

7-1-1971

## Adoptions for the Hard-to-Place: The Role of the Court and the Trend Against Matching

Judith Finkel Rinsky

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### Recommended Citation

Judith Finkel Rinsky, *Adoptions for the Hard-to-Place: The Role of the Court and the Trend Against Matching*, 25 U. Miami L. Rev. 749 (1971)

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# ADOPTIONS FOR THE HARD-TO-PLACE: THE ROLE OF THE COURT AND THE TREND AGAINST MATCHING

JUDITH FINKEL RINSKY\*

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## I. INTRODUCTION

Attention in recent national publications is being focused upon reports that there exists a dearth of children available for adoption, and, as a result, many potentially good homes remain childless. In part, this is the result of liberalized abortion laws, and, in part, it is the result of the new morality which permits unwed mothers as well as unwed couples to keep their illegitimate children.<sup>1</sup> This, however, is not the whole story. What these articles are generally referring to is the fact that there are not enough white infants for all the white families seeking to adopt a child. There are, however, a large number of black babies as well as other children, both white and black, who, because of age or other handicaps, are difficult to place and thus remain in the care of state welfare departments. It is these children with whom this comment is primarily concerned.<sup>2</sup>

Although each state has its own adoption laws with considerably varying requisites, one common thread is evident in all instances—the paramount consideration must be the best interests of the child. Whether it is the agency or the court that determines the suitability of the adoptive applicant, all are guided by the principle of what will best serve the child's welfare. Within this framework there exists vastly divergent

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\* Associate Editor, *University of Miami Law Review*.

1. L. GROW, A NEW LOOK AT SUPPLY AND DEMAND IN ADOPTION 1 (Child Welfare League of America 1970).

2. The Child Welfare League of America reported that of 60 agencies supplying information there was a 7% decrease in the total number of children accepted for adoption between 1969 and 1970. "However, while there was an 11% decrease in white children accepted between 1969 and 1970, there was an 18% increase in the number of non-White children accepted." The majority of these non-white children are black. Grow and Smith, *Adoption Trends: 1969-1970*, in *CHILD WELFARE* 401 (July 1971) [hereinafter cited as *Adoption Trends*].

interpretations. The importance of the emotional as well as spiritual and physical needs of the child is universally recognized.<sup>3</sup> Until recently, however, these needs were considered to be met only by adoption into a "matched" family. A matched family refers to a family with a husband and wife of child bearing age, and of the same race and religion as that of the child. While such matching would seem most desirable, the fact remains that strict adherence to this standard often precludes other adoptions with the result that many black, older, or otherwise difficult to place children<sup>4</sup> are shunted from one foster home to another or remain in an institution.

The objects of this comment are to trace the developing trends within the different traits that comprise a "matched" family, and to propose that the test of the "best interests of the child" take an additional dimension. The additional dimension involves the question: What are the best interests of the child in view of the alternatives available if the child is not adopted by the immediate applicant?

## II. MATCHING REQUIREMENTS

### A. Background

There is no common law rule of adoption. It is purely a creature of statute;<sup>5</sup> and, although a Uniform Adoption Act has been developed, very few states have enacted it.<sup>6</sup> Consequently, each state has its own requirements as to who may adopt. Some have specific restrictions against interracial or interreligious placements,<sup>7</sup> while others have few requirements.<sup>8</sup> However, in practice, a mere lack of specific requirements in a given statute is not necessarily indicative of a liberal adoption procedure.<sup>9</sup> Before an adoption becomes final, an agency's report either recommend-

3. O'Connell, *The Adoption Muddle: A Possible Solution*, 15 N.Y.L.F. 759, 764 (1969) [hereinafter cited as O'Connell].

4. The hard-to-place child is one who falls in one or more of the following categories: 1. one year of age or older; 2. having a physical, mental, or emotional handicap; or 3. difficult to place due to race, ethnic background, color, or language. H. PIERCE MARKLEY, JR., COMMITTEE OF HEALTH & REHABILITATIVE SERVICES, FLORIDA HOUSE OF REPRESENTATIVES, STAFF REPORT OF ADOPTION SERVICES IN THE STATE OF FLORIDA 12 (Dec. 1970) [hereinafter cited as STAFF REPORT].

5. 2 AM. JUR. 2d *Adoptions* § 2 (1962).

6. UNIFORM ADOPTION ACT, 9 U.L.A. See also MONT. REV. CODES ANN. §§ 61-201—61-218 (1947); OKLA. STAT. ANN. tit. 10, §§ 60.1—60.23 (1966).

7. See, e.g., on race restrictions, LA. REV. STAT. ANN. § 9.422 (1965); MO. ANN. STAT. § 453.130 (1952); S.C. CODE ANN. § 16-533 (1962). E.g., for religious restrictions, MASS. GEN. LAWS ANN. ch. 210, § 5B (1970); N.Y. SOCIAL WELF. LAW § 373 (McKinney 1966).

8. E.g., MD. ANN. CODE art. 16, § 67 (Supp. 1970); N.J. STAT. ANN. §§ 9:3-21—3-36 (1960); S.D. COMP. LAWS ANN. § 25-6 (1967).

9. For instance, although FLA. STAT. § 63.061 (1969) allows adoption by single people, in practice, the Department of Health & Rehabilitative Services does not permit adoptions by white single adults. Letter from Margaret Ward; Supervisor, Adoption Programs, Bureau of Children's Services, Div. of Family Services, Dept. of Health & Rehab. Services, Fla., to author, March 3, 1971, [hereinafter cited as Margaret Ward Letter].

ing or rejecting the adopting applicant is usually required, and this report carries great weight in court proceedings.<sup>10</sup> Thus, legal force is given to the agency's rules and practices concerning eligible parents. The agency's refusal to recommend placement of a child with a particular applicant, though theoretically reviewable by the courts, is rarely challenged.<sup>11</sup> As a result, it is not always possible to ascertain how rigidly a particular state will view the individual requirements that define a "matched" family. However, in each of the different areas of matching, certain discernible trends appear to be emerging.

### B. Race

Although the number of non-white children available for adoption has continued to increase,<sup>12</sup>

[t]he percentage of all children adopted who are black or belong to other minority races has not risen significantly despite special efforts by social agencies to find adoptive homes for them. In 1969, children from these groups represented an estimated 11 percent of all children adopted. . . .<sup>13</sup>

This is an increase of only 2 percent since 1957.<sup>14</sup> "Until such time as the pool of non-white homes is expanded substantially," transracial adoptions might provide the necessary homes for these children.<sup>15</sup>

While most statutes do not specifically mention race,<sup>16</sup> there is no question but that it is an important consideration in any adoption proceeding and that many placements are blocked because of it.<sup>17</sup> Whether an interracial adoption can be accomplished is ultimately determined by the courts and by the judge's own determination of what would serve the child's best interests. Because of the court's great reliance on an agency's recommendation, the policy of the agency often has the force of law.<sup>18</sup>

Few cases have been decided directly on the issue of transracial adoptions. However in one such case, *In re Gomez*,<sup>19</sup> the Texas statute forbid-

10. See *In re St. John*, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (Family Ct. 1966) where it was held that no adoption could be granted by the court without agency approval, because without such approval the court would have no jurisdiction.

11. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 641 (1968).

12. See note 2 *supra*.

13. U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *ADOPTIONS IN 1969: SUPPLEMENT TO CHILD WELFARE STATISTICS 2* (1969).

14. *Id.* at Table 11.

15. *Adoption Trends*, *supra* note 2, at 404.

16. See note 7 *supra*. TEX. REV. CIV. STAT. ANN. art. 46a, § 8 (1969) specifically forbidding interracial adoption, was declared unconstitutional in *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967). For a discussion of the constitutional issues involved see Grossman, *A Child of a Different Color: Race as a Factor in Adoption & Custody Proceedings*, 17 BUFF. L. REV. 303 (1968) [hereinafter cited as Grossman].

17. Comment, *Race as a Consideration in Adoption & Custody Proceedings*, 1969 U. ILL. L.F. 256, 258.

18. Grossman, *supra* note 16.

19. 424 S.W.2d 656 (Tex. Civ. App. 1967). This case involved a Negro married to

ding interracial adoptions was declared unconstitutional, and the adoption was granted. Such an adoption has also been granted in the District of Columbia<sup>20</sup> where no statutory proscription existed. It is significant to note that both cases involved a stepfather wishing to adopt his wife's children who were already living in his home and who were being raised as his own. Although there is language in the latter case indicating that the racial factor alone could not be decisive in determining the child's welfare, the court indicated its awareness of the fact that regardless of the decision the child would continue to live in this home. Therefore, denial of the adoption would serve only to deprive the child of legitimacy.<sup>21</sup>

Because of the great weight afforded an agency's recommendation by the courts, its individual policies are often difficult to challenge. For example, in *Rockefeller v. Nickerson*,<sup>22</sup> a white couple sought to compel the Commissioner of Welfare of New York to accept their application for adoption of a Negro child. The couple claimed that their application was rejected because of an "unwritten policy of the Department of Welfare not to accept white foster parents for a Negro child."<sup>23</sup> The court denied the couple's application and found that no policy against interracial adoption existed. However, the opinion was void of any evidence upon which this conclusion was founded. In applying the test of the child's best interest, the court found the denial was not unreasonable because the petitioners had five other children (three natural and two adopted); that they were capable of having additional children; that they had recently adopted another child; and that the mother planned to continue in her job as a kindergarten teacher.<sup>24</sup> In applying the test, the court appears to have looked solely to the family situation without giving consideration to the child's dilemma—would the child be adopted by another couple or would he probably remain in an institution?

If no other placement appears likely, the court's objections in themselves appear to have little merit. Petitioners may have five children, but an institution has far more. Although unspoken, it is obvious that racial differences were a factor in the court's decision, and it is a legitimate factor to be considered. Adoption is an area where racial difference should not be totally disregarded. What should have been explored, however, was this family's fitness for an adopted child, *plus* how this child would relate in a white home and white environment, as well as how

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the mother of two white girls who had lived together with them as a family since 1958. The trial court had found the home suitable for such adoption but denied it solely because of the prohibition in the Texas statute. On appeal, the statute was found unconstitutional and the adoption was granted.

20. *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955).

21. *Id.* at 448.

22. 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962).

23. *Id.* at 870, 233 N.Y.S.2d at 315.

24. *Id.*

the family and community would relate to him.<sup>25</sup> While there are many problems inherent in raising a child in an interracial home, there are just as many problems inherent for him in growing up in an institution. The problems and advantages of both must be weighed and evaluated in light of the uniqueness of each individual child and a decision made in terms which would most benefit the particular child. The premise that a white family can provide a healthy and supportive environment for a black child is not just arguable in theory; it has, in fact, been proven by agencies which have made such interracial placements.<sup>26</sup>

### C. Religion

Religion is mentioned specifically in adoption statutes far more frequently than race. Over forty jurisdictions have some type of statutory regulation pertaining to religion in adoption.<sup>27</sup> Although most statutes require that "when practicable" adopting parents be of the same religion as the child, the actual words of the statutes appear of little consequence. Each jurisdiction has interpreted them in its own way. Among the problems the court must resolve in applying these statutes are what is the religious faith of the child, and how to construe the term "when practicable."<sup>28</sup> Consequently, states that have the same statutory wording differ in the practical application. The courts have taken three approaches to this type of statute: 1) give it practically no effect, such as in Missouri; 2) read a discretionary interpretation into it, as in Illinois and Pennsylvania; or 3) as in Massachusetts, regard its dictates as mandatory.

Although the Missouri statute forbids adoption by persons of a religious faith different from that of the natural parents if another suitable person can be found, it was held in *In re Duren*<sup>29</sup> that "practicalities and temporal considerations" must come first.

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25. See generally Comment, *Race as a Consideration in Adoption & Custody Proceedings*, 1969 U. ILL. L.F. 256.

26. Grossman, *supra* note 16, at 333. These considerations are applicable when dealing with any racial differences though the problem more frequently develops with black children and white families than any other groups. The reverse situation of a black couple seeking to adopt a white child is not explored here because there are few instances where the problem develops, as there are generally too few white infants for families seeking them.

For a case allowing the petition of an American and his Japanese wife to adopt a child of mixed English and Puerto Rican ancestry, see *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E.2d 51 (1962). The court considered the fact that the alternative available to this child was to

remain an illegitimate orphan to be reared in an institution. Orphanages are all well and good but they do not provide a real home with the attendant care, love and affection incident to the relation of parent and child.

*Id.* at 28, 185 N.E.2d at 53.

27. Comment, *The Religious Factor in New York Adoption Proceedings*, 18 SYRACUSE L. REV. 825, 827 (1967).

28. *Id.* Since it makes little sense to speak of an infant as having a religion, the courts generally determine the child's faith as being that of his natural parents or, at least, of his natural mother.

29. 355 Mo. 1222, 200 S.W.2d 343 (1947).

Minnesota, Pennsylvania, and Illinois consider religious identity as an important, but not decisive factor.<sup>30</sup> In *Stone Adoption*,<sup>31</sup> a Pennsylvania court stated:

[I]n each instance, the court has discretion to determine primarily whether the child's best interests are served by the adoption, and in the exercise of that discretion the identity of religion between the adopting parents and the natural parents is significant and desirable but not an exclusive factor.<sup>32</sup>

An Illinois court<sup>33</sup> used similar language in granting the adoption to Presbyterian petitioners of twin girls, baptized Roman Catholic, even though there apparently were other Catholic families seeking to adopt.<sup>34</sup>

Massachusetts' courts had regarded the religious factor in a manner similar to the above group of states<sup>35</sup> until the passage of a statute which contained a "when practicable" clause.<sup>36</sup> *Petition of Gally*<sup>37</sup> first interpreted this new statute and found that while there was a certain element of compulsion that goes beyond the point where factors other than religion are in equal balance with it, the term "when practicable" carries

the thought of practical suitability in relation to existing conditions. . . . All of the familiar tests are therefore still to be considered. Each case is to be determined on its own facts. The difference is that, whereas before the new statute there was no definite rule binding upon the judge in any set of circumstances as to how much weight was to be given to any one of the several elements as against the others, he is now bound to give con-

30. *Cooper v. Hinrichs*, 10 Ill. 2d 269, 140 N.E.2d 293 (1957); *In re Adoption of Kure*, 197 Minn. 234, 266 N.W. 746 (1936); *State ex rel. Evangelical Lutheran Kinderfreund Society v. White*, 123 Minn. 508, 144 N.W. 157 (1913); *Stone Adoption*, 21 Pa. D. & C.2d 730, 10 Fiduciary 142, 57 Lanc. Rev. 51 (Orphan's Ct. 1960).

31. *Stone Adoption*, 21 Pa. D. & C.2d 730, 10 Fiduciary 142, 57 Lanc. Rev. 51 (Orphan's Ct. 1960).

32. *Id.* at 735, 10 Fiduciary at 147, 57 Lanc. Rev. at 54.

33. *Cooper v. Hinrichs*, 10 Ill. 2d 269, 140 N.E.2d 293 (1957).

34. *Id.* at 278, 140 N.E.2d at 298.

35. *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907).

36. MASS. GEN. LAWS ANN. ch. 210, § 5B (1958):

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. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.

A 1970 amendment rewrote this section. The relevant portion now reads:

If, at the time of surrender of the child for adoptive custody, the parent or parents of said child requested a religious designation for the child, the court may grant a petition for adoption of the child only to a person or persons of the religious designation so requested, unless a placement for adoptive custody based on such request would not have been in the best interests of the child. If a request for religious designation is not given effect, such reasons in support of such determination shall be made a part of the records of the proceedings.

MASS. GEN. LAWS ANN. ch. 210, § 5B (Supp. 1971). There have as yet been no court decisions reported to indicate if this will in practice change the interpretation and effect of the decision in *Petition of Goldman*. See note 40 *infra* and accompanying text.

37. 329 Mass. 143, 107 N.E.2d 21 (1952).

trolling effect to identity of religious faith "when practicable," but not otherwise.<sup>38</sup>

The court concluded that it was not practicable to give custody of this child to people of the same faith since there was no evidence that anyone else was seeking to adopt this child or that anyone would offer to do so.<sup>39</sup>

Without overruling *Gally*, the Massachusetts Supreme Court tightened its interpretation of "when practicable" two years later in *Petitions of Goldman*.<sup>40</sup> This case involved the adoption of twin girls born of a Catholic mother who consented in writing to the adoption by petitioners who were Jewish. The mother knew petitioners were Jewish and was satisfied that the girls be raised in that faith. The twins, who were over two years of age at the time of the case, had been in the petitioners custody from their second week of life. The lower court judge denied the petition because

there are in and about the city of Lynn [which is near the residence of the petitioners] many Catholic couples of fine family life . . . who have filed applications with the Catholic Charities Bureau for the purpose of adopting Catholic children . . .<sup>41</sup>

On appeal, the court found that although there had been no definite proof presented that suitable persons had actually seen these children and were ready to adopt them together, the evidence did not fall so far short as to warrant overruling the lower court judge.<sup>42</sup>

It is difficult to understand how this decision can be reconciled with any interests other than those of the Catholic Church. Certainly the court did not honestly evaluate the best interests of the twin girls who were over two years old and had known no other family than petitioners. Even assuming that these children might be placed in a Catholic home immediately, the court did not discuss the trauma likely to result from such a separation at this vulnerable stage in life. The children were too young to have any true religion of their own, and their natural mother agreed to have them raised in the Jewish faith. Therefore the state would have no interest in the children being raised in a Catholic home, because in every other way the petitioners were found to be a qualified adopting couple.

New York has been considered to be in the same category as Massachusetts in statutory interpretation of "when practicable". New York

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38. *Id.* at 149, 107 N.E.2d at 25.

39. *Id.*

40. 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied*, 348 U.S. 942 (1955).

41. *Id.* at 650, 121 N.E.2d at 844-45.

42. *Id.* at 651, 121 N.E.2d at 845. *See also* *Ellis v. McCoy*, 332 Mass. 254, 124 N.E.2d 266 (1955). While the quantum of evidence necessary to show there are other families of the same religion in the area to adopt the children was found sufficient in *Goldman*, in *Petition of Duarte*, 331 Mass. 747, 122 N.E.2d 890 (1954), it was held that a judge may not take judicial notice of this fact.



also views the term as intending that "unless some compelling reason requires otherwise no child shall be placed with a guardian of a religious persuasion other than that of the child."<sup>43</sup> Such a compelling reason was found in *In re Maxwell's Adoption*,<sup>44</sup> where the natural mother, a Catholic, had represented in the consent agreement that she followed no religious faith, and petitioners, Protestants, had had the child for more than four years and agreed to raise the child as a Catholic. The court reasoned that it was cruel and harsh to sever the relationship that had developed in these formative years.

A recent case decided in the Family Court of New York City indicates that the strict interpretation may be changing. The court, in *In re C*,<sup>45</sup> granted the adoption of a two year old Puerto Rican boy, born of a Catholic mother, to a Puerto Rican man who was Protestant and his Jewish wife, after the Catholic agency had not found adoptive parents in five weeks and could not assure any would soon be found. It was held that Section 116(e) of the Family Court Act,<sup>46</sup> if literally applied, would preclude a child's adoption by persons of another religion as long as custody by an agency under the control of the child's religion was available, regardless of what would serve in the child's best interest. The court recognized, however, a delay of more than a month or two in placement must be deemed detrimental to a child. In addition, such interpretation would violate the fourteenth amendment equal protection clause and the first amendment establishment clause and prohibition against interference with the free exercise of religion.

Other than a limited parental right to express a religious preference there appears to be no ground, consistent with the Constitution, for attributing a religious preference to an adoptive child who is below the age for actual religious training.<sup>47</sup>

Instead, the section must be construed to require placement with persons of the same religion or with an agency controlled by such people "only if such placement will neither preclude nor substantially delay their adoption."<sup>48</sup> This test is far more realistic in view of the child's welfare than are the narrower interpretations discussed above.

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43. *Starr v. DeRocco*, 29 App. Div. 2d 662, 663, 286 N.Y.S.2d 313, 315 (Sup. Ct. 1968), *aff'd*, 24 N.Y.2d 1011, 250 N.E.2d 240, 302 N.Y.S.2d 835 (1969).

44. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

45. 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (Family Ct. 1970).

46. N.Y. JUDIC.—CT. ACTS § 116(e) (McKinney 1963). This section provides that:

The words "when practicable" . . . shall be interpreted as being without force or effect . . . if there is a duly authorized . . . society or institution under the control of persons of the same religious faith or persuasion as that of the child, at the time available and willing to assume the responsibility for the custody of or control over any such child.

47. 63 Misc. 2d at 1027, 314 N.Y.S.2d at 264. For a discussion of the constitutional issues of religious protection clauses, see List, *A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFF. L. REV. 9 (1963); Comment, *The Religious Factor in New York Adoption Proceedings*, 18 SYRACUSE L. REV. 825. (1967).

48. 63 Misc. 2d at 1029, 314 N.Y.S.2d at 266.

Regardless of how a state construes its "when practicable" clause, another problem arises in any statute mentioning religion; namely, how to apply the statute to adopting applicants who are atheists. The constitutional implications of denying applicants the opportunity to raise a child because they do not subscribe to a belief in a Supreme Being seem substantial. Additionally, the courts should be asking: Is it fair to children who might have found a happy home to remain in an institution?

A recent New Jersey case is illustrative of the problem.<sup>49</sup> Petitioners sought to adopt an eleven month old child who had lived with them since she was eight days old. The Bureau of Children's Services recommended the adoption stating that petitioners were of high moral and ethical standards, and they had previously adopted another child. Although New Jersey's statute has no requirement as to the religion of the adopting parents, the court denied the petition concluding that the child's best interests would not be promoted by the adoption. The court reasoned that the child is a ward of the state and, under the doctrine of *parens patriae*, the state has the duty to carry out the child's constitutional rights, one of which is the right to worship God in any manner agreeable to the "dictates of his own conscience."<sup>50</sup> "The child should have the freedom to worship as she sees fit and not be influenced by parents or exposed to the views of prospective parents who do not believe in a Supreme Being."<sup>51</sup> Fortunately, the New Jersey Supreme Court reversed the decision, finding that religion was only one consideration among many to determine the fitness of the adopting applicants.<sup>52</sup>

What purposes are served by making identity of religion, or even any religion at all, so important in deciding the course of a child's life? Why should a parent from whom all other rights have been terminated, still retain the right to determine the religion in which a child should be raised?<sup>53</sup> If the alternative is to spend their formative years being shifted from foster home to foster home—or to live in an institution—what can be so compelling about safeguarding the religious lineage of a child? What possible theory of religious identity can truly better serve the temporal welfare of each individual child than can placement in a loving home atmosphere? To the same extent, why is it necessary that the parents adopt any formal religion or belief in a Supreme Being? Certainly this requirement cannot be supported on any theory that such a belief is essential to the development of moral and ethical principles. There are many

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49. *In re Adoption of "E,"* 112 N.J. Super. 326, 271 A.2d 27 (Essex County Ct., P. Div. 1970).

50. N.J. CONST. art. I, § 3 (1947).

51. 112 N.J. Super. 326, 331, 271 A.2d 27, 30 (Essex County Ct., P. Div. 1970).

52. 59 N.J. 36, 279 A.2d 785 (1971). See especially Chief Justice Weintraub's concurring opinion at 796.

53. Child Welfare League of America, Z. R. Turitz, *A New Look at Adoption: Current Developments in the Philosophy and Practice of Adoption*, February 19, 1965 (paper presented at CWLA Eastern Regional Conference), [hereinafter cited as *NEW LOOK AT ADOPTION*].

people who embrace a religion and are neither moral nor ethical. The converse is equally true, as the Supreme Court has impliedly recognized in its recent decisions involving the exemption of conscientious objectors from the draft.<sup>54</sup>

In the majority of placements, especially those involving white infants, religious matching requirements have little effect on the child. But, to the extent that such requirements ever block an adoption where in all other respects the adopting petitioners are qualified, they are entirely indefensible. Religious dogma is then put ahead of the only real quest in any adoption—the best interests of the child.

#### D. Single "Parents"

Many statutes, including Florida's, are worded "[a]ny person . . . may petition for leave to adopt," provided that a petition will not be granted to a married person unless both husband and wife sign the petition.<sup>55</sup> These statutes provide the basis for the "single parent" adoption, a practice that has been gaining popularity in recent years. The "single parent" adoption is also an area in which agency policy can be decisive, sometimes negating the effect of statutory allowance.<sup>56</sup>

As yet, there are relatively few cases on point, and these generally concern an adoption begun by a married couple where the husband died before its completion, and the surviving widow seeks to continue it on her own. Such a situation occurred in *In re McDonald's Adoption*,<sup>57</sup> where the child had been placed with foster parents at three weeks of age. The husband committed suicide when the baby was eight months old. When the agency demanded the return of the child, the widow refused and petitioned for adoption. In granting the adoption over the agency's objection, the court found it would be injurious to the child to take it from the home to be placed in an institution to await possible future placement.<sup>58</sup>

A similar case decided the same year in Wisconsin held the opposite.<sup>59</sup> In that case, the husband died after the child had been with them a year and after adoption proceedings had already begun. The trial court found it in the child's best interest to remain with the adopting mother over the agency's objection. On appeal, the decision of the trial court was reversed, and the court held that although the statute permits adop-

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54. See *Welsh v. United States*, 398 U.S. 333 (1970), where it was held that if an individual sincerely holds beliefs which are purely ethical or moral in source and content but which impose upon him the duty of conscience to refrain from participating in war, such an individual is entitled to exemption as a conscientious objector as much as someone who derives his conscientious objection to war from traditional religious convictions.

55. FLA. STAT. § 63.061 (1969). See, e.g., LA. REV. STAT. ANN. § 9.422 (1965); GEN. LAWS OF MD. ANN. art. 16, § 69 (1966); N.Y. CONSOL. LAWS § 110 (McKinney 1964).

56. See Section III *infra* on Florida practice in law and in fact.

57. 43 Cal. 2d 447, 274 P.2d 860 (1954).

58. *Id.* at 451, 274 P.2d at 862.

59. *In re Adoption of Tschudy*, 267 Wis. 272, 65 N.W.2d 17 (1954).

tion by single adult persons, it does not prohibit the withholding of consent by any guardian or agency on the ground that the petitioner is a single adult person. Therefore, the court had no jurisdiction to review the reasonableness of a departmental policy forbidding adoption by such single persons.<sup>60</sup> There are instances where a child should not be left in the home of one recently widowed; as, for example, where the emotional environment might be detrimental to the child's best interest. The effects of the death on the home and the ability of the surviving spouse to care for and raise the child must be examined in each case. The length of time the child has been with the family and the effect on the child of separating him from them at this time are also relevant factors. However, to blindly enforce an agency policy against such adoptions, as was done in *McDonald*, is to lose sight of the individual for the sake of an abstract principle.

A similar situation is one in which a married couple files for adoption but prior to a decision, obtain a divorce, and the wife seeks to continue with the adoption. There are cases allowing and prohibiting such placements.<sup>61</sup> As in the situation where one spouse dies, there are valid considerations that must be examined separately in each individual case to determine the effect of the divorce on the family as a whole and on the child in particular.

There are, as yet, no cases reported where a court has ruled on a denial of the petition of a single non-relative adult who has never been married. The closest case involves the father of an illegitimate boy who sought to adopt and legitimize the child.<sup>62</sup> Although in granting the petition the court based its decision on the legitimation of children by a father,<sup>63</sup> the case nevertheless provides an analogy to the single person wanting to adopt a child. The child was a ward of the state, living in an institution. The best interest test could easily have been applied here. The same criteria used to decide what is in the child's best interest could be as aptly applied with adoptions by single persons as with any adoption petition.<sup>64</sup>

### E. Age

Age qualifications are rarely mentioned in statutes,<sup>65</sup> though for obvious reasons agencies generally look for parents of child-bearing age.

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60. *Id.* at 289-90, 65 N.W.2d at 26-27.

61. See *In re Barnett's Adoption*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960); *County of Los Angeles Dep't of Adoptions v. Superior Ct.*, 2 Cal. App. 3d 1059, 82 Cal. Rptr. 882 (1969).

62. *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

63. CAL. CIVIL CODE § 230 (Deering 1960).

64. Adoption of an adult by a single person often occurs, but that is usually handled separately by statute and is not within the province of this paper. See e.g., FLA. STAT. § 63.241 (1969).

65. Statutes sometimes mention a necessary age differential between adopter and adoptee, but these are generally applicable for adoptions of adults. For example, FLA. STAT. § 63.241 (1969) provides that the adopting parent must be more than 10 years older than adoptee.

The cases that arise usually deal with older couples who petition to adopt. Florida has had several such cases and has ruled in favor of the older parents. In one, the adoption of a 13 year old was granted to the child's 68 year old grandmother, where there had been prior custody and the consent of both the father and child.<sup>66</sup> The court recognized that age was an important factor and that this was an unusual case of "remarkable circumstances" which would permit such adoption, but it stated that "[a]dvanced age, standing alone, will not serve as an automatic disqualification of an adoption petitioner."<sup>67</sup>

Another case involving advanced age of the petitioner was *In re Duke*.<sup>68</sup> In this case a 48 year old husband and his 63 year old wife of 20 years sought to adopt the two and a half year old child who had lived with them since she was one year old. The lower court denied the petition primarily because of their age. In reversing, the Florida Supreme Court found that the petitioners were in good health and had other qualities, such as love and devotion which were more important and which were the qualities that helped develop good character.<sup>69</sup>

Two cases in other jurisdictions held the opposite. In both, the child had spent a substantial amount of time in the petitioners' homes under a foster parent program, yet when the couple wanted to adopt, they were told they were too old. In a Maryland case,<sup>70</sup> the wife was 48 and the husband 54. As foster parents they had nursed the child to health since he was two months old. The court found that their age was satisfactory for foster parents but not for adoptive parents. Though age would not per se be a disqualification, it was an important consideration, because in ten years the petitioners might be too old to effectively deal with the child. The court held, however, that it would allow a subsequent petition if the child was not adopted by a younger couple within six months.<sup>71</sup> In a Wisconsin case, the foster parents were 51 and 44. The court's refusal to grant the petition was based in large part on an agency policy that a young child should not be placed with people over 40. Moreover, the court was aided by the fact that the agency had already found a "younger" home for the girl.<sup>72</sup>

Age is an important consideration in determining a child's best interests, particularly where the child is young. A 55 year old mother would be 70 in 15 years, a time when the child would be going through adolescence, which is often a difficult stage requiring the guidance of a

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66. *In re Adoption of Christian*, 184 So.2d 657 (Fla. 4th Dist. 1966).

67. *Id.* at 658.

68. 95 So.2d 909 (Fla. 1957).

69. *Id.* at 910. *Accord.*, *In re Adoption of Brown*, 85 So.2d 617 (Fla. 1956).

70. *Frantum v. Dept. of Public Welfare*, 214 Md. 100, 133 A.2d 408 (1957), *cert. denied*, 355 U.S. 882 (1957).

71. *Id.* at 103, 106-07, 133 A.2d at 410, 412. The dissent argued that age should not have been a decisive factor because of the great care petitioners had given the boy.

72. *In re Shield's Adoption*, 4 Wis. 2d 219, 89 N.W.2d 827 (1958).

younger person. In addition, adoption by middle-aged or elderly couples can create a relationship more like that of grandchild-grandparent than that of parent and child.<sup>73</sup> However, this comment is not directed to the category of adoptions considered "easy placements"; it is concerned with the hard to place, those who but for the adoption would be left in an institution or wrenched away from foster parents who had provided the only family they had known. It is more likely that an aged parent can provide a child with more love and care than can an institution.

Since the early years are critical in a child's development, the personal care and attention the parents can give to this child is perhaps more important than what the parents' age will be when the child is a teenager. Furthermore, when concerned with a petition from older foster parents who have already had custody of the child and now seek to adopt him, the agency and court can readily evaluate the relationship and the effect that advanced parental age would have on the child and his welfare in general.

#### F. *Handicapped Parents*

There are very few cases involving adoptions by handicapped applicants. An interesting one is *In re Adoption of Richardson*<sup>74</sup> which involved a deaf mute couple who, as guardians of another child, had raised him successfully. The child in question was two years old and had been nurtured by the petitioners since the second day of his life. The natural mother had knowingly selected petitioners from several prospective parents notwithstanding their handicap. The agency also consented. However, the trial court judge denied the petition on the grounds that it was not a normal home. In reversing, the appellate court held that the denial was made solely on the grounds that petitioners were deaf mutes and was, therefore, a denial of fourteenth amendment equal protection and due process. The decision was also based upon the best interests of the boy as there was medical testimony that when he was placed elsewhere after the initial hearing, he immediately suffered adverse physical and mental reactions.<sup>75</sup>

#### G. *Financial*

In growing numbers, various states and child placement agencies are becoming interested in placement of children not readily adoptable.<sup>76</sup> For some of these children legal complications do not free them for adoption until they are past the "desirable age";<sup>77</sup> others may require a spe-

73. *Id.* at 226, 89 N.W.2d at 831.

74. 251 Cal. App. 2d 222, 59 Cal. Rptr. 323 (1967).

75. *Id.* at 239, 59 Cal. Rptr. at 334.

76. See note 4 *supra*.

77. "Two-thirds of all children adopted by unrelated persons in 1969 were less than three months old when placed in an adoptive home. The median age at time of placement.

cial treatment or diet due to some handicap or disease. Many of these children have been living in foster homes. When they become free for adoption, their foster parents may wish to adopt them, but may be unable to do so without the financial aid they have been receiving; or they may be unable to afford the additional cost of treatment necessary for the care of a handicapped child. In an effort to place these children some agencies have begun a program of subsidization and, recently, several states have passed subsidy laws.<sup>78</sup> The provisions of these laws vary. Some laws, such as Minnesota and New York, are limited to foster parents who adopt.<sup>79</sup> California's law is specifically limited to aid in adoption of the hard-to-place child.<sup>80</sup> As a result of their three year pilot program, the Crippled Children's Services have helped 100 children. Another 199 children were adopted *without* subsidy because of the interest generated by the program.<sup>81</sup>

In addition to the advantage for the children, the state and taxpayer benefit when a child is adopted. It is far more costly to provide either foster care or institutional housing than to provide an initial and generally limited subsidy. For example, in New York between September 1968, when its subsidy bill took effect, and June 1970, there were 302 subsidized adoptions (four percent of all agency adoptions). When translated into dollars and cents, savings over the monthly foster care rate amounted to an average of \$8,550 per child or a total savings to the state of \$327,000!<sup>82</sup>

Despite the apparent success of these first programs, "[t]he child welfare field in general has been cautious in implementing subsidy plans."<sup>83</sup> This apparent reluctance to adopt subsidy plans may be attributable to a general societal attitude that parents should assume the full financial responsibility for their children. Hopefully, as these subsidization plans are implemented and tested, more and more agencies will agree that

[i]f a child is not placed for adoption because of the financial

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was 1.9 months." U.S. DEP'T OF HEALTH, EDUCATION, & WELFARE, ADOPTIONS IN 1969: SUPPLEMENT TO CHILD WELFARE STATISTICS 2 (1969).

78. *E.g.*, MD. LAWS 1969, ch. 135; MINN. LAWS 1969, ch. 244; N.Y. LAWS 1968, ch. 320; S.D. LAWS 1970, ch. 154; WASH. LAWS 1971, ch. 63.

79. MINN. LAWS 1969, ch. 244; N.Y. LAWS 1968, ch. 320.

80. CAL. WELF. & INST'NS CODE §§ 16117, 16118 (Deering Supp. 1970).

81. STAFF REPORT, *supra* note 4, at 16.

82. *Id.* at 14. The following formula was used for determining the savings: "[t]he difference between the monthly board rate and the monthly subsidy was multiplied by 12 for the months of the year and then by the number of years eliminated for each child through adoption.

$$\begin{array}{rcccl} \text{Monthly Foster} & & & & \text{Total months} \\ \text{Care Rate} & - & \text{Monthly} & \times & \text{covering the years} \\ & & \text{Subsidy} & & \text{for which foster} \\ & & & & \text{care was eliminated} \\ & & & & \text{through adoption} \\ & & & & = \text{Savings}'' \end{array}$$

83. Information Service of the Child Welfare League of America, *Some Comments Related to Adoption Subsidies* (February 1966).

circumstances of a potentially good family, he will still have to be supported by some agency, private or public, until he is grown. Is it not better that he have that financial support in a family which will give him the additional care and protection inherent in good adoption placement?<sup>84</sup>

### III. FLORIDA LAW AND PRACTICE

Florida's adoption law is found in chapter 63 of the Statutes. It is similar to other statutes discussed herein in that it permits adoption by single persons.<sup>85</sup> The only actual matching requirement is that

when practicable, the child and adoptive parents shall be of the same religion; provided the natural parents may give written consent to the placement of the child with adoptive parents of a different religion.<sup>86</sup>

There have been few reported cases applying Florida's statute and those have been primarily concerned with the age of the adopting couple.<sup>87</sup> One interesting case, *In re Adoption of Brown*, dealt with both age and religion.<sup>88</sup> The couple were 57 and 53 years old, and while the husband was Presbyterian, the wife was a psychic reader who held "services" in her home two hours per week. The petitioners had had custody of the boy since birth, and at the time of the petition he was two years old. They had previously raised another adopted son and had been considered good parents. The State Welfare Board recommended against the approval of the adoption because of the adoptor's age and the "readings," but the court held for the parents. It found that there was no evidence that the psychic readings would be detrimental to the child's welfare, and there is no statutory age limit in Florida.

While age is undoubtedly a factor to be evaluated by the chancellor in ruling upon a petition of this nature, we are of the opinion that the age of these petitioners should not, without more, be held to bar the adoption, particularly where, as here, the alternative seems to be placement of the child with a public agency.<sup>89</sup>

It is interesting to note the court's awareness and consideration of the likely alternative to this adoption, i.e., being placed with an institution. The boy was two at the time, which would put him in the hard-

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84. *Clover, Adoption for the Handicapped Child: Discussion*, in READINGS IN ADOPTION 204, 207 (Smith ed. 1963).

85. FLA. STAT. § 63.061 (1969).

86. FLA. STAT. § 63.011 (1969).

87. See section II E *supra*.

88. 85 So. 2d 617 (Fla. 1956).

89. *Id.* at 618.



to-place category since the most desirable children are generally considered to be under one. In fact, in 1969, the median age of all children placed in Florida was less than one month.<sup>90</sup>

The problem of the hard-to-place child is being recognized in Florida. In 1969, 6,458 children were placed, of which 2,376 were adopted by a step-parent.<sup>91</sup> As of October 1969, 372 children were awaiting placement, but because the child generally sought for adoption is under one year and white, only 16.6 percent of this group was considered in demand. Three hundred ten of them were considered hard to place because of their race or age. Of the 62 children in the desired category, 22 had a health problem that would render them not readily acceptable to adoption applicants. That means that "of the 372 children awaiting adoption, only 40 children or 10.7% are in demand."<sup>92</sup> The shortage of applicants for black children "is so great that we must place our black and bi-racial children in other states. Even then we are not able to place a sufficient number of them."<sup>93</sup> And yet, it appears that little has been done to study the feasibility of making transracial adoptions. "Our division has placed two negro/white [sic] children with families who were white but this is not a general practice here in Florida."<sup>94</sup>

Although neither state statutes nor state agency policies restrict single parent adoptions, very few have been made and of those the majority were done by private agencies.<sup>95</sup> Florida's Bureau of Children's Services reports that "[w]e do not place children with single non-relative white adults but have placed a few black children with single or widowed negro women."<sup>96</sup> The Staff Report on Adoption Services in the State of Florida has suggested that the state agency should "manifest a policy of encouraging single parent adoptions for the hard to place child."<sup>97</sup>

#### IV. A NEW CONCEPT OF "BEST INTERESTS"

Adoption proceedings involve the future of another human being, a "child about whom precious little is known and for whom a court must make a decision which in large measure will chart the course of his life, irrevocably, for however long he lives."<sup>98</sup> The importance of such a decision makes it imperative that the court's foremost concern be the temporal welfare of this individual child.

Courts and agencies alike state that the policy behind adoption

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90. U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, ADOPTIONS IN 1969: SUPPLEMENT TO CHILD WELFARE STATISTICS, table 5 (1969).

91. STAFF REPORT, *supra* note 4, at 11.

92. *Id.* at 11.

93. Margaret Ward Letter, *supra* note 9.

94. *Id.*

95. STAFF REPORT, *supra* note 4, at 16.

96. Margaret Ward Letter, *supra* note 9.

97. STAFF REPORT, *supra* note 4, at 23.

98. List, *A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFF. L. REV. 9, 34 (1963).

approval is the best interests of the child. Yet, in many instances, this is translated into meaning what is in the best interests of adoptive children in general, rather than what is in a specific child's best interests. The criteria behind a child's "best interests" must be given new meaning. A child must be looked at as an individual and his individual needs considered in view of the alternatives available to him.<sup>99</sup> The question becomes: If the child is not adopted by *this* person, is the child likely to remain in an institution or be shuffled from one foster home to another? If the latter alternative is likely, the various matching characteristics used to find the model family become less important. Matched characteristics such as race and religion may afford the child an environment in which he can more easily adjust, but the significance of these environmental considerations is overemphasized if the result is even one child growing up in an institution or being repeatedly placed in numerous foster homes. Such results can, in themselves, be highly detrimental to a child's development.

Psychiatrists, psychologists, and social workers initially recognized and emphasized the emotional damage and deprivation suffered by infants and small children cared for in mass congregate institutions and the equally damaging results of long-time institutional care for children of all ages. Later, when foster home placement was used indiscriminately, the same team of practitioners documented the permanent personality damage caused by repeated placement and the consequent trauma due to lack of any sense of belonging to a permanent family group.<sup>100</sup>

There are always more adoptive applicants than approved homes, and this is as it should be, but when dealing with a hard-to-place child a closer look should be taken at the applicants who have not been approved. The courts should be asking: Was this applicant denied because of arbitrary standards of a particular agency which require it to turn applicants down on the basis of their age or single status? Certain guidelines are helpful and even necessary in approving adoptive petitions, but they should not be indiscriminately applied without regard to differing individual factors. Nor is it suggested that standards be relaxed to the point where a child is placed with "any" family just to give him a home. There are instances where a particular adoption truly is not in the child's best interests,<sup>101</sup> but this decision must rest on the individual

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99. An example of the careful placement of two very "hard to place" children is explored by Taft, *Adoptive Families for "Unadoptable" Children*, in *READINGS IN ADOPTION*, 237 (Smith ed. 1963).

100. D. ZIETZ, *CHILD WELFARE: SERVICES AND PERSPECTIVES* 101-110 (1969).

101. See, e.g., *Van Kleek v. State Public Welfare Comm.*, 252 Ore. 497, 450 P.2d 549 (1969), where the adoption was denied to petitioner who had had custody of the child for several years since birth because it was found petitioner, who had been married and divorced three times (each time to a wife with a drinking problem) was unable to provide a stable adoptive home. Although the court recognized the deep affection between petitioner and the

circumstances of the applicants and the child's individual characteristics, not on arbitrary matching criteria. What is important is not that there is a large degree of identity between the adoptive parents and the child, but rather that the child is placed in a loving home with an atmosphere conducive to healthy and normal development.

There are of course certain inherent difficulties with "non-matched" adoptions, and these should be considered in each case before placement is made. A black child will likely have certain identity problems in a white family. But the problem inherent in being of a minority group will be present regardless of whether or not he is adopted, and if adopted, his parent can help him to better meet these obstacles with their love and support.

Problems in resolving feelings about difference and identity can be anticipated, and parents and child can be helped to cope with them, whereas the alternative of having no emotional roots, and repeated experiences of unsatisfying placements, may be irreversibly damaging.<sup>102</sup>

It is recognized that there are certain areas of the country where a trans-racial placement would not be considered wise, even with a willing and able family, because of the hostile atmosphere of the surrounding community. Nonetheless, there have been programs for interracial adoptions, and they have thus far proved highly successful.<sup>103</sup>

Single parent adoptions offer a broader range of available homes for the hard-to-place child, but, here too, certain guidelines are important to insure that the single parent can offer the needed essentials. Some of these standards differ somewhat from those required of two parent applicants because of the unique problems that can arise with a single parent. Characteristic standards with single parent adoptions include:

1. Opportunity for close contact with an extended family to:
  - a. provide substitute figure for absent parent.
  - b. provide substitute care if the single parent should become ill.
2. Financial stability.
3. More emphasis on the question of sexual identification of the single applicant.
4. Health status of the single applicant.
5. Motivation considered within the applicant's needs motivat-

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boy, it concluded it was not in the child's best interest to grant this adoption in light of the fact that he had been left unattended in locked cars and once in a hotel lobby by the third wife. He had been subjected to numerous traumatic experiences, had a speech defect, and was getting a late start in school.

102. A NEW LOOK AT ADOPTION, *supra* note 53, at 7.

103. *Id.* See also R. ISAAC, ADOPTING A CHILD TODAY 128-32 (1965).

ing him to adopt a child taken in context of the total, balanced configuration of his life pattern.<sup>104</sup>

Under the expanded concept of "best interest" there is room to accommodate consideration of these unique problems and different standards in each individual case.

#### V. CONCLUSION

The best interests of the child must always be the paramount consideration in any placement, and these interests can best be met by placement of the child with a family which can provide a healthy and loving home environment. The best interests of the child for whom the "matched" family is not available also dictate a loving home, but for him these interests can only be met by exercising greater flexibility and moving away from rigid artificial standards. For the hard-to-place child "the choice is not the *ideal*, but something better than they would otherwise have, something better than growing up without any permanent family at all."<sup>105</sup>

It is hoped that the stated policy behind all adoptions, i.e., that of the child's best interests, will come to universally take on new meaning, a meaning that views each child as a separate individual and which includes the principle that

[n]o child should be deprived of the opportunity to have a permanent family of his own because of age, religion, race, nationality, place of residence, or handicaps that do not preclude his being benefited by a family life.<sup>106</sup>

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104. STAFF REPORT, *supra* note 4, at 16.

105. A New Look at Adoption, *supra* note 53, at 8.

106. AMERICAN ACADEMY OF PEDIATRICS, ADOPTION OF CHILDREN 15 (1967).