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Constitutional Law -- Contempt -- Court's Jurisdiction over the Religious Upbringing of Children

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riers to see who creates an award first"[44] if the employee is eligible for compensation in more than one state. Rather, employers and courts should provide protection[45] within the framework of the laws when dealing with redress for industrial injuries. Any other attitude would not be consonant with the spirit in which the compensation statutes were enacted.[46]

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Constitutional Law—Contempt—Court's Jurisdiction over the Religious Upbringing of Children

The recent Iowa case of *Lynch v. Uhlenhopp*[1] presents a situation which probably has never arisen before. A divorce decree had been entered in a previous suit under which the wife had obtained custody of the six-year-old child of the marriage. The parents had agreed by stipulation, written and signed, that the "child shall be reared in the Roman Catholic religion," and the court's decree embodied the exact terms of this stipulation. Several months after the decree was entered, the petitioner (wife) began taking the child to Protestant Sunday school and since that time has been rearing the child in the Protestant faith. It seems that the father protested to the mother about this matter shortly after he learned about it, and brought the present proceedings to enforce the terms of the custody decree. In this proceeding the father did not seek and the district court did not order a transfer of the child's custody to him. The district court held that the decree was binding upon the mother so long as it remained unvacated and unmodified, adjudged her in contempt, but suspended passing sentence upon her in order to afford her an opportunity to purge herself by filing an affidavit to the effect "that she is rearing the child in the Catholic faith." Writ of certiorari was granted and execution of the order has been stayed pending completion of the hearing to review the order.

The main question presented on appeal will be whether the court

[44] In some cases the insurance carrier can create an award in the state whose laws are more favorable to the employer before the employee takes steps to protect himself. HOROVITZ, WORKMEN'S COMPENSATION 41 (1948); therefore, the result of the *Magnolia Petroleum Co.* case may tempt an employer to shop for the state with the smallest award. Cheatham, *Res Judicata and the Full Faith and Credit Clause—Magnolia Petroleum Co. v. Hunt,* 44 COLUM. L. R. 330, 345 (1944). ...

[45] An award of compensation by the Arkansas commission to a Texas employee for injuries sustained in Arkansas, on petition filed by the employer *without the knowledge of the employee,* did not bar a second award under the Texas act. Standard Acc. Ins. Co. v. Skidmore, — Tex. Civ. App. —, 222 S. W. 2d 344 (1949).

[46] "Under our statute the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises." Bausman, J., in Stertz v. Ind. Ins. Comm'n, 91 Wash. 588, 606, 158 Pac. 256, 363 (1916).

[1] — Iowa —, — N. W. 2d — (1956). Now on appeal from the District Court of Wright County, Iowa.

awarding custody of the child had jurisdiction to enter into its decree provision respecting the child's religion. The fact of the court's jurisdiction will determine whether the court's decree can be collaterally attacked.[2] As no cases in which the jurisdictional question is raised have been found, a review of some of the cases in which the religious upbringing of children has been considered should be helpful in predicting the outcome of this case on appeal.

In attacking the validity of decrees, violation of which has been punished by contempt, courts classify decrees as (1) erroneous or irregular and (2) void. As to the first type, erroneous or irregular decrees, where the court has jurisdiction over the subject matter and the parties the rule is stated as follows:

> "[T]he fact that such order or decree, violation or disobedience of which is made the basis of the contempt charge, is erroneous or irregular or improvidently rendered, does not justify the defendant in failing to abide by its terms, and his conduct in failing to do so may be punished as for contempt despite the error or irregularity. It is almost unanimously agreed that if the defendant desires to attack the order or the decree as erroneous, he must do so, not by disregarding or violating it and then setting the error up as a defense to a charge of contempt, but by a direct attack thereon by appeal or a motion to set it aside. He must obey it so long as it is in effect and until it is dissolved by the court issuing it, or reversed on appeal by the appellate court."[3]

Under the second type, where the mandate, order, judgment, or decree is void or issued by a court without jurisdiction, disobedience of such order or decree is not contempt. Further, if the court has no jurisdiction to make the order, no waiver can cut off the rights of the party to attack its validity.[4]

In view of these general rules, it seems that if the court awarding custody of the child had jurisdiction to incorporate into its decree provision as to the religious training of the child the present appeal is a collateral attack on the decree and therefore invalid. This would be true even though the appellate court should find the decree irregular or erroneous. On the other hand, if the appellate court should find that the

[2] A brief filed by the American Jewish Congress as amicus curiae raises the question of whether the action of the district court is in violation of the freedom of religion clauses in the Iowa Constitution and the Federal Constitution. IOWA CONST. art. I, § 3; U. S. CONST. amend. I. Each provides that the General Assembly and Congress, respectively, "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

[3] Annot., 12 A. L. R. 2d 1059, 1107 (1950); Burtch v. Zeuch, 200 Iowa 49, 202 N. W. 542 (1925); 17 C. J. S., *Contempt* § 14 (1939).

[4] 17 C. J. S., *Contempt* § 14 (1939); State v. Morrow, 57 Ohio App. 30, 11 N. E. 2d 273 (1937).

district court had no jurisdiction to make provision in the decree fixing the child's religious training, then the decree, or at least that part of the decree, is void and subject to collateral attack upon an appeal from the judgment of contempt.

The recent case of *Martin v. Martin*[5] presents facts somewhat similar to the facts in the *Lynch* case. Involved was an antenuptial agreement between the father and mother that all children of their union were to be brought up in the Roman Catholic faith. The wife, contrary to her agreement and her husband's desires, sent the child, who had been baptized a Catholic, to a Christian Science Sunday school at an early age. Several years later the father brought an annulment action, and the wife prevailed on her counterclaim for a separation. The wife got custody of the child, and the judgment provided that the child be brought up in the Roman Catholic religion in accordance with the antenuptial agreement of the parties. Later, the wife asked that the judgment be modified so that the boy might be permitted to attend the public schools and receive instruction in the Christian Science religion. The Supreme Court of Kings County ordered the modification of the judgment, and this was affirmed by the Appellate Division of the Supreme Court.[6] On appeal the Court of Appeals in a per curiam opinion held that the modification was justified.[7] The majority found that the evidence supported the conclusion that the modification was for the child's best interests and welfare. The dissent took the position that "this sort of antenuptial agreement is enforceable like any other, unless and until its enforcement is shown to be harmful to the child. 'Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country.' Weinberger v. Van Hessen, 260 N. Y. 294, 298, 183 N. E. 429, 431 (1932). Particularly must this be so when the agreement has been confirmed by, and written into a judgment."[8]

A similar situation arose in the case of *Goldman v. Hicks*,[9] in which a separation agreement was incorporated into and made a part of a subsequent divorce decree. The decree provided that the custody of the daughter was to be in the mother for six months and the father for six months of each year. Subsequently the mother married a man whose religion differed from that of the father, and the father filed a bill in equity in which he sought the exclusive custody and control of his daughter. He contended that the subsequent marriage of the mother to a man of the Jewish religion created a condition which rendered her unfit or unsuitable for the care and custody of her child. The lower court granted

[5] 308 N. Y. 136, 123 N. E. 2d 812 (1954).
[6] 283 App. Div. 721, 127 N. Y. S. 2d 851 (2d Dep't 1954).
[7] 308 N. Y. 136, 123 N. E. 2d 812 (1954).
[8] *Ibid.*
[9] 241 Ala. 80, 1 So. 2d 18 (1941).

the relief prayed for, but the Supreme Court of Alabama reversed. The court was of the opinion that the agreement of the parties with reference to the custody of the daughter would best preserve the interest and welfare of the child. However, the court said that "in custody proceedings it is a well established rule in Alabama that the best interest and welfare of the child or children be the controlling and paramount inquiry. . . . Any agreement in reference thereto is not controlling."[10]

In *Donahue v. Donahue*[11] the custody of minor children was awarded to the mother following divorce, and the mother decided to rear the children in accordance with her religious faith, which differed from that of their father. The father applied to the court for an order requiring that the boy be reared in the Christian Science religion and the girl in Catholicism, or at least that they be reared in some Christian faith. The court declined to interfere with the religious training of the children, saying, "no end of difficulties would arise if judges sought to proscribe the selection of a religious faith made by a parent having custody. . . . Intervention in matters of religion is a perilous adventure upon which the judiciary should be loathe to embark."[12]

Brewer v. Cary[13] was an action for specific performance of an antenuptial contract pertaining to the religious training of infant children. The court held that the agreement was not binding and could not be specifically enforced in equity.

> "[T]he right of custody as guardian, whether natural or by appointment of law, carries with it, as one of the incidents involved, the right as well as the duty to direct its [the child's] training, its education, religious and secular . . . these are of the very essence of the appointment of guardians, and lie at the foundation of the right of custody itself; . . . no court will interfere directly in directing such matters, save when convinced that the welfare of the child demands it; . . . when the question of its welfare turns on the direction of its training and upbringing in one belief or another, our courts, save as controlled by statute, have no power; . . . to do so would be a determination by the courts as to differ-

[10] *Ibid.*

[11] 142 N. J. Eq. 701, 61 A. 2d 243 (1948).

[12] *Id.* at 703, 61 A. 2d at 245. *Accord, In re* Flynn, 87 N. J. Eq. 413, 423, 100 Atl. 861, 864 (Ch. 1917); People *ex rel.* Sisson v. Sisson, 271 N. Y. 285, 2 N. E. 2d 660 (1936); *Ex parte* Kananack, 272 App. Div. 783, 69 N. Y. S. 2d 889 (2d Dep't 1947), in which the court held that it would not take the question of the child's religious traning into its own hands, short of circumstances amounting to unfitness on the part of the custodian. The reluctance of the courts to inject themselves into so personal and controversial an area is understandable. *Contra,* Commonwealth *ex rel.* Stack v. Stack, 141 Pa. Super. 147, 15 A. 2d 76 (1940).

[13] 148 Mo. App. 193, 127 S. W. 685 (1910).

ences in religious belief, which is incompatible with religious freedom."[14]

It should be noted that the cases discussed above are not appeals from contempt proceedings. Each case is of a different type from the *Lynch* case. However, from these cases and others one can get an idea of how courts feel about making any decisions as to the religious training of children. Writers on this subject seem to agree that, generally speaking, the questions respecting the child's religion will be settled by the award of the right of custody.[15]

It seems clear that the general opinion of the authorities is that the court should not take over the religious training of the children, except in cases where it is for the children's interest and welfare to do so.[16] In none of the cases discussed above has a court explicitly stated that courts have no constitutional jurisdiction to enter into its decree an agreement of the parents as to the religious training of the children of the marriage. True, some cases have denied enforcement of these agreements and modified some of the provisions of the agreements, but not on the ground that the court had no jurisdiction to enforce such agreements.

In the *Lynch* case the court did not of its own accord make the decision as to what religion was best for the child. The parties themselves did that by an agreement made at the time they were married. The court merely entered into its decree the apparent wishes of the parents. No doubt it appeared to the court that such an arrangement as to the child's religion was in the best interest and welfare of the child at that time.

It is submitted that if the wife, at some date after the decree was entered, had made a motion to modify such decree so that she be permitted

[14] 148 Mo. App. 193, ——. 127 S. W. 685, 692 (1910); Hernandez v. Thomas, 51 Fla. 522, 39 So. 641 (1905), where the court held such agreements against public policy, unenforceable and not binding upon the parties; Smith v. Smith, 340 Ill. App. 636, 92 N. E. 2d 358 (1950). *But see* Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920) which involved the surviving non-Catholic parent who had signed an antenuptial promise. While the court declined to take the child from the custody of a paternal grandmother to whom the surviving father had entrusted it, it referred to the antenuptial promise as a "commendable compromise between two natural guardians, who, under the statutes of the state, had equal authority." The agreement was held merely persuasive upon the father, not binding. *Contra,* Weinberger v. Van Hessen, 260 N. Y. 294, 183 N. E. 429 (1932); Ramon v. Ramon, 34 N. Y. S. 2d 100 (N. Y. Dom. Rel. Ct. 1942).

[15] Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMPORARY PROBLEMS 721, 732 (1944); Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. REV. 469, 499 (1916). In Boerger v. Boerger, 26 N. J. Super. 90, 97 A. 2d 419 (1953) the court said "there is much to be said for the view that all other things being equal, the determining factor should be custody. The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. To create a basic religious conflict in the mind of the child, and between it and its custodian, would be detrimental to its welfare."

[16] See Prince v. Massachusetts, 321 U. S. 158, 167 (1943) and Pierce v. Society of Sisters, 268 U. S. 510, 534 (1925) in which cases the state intervened to protect the child's interest and welfare.

to rear the child in the Protestant religion on the ground that she found it difficult to rear him in a religion different from her own, and that this would be in the best interest and welfare of the child, this court might possibly have done what the court did in the *Martin* case. The fact of the mother's custody makes this result even more likely. On the other hand, the court could do what was done in the *Goldman* case and continue to enforce the agreement of the parties on the ground that it is in the best interest of the child to continue rearing him as a Catholic. If the mother had taken the action suggested above, whichever way the court held, its decision would necessarily be based upon what it found to be in the best interest and welfare of the child, and not upon the fact that the parents had previously reached a particular agreement in the matter.

It seems that Mrs. Lynch has taken the wrong step in openly violating the decree of the court without first seeking a modification. Under the cases discussed the courts have taken jurisdiction to enter decrees regarding the religious upbringing of children where the best interest of the child required it. As the court in the principal case has exercised jurisdiction under similar circumstances, Mrs. Lynch's appeal amounts to no more than an attempted collateral attack on the decree.[17]

MAITLAND GUY FREED.

Constitutional Law—Estoppel to Raise the Constitutional Question

In *Convent of the Sisters of Saint Joseph v. Winston-Salem*[1] the North Carolina Supreme Court enunciated the doctrine that a party may be estopped to assert a statute's unconstitutionality through some prior conduct on his part. In that case the Convent of Saint Joseph sought a declaration of rights under the zoning ordinances of Winston-Salem and

[17] Howat v. Kansas, 258 U. S. 181 (1921) in which the Court said at page 189: "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." See also State v. Baldwin, 57 Iowa 266 (1881) which held that in injunction proceedings the order of a court having jurisdiction of the matter and of the parties, even if erroneous, is not void, and until reversed must be obeyed.

[1] 243 N. C. 316, 90 S. E. 2d 879 (1956). The plaintiff acquired a large private estate in a residential area of Winston-Salem zoned against all but residences, churches, and public schools. Through a special-use permit, permission was obtained by plaintiff from the city, over objections from residents, to create a private Catholic school on the estate. After the school was established, the plaintiff applied to the zoning board for modification of the permit to allow for the conversion of a garage into a chemistry laboratory, which conversion necessitated structural alterations. The modification was denied and plaintiff was held estopped to assert the unconstitutionality of the zoning ordinances under which the original permit was granted.