Constitutional Law--Freedom of Religion--Statutory Preference for Adoption By Persons of Same Religion as Child

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CASE COMMENTS

CONSTITUTIONAL LAW—FREEDOM OF RELIGION—STATUTORY PREFERENCE FOR ADOPTION BY PERSONS OF SAME RELIGION AS CHILD. —A Jewish couple sought to adopt the three-year-old twins of a Roman Catholic mother. Under a statute requiring, when practicable, the giving of custody only to persons of the same faith as the child, 6 Mass. Gen. Laws c. 210, § 5B (Supp. 1953), inserted by Mass. Acts 1950, c. 737, § 3, the trial judge refused the petition for adoption. Upon appeal, held that the statute was not unconstitutional as a law “respecting an establishment of religion.” Goldman v. Fogarty, 121 N.E.2d 843 (Mass. 1954), cert. denied, 75 Sup. Ct. 363 (1955).

Petitioners questioned the constitutionality of the statute, which states, "In making orders for adoption the judge when practicable must give custody only to persons of the same religious faith as that of the child," as being contrary to the First Amendment direction that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", applicable to the states by virtue of the Fourteenth Amendment. Hamilton v. Regents of University of California, 293 U.S. 245 (1934). The Massachusetts court rejected that position, arguing for the statute's validity that there is no subordination of one sect to another by the statute, and no exercise of religion is required, prevented or hampered thereby.

The Supreme Court's denial of certiorari, of course, carried with it no implication whatever regarding the court's view of the merits of the case. See Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). This is apparently the first time the Supreme Court has been asked to extend the "establishment of religion" clause to statutes concerning adoption, and it has taken no position. But such statutes are common and the question may have to be answered. An earlier Massachusetts case, Petition of Gally, 329 Mass. 143 n.156, 107 N.E.2d 21 n.29 (1952), lists numerous adoption statutes elsewhere as containing substantially similar recognition of the religious element. See Calif. Welfare & Institutions Code § 551 (Deering, 1951); D.C. Code § 11-918, 52 Stat. 601, § 17 (1940); Ga. Laws §23, page 305 (1951); Ill. Rev. Stat. c. 23, § 299b1 (1953); Iowa Code Ann. §§ 232.24, 235.3 (West, 1950); Minn. Stat. Ann. § 260.20 (West, 1949); Mo. Rev. Stat. §§ 211.140, 457.170 (1949); 3A Neb. Rev. Stat. § 43-216 (1952); N.D. Rev. Code § 27-1622 (1943); Pa. Stat. tit. 11, § 252 (Purdon, 1939); S.D. Code § 43.0322 (1939).
This "establishment of religion" clause has received the Supreme Court's attention primarily with respect to education problems. *Everson v. Board of Education*, 330 U.S. 1 (1947) (holding tax expenditures for transportation of children to parochial schools constitutional); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious teaching in public schools violated First Amendment as made applicable to the states by the Fourteenth); *Zorach v. Clauson*, 343 U.S. 306 (1952) (approving "released time" system of New York City schools). The clause has been considered with respect to other subjects in lower federal courts, where it has been held not violated by exempting from combatant military service the members of religious sects whose tenets exclude the moral right to engage in war, *Roodenko v. United States*, 147 F.2d 752 (10th Cir. 1947), and the refusal of a Jehovah's Witness to serve on a jury is justified by this Amendment. *United States v. Hillyard*, 52 F. Supp. 612 (S.D. Wash. 1943).

Whether or not the Supreme Court will generalize its attitude in the school cases in such a manner as to affect adoption statutes of this sort is the important question which awaits an answer when the Court is presented with a case which it is willing to dispose of on the merits.

E. W. C.


Fluoridation of water, one part to one million parts water, has the effect of reducing dental caries, the major cause of tooth decay, by building up the enamel of the teeth. It affects only children under twelve years of age. It is highly recommended by dental and medical societies and by the West Virginia Board of Health.

In *Kraus v. City of Cleveland*, 66 Ohio L. Abs. 417, 121 N.E.2d 311 (1954), and *De Aryan v. Butler*, 119 Cal.App.2d 674, 260 P.2d 98 (1953), the same problem is presented with results in accord with the principal case. In each case, the action of the municipality