foster home for there are not any families of his "religious faith" since he does not have a religious faith. Must such a mother be forced to claim falsely a religious affiliation in order to have some hope her child will be adopted?

The most striking criticism of all results from the impact of subsection 4 of section 31. Strictly interpreted, this section removes the "protection" afforded the child's religion by subsection 3, except for those children in cities where more than one Children's Aid Society exists. If this type of protection is so beneficial to children in the larger cities where there are two Children's Aid Societies, why should a reading of the Act deny it to all other children in the province?

However, it is not intended to suggest changes in the present structure to insure the minority religious groups equal protection of their religious interest. Nor should the Act be revised so that a legal protection be given to religion where it confronts adoption practice, rather than the protection which seems to be based largely on practice as at present. On the contrary, in the best interests of child welfare it would be far better to abandon the religious concept in adoption practice completely.

Part II.

On what is this power of religion over adoption based? It is based primarily, where the parents are married, upon the imputation of the religious faith of the father to the child. Similarly, where the parents are unmarried, the religious faith of the mother is imputed to the child.²² What is the reason for this imputation? "Is it only the age-old prejudice in favour of natural ties, in contrast to ties brought into being by covenant, strengthened now by the statutory and judicial notice taken of the "religion of the child; when the latter in turn is attributed to the child not only because of the statutes but also because of the lingering force of common law notions of blood-sonship as the only true form of sonship?"²³

It would seem hardly rational that, the state having arbitrarily chosen the parent from whom the religion of the child is to flow, does not further legislate so as to make the parent care for the child materially. Instead, the parent in the great majority of cases may permanently leave the unwanted infant with the "proper" Children's Aid Society twenty-eight days after birth, this consent to so leave

²² Religious imputation section: R.S.O. 1960, c. 53, sec. 31(1) and (2).

²³ Ramsay, (1959), 34 N.Y.U. Law Review, 649 at page 690.

him having cut all legal ties with the child. All legal ties may be cut, but this legal imputation of parental religion taken at birth from his unwanting parent, may operate thereafter to preclude adoption for the child, thus menacing the child's welfare and burdening the state with the cost of his care until adulthood is reached. The wisdom of the state in allowing these legal "imputation of religion" statutes to exist should be seriously questioned.²⁴

Irrespective of this mixing by the state with religion, and, irrespective also of the inconsistency of the state in dealing with the child's religion at the expense of his welfare, any statute containing religious imputation sections, such as those in the *Ontario Child Welfare Act* section 31(1) and (2) raises fantastic interpretational problems for the judiciary. Ontario has been singularly fortunate that such problems seem to have been settled without recourse to the courts. Other jurisdictions have not been so fortunate.

For example, the Court of Appeals of New York, in order to impute a religious faith to an unbaptized child, had to decide whether "the religious faith" of the mother was her religious persuasion at the time the child was born or whether it was her "birthright" religion as judged by past indicia. At the time the child was born the mother had signed a document stating, "I have no religious faith at the present". In this instance the court decided to apply the religion—that is, no religion—supposedly held by the mother at the child's birth although they felt that the document might have been signed under duress.²⁵

A second adjudicative problem may arise due to the omission from sections of this nature of any provision for a person who either doubts all religious faith or claims forthrightly that religion does not exist. Thus, what would a court decide if an agnostic or atheistic mother of an illegitimate child abandoned her child in the streets? No person of any religious persuasion would be pleased if the law, in its interference with religion under section 31(1) and (2) of the *Child Welfare Act* forced the courts to rule that the child was deemed to have the faith of his mother, that is, none at all. What could be the court's ruling if this atheistic mother goes to court to block her

²⁴ It is necessary, in order to attribute the relevance to Ontario law of many of the passages and cases quoted herein, drawn from other jurisdictions, to explain that the dependence of adoption upon religion exists generally throughout Canada and the United States.

²⁵ *Matter of Maxwell*, 4 N.Y. 2nd 429; 151 N.E. 2nd 848 (1958).

Here the majority judgment upheld the validity of the document, wisely deciding they could not rule upon its bona fides without becoming involved in a question of "quantum" of faith. Thus such a declaration of non-religion, at least in New York gives a document the power to break the generation after generation chain imputing the same religion to all members of a family. However it must be noted that the strength of the judgment is impaired by the realization of the majority judges that the adopting parents had consented to raise the child in the religion of his natural mother. The dissenting judges argued for the mandatory passage of the "birthright" religion, hardly a liberal view.

child's adoption to any but atheistic adoptive parents? A Supreme Court of Canada precedent would seem to favour the mother.²⁶

Furthermore in placing judges in the untenable position of deciding such a potentially-biased and personal matter as a person's religious faith, we are putting an unnecessary burden on his conscience. Apart from this embarrassment, can we reasonably expect a judge, with the multiplicity of religious beliefs adhered to in our society, to know what constitutes "religious faith", or to know what constitutes each particular religion?²⁷ Nor is a mere fund of knowledge of religion and its dogma sufficient. For the judge under laws such as these is constantly forced to evaluate and measure quantum of faith, and also to surmount the inevitable confusion of "fides" and "bona fides".²⁸ In conclusion it has been said that: "It seems entirely proper for the civil courts who have no competence to judge what is sacreligious not to presume to judge what is sacred or to determine whether a person is religious or irreligious when there are so many conflicting views on the subjects".²⁹

In the light of these serious judicial problems, what is the argument used to justify the inclusion of sections like section 31 of the Ontario Act in adoption legislation? According to Mr. Eric T. Smit, Executive Director of the Family and Child Welfare Division of the Dominion Government, the argument for inclusion is based on the premise "that the religion of the child is a natural right derived from

²⁶ In the following cases the true welfare of the child seems secondary to the rights given in the *Child Welfare Act* to the natural mother. See *Re Baby Duffell*, [1950] S.C.R. 737; 4 D.L.R. 1; affirming the Ontario Court of Appeal in [1960] O.R. 35; 1 D.L.R. 694, and *Hepton v. Maat*, [1957] S.C.A. 606 (1957), 10 D.L.R. (2d) 1 affirming the Ontario Court of Appeal in [1957] O.R. 64; (1957), 7 D.L.R. (2d) 488.

And see also *Re Agar, McNeilly et al. v. Agar*, [1958] S.C.R. 52; (1958), 11 D.L.R. (2d) 721 affirming the Court of Appeal of Ontario in [1957] O.R. 359; (1957), 8 D.L.R. (2d) 353 which had reversed the trial judgment in [1957] O.W.N. 49; (1957), 7 D.L.R. (2d) 502.

In the *Re Agar* case at p. 52 Locke J. in the Supreme Court of Canada said, "I have examined with care the evidence in this case, and while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of the appellants, I have come, with regret, to the conclusion, that, in applying the rule as stated in the decisions of this court in the cases of *Duffell* and *Hepton*, it has not been shown that the mother should be refused custody".

²⁷ The courts have always refused to go into such problems because of the inherent difficulties. For example bequests have been held void for uncertainty if the gift was only to take effect if the beneficiary married a person "not practising the Jewish religion". Vaisey J. in *Re Krawitz's Will Trusts*, [1959] 3 All E.R. 793 at 796; 1 W.L.R. 1192 at 1195 stated: "I do not know, except in the broadest and most indefinite sense, what is meant by 'practising' the Jewish religion, or, indeed, any religion." (Italics mine.)

²⁸ In the *Matter of Glavis*, 121 N.Y.S. 2nd 12 (1953). In this case the court became entangled between the good faith of the father in exercising his parental rights and the faith of the father used in the imputation of a finding of the proper faith of the child. Here the Catholic father, who had heretofore evidenced no interest in the Catholic faith had his children baptized Roman Catholic while his wife was confined to hospital. His wife was Jewish and the children had been circumcised four years earlier. Are the judges to be faulted for their apparent confusion, or is the imposition of religion into law responsible?

²⁹ *Supra*, footnote 23 at page 659.

the parent and neither man nor his laws should interfere with this right".³⁰ In support of such a view is the famous statement of Judge Considine of the Massachusetts court claiming that, "No one, not even the parents, have the right to deny an immature child who has been baptized a Roman Catholic the privileges of being reared in Catholicity".³¹ Admittedly this is an extreme view and even goes so far as to derogate from all natural parents the exercise of their parental right qua supervision of family religious upbringing.

As long ago as 1886, the American jurist Jeremiah Black pointed out that "the manifest object of the men who framed the institutions of this country was to have a state without religion and a church without politics—that is to say, they meant that one should never be used as an engine for the purpose of the other."³² Although Canada has no similar constitutional problem, both our new Bill of Rights³³ and the unwritten legacy from our ancestors, emphatically declare freedom of religion to exist in Canada. Canada has no state church. Pre-eminence of freedom of religion absolutely precludes any attempt to examine the statements of Mr. Smit or Judge Considine in order to verify their theological correctness—in the light of the teachings of the respective faiths. Under our constitutional system, one church cannot force its interpretations upon all the other churches, or upon the state. It is startling to suggest that the laws of Canada or Ontario should enforce positivistic religious beliefs and interpretation in what are essentially secular spheres.

It is misleading to present this problem in terms of the Roman Catholic Church obtaining by means of statute law a device whereby it can assert its religious tenets to the apparent detriment of adoptible infants. This type of statute works both ways equally. However, due to the fact that in Ontario there is a surplus of "adoptible" Catholic wards, its practical effect is rather one sided. It is certainly not the universal opinion of Catholic officials that statutes of this sort are a proper exercise of legislative power in the context of a democratic system of government. Father Joseph M. Snee, himself both a priest and a lawyer and a member of the faculty of Law at Georgetown University, has remarked, when speaking of a child baptized as a Roman Catholic, "Does he have a right to be raised as a Catholic? As a matter of Divine Law I would say yes. As a matter of constitutional law I would say no, because the constitution speaking

³⁰ Correspondence from E. T. Smit to Mr. Mervin Burgard, editor-in-chief of Osgoode Hall Law Journal.

³¹ Quoted in Pfeffer, *Creeeds in Competition* p. 131 (1958).

³² Black, Jeremiah S., *Essays and Speeches* (1886) at p. 53.

³³ *Quaere*: does freedom of religion also reflect acknowledgement of its necessary corrolary, that is, the freedom not to be religious? It is suggested that this is so. Why then does present Ontario adoption policy exclude a person from enjoying the freedom of not being religious, from consideration as a potential adoptive parent? This type of policy is analagous to having all professors sign religious affiliation orders prior to consideration for employment. For they also exert influence on the minds of youth!

of freedom of religion, is speaking of religion from the subjective viewpoint—the right of a person to choose his own religion”.³⁴

The legislature has not been so tender of religious views in all areas where they conflict with the general welfare. For example, consider the area of divorce law. The Roman Catholic Church will not sanction divorce for its adherents, holding as a fundamental tenet that holy matrimony once consummated is indissoluble. Most other faiths approve of divorce in varying degrees. However, a member of any religious group is still eligible under the law of Canada to seek secular dissolution from his wife. Our courts, if satisfied that the conditions precedent to the need for dissolution exist, will legally break the bonds of holy matrimony. This action of the state does not intrude upon the domain of the churches, nor are the churches forced to give tacit approval of this dissolution. In the eyes of the State they are separated; in the eyes, for example of the Roman Catholic Church, they are not. The sanction that this Church imposes in such cases is censure by means of excommunication, although it recognizes that its sanctions under Divine Law may not transgress the boundaries of the separation of Church and State. Every churchman then owes an allegiance to two laws, to his Church and to his State; these laws need bear no necessary similarity. The Parliament of Canada in pursuance of its responsibilities has seen fit to allow divorce, as an instrument by which people may seek marital compatibility a second time—despite the contrary views of many of the religious groups in Canada. But this is not the sole instance of a conflict in the laws of state and church; perhaps a more striking example will elucidate.

The members of the sect of Jehovah's Witnesses are extremely cognizant of the biblical admonition concerning “the eating of blood”. In modern times their leaders have interpreted this to include an implicit prohibition of blood transfusions. But the state, through its courts, again on a basis of public welfare, has employed the wardship provisions of the *Ontario Child Welfare Act* to ensure that all young children in Ontario have equal opportunities to receive necessary transfusions of blood. This decision has not been extended by the state to include those of full legal age and rightly so; however the state did feel that public policy decreed protection for those not yet capable of forming their own religious beliefs.³⁵

It is suggested that such a benevolent attitude should also be assumed by the provincial legislature to protect those infants whose possibilities of adoption are unnecessarily limited. It would seem inconsistent, in the face of the Welfare Minister's avowed intention to protect the welfare of the child,³⁶ for the legislature not to intrude itself to protect an infant child from the consequences of his natural

³⁴ *Religion in Adoption and Custody Cases* (1957 Conference at Villanova School of Law) 71.

³⁵ It should be noted, however, that the present means of implementing the decision may not be legal. See *Religion, Medicine and the Law*, by W. G. How, 1960, *Can. Bar Journal* 365.

parent's religion, whether this religion deprives him of his chances to be adopted—or to receive a blood transfusion.

Similarly, the churches affected, drawing an analogy from the statements of Father Snee,³⁶ should be able to effect a reconciliation of the state's decision, if made, to permit what would at present be called "adoptions across religious lines". The position of the various religious groups on this matter should be analogous to that taken after the Legislature enacted divorce legislation. The state would not be impinging upon the Churches right to baptize an infant child of Catholic parents as their Divine law dictates is necessary. So long as the mother retains custody and guardianship of the child, she alone should have the right to direct and control its religious education, uncontrolled by the state. At the instant when she agrees to surrender the child to the state, that is, to the Children's Aid Society, any control based upon her own religious affiliation should be severed. The state should then be allowed to place the child wherever it deems fit having always the child's welfare as its principal consideration.

It is necessary that the state respect conscientious religious beliefs where it does exist in a child. That is, if a child were of an age where it could comprehend, if only in a very basic way, the religious teachings of his faith then adoption "across religious lines" would definitely not be recommended. One relatively easily administered solution to this aspect of the fallacy of religious imputation³⁷ would be a policy based upon differentiating between those children who had received the benefit of a ceremony of religious indoctrination such as baptism, circumcision etc. and those had had not. However, a differentiation based on the indicia of a religious ceremony would favour those religions where ceremonies such as baptism are required at an extremely early age;³⁸ the legislature should not so favour one group. Moreover, it is absolutely certain that a child could not knowledgeably uphold any persuasion a few days after birth. Consequently, it is submitted that the "break-off age" would have to be, as set out above, determined by the presence or absence of conscientious religious belief.

Although the welfare of the child is the principal motivation in suggesting reform, an intelligent appraisal of the effect of the policy inherent in section 31 of the Act, shows the heavy financial responsibility in the continuance of such policy if the result is that a large group of "adoptible" infants are not being adopted. Foster parents in Metropolitan Toronto are paid a minimum of forty dollars per

³⁶ Op. cit. *Globe and Mail*, Sept. 7, 1957.

³⁷ That this practice of imputation is a fallacy is borne out by St. Thomas Aquinas. In *Summa Theologicae* III Sup., Q. 54 art. 4, Aquinas at page 65 states "it was only in former, pre-Christian times that the Divine worship was handed down as the inheritance of the race and that now 'the worship of God is no longer handed down by carnal birth but by spiritual grace'".

³⁸ There is a great discrepancy in the ages at which various religious groups permit these ceremonies. For example the Roman Catholic Church recommends baptism as soon as possible while Baptists suggest a waiting period of twelve to fourteen years.

month and in addition the Society pays the cost of the clothing, schooling, medical and dental care. The total cost of care per child per year averages out to roughly seven hundred and fifty dollars a year. Last year in Metropolitan Toronto alone the total cost of foster child care, in approximate figures, was slightly more than two million dollars; this cost does not even include the cost of care administered to children of either agency maintained in institutions. Where then does the money come from to finance these foster homes?

In 1959³⁹ the Catholic Children's Aid Society received all but \$6,878 out of a total budget of \$1,769,751 from the Municipality of Metropolitan Toronto, the Province of Ontario and the United Appeal⁴⁰, none of which are religious organizations. The Metropolitan Children's Aid Society received its finances in much the same set of proportion, only \$36,988 of its total budget of \$3,303,000 in 1959 from private sources. Consequently, it is apparent that various governmental agencies together with the United Appeal, all purely secular in nature, sustained over 99 per cent. of the cost of the two Children's Aid Societies.⁴¹

On an individual basis a child that came under the care of a Children's Aid Society at the age of one month and remained in care until he reached the age of eighteen would cost the public \$13,500. Projections of these figures point out the desirability from a financial point of view to every Canadian tax payer of increasing the numbers of adoptions each year. It is obvious that millions of dollars could be saved by implementation of legal adoption across religious lines over a period of years.

Having attempted to demonstrate the problem and its cause, a possible legislative solution is set out below. This solution could be brought about by amending the present section 31 of the Ontario *Child Welfare Act*. Section 31 (amended) would then read:

- A(1) A child, being under the age of four years, whether legitimate or not, shall be deemed for purposes of all proceedings under this Act to have no religious affiliation whatsoever.
- (2) A child, being under the age of four years, whether legitimate or not, shall be placed by the Children's Aid Society, with regard to the best interests of the child and without consideration of the particular religious faith of either the natural or adoptive parents of the child. This shall apply to placement in a foster home or to a placement for adoption.
- (3) Subsections (1) and (2) shall apply notwithstanding any form of religious initiation or ceremony performed on or in the presence of the child.

³⁹ See the 1959 Annual Reports for both the Catholic Children's Aid Society and the Metropolitan Children's Aid Society.

⁴⁰ It is interesting to note that the total United Appeal Contribution to the two agencies was \$436,748 in 1959, but that the Catholic agency seemed to receive a disproportionately small share of \$103,210 in the light of the relative number of children at each agency.

⁴¹ It would seem most evident that various religious groups which in total do not contribute more than one per cent. toward the welfare of these children cannot justify religious control on the basis of their contributions.

- B(1) A child, not being under the age of four, whether legitimate or not, may not be placed, without consideration by the court of any religious or spiritual belief⁴² shown to the satisfaction of the court to exist in the child.
- (2) If the religious or spiritual belief is shown to the satisfaction of the court to exist, the child shall be placed where practicable⁴³ with a family holding that religious or spiritual belief.

In explanation, the age of four years as the line of demarcation was chosen for two reasons. Firstly, social attitudes at present have not progressed sufficiently to create a sizable demand for children who have already reached this age. Secondly, since children in Ontario begin elementary school at the age of five,⁴⁴ it is our feeling that, due to the existence of a separate school system, it is likely that a child having entered school will have some religious persuasion since by this time he is actually knowledgeable.

The amended 31 (B) is an attempt to draft a section permitting the judiciary to approve adoptions "across religious lines" where it is felt that the child, although over four, still is unaffected by his religious environment. However the judge shall have no discretion where a finding of an affirmative nature is made—except where it is not at all probable that such a child would otherwise be adopted by a family of his own religious faith.

No attempt to draft a penalty or license provision for sections 31(A) and (B) as amended was made due to inherent faith in the integrity of agency employees. However such a regrettable enactment might be required if the provisions of this revision were not being adhered to.⁴⁵

It is hardly necessary to add that the amalgamation of the present dual facilities where they exist would be mandatory in order to facilitate the suggested changes. With adoption across religious lines being permitted and encouraged, separate Children's Aid Societies would serve no useful purpose. This too, would result in considerable

⁴² *Quaere*: would the phraseology "religious or spiritual" belief in the suggested revision of the statute be judged by the courts to permit adoption by those "without religious or spiritual belief", that is, agnostics and atheists?

⁴³ "Where practicable" is to be construed in the revised section 31 in its liberal context. Some courts in the United States have, it is submitted, tortured "where practicable" beyond the intended meaning of the legislators. Consequently a Protestant boy with a cleft-palate and subnormal intelligence would be held not adoptable by a Jewish couple on the theory that "where practicable" meant that someone Protestant, somewhere, would wish to adopt the boy, but had not yet applied.

⁴⁴ R.S.O. 1960, c. 53, sec. 62 provides that there is a mandatory six months probationary period in all adoption proceedings before the order is made final. The existence of this waiting period was a factor in choosing the age of four years as a line of demarcation.

⁴⁵ Also in the nature of procedure, to prevent a possible misuse of the facilities providing for temporary wardship under section 17(15) of the *Child Welfare Act* it might be necessary, to prevent mothers of illegitimate children, with strong religious convictions from withholding their consents until the child is two years of age and hence not as easily placed for adoption. To prevent this deprivation of welfare to the child it is recommended that this maximum period of temporary wardship be reduced to twelve months, but only in the case of mothers of illegitimate children.

economies, but of course these would be of little consequence when compared with the economies gained through the reduction in payments to foster homes.

In closing, allusion should be made to another important benefit to be derived from the proposed changes; there should be a substantial decrease in the number of private adoptions. It has been said, "While the majority of these private placements are successful, they are usually not recommended. A comparison of agency and private adoptions in California recently showed that the agency placement is twenty times more likely to turn out happily. Adoption procedure as carried out in good agencies is a complicated and skilled business—a partnership of social work, pediatrics, psychiatry, psychology, law, anthropology and genetics. The identity of the adopting parent is kept secret from the mother, and finally, great care is taken to match the child and the adopting parents. These careful procedures are not often found in private placement with somewhat tragic results".⁴⁶ It may be inferred from this that even honestly-contrived private adoptions cannot compare with those passing through the Children's Aid Societies. Society would thus benefit from the shifting of many placements from the former to the latter category, a likely result of the proposed amendments.

More importantly, the proposed amendments would remove much of the incentive and marked demand which currently supports a flourishing black market effected through private adoptions, a business reputedly worth over a million dollars a year in Ontario. For it is the couple, discouraged by the agencies today, due to the scarcity of babies available of their "faith" who is forced to deal in the black market. There is a necessary corollary resulting from the removal from the black market of couples who, except for their religion, would be approved by the agencies under the present legislation; that is a recommendation for stiffer enforcement of the black market penalty provision, section 80 of the *Child Welfare Act*. For, after the suggested amendments were implemented, any couple still forced to have recourse to such clandestine means to obtain a child would not be a couple capable of caring for the welfare of a child and should be severely dealt with.

What is needed is an increased awareness of the multiplicity of problems impeding adoption practices in Ontario. Perhaps the public opinion can create a demand for legislation to enforce a separation of church and state in this area. Only then, will true child welfare be achieved.

⁴⁶ Katz, Sidney, *Why can't you adopt a child?*, October 1957, *Chatelaine* at p. 118.