

4-1-1969

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### Recommended Citation

DeJarmon, LeMarquis (1969) "Religion, Adoptions and the Conflict of Laws," *North Carolina Central Law Review*: Vol. 1 : Iss. 1 , Article 3.

Available at: <https://archives.law.nccu.edu/nclcr/vol1/iss1/3>

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## RELIGION, ADOPTIONS AND THE CONFLICT OF LAWS

LEMARQUIS DEJARMON\*

In recent years the device of adoption has become a very popular method of providing for the care and welfare of many unfortunate children who would otherwise become a charge upon the State. Not only has this been the case in the United States, but also it has been the case in most of the countries of the world.<sup>1</sup> The anxiety and uncertainty in human affairs, one of the results of the long continuance of the Cold War, have produced some serious socio-economic as well as political problems regarding child care. Sporadic and spasmodic tampering with the welfare laws of the various states is, to say the least, an ineffective approach to a solution of these problems.

In the United States, the need for a more definitive program of adoption is greater today than in any other comparable period in American history. Practically every public or private child care agency has a backlog of eligible children for adoption. Reports show that approximately 208,700 women were delivered of out of wedlock babies in the United States in 1958.<sup>2</sup> Periodically the mass communication media carry reports and documentaries on the increase of the Black Market Babies racket. More recent reports show that more and more illegitimate children are being born to those who, because of their age limitation, have very low income earning power. Fern N. Eckman<sup>3</sup> reports that of the number of mothers who were delivered of out of wedlock babies in 1958, more than 83,000 were under twenty years of age, and 4,000 of that number were under fifteen years of age. Obviously, these mothers, because of limited training and tender years, were ill equipped to provide these children with the foundation for a successful life.

An effective adoption program would provide a large number of these children with the best probability of a creative and useful life for them-

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<sup>1</sup> McVeety, *Comparative Study of the Law of Adoption of Minors*, 47 *WOMEN LAW. J.* 13 (Spring, 1961).

<sup>2</sup> Eckman, *The Unwed Mothers*, *New York Post* (June 18, 1961). [Magazine]

<sup>3</sup> *Ibid.*

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selves and for their communities. For this reason, among others, it may be worthwhile to take a new and closer look at our adoption laws. One of the unique contributions of American jurisprudence to the law of adoption has been the principle that the adoption should serve the best interest of the child to promote the welfare of the child. This contribution has been the source of some of our more serious conflict of laws problems. During the late nineteen forties and early nineteen fifties, a large number of states had added a religious identity requirement as an integral part of the "welfare of the child" or "best interest of the child" test.<sup>4</sup> This requirement usually provides that the courts of the particular state will not decree an adoption unless the adoptive parents are of the same religious faith or persuasion as the natural parent, usually the mother, or that of the child where the child is old enough to choose. If the child is too young to choose a religion of his own, then the religion of the natural parent is imputed to him.

The state policies as represented by these enactments have hardened down into four basic patterns, namely:

- (a) Some states have attributed controlling weight to the religious differences of the natural parent and the adoptive parents and have rejected the would-be adoptive parent solely on these grounds.
- (b) Some states have taken the position that if other considerations show that the best interest of the child would be served, then the adoption would be approved on the condition that the adoptive parents rear the child in the religion of the natural parent.<sup>5</sup>
- (c) Still other states have taken the position that the potential adopting parents should be selected or rejected on consideration of their religious affiliation along with factors, such as home environment.
- (d) Finally, still other states have taken the position that the religious differences between natural parents and the adoptive parents should be subordinated and not given any considerable weight in approving the adoption.

The main stem which supports all these patterns is the right of the natural parents to determine the religion of the child who is to be adopted by a stranger. This religious factor is deemed an integral and necessary ingredient of the child's welfare.

On at least two different occasions,<sup>6</sup> State Court Justices have sug-

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<sup>4</sup> For a comprehensive review of the legislation in the various states, see Appendix, *Religion as a Factor in Adoption, Guardianship and Custody*, 54 COL. LAW REV. 376 (1954).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

gested that the trial court take notice that there were persons of the same religious faith who could have adopted, even though there was no evidence that these persons were attempting to adopt the particular child.<sup>7</sup>

At an early date, the Children's Bureau of the Federal Security Administration<sup>8</sup> reported that about 60 per cent of all adoptions were of illegitimate children. Further, a survey of nine states revealed that in a given year, of 1,508 children who were adopted, only 318 were adopted by members of a given religion, although the religion represented nearly one-half of the population of the nine states surveyed. The question may well be asked, whether, when there is a possible shortage of adoptive parents of the same religious faith as the natural parents, the best interest of the child is promoted by a prolonged stay in a welfare institution until adoptive parents of the same faith are found?

If we consider the four basic patterns of state policy on the religious identity test, in the light of the serious problems of illegitimate children cited earlier, it is apparent that conflict of laws problems are latent in this area. If we consider the four basic patterns in the light of our experiences in the way the courts have applied the religious identity factor, the conflict of laws problems become more apparent. What societal interest is fostered by a policy which is structured to encourage forum shopping on the part of those desiring to adopt children? Transactions involving foreign contacts invariably raise questions of jurisdiction, choice of law and extra-state recognition.

### *Jurisdiction*

Any discussion of the issue of jurisdiction to decree an adoption necessarily raises the question of the domicile of the parties. The *American Law Institute's Restatement of the Law of Conflict of Laws*<sup>9</sup> takes the position that jurisdiction to decree an adoption is based on either of two factors: the domicile of the adoptive parents or the domicile of the child. Jurisdiction based on the domicile of the adoptive parents is usually conditioned on the court also having jurisdiction over the person having legal custody of the child. Adoptions have two opposing results which are (a) the destruction of the parent-child relation between the child and his

<sup>7</sup> Tomkins & Jencken, *Modern Roman Law*, pp. 113, 131, 132 (1870); Cooper, *The Institutes of Justinian*, 3rd ed.; John Voorhis, N.Y. 1852, Book I. Shuman, *Roman Law in Modern World*, Vol. II, p. 84, 1922.

<sup>8</sup> *Religious Factors in Adoption*, 28 *IND. L.J.* 401, p. 407 n.35 (1953).

<sup>9</sup> *Restatement, Conflict of Laws*, Sec. 142 (1958); also Taintor, *Adoption in the Conflict of Laws*, 15 *U. PITT. L. REV.* 222 (1954).

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natural parents on the one hand; and (b) the creation of the parent-child relation between the child and the adoptive parents on the other hand. Since adoptions have this dual effect, a number of jurisdictions outside the United States base jurisdiction to decree adoption on the domicile of the natural parent or on the domicile of the child. In this way it is felt that both interest and status are represented before the court. If the adoption is decreed at the domicile of the natural parent or at the domicile of the child, where it is different from that of the natural parent, the existing parent-child status is necessarily before the court. The presence of the adopting parents would be sufficient to satisfy the interest of all in either the existing status or in the status to be created.

Under the prevailing American view, the interest of all concerned with the adoption may not be fully satisfied. In the majority of cases, the domicile of the adoptive parents is the place with the least contacts with the religious faith of the natural parent which, policy-wise, is an important ingredient of the best interest of the child. This becomes unmistakably clear in the instances where the adoptive parents have acquired a new domicile of choice for the purpose of avoiding the religious policy of their original domicile. The case of *Ellis v. McCoy*<sup>10</sup> is a prime example. The Ellises, after having been denied an adoption decree in Massachusetts because of religious differences, fled Massachusetts, taking the child with them. After acquiring a domicile in Florida, where the religious factor has been subordinated, they applied for and received a decree of adoption.<sup>11</sup> The child involved in this adoption was present in the adopting state only because of the adoptive parents' desire to evade the religious requirement of the domicile of the child and the child's natural parent. In this respect, Florida had the least contact with the natural parent-child status it purported to destroy, or with the religious factor which according to Massachusetts should survive the destruction of the parent-child status. The writer is of the opinion that in this case, Florida, since it was neither the domicile of the child nor of the natural parent, did not have the natural-parent-child before it, and thus, under *Pennoyer v. Neff*<sup>12</sup> should have been powerless to affect the status. *Ellis v. McCoy*,<sup>13</sup> in its final disposition, creates a situation reminiscent

<sup>10</sup> *Ellis v. McCoy*, 332 Mass. 254, 124 N.E.2d 266 (1955); *Appeal dismissed sub nom*, *Ellis v. Doherty*, 334 Mass. 456, 136 N.E.2d 203 (1956).

<sup>11</sup> *In Re Adoption of Hildy McCoy*, Chancery No. 199852, N. Fla. (July 10, 1957).

<sup>12</sup> 95 U.S. 714, 24 L. Ed. 565 (1878).

<sup>13</sup> Note 10, *supra*.

of that created by the decrees in the so-called migratory divorce cases.<sup>14</sup> For this reason it is suggested that jurisdiction to decree an adoption should be based on the domicile of the natural parents or on the domicile of the child, when his domicile is different from that of the natural parent. The natural parent's or the child's domicile is usually the place with the most contacts with the factors which comprise the best interest of the child test.

It has been advanced that it is the advantages of the new adoptive status that should be accentuated and made controlling. Therefore, if the court has jurisdiction over the person who has legal custody of the child or if the child is a waif, subject to the jurisdiction of the state, there is sufficient contact to empower the state to decree an adoption. In the *Matter of Maxwell*,<sup>15</sup> the mother migrated to Buffalo, New York, to avoid the Canadian authorities. The baby was born in Buffalo and given up for adoption there. The New York court, treating the child's domicile as different from that of the mother and since New York was the domicile of the adopting parents, took jurisdiction of the case. The New York court, emphasizing the welfare of the child, recognized that the religious choice of the mother should survive and continue into the new adoptive status which the court was empowered to create. In considering that the child in this case, having been born in Buffalo and having been given up for adoption in Buffalo, had acquired a domicile in fact in Buffalo, which was different from that of the natural mother, it is obvious that the New York court had the power to adjudicate this question. Unlike *Ellis v. McCoy*,<sup>16</sup> both the natural parent-child status and the adoptive parent-child status were before the court. Thus the court had the power to satisfy the interest of all concerned in the adoption. Even though jurisdiction is readily admitted in this case, the religious factor raised an interesting question. Since the religious identity test is an incident of the natural parent-child status, is the requirement a substantive part of the proceedings? A true appreciation of the ramification for this question can have significant effect. If the question is answered in the affirmative, then choice-of-law rules would eliminate some of the conflict-of-law problems experienced by past decisions. On the other hand, if the question is answered in the negative, then choice-of-law rules would increase the

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<sup>14</sup> *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *Sherrer v. Sherrer*, 334 U.S. 343, 68 S. Ct. 1087 (1948), *Coe v. Coe*, 334 U.S. 378, 68 S. Ct. 1094 (1948).

<sup>15</sup> 4 N.Y.2d 429, 151 N.E.2d 843 (1958).

<sup>16</sup> Note 10, *supra*.

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probability of conflict-of-law problems. At present the courts have not been too clear as to their position on this issue. The courts, in the few multi-state cases, have used language which would lead one to believe that the religious requirement is a substantive part of the proceeding. However, on closer observation, it is discovered that these courts unhesitatingly have applied their own law of religious identity as if the requirement was not a substantive part of the proceeding.

### *Choice of Law*

In the states where the issue has been raised, it appears that the courts have considered the religious factor not only as a jurisdictional fact, but also have considered it as a substantive part of the action. The Massachusetts court in *Krakow v. Department of Public Welfare*,<sup>17</sup> refused to decree an adoption, even though it had jurisdiction over the subject matter and of the parties because it could not acquire information on the religious faith of the family seeking the adoption. In so doing, the court cited, as authority, cases<sup>18</sup> involving actions ultra vires the corporation. The New York Domestic Relations Court Act<sup>19</sup> contains a provision which permits the court to vacate a commitment upon the showing of an erroneous adjudication of the child's religion.

In *Matter of Santos*,<sup>20</sup> the New York court, in a per curiam opinion, stated that the legislative mandate on religious identity left it no discretion. In the course of the opinion denying the adoption, the court said :

It was possible to give these infants to an institution under the control of persons of their religious faith in fulfillment of the statute that the religious faith shall be preserved and protected by the court. *To this the children had a natural and legal right of which they can not be deprived by their temporary exposure to another religion prior to the age of reason.* (Italics added.)

These three illustrations certainly point to the conclusion that the religious identity factor is considered to be a substantive part of the adoption action. Since it is an incident of the status in which the domicile of the natural parent and the child is vitally interested, the law of that domicile should be the law that controls. The consistent application of

<sup>17</sup> 326 Mass. 452, 95 N.E.2d 184 (1950).

<sup>18</sup> *Springfield v. Mayo*, 265 Mass. 41, 163 N.E. 653 (1928); *City of Cambridge v. Commonwealth*, 306 Mass. 358, 28 N.E.2d 447 (1940). Also, *Duffery v. School Committees*, 236 Mass. 5, 127 N.E. 540 (1920).

<sup>19</sup> N.Y. Dom. Rel. Ct. Act, Sec. 86(3).

<sup>20</sup> 278 App. Div. 373, 105 N.Y.S.2d 716 (1951); *appeal dismissed*, 304 N.Y. 483, 109 N.E.2d 71 (1952).

this principle would accomplish a greater degree of uniformity in results in the law of adoption than is probable under the existing view. If the Florida court in the adoption proceeding of Hildy McCoy<sup>21</sup> had accepted this view, then the Florida court, aside from the jurisdiction problem, would not have applied its own law on the religious issue but would have applied the law of Massachusetts which was the domicile of the natural parent as well as that of the child. In such event, the "natural and legal right" of the child would have been protected whether the action was brought in Massachusetts or in Florida. In this instance, the Florida court would sit and judge as a Massachusetts court would sit and judge on a petition for adoption of one of its domiciliaries by a non-domiciliary<sup>22</sup> of a different religious persuasion. The *Krakow*<sup>23</sup> case, in which a Brooklyn couple sought to adopt a Massachusetts child, indicates that Massachusetts would have denied the petition. Therefore, Florida would have done the same. The results of the petition, under this rule, would not depend so heavily on the adopting parents' choice of forum. Of more importance is the fact that such application of the substantive rule would avoid the situation where the status created would be recognized as valid in one state and considered invalid in the other state.

In *Matter of Maxwell*,<sup>24</sup> the New York court had a 3-1-3 split on the religious question in an adoption proceeding of a child whose natural mother at first proclaimed that she did not embrace any religious faith. Later, it was discovered that, in fact, she did embrace a particular religious faith. The mother was domiciled in Quebec, but the child had been born and given up for adoption in Buffalo, New York. The New York court, which considers religious identity such a substantive feature that the requirement has been written into the Constitution of the State,<sup>25</sup> did not take one look at the laws of Quebec, the domicile of the natural mother and, at least by operation of law, the domicile of the child.<sup>26</sup> The writer has not been apprised of any religious test in Quebec; but since

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<sup>21</sup> Note 11, *supra*.

<sup>22</sup> Briggs, *Excerpts from Utility for Solving the "Renvoi,"* in Selected Readings on Conflict of Laws, 189 A. Am. L. S. (1).

<sup>23</sup> Note 17, *supra*.

<sup>24</sup> Note 15, *supra*.

<sup>25</sup> Art. VI, Sec. 18, N.Y. Constitution. This provision is reported to be the only State constitutional provision of its kind. Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. REV. 334, 372, Note 207 (1955).

<sup>26</sup> Quebec requires the domicile of the applicant and of the child; Quebec R.S.Q. 1941 c. 324, Sec. 5, also, Infants Act, c. 306, R.S.S. (1953). Neither of these acts provides that religious identity between the applicant and the child is mandatory as a condition precedent to adoption.

Quebec requires both the domicile of the applicant and the child before decreeing an adoption, it is very likely that the Quebec court might consider religious identity as a part of the over-all welfare of the child. However, I have found no indication that Quebec would consider the identity of religions as absolutely mandatory. Thus, by applying the Quebec law it is possible that this adoption could have been affirmed by the New York court. In Quebec the natural mother may have been able to consent to the cross-religious adoption. Instead, New York applied its own law under which neither the consent of the mother nor the existence of persons of the same faith would permit the court to decree the cross-religious adoption.<sup>27</sup>

A factor which carried such importance in a proceeding of this kind certainly should be controlled by the law of the state which has the most interest in the transaction, that is, the domicile of the natural mother or the domicile of the child.

The possibility of uncertainty in adoptions as a result of the interplay of the four basic patterns of state policy as set out above point toward the desirability of a rule which would reconcile the policies of the various states rather than a rule which would put such policies in competition with each other. It is submitted that a rule which would require that the religious factor be governed by the law of the domicile of the natural parent would reduce the possibility of competition between conflicting state policies and remove the temptation of migratory adoptions. Under such a rule, once it is brought to the attention of the court that the petition for adoption contains a foreign element, such as, the non-domicile of the natural parent or the child, the forum court should look then to the law of the other state which has an interest in the matter, and apply that state's law to the religious issue. Not only would this procedure effect uniformity of results, but it would also foster the universal principle that the natural parent has the right to determine the religious faith of his child. In this respect, the interest of both states would be reconciled in a situation where otherwise they might be in conflict.

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<sup>27</sup> See *Matter of Santos*, Note 20, *supra*. See also, *Petition of Goldman*, 331 Mass. 647, 121 N.E.2d 843 (1954); *cert. denied*, 348, U.S. 942 (1955), where petition of adoption was denied even though the mother had consented and the adoptive parents had been found suitable on all other factors except religion. The court found the adoption "not practicable" since it was established that many families of the same religion as that of the child had filed applications for adoptions. However, there was nothing in the evidence to show that any of these families had ever seen these particular children or had expressed any desire to adopt these children.

*Full Faith and Credit*

In addition to the foregoing, the introduction of the religious requirement in adoptions provides an added reason for raising the question of extra-state recognition. In the past, recognition of out-of-state adoptions among the states has been primarily based on the similarity of local policy.<sup>28</sup> As far as can be determined, the Supreme Court of the United States had not expressly held that the Full Faith and Credit Clause of the Constitution requires a state to recognize an out-of-state adoption.<sup>29</sup> However, it should be noted that the Supreme Court has held at an early date that for a state to deny the right to inherit its land to a child adopted in another state did not violate the Full Faith and Credit Clause.<sup>30</sup> This case involved the denial of one of the incidents of the adoptive status, but not the state's denial of the adoptive status itself. A state may well recognize the adoptive status and yet deny the incidents which flow therefrom.<sup>31</sup>

The question remains open as to whether a state faced with a cross-religious factor in an out-of-state adoption is free to withhold recognition of that decree on the grounds that cross-religious adoptions are contra to that state's strong public policy. What little we have on the matter would seem to indicate that the question should be answered in the affirmative.

When the question was raised that the Florida court should give Full Faith and Credit to the Massachusetts decree denying the petition for the adoption of Hildy McCoy,<sup>32</sup> it was argued that Massachusetts could have considered a new application for adoption by the Ellises on a showing of a change of religion. Therefore, since the decree was not final in Massachusetts, it was not entitled to Full Faith and Credit in Florida. This seems to be in accord with the prevailing view—that only final judgments must be accorded Full Faith and Credit.<sup>33</sup>

In the United States, the "best interest of the child" is the basic test

<sup>28</sup> See 32 ST. JOHN'S L. REV. 292 (1958).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Hood v. McGehee*, 237 U.S. 611 (1911). England has reached the same conclusion by not recognizing the adoption: In *Re Wilson*, 2 W.L.R. 262 (1956), a child adopted in Montreal could not succeed to English land. To the same effect, see In *Re Wilby*, 1954 Ch. 733. (Child adopted in Burma.) For other instances, see *Burnfel v. Burnfel*, 2 D.L.R. 129 (1926). (Child adopted in Iowa could not succeed to Saskatchewan land.) In *Re Brophy* 1947, 3 All. E.R. 172. (Child adopted in N.Y. could not succeed to land in New Zealand.)

<sup>31</sup> Erhenzweig, *Conflict of Laws*, Part I, Sec. 51, pp. 182, 184 (1962).

<sup>32</sup> Note 10, *supra*.

<sup>33</sup> *Lynde v. Lynde*, 181 U.S. 183 (1901); *Sistare v. Sistare*, 218 U.S. 1 (1909).

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for decreeing an adoption. The religious identity requirement has become associated with the best interest test. It should also be noted that the best interest test is also the test used almost universally in determining child custody other than adoptions. In such a custody case, *May v. Anderson*,<sup>34</sup> Mr. Justice Frankfurter advanced the thesis that the “best interest of the child” or “the child welfare” test is a factor in which the state has such vital interest that the state could not be precluded from inquiry by a prior adjudication. Said Mr. Justice Frankfurter, “The child’s welfare in a custody case has such a claim upon the state that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state’s discharge of its responsibility at another time.” Since the “child welfare” or “best interest” test is the same test used by the courts in both custody and adoption cases, it is highly unlikely that the Full Faith and Credit Clause would require that the test be treated differently in adoptions from the way it has been treated in custody cases. In this light, since the religious requirement is a part of the welfare test, it merely adds another set of facts, the consideration of which results in just one more element making for the non-finality of adoption decrees.

Earlier in this paper it was suggested that the religious identity factor also raises a question of jurisdiction. It is well settled that the Full Faith and Credit Clause does not require a court to recognize a foreign decree when that decree has been issued by a court that did not have jurisdiction.<sup>35</sup> In such a situation, the decree is subject to collateral attack in the courts of a sister state. The cases discussed previously have certainly treated the religious factor as a most important fact, without expressly labelling it a jurisdictional fact. Yet a few cases have alluded to the religious factor effect on the power of the court. Therefore, if, as these few cases have intimated, religious identity was treated as a jurisdictional fact in the sense that domicile is a jurisdictional fact, then a sister state should be able to inquire into that fact in the absence of the issue having been expressly litigated. On the court finding that the identity did not exist, the court should be free to withhold its recognition of the foreign decree.

Even if we consider that the Full Faith and Credit Clause would require extra-territorial recognition of the status created by the foreign decree,

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<sup>34</sup> 345 U.S. 528, 536 (1953).

<sup>35</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942). See also, Jackson, *Full Faith and Credit-The Lawyer’s Clause of the Constitution*, 45 COL. L. REV. 1 (1945).

other interesting questions of out-of-state recognition may be raised. Let us suppose that the court of State 1 has decreed an adoption, and in that proceeding the natural mother has falsely claimed that she is of the same religious persuasion of the adoptive parents when in fact she is of a different persuasion. In a subsequent action in State 2, where the issue of status is raised, equitable defenses cannot be raised in an action of law. Should the court of State 2, with this information before it, recognize the decree as long as it is outstanding in State 1? *Jaster v. Currie*<sup>36</sup> would indicate that the decree should be recognized as long as it was outstanding in State 1, thus placing the burden on the person alleging fraud in the procurement of jurisdiction to impeach the decree in the state of rendition.<sup>37</sup> On the other hand, in a jurisdiction where law and equity are combined, the equitable defense of fraud should be available to impeach the decree in the second state. Then State 2, upon admitting the plea of fraud, would withhold its recognition of the decree.<sup>38</sup> Still further, if religious identity is a jurisdictional fact, the court of State 2 should not be bound by the recital of the mother in the State 1 court, should be able to determine for itself that the particular jurisdictional fact was or was not present, and that the State 1 court had or had not the jurisdictional power to render such decree.<sup>39</sup>

It is the writer's contention that the introduction of the religious factor in adoptions merely adds an issue which makes for problems of extra-territorial recognition without serving any basic interest of the state. The increasing number of adoptable children in most states would seem to call for an effective program to care for these children—not a program which makes it more difficult. The religious requirement merely complicates a beneficial device unduly and has introduced more uncertainty in an area where uncertainty should be held to a minimum.

### *Conclusion*

From a review of the cases in the various states which have considered the religious requirement, two propositions are discernible:

1. By imputation, the natural parent's religious beliefs become that of the child, and
2. Religion is to be perpetuated in the new adoptive status, either

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<sup>36</sup> 198 U.S. 144 (1905). See also Anno. 55 A.L.R.2d 673 (1957).

<sup>37</sup> *Christmas v. Russell*, 5 Wall. 290, 18 L.Ed. 475 (1866); *Maxwell v. Stewart*, 89 U.S. 77 (1874).

<sup>38</sup> *Levin v. Gladstein*, 142 N.C. 482, 55 S.E. 371, 32 L.R.A. ns (1906).

<sup>39</sup> *Williams v. North Carolina*, 325 U.S. 226, 89 L.Ed. 1577 (1945).

- (a) Restricting adoptive rights to those of the same faith of the natural parent, or
- (b) By requiring the adoptive parents to rear the new member of their family in a religious faith different from that of their own.<sup>40</sup>

The latter of these two propositions is objectionable to the writer because there appears to be no societal interest served by such requirement. The huge increase in the number of illegitimate births has resulted in an increase in the number of children admitted to public adoption agencies. It is difficult to see what societal interest is being fostered by requiring a prolonged stay in a public institution simply because there are some members of the same religious faith as the natural mother in the community. Justice Desmond, in voting to deny the adoption in *Maxwell*,<sup>41</sup> said: "It is inconceivable that in the city of Buffalo such persons (of same faith as the mother) could not be found." Thus Justice Desmond would deny this child the advantages of a home life simply because some people existed of the same faith of the mother, although the record did not disclose that these persons were eagerly seeking to adopt this child.

Further, the suggestion that the adoptive parent be required to rear the child in the religious faith of the natural parent, which is different from that of the adoptive parents, is objectionable to the writer for the following reasons:

Not only is such requirement directly contra to the historical purpose of adoption, but the requirement serves no societal interest.

The foundation of American society is the family unit. There is little value to society in creating a familiar status only to inject into that status a factor so widely recognized as productive of disunity. Most sociologists agree that a family with religious unity is the family least likely to produce community social problems.

As has been shown earlier, there exist four basic patterns for treating the religious requirement in this country. It seems quite possible, indeed

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<sup>40</sup> See *In Re Varoinkes*, 160 Misc. 13, 289 N.Y.S. 355 (1936), where in a cross-religious family situation the four children involved were finally distributed as follows: the oldest child (boy) was given to a paternal uncle and reared in the Mohammedan faith of the father; the other three children were placed in a Protestant home together, but one received training in the Catholic faith of the mother, while the other two received training in Mohammedanism with the father. See also, Froessel, J. concurring in *Matter of Maxwell*, 4 N.Y.S.2d 429, 151 N.E.2d 848 (1958). Further, see Paul, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U.L. REV. 649 (1945).

<sup>41</sup> Note 15, *supra*.

probable, that an adoption which requires the adopting parent to rear the child in a different religion from his own may provide additional facts on which a sister state may disapprove the law of the adopting state in matters involving the incidents of that adoption.

The writer is of the opinion that the "best interest of the child" test, so uniquely an American contribution to the law of adoption and so radically a departure from the Roman law concept of adoption, is being defeated in its ideological purpose of protecting the homeless and destitute child by associating it with the religious identity requirement. When the state's policy of religious identity is placed in competition with other interests, the possible harm flowing from the religious restriction outweighs the good of such legislation.

Since it is highly unlikely that the legislatures of the various states will repeal these enactments, the need exists for the development of some uniform treatment of adoptions with foreign or multi-state contacts.

The National Conference of Commissioners on Uniform State Laws has proposed a Uniform Adoption Act<sup>42</sup> which has as its main thrust the principle that adoption proceedings should be based on consent. The theory put forward is that under this principle the adoption court is freed of the issues to be determined in a controversy over parental rights. The proposed act also contains a provision for recognition of out-of-state adoptions, which would make for finality in adoption decrees.

Towards that end, the writer recommends the following:

1. That jurisdiction to decree an adoption be based on the domicile of the natural parent or on the domicile of the child.
2. That the state legislatures enact legislation similar to that proposed by the Commission on Uniform State Laws.<sup>43</sup>

As for the first proposal, such requirement would bring before the court the parent-child status as between the natural parent and the child as well as the parent-child status to be created between the adoptive parents and the child, which was not the case in *McCoy*.<sup>44</sup> In addition, such requirement would minimize the problems of choice of law on some rational basis, rather than just ignoring them, as is the case at present. Since, under this view, both status between that of the natural parent and child and that between the adoptive parent and child would be before the

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<sup>42</sup> See 1953 Handbook, National Conference of the Commission on Uniform State Laws.

<sup>43</sup> *Ibid.*

<sup>44</sup> Note 10, *supra*.

court, the law of the forum would be the only law with complete contact and thus capable of serving the interest of all concerned. The possible uncertainty and complication resulting from migratory adoptions would, for the most part, be eliminated. Further, such requirement would bring this country more in line with the other countries of the world.

As for the second proposal, the proposed Uniform Adoption Act<sup>45</sup> provides an effective method of interstate recognition for adoptions. The desirable goal should be that an adoption valid where created should be valid everywhere. The increasing economical and sociological problems created by the increase of destitute and homeless children call for an effective adoption program, free from uncertainty and doubt, so as to relieve the fears of would-be adopters. Once this is done, these children will have a better chance for a fully creative and useful life for themselves, their community, and their country.

Adoptive parents and adoptive children should not be subjected to the ever-present danger of having attachments which have been formed painfully severed, “. . . for how may it be known that the natural mother has not lied about her religious affiliations.”<sup>46</sup>

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<sup>45</sup> Note 42, *supra*.

<sup>46</sup> Fields, J. Matter of Maxwell, 151 N.E.2d 848, 850 (1958).