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# The Religious Factor in Adoptions

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# INTERFAITH ADOPTION: A SYMPOSIUM

*Most of the material used in the symposium which appears on the following pages was solicited prior to an announcement by Lloyd Richardson, Director of the Metropolitan Children's Aid Society of Toronto that henceforth in Metropolitan Toronto, the Protestant Children's Aid Society would permit atheists, agnostics and Jews to adopt Protestant children where necessary. The position of the Roman Catholic Church in opposition to interfaith adoption remains unchanged. The other Children's Aid Societies in Ontario have not publicly announced any intention to follow Metropolitan Toronto's example.*

## (1) The Religious Factor in Adoptions

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### INTRODUCTION:

In keeping with contemporary social attitudes the plight of the illegitimate and adopted child has been considerably improved in Ontario as a result of the legislative reforms represented by the *Legitimacy Act*<sup>1</sup> and the *Child Welfare Act*.<sup>2</sup> These measures have given statutory effect to a more enlightened and humane point of view which was sorely lacking in the traditional common law approach influenced as it was by feudalistic and Puritanical concepts relating to illegitimacy and the status (or lack of it) of the adopted child. The result is that today illegitimacy does not carry with it as many of the legal disabilities which it once attracted. Adopted children now enjoy virtually all of the legal rights and privileges that they were once denied under a harsher and more severe legal regime.

One would expect that as a result of the improved status now accorded the adopted child by law real impetus would have been given to the desires of many childless couples to adopt one or more children. If so, it seems difficult to understand why the growing numbers of children available for adoption cannot be substantially reduced. The problem has reached such proportions that the Ontario Department of Public Welfare has been conducting a province-wide campaign of newspaper advertisements designed to encourage childless married couples or parents with small families to adopt some of

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<sup>1</sup> R.S.O. 1961-62, c. 71.

<sup>2</sup> R.S.O. 1960 c. 53, as amended by 1962-63, c. 12.

the hitherto "unadopted" children presently under the care of the Children's Aid Society, institutions and other agencies.

One factor which serves to inhibit the placement of children with prospective parents for adoption is the religious question. This is so because no effort is made to place a child in a home where the religious faith of both parents is not identical with that of the child's natural parents (or if illegitimate, with that of the natural mother). The current practice "tags" each child with a religious affiliation at birth that is irrevocable, even by the parents themselves. It means that a Roman Catholic child can only be placed with Roman Catholic parents, a Protestant with Protestant parents, a Jewish child with Jewish parents. It is interesting to note the specified designation for Roman Catholics and the broad distinctions that are held to suffice for others. This means that if there are more Roman Catholic infants than there are available or willing Roman Catholic parents, the children are destined to a life within an institution for infants whose natural parents are unable to care for them or with an endless series of "temporary" foster homes.

It is interesting to note that in this day and age when great stress is laid upon interracial harmony no absolute bar exists to prevent a cross racial adoption, though, they are not undertaken lightly nor frequently in view of the sociological by-products which must be reckoned with and evaluated in terms of the adopting parents and the adopted child. But the fresh breezes of ecumenicity have evidently not achieved a velocity sufficient to permit cross-faith adoptions where it is felt that the best interests of the child would indicate its desirability.

There is no doubt that as an ideal, identity of race, religion, cultural background and physical characteristics between the prospective parents and the child to be adopted would be both desirable and in many instances conducive to the welfare of the child and the ultimate success of the placement. To any who admit of the significance of religious values a high priority will always be accorded the ideal of seeking to achieve identity of religious background between adopted child and adopted parents. The question this factor raises, among others, is whether this element should be a determining factor and whether the onus, or prime responsibility for achieving this form of religious matching should rest upon the state? When one accepts the fact that in Canada, with perhaps the exception of Quebec which professes rather vigorously to be a province quite unlike the rest, a pluralistic society requires a very large measure of separation of church and state, if the principles of a democratic society are to operate effectively, it is essential that the state should be excluded from any involvement in religious matters.

Three developments within recent years have focused public interest on the religious aspect of the adoption problem in Ontario. First, a district court approved the adoption of a child, born to an

illegitimate mother who was a Roman Catholic, by parents who had provided a foster home for this child for some years under the auspices of the Children's Aid Society but, who by religious persuasion were Protestants.<sup>3</sup>

Second, prospective parents without any religious affiliation were in a particular instance<sup>4</sup> refused the opportunity of adopting a child on what was conceded to be the sole ground of lacking any religious faith. It would appear that child welfare authorities have succeeded in "tagging" every "adoptable" child in Ontario with a religious label and there were just none left over for an agnostic couple; or one can conclude that agnostics do not give birth to children out of wedlock nor die leaving their children in need of adoption here in Ontario!

Third, Coadjutor Archbishop Philip F. Pocock, of Toronto, issued a statement in September of 1963, reported in the official newspaper of the Roman Catholic Church's Church Extension Society of Canada<sup>5</sup> attacking the suggestion that crossfaith adoptions should be allowed at all, under any circumstances in Canada and the proposed changes in the Ontario *Child Welfare Act*<sup>6</sup> allowing the placement of a child for adoption without regard to its religion would represent a sellout to authoritarian statism.

#### *The Statutory Background*

Before proceeding any farther, it would be well to examine the statutory background as it now exists in Ontario so as to properly assess the current situation before making any suggestions as to what changes, if any should be made.

*The Child Welfare Act*<sup>7</sup> with subsequent amendments was first enacted in 1954, and replaced several statutes dealing with portions of the field now covered by one act. The *Children's Protection Act*,<sup>8</sup> *Children of Unmarried Parents Act*<sup>9</sup> and the *Adoption Act*<sup>10</sup> in force until 1954 have now been revised and incorporated within the one act.

It is interesting to note that the section dealing with the religious affiliation of a child is not found in that part of the Act which deals with adoption but rather in Part II where its provisions deal with the protection and care of neglected children. Since the matter is only mentioned in the one section of the Act it will be quoted in full herewith incorporating the amendments adopted by the Legislature in 1963. Section 31 of the *Child Welfare Act*<sup>11</sup> now reads as follows:

<sup>3</sup> *In Re Lamb* [1961] O.W.N. 356.

<sup>4</sup> See page 23. "Adoption In Ontario: An Agnostic's Position" by Patricia M. Chaikoff.

<sup>5</sup> THE CANADIAN REGISTER, Kingston, Ontario, Sept. 14, 1963, p. 1.

<sup>6</sup> *Supra*, footnote 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> R.S.O. 1950, c. 53.

<sup>9</sup> R.S.O. 1950, c. 51.

<sup>10</sup> R.S.O. 1950, c. 7.

<sup>11</sup> *Supra*, footnote 2.

31.—(1) A child shall be deemed to have the same religious faith as his father.

(2) A child who is born out of wedlock shall be deemed to have the same religious faith as his mother.

(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 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, a judge may make an order finding the religious faith that a child is deemed to have under this section to be any religious faith that is in the best interests of the child.

Part IV of the same Act is the part which deals with the adoption of children and no mention is made in this part of the Act with reference to any requirement that the adopting parents must have the same religious faith as the child about to be adopted. Indeed, apart from Section 31, no mention is made of the religious affiliation of the child that comes under the provisions of this Act. It is therefore possible to assert that under the present Act there is no statutory requirement calling for adopting parents to have the same religious faith as that of the adopted child as a condition precedent for the Court to make an adoption order. Section 31 deals only with the care and custody of the child prior to placement for adoption and not with the adoption of the child.

#### *The Common Law Position*

If the statute is silent then where does one turn for authority? If the Child Welfare Act<sup>12</sup> is to be properly considered as a codifying statute embodying in one Act a specific branch of the law the rule of interpretation is laid down in the famous House of Lords decision in the case of *The Bank of England v. Vagliano Bros.*<sup>13</sup> where Lord Herschell said:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

<sup>12</sup> *Ibid.*

<sup>13</sup> [1891] A.C. 107 at pp. 144-5. These comments were made in a reference to the Bills of Exchange Act, 1882.

In addition, Lord Herschell outlined three exceptions to the rule:

(1) where the provisions of the Act are ambiguous, earlier cases may help to resolve the ambiguity; (2) where a term used in the Act has acquired a technical meaning, previous cases may be cited to illustrate this specific technical meaning; and (3) where the Act is silent with reference to a particular point the older decisions on this point are still authoritative.

It will not be possible here to canvass all the cases both in England and in Ontario dealing with the religious faith of a child in terms of its future custody after one or more of its parents are by reason of death or for some other reason unable to care for it. Indeed, it will not be possible to examine more than just a few cases which appear to be typical of the approach taken by the courts in this area.

In the case of *Re. Steacey*<sup>14</sup> a husband and wife agreed that their children should be reared in the Roman Catholic faith. Just before the wife died, the husband agreed to his wife's dying request that the youngest child was to be raised a Roman Catholic by the wife's sister. After his first wife's death, the husband married again, this time to a Protestant. In the action the husband sought custody of the child who then was nine years old. The learned trial judge refused the husband's application. On appeal to the Ontario Court of Appeal, it was held that notwithstanding the fact that the husband's agreement with his first wife was not binding in law (because it was not in form a deed nor was it incorporated in her will) the father's action was equivalent to a breach of promise. In addition the Court of Appeal felt that at the age of nine the girl's religious life could only be changed at the expense of permanent injury to her and that having regard to what was in her best interests the father's application should be refused and the appeal dismissed.

Perhaps the leading authority with respect to the role of the courts in determining the degree to which it will be bound by the religious factor of the children and their natural parents in terms of future custody is to be found in a House of Lords decision in the case of *Ward v. Laverty*.<sup>15</sup> Before their marriage, the husband was a Roman Catholic, the wife a Presbyterian. However, the wife embraced her future husband's faith and they were married as Roman Catholics. The three daughters of the marriage were baptized as Roman Catholics. In time the husband's conduct and treatment of his wife forced her to leave him and she went to live with her parents. The wife removed the oldest daughter from a Roman Catholic school and placed her in a Protestant school. In his will the husband directed that his children were to be raised in the Roman Catholic faith. Shortly after the execution of his will, he died. Within a few years the wife died and the children remained in the care of her parents who were Presbyterians. The husband's relatives brought an

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<sup>14</sup> (1922) 52 O.L.R. 579 (C.A.).

<sup>15</sup> [1925] A.C. 101 (House of Lords).

application for *habeas corpus* seeking custody of the children, so that they might be brought up in the Roman Catholic faith as indicated in the father's will. The trial judge refused the application holding that the oldest child had acquired strong religious convictions of her own and it would be harmful to precipitate a change. The Court of Appeal while agreeing with the trial judge with reference to the oldest daughter agreed to allow the appeal in respect of the two younger girls. The House of Lords disagreed with the Court of Appeal and reinstated the trial judge's decision because it felt that while the younger children could probably be given over to their paternal relatives with little risk of injury the oldest could not and it would not be in the best interests of all the children to be separated from each other.

This decision was cited a few years later in the Ontario Court of Appeal in the case of *Re. Laurin*.<sup>16</sup> Here both husband and wife were Roman Catholics. The husband died first. The wife after her husband's death transferred her religious allegiance to a Protestant church and proceeded to bring up her children in her new found faith. Shortly afterwards she died and the members of her church assumed the custody and religious upbringing of the surviving children. The father's Roman Catholic relatives applied for an order of the court designating them as the guardians of the children. The Court refused the application citing the *Ward v. Laverty*<sup>17</sup> decision.

Middleton, J.A. had this to say in the course of his judgment, ". . . the wishes of the father of the child are to be considered; and if there is no other matter to be taken into account, then . . . the wishes of the father prevail. But that rule is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. . . . *the welfare of the children forms the paramount consideration.*"

Speaking of the authority of the child's natural parents to determine its religious education the Supreme Court of Canada in the case of *DeLaurier v. Jackson*,<sup>18</sup> a judgment concurred in by Chief Justice Duff, Crocket, J.; and Smith, J. said that:

however wide it may have been at common law, must now be measured by the rules of equity, which in virtue of the express provisions of the Judicature Act prevail in Ontario as they do in England and . . . recognize the welfare of the child as the predominant consideration. If the general welfare of the child requires that the father's rights in respect of the religious faith in which his offspring is to be reared, should be suspended or superseded, the courts in the exercise of their equitable jurisdiction have undoubted power to override them, as they have power to override all other parental rights though in doing so they must act cautiously . . . if the court is satisfied in any case upon a consideration of all the facts and circumstances, as shown by the evidence, that the father's wishes conflict with the child's own best interests, viewed from all angles—material, physical, moral, emotional, and intellectual as well as religious—then the father's wishes must yield to the welfare of the child.

<sup>16</sup> (1927), 60 O.L.R. 409, 3 D.L.R. 136 (C.A.).

<sup>17</sup> *Supra*, footnote 15.

<sup>18</sup> [1934] S.C.R. 149, (1934) 1 D.L.R. 790 (Supreme Court of Canada).

It is clear that there is no rigid, unvarying rule that in every case the religion of the child, or what is more accurate, the religion of its natural parents, must be identical with that of the prospective adopting parents. Both in England and in Ontario, the decisions of the Courts have underlined one salient point in all considerations relating to the religious question, and that is *the ultimate well being of the child*. No consideration has been given to the interests of any racial or religious group in such cases. Even the sigularly important and valid rights of the child's natural parents have on occasions given way before the paramount concern of the best interests of the child itself.

### *The Unwritten Law*

Having considered the terms of the CHILD WELFARE ACT<sup>19</sup> and the jurisprudence of the highest courts in England, Canada and Ontario, how is it possible to say that here in Ontario in the year 1964, the religious affiliation of an infant's parents (father, if legitimate; mother, if illegitimate) can be a bar to the adoption of that child by any married couple who do not happen to share the same faith? No doubt the simple answer is that "it just isn't done." But this is not a satisfactory answer in the absence of any clear-cut statutory directive or line of decided cases that lay down any other alternative. It will continue to be an unsatisfactory answer until the Legislature determines to resolve the uncertainty and dubious legality of the current practice. Such a solution has indeed been suggested during the current session of the Ontario Legislature by R. A. Eagleson, the member for Lakeshore.<sup>20</sup>

The practice of dividing the "religious world" into Roman Catholic, Protestant, Jewish and others while having some statutory warrant hardly seems to be consistent with the resort to particularity in the case of one religious group but accepting broad classifications quite out of line with the facts of life in both Protestant and Jewish areas of religious life where there are distinct and decided group and denominational identities so that a schizophrenic approach characterizes the practice of sharply delineating the religious differences on the one hand and being content to accept broad and blurred categories on the other hand.

The decision in the *Lamb*<sup>21</sup> case while consistent with the general tenor of previous decisions relating to the custody of children and the impact of the religious issue on that question, is nonetheless an important and perhaps significant decision. This appears to be the first time in Ontario a court has been asked to determine the issue of whether to grant an adopting order or not on the primary ground that the child's best interests demanded a rejection of the religious identity test. The decision has provoked vigourous protests not the

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<sup>19</sup> R.S.O. 1960, c. 53, as amended by 1962-63, c. 12.

<sup>20</sup> Legislature of Ontario Debates—Wednesday, January 29, 1964.

<sup>21</sup> *Supra*, footnote 3.



least of which have come from various Roman Catholic sources. There is reason to suspect that strong pressure has been exerted to prevent the recurrence of a situation such as prevailed in the *Lamb* case.

If the number of children who are available for adoption was being substantially reduced such a development might not cause any concern. But, when the number is rising faster than the rate of adoptions with a consequent backlog and a growing number of apparently "unadoptable" children, ("Unadoptable" not because of any physical disabilities, but because of an unwritten quasi-social code that decrees that an otherwise adoptable child's natural parent's religious affiliation is his for life and dictates the narrowed area from which potential adopting parents can be drawn) this is a matter of concern to all and certainly to those who are interested in seeing that the law should serve the highest interests of society, without regard to racial or religious considerations.

### *Some Possible Solutions*

What is the solution to the problem? Is it to be found in the statutory device used by some forty-three of the jurisdictions in the United States and described as "religious protection statutes?" These statutes have been painstakingly analyzed by Lawrence List, a member of the New York State bar and reported in a recent issue of the *Buffalo Bar Review*.<sup>22</sup> Mr. List points out that these statutes, while varying in form and structure, in essence require that the religion of a child's natural parents (father's if legitimate and mother's if illegitimate) is deemed to be the child's religion and if placed for adoption the adopting parents must have the same religion. In terms of their implementation it would appear that these statutes fall into three categories: (1) where the courts appear to ignore this provision of the statute; (2) where the courts look upon the statute as merely directory and not mandatory, leaving a large area of discretion to the courts and finally, (3) where the courts interpret the statute strictly exercising little or no discretion [he cites two examples in this last category—Massachusetts which appears to be adopting an even stricter and narrower interpretation of these statutes and New York which appears to be veering away from the strict view to one that suggests it might in time fall into category (2)].

It would seem that the better approach would be an amendment to the CHILD WELFARE ACT<sup>23</sup> providing that where all other factors are equal if a home is available for an adoptable child with the same religious faith as that of its natural parents such an adoption may be approved by the Court, but, that the Court shall have the discretion, where in its view the best interests of the child require it, to disregard the fact that otherwise acceptable parents do not

<sup>22</sup> *Buffalo Law Review*, Vol. 13, Number 1, Fall 1963, pp. 9-57.

<sup>23</sup> *Supra*, footnote 2.

happen to possess the same religious affiliation as the adopted child's natural parents possessed.

But, the best approach would be an amendment providing for the court to consider the best interests of the child in question without regard to any sectarian or denominational considerations. This would leave to the churches and other religious organizations the responsibility of seeing that every child whose natural parents had a religious affiliation would not lack for applications from prospective adopting parents of a similar religious persuasion. It would leave to the state the responsibility, heavy enough as it is, of considering only the temporal welfare of the adopted child.

### CONCLUSION

If one considers the nature of contemporary society with its pluralistic racial and religious characteristics it seems obvious that the course of prudence and common sense would suggest that the state which is the corporate reflection of all its citizens must therefore play a neutral and certainly strictly impartial role in matters religious and racial. If this is a sound premise then how can the state be required to inject itself into primarily sectarian concerns and considerations without imperiling at the same time the essential nature of the democratic and representative form of government accepted and recognized as the most desirable form here in Canada?

Is it in keeping with the current climate of public opinion and sociological knowledge that the future happiness, development and preparation of tomorrow's citizens should be sacrificed or at the least endangered by the state for reasons that are not relevant to the prime concerns of the state? Should sectarian anxieties, on grounds perfectly valid *per se* for such organizations, be permitted to influence government agencies in depriving an otherwise adoptable child of a home, the love and care and warmth that only a home can provide and instead to sentence such a child to a childhood of institutional barrenness or nomadic wandering from one temporary foster home to another until he is old enough, though hardly capable of fending for himself?

If there are those who feel keenly that religious values are important and highly significant, and this writer is one who does share that view, then let them and the various organizations that give form and substance to the religious life of the nation exert the pressure, indeed the ecclesiastical discipline if necessary, to make sure that every Baptist, Jewish, Lutheran, Roman Catholic, Anglican child available for adoption will have Baptist, Jewish, Lutheran, Roman Catholic and Anglican applicants. The onus should rest squarely, and nowhere else, upon the churches and those individuals who feel that a child's religious training is important and that the adoptable child's best interests also include his religious upbringing.