Religion and Best Interests in Custody Cases†

by
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Introduction

Religious freedom has a special place in American social and legal history. The concept of freedom of religion is as loaded with symbolism as religious belief itself and, in the context of the parent-child relationship, engages the most basic emotions. When religion is part of a custody dispute, the emotional stakes inevitably rise and problems become more difficult to resolve. Reconciling the liberty concepts of religious freedom and parental autonomy with the best interests of the child is never easy and presents a major lawyering challenge.

Religion, by definition, defies rationality and militates against compromise. The custody litigation that is fueled by religious fervor can easily take on all of the intractability of a crusade in which compromise is unthinkable and settlement impossible. The cases suggest that the lawyer must address the emotions existing not only between the parties, but also the fact finder's personal biases to produce a satisfactory and sensible result. When the standard of appellate review is an abuse of discretion, what is in the child's best interest is almost always irrevocably defined by the trial judge. The practitioner must understand not only the legal principles involved, but what will make the court in one case defer to the parent's religious scruples while intervening without hesitation in another under the banner of the child's best interests.

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† Portions of this article have appeared in *Pennsylvania Family Law Practice and Procedure*, *Fifth Edition*, and are reprinted here with permission.

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I. What Does *The Child's Best Interests* Really Mean?

All custody decisions in the United States today purport to be based upon the best interests of the child. Psychologists, doctors, lawyers, judges, reporters, talk show hosts, tabloid columnists and the general public all use this phrase as if it had a single meaning and everyone knows what that is. Unfortunately, the casual application of this language often obscures the real issues, probably resulting in much bad law and many unfortunate decisions. It is helpful to recall the genesis of the term *the best interests of the child*.

The best interests of the child first appeared in American jurisprudence in 1813 in the Pennsylvania case of *Commonwealth v. Addicks*[1] as a means to avoid the absolute common law rule that the father was entitled to custody of his minor children.[2] The father's rights were cast in the nature of property rights, a perfectly reasonable approach since children were viewed as chattels at common law. The mother, being similarly situated with her children as a nonperson at common law, could not be awarded custody unless her husband had died or was otherwise disqualified, thereby destroying the fiction of coverture. During coverture, mother and children were *under cover of* the husband/father, and he reigned supreme.

In *Addicks*, the court awarded the children, both little girls, to their mother, who had always been their primary caretaker. The concept of the best interests of the child was the rationale for the *tender years doctrine* which shifted the focus of custody from paternal prerogatives to a view which was theoretically, if not in actual practice, child-focused.[3] Even at its genesis, the best interests of the child doctrine was misleadingly cast. Although the maternal preference was said to be dictated by a young child's attachment to the mother, the maternal preference was only op-

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1 5 Binn. 520 (Pa. 1813).

2 King v. DeManneville, 102 Eng. Rep. 1054 (K.B. 1804).

3 According to the *tender years doctrine*, the best interests of young children are served by placing them in the custody of their mother, provided that she is a fit parent. S*ee, e.g.*, Johnson v. Johnson, 564 P.2d 71 (Alaska 1977), *cert. denied* 434 U.S. 1048 (1978); Com. ex rel. Spriggs v. Carson, 368 A.2d 635 (Pa. 1977).

erative if the mother was "fit," a criterion which in actual practice had very little to do with her children. The unfitness that generally disqualified mothers of young children as custodians was adultery, the most serious marital fault, and regardless of other factors, courts generally held that the child's best interests were served by denying custody to an adulterous mother. For example, when the *Addicks* children were no longer of "tender years," the court changed custody to the father because the mother, who was living in adultery, was viewed by the court as a poor example to her daughters. Although the mother claimed that the father was abusive, the court ended its inquiry with the mother's adultery. This was true even though the mother was unable to marry the man with whom she was living because of an arcane statute prohibiting her marriage to the man whom her husband had named as the co-respondent in the parties' divorce action.

In England, it took an act of Parliament to carve out an exception to the rule that fathers were always entitled to custody of their minor children. Unlike the American courts, King's Bench judges were reluctant to depart from precedent and contravene the father's right to custody even in a very compelling case. The decision of Rex v. Greenhill[4] generated a tidal wave of sentiment to change the law and ultimately resulted in the passage of Lord Talfourd's Act,[5] which permitted an award of custody to the mother consistent with the best interests of children of tender years.

In *Rex v. Greenhill*, the husband set up housekeeping with his paramour but when mother took the children and returned to her parents' home, he filed a petition for habeas corpus to reclaim custody of his children. Although it was obvious to the court that the husband was using the children to force the wife to return to the marital residence without having to give up his extramarital liaison, the court saw no alternative to granting custody of the children to their father. Lord Talfourd, one of the lawyers in the case, was so appalled at the result that he mounted a campaign to reform the law. His efforts ultimately succeeded,

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4 111 Eng. Rep. 922 (K.B. 1836).

5 An Act to Amend the Law as to the Custody of Infants, 2 & 3 Vict., C.54 (1839).

and the result was to introduce a version of the *tender years doctrine* to English jurisprudence.

The *tender years doctrine* gained a life of its own and became one of the most pervasive and firmly entrenched presumptions in American law. It has been only in the past several decades that courts in the United States have attempted to separate the concept of the best interests of the child from the *tender years doctrine* and other presumptions. In fact, the majority of jurisdictions in the United States proclaim presumption-free custody case law which supposedly focuses on the needs of each individual child-subject of custody proceedings. Other jurisdictions have adopted a preference for the primary caretaker, a presumption which purports to be gender-neutral but has been criticized as a glycerine attempt to repackage the *tender years doctrine* and maternal preference with a gender-neutral label.[6]

The least experienced custody litigator knows that a so-called presumption-free and gender-neutral legal climate is at best wishful thinking and that the single most difficult task facing the lawyer is to identify, isolate and either exploit or overcome the unstated assumptions which pervade the decision-making process in every custody case. Since the trial judge has broad discretion in deciding custody cases and because the standard of review is virtually always the very difficult abuse of discretion standard, the decision of the trier of fact is crucial since it is usually final for all intents and purposes. Even in those rare cases in which a reversal is achieved on appeal, a new status quo has been created during the pendency of the appeal. The possibility of a change in custody as a result of an appeal is therefore quite remote. While the law of custody can be changed on appeal, actual custody of an individual child will almost always remain with the parent to whom the trial court granted custody.

Every custody litigator knows that the judge is the most important witness in any custody case and strives hard to identify, understand and address the biases which the judge brings to the decision-making process. While this may not be a desirable situ-

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6 *See, e.g.*, Comment, *A Step Backward: The Minnesota Supreme Court Adopts "Primary Caretaker" Presumption in Child Custody Case*: Pikula v. Pikula, 70 MINN. L. REV. 1344 (1986).

ation, it is a reality.[7] Since custody decisions are within the discretion of the trial court, and because the judge is the determiner of credibility, the reality is that the judge will make the custody determination on the basis of information that may appear nowhere in the record. But because the standard, *the best interests of the child*, is so amorphous, usually the record contains sufficient evidence to support whatever decision the trial judge chooses to make, particularly where the decision is grounded in credibility.

A classic example of the importance of the forum, or the trial judge as the fact finder, is an Iowa decision awarding custody of a five year old boy to his maternal grandparents with whom father had placed the child temporarily following the death of the mother in an accident. In awarding custody to the grandparents, the court cited their stability and middle class values, in contrast to father's "Bohemian" lifestyle.[8] If the case had been tried in father's home jurisdiction, San Francisco, the result might well have been different.

One real problem with the term *the best interests of the child* today is that these exact words are often used to mean completely divergent concepts. As a legal term, the best interests of the child is not limited to what might be good for a particular child at a given time but also embraces various policy considerations. Consequently, a child may be wrenched from the only parents she has ever known and returned to virtual strangers because the adults failed to follow the law. The true best interests of a child may never be reached because of other considerations, such as the wrongdoing of adults. Lay people do not understand custody decisions that appear to be contrary to a particular child's welfare, hence the endless expressions of outrage in the media when the Baby Jessicas and Baby Richards are found in these unfortunate situations.

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[7] *See* Joseph Goldstein, et al, IN THE BEST INTERESTS OF THE CHILD (1986) in which the authors criticize the judge in a custody decision for being a covert witness effectively denying the right to cross-examine or counter his unspoken testimony which he accepted to the exclusion of voluminous evidence to the contrary.

[8] Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), *cert. denied* 385 U.S. 949 (1966).

Parents have a primary right to custody of their children; a true best interests standard would level the playing field for third parties and would infringe upon the concept of family autonomy, closely allied to the constitutional right of privacy. Parents are presumed to act in the best interests of their children.[9] The reality is that the best interests of the child is subordinated to overarching public policy considerations with the result that the welfare of an individual child may be sacrificed to a greater good. For example, courts are prohibited from considering the effects of racial discrimination upon a child as a factor in determining custody although clearly relevant to the child's best interests, on the theory that an individual child's difficulties with racial discrimination, however problematic, cannot support a denial of constitutional rights.[10] It is important to remember that "the best interests of the child" is used as a term of art in law and consequently, when parents, psychologists, and lawyers talk about the child's best interests, they are usually speaking about three entirely different concepts.

Custody litigation is unique. Ordinarily, judges are required to decide past events and mete out or deny punishment, compensation, or damages as warranted by the facts. A custody decision is actually a prediction for the future, and the stakes are high. Judges actually lose sleep over custody decisions while at the same time they are often without sufficient reliable information to feel comfortably secure in making factual findings regarding past events. It is small wonder that judges want to turn to experts for help. Unfortunately, mental health professionals are no better equipped to predict the future than are lay persons.[11] The expertise of mental health professionals as it impacts on custody decisions is really limited to providing information on relationships, rather than opining about a child's "welfare." The Guidelines for Child Custody Evaluations published by the American Psychological Association[12] instruct psychologists to limit their opinions to the psychological best interests of the child, a re-

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9 Parham v. J.R., 442 U.S. 584 (1979).

10 Palmore v. Sidoti, 466 U.S. 429 (1984).

11 David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

12 American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677 (1994).

quirement which is more often than not honored in the breach. Critical studies of so-called impartial expert reports find them generally rife with hearsay, gossip and innuendo,[13] a finding to which any custody litigator could immediately attest, based solely upon experience. The damage caused by such junk science cannot be overestimated. Although judges are fond of saying that they can disregard inadmissible evidence, judges are human, after all. Misplaced deference to expertise on the part of lawyers and judges results in the admissibility of much "expert" testimony germane to the issue of the best interests of the child which is unsupported by any scientific data.[14] This occurs because of the mistaken belief that the qualifications of the mental health professional somehow invest the expert's unsupported and insupportable opinion with scientific validity or at least insights beyond the ken of the bench and bar. This is pseudo science at its most dangerous, and lawyers and judges are well advised to step up to the plate, act like lawyers and judges, apply the rules of evidence, and treat custody cases like real law, instead of looking for a fix from another discipline. *Daubert v. Merrell Dow Pharm., Inc.*[15] articulates the requirement of "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," and one scholar suggests that *Daubert* is particularly applicable in custody cases.[16]

Implicit in the determination of what is in the best interests of the child in any particular custody case is the question of what is important, and how important. It seems to be universally ac-

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13 Robert J. Levy, *Custody Investigations in Divorce Cases*, 4 AM. B. FOUND. RES. J. 713 (1985).

14 *See, e.g.*, Thomas A. Gionis & Anthony S. Lito, Jr., *A Call for the Adoption of Federal Rules of Evidence 702 for the Admissibility of Mental-Health Professional Expert Testimony in Illinois Child-Custody Cases*. 27 S. Ill. U. L. J. 1, 4 (2002). ("There is no research to support the proposition that mental-health professional expert guided child-custody placements are better than those where children are placed without the benefit of an expert opinion.")

15 509 U.S. 579 (1993).

16 See Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say about "The Best Interests of the Child?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L. Q. 551 (1997).

cepted that litigation between parents creates a stressful situation for children which is inimical to their best interests and to be avoided if at all possible. If avoiding litigation is so important, why don't we just flip a coin or, as the social scientists put it, "randomize" custody decisions?

It is not slavish homage to the adversary system that keeps courts from flipping coins to decide custody cases, or at least owning up to doing so. The state takes seriously its *parens patriae* responsibility toward its children and cautions against shortcuts in the custody process which ground decisions on one factor to the exclusion of others. The court system tends to be a reactionary institution and can generally be counted upon not to embrace every child custody fad that comes along. For example, the concept of the psychological parent as sole custodian developed by several prominent child psychologists in the early 1970's enjoyed a wave of popularity, except in the courts which found that the concept of the psychological parent was interesting, and even helpful, but could not be, as its proponents urged, the determining factor in custody litigation.

The concept of the psychological parent was articulated in *Beyond the Best Interests of the Child*,[17] in which the authors concluded that the psychological parent should be invested with plenary power to make decisions with regard to the child, to the exclusion of others, including the other parent. A "psychological parent" is "[O]ne who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutually fulfills the child's psychological needs for a parent, as well as the child's physical needs."[18] From a psychological standpoint, the third party who is the psychological parent should prevail in a custody dispute over a natural parent. This concept was never adopted by any state, not because the theory was lacking in validity, but because it was trumped by overarching public policy considerations. Deciding custody disputes by determining who is the child's psychological parent and then awarding custody of the child to that person along with virtually all of the decision making authority with respect to the child is unacceptable because the psychological parent could be "a kidnapper, a band of gyp-

17 Goldstein, et al, *supra*, note 6.

18 *Id.* at 98.

sies, a babysitter or nanny, the child-snatching non-custodial parent, the grandparent resorted to in desperation, or anyone else . . . ."[19]

Relocation cases offer another example of the subordination of the best interests of the child to other considerations. Although statutes and case law relating to custody uniformly proclaim that children need both of their parents, courts are often willing to disregard the child's best interests even where there is a provable benefit to the child in having both parents within the same geographic location. These courts permit the custodial parent to relocate at great distances, thereby eliminating any meaningful hands-on parenting by the other parent, upon a showing that the best interests of the custodial parent, not the child, will be served by the move. Some courts have even rejected a requirement that some independent benefit be shown to the child.[20] The rationale is a sort of "trickle down" benefit: In other words, if the custodial parent is happy, then things will be better for the child.

It is worthwhile in the context of custody litigation to examine *the best interests of the child* concept. The thoughtful and skilled advocate will insist that the term be used with precision, remembering that it is a term of art and not just a handy catch phrase to apply to any expert opinion or to explain anything that the judge ultimately decides. Placing the term *the best interests of the child* in context helps to explain the difficulties in dealing with issues involving religion in custody cases.

II. Freedom of Religion and Parental Autonomy

A. *Freedom of Religion*

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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19 Richard Edelin Crouch, *An Essay on the Critical and Judicial Preception of Beyond the Best Interests of the Child*, 13 FAM. L. Q. 49, 103 (1979). *See also* Judith S. Wallerstein, and Joan Berlin Kelly, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980).

20 *See, e.g.*, Zalenko v. White, 701 A.2d 227 (Pa. Super. 1997).

The Establishment Clause mandates a neutral stance with respect to religion on the part of the state. For example, mandatory bible reading in public schools has been held unconstitutional,[21] as has a period of silence "for meditation or voluntary prayer."[22] The Free Exercise Clause affords constitutional protection to *beliefs* although not necessarily to *actions* motivated by these beliefs. For example, Mormons do not have a constitutionally protected right to practice polygamy.[23] Similarly, sacramental drug use may be prohibited and public benefits withheld as a result of such use.[24]

Some actions motivated by religious beliefs have received constitutional protection on the basis of freedom of speech. For example, Jehovah's Witnesses cannot be prohibited from proselytizing in the absence of a clear and present danger to the public peace.[25] Sometimes, even actions that go beyond speech and expression are constitutionally protected. In Sherbert v. Verner,[26] a state requirement that an individual must be available to work on Saturdays to be eligible for unemployment compensation failed to survive a constitutional attack by a Sabbatarian.

B. *Parental Autonomy*

Parents have a constitutionally protected liberty interest in raising their children as they see fit.[27] The parents' own freedom of religion includes the right to direct the religious upbringing of their children,[28] and parents have standing to challenge practices that interfere with their right to define their children's religious training and practices.[29] Parental rights are limited, however, and the government may intervene in the parent-child relationship to protect the safety and welfare of children. In *Prince v.*

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21 Abington Sch. Dist. v. Schempp, 403 U.S. 602 (1971).

22 Wallace v. Jaffree, 472 U.S. 38 (1985).

23 Reynolds v. United States, 98 U.S. 145 (1878).

24 Employment Div., Dep. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

25 Cantwell v. Connecticut, 310 U.S. 296 (1940).

26 374 U.S. 398 (1963).

27 Troxel v. Granville, 530 U.S. 57 (2000); Santosky v. Kramer, 455 U.S. 745 (1982).

28 Wisconsin v. Yoder, 406 U.S. 205 (1972).

29 Newdow v. United States Cong. 292 F.3d 597 (9th Cir. 2002).

Massachusetts,[30] the court upheld a conviction for violation of the child labor laws by the guardian of a child who was passing out religious literature on a public street. Similarly, parental refusal to grant permission for necessary blood transfusions or required vaccinations for children on religious grounds has been overridden.[31]

Where the family is no longer intact, it is no longer autonomous and, historically, intervention has occurred with great ease and frequency. Every aspect of the parents' care of their children may be scrutinized in the most routine custody case. If separated or divorced parents are unable to agree, the government may intrude upon the otherwise protected sphere of parental decision-making and child-rearing.[32] While the court may designate the custodial parent, parents have a fundamental right to make their own child rearing decisions and the court may not substitute its judgment for that of the parent on the ground that a different choice might be better for the child, absent a showing of harm to the child.[33]

Most courts in the United States today claim to confront religious issues in custody cases by attempting to balance the parents' right to freedom of religion and the right to parent one's children with the child's best interests.

III. Conflicting Religious Practices

The custodial parent generally determines the child's religion and religious training.[34] Exceptions occur, however; for example, custody was awarded to a Jehovah's Witness mother with the proviso that the father would continue to take the children to Catholic school and church.[35]

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30 321 U.S. 158 (1944).

31 *See, e.g.*, Levitsky v. Levitsky, 190 A.2d 621 (Md. 1963) (blood transfusion); Brown v. Stone, 378 So.2d 218 (Miss. 1979) (vaccinations).

32 *See, e.g.*, Morris v. Morris, 412 A.2d 139 (Pa. Super. 1979).

33 Troxel v. Granville, 530 U.S. 57 (2000).

34 *See, e.g.*, Funk v. Ossman, 724 P.2d 1247 (Ariz. Ct. App. 1986); Baker v. Baker, 1997 Tenn. Ct. App. LEXIS 837 (Nov. 25, 1997)

35 Romano v. Romano, 283 N.Y.S. 2d 813 (1967).

Legal custody includes the right to make decisions with regard to the child's religious training.[36] Shared legal custody implies that each parent retains the right to direct the child's religious upbringing. Serious disputes between the parents regarding the children's religious upbringing may dictate an award of sole legal custody to one parent.[37]

Many parents, and judges, for that matter, assume that subjecting children to conflicting religious beliefs and practices is *per se* undesirable in that it causes confusion and insecurity and undermines the child's sense of stability and well-being. This is not necessarily true, and it may well be that exposure to a diversity of beliefs and practices may actually be beneficial to the child.[38] A Massachusetts court suggested that diverse religious experiences may not only be intellectually stimulating to a child but may constitute valuable exposure to the religious models from which the child will choose in later life. Accordingly, the negative effects of conflicting religious practices should not be assumed but must be specifically proven if limitations are to placed on the parent's right to parent.[39] The parent seeking to place restrictions on the other parent must be prepared to bear the burden of demonstrating harm to the children to justify the requested restrictions.[40]

Most jurisdictions hold that the non-custodial parent has a right to expose the child to his or her religious beliefs and practices absent a clear showing of harm to the particular child in question.[41] Showing harm means more than merely demonstrating that the child may be confused and upset by conflicting relig-

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36 In re Marriage of Murga, 103 Cal. App. 3d 498 (1980); Kirchner v. Caughey, 606 A.2d 257 (Md. 1992). *See also* Douglas v. Wright, 801 A.2d 586 (Pa. Super. 2002) in which the court declined to preclude the grandparents from taking the children to a Methodist church although the father complained that this interfered in his right to make decisions regarding the children's religion. The court found that the father's Lutheran religion shared the same fundamental theology as the Methodist church and that the children's church attendance with their grandparent's did not interfere with the father's custody rights.

37 Andros v. Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986).

38 Felton v. Felton, 418 N.E.2d 606 (Mass. Ct. App. 1981).

39 *Id.*

40 Baker v. Baker, 1997 Tenn. Ct. App. LEXIS 837 (Nov. 25, 1997).

41 In re Marriage of Murga, 103 Cal. App. 3d 498 (1980).

ious practices,[42] or that the child might be bored by being required to sit in church for extended periods of time or being taken on door-to-door proselytizing calls.[43] Restrictions on a noncustodial father prohibiting unsupervised visits until he demonstrated that he would not expose the children to his fundamentalist religious views were upheld on appeal,[44] as are orders enjoining parents from exposing the children to their religion, upon findings that the tension resulting from the parents' conflicting beliefs is causing the children severe anxiety.[45] In Johns v. Johns,[46] the noncustodial father was required to insure that the children attended church and Sunday school during his periods of partial custody. The father had earlier promised to take the children to church, and the court rejected his argument that the order interfered with his religious freedom, noting that he had not offered any alternative to provide spiritual instruction for the children. Similarly, the Mississippi Supreme Court dodged a constitutional challenge to an order requiring both parents to assume responsibility for their children's attendance at church or Sunday school every Sunday by recasting the order as a "suggestion," noting that any interference with mother's parenting choices was justified by the children's need for stability.[47]

For some parents, conflicting religions offer a tempting opportunity for exerting power and control over the other party. Other parents attempt to use religion as the excuse to attain what amounts to an exclusive parenting arrangement with respect to the children that might otherwise be unavailable. It is difficult for such parents to find the line that separates parental comfort from the child's best interests.

Practices inconsistent with the custodial parent's religious beliefs, such as the non-custodial parent living in adultery, do not necessarily preclude visits or even restrictions on the noncustodial parent's behavior.[48] The relationship with the non-custo-

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42 Munoz v. Munoz, 489 P.2d 1133 (Wash. 1971); Khalsa v. Khalsa, 751 P.2d 715 (N.M. Ct. App. 1988).

43 Palmer v. Palmer, 545 N.W.2d 751 (Neb. Ct. App. 1996).

44 Lange v. Lange, 502 N.W.2d 143 (Wis. Ct. App. 1993), cert. denied, 511 U.S. 1025 (1994).

45 Meyer v. Meyer, 789 A.2d 921 (Vt. 2001).

46 918 S.W.2d 728 (Ark. Ct. App. 1996).

47 McLemore v. McLemore, 762 So.2d 316 (Miss. 2000).

48 In re the Marriage of Roberts, 503 N.E.2d 363 (Ill. App. Ct. 1986).

dial parent is more important than the religious practices of either parent, and even where actual harm can be shown to the child, the least intrusive remedy is usually imposed.[49]

Theoretically, the court may not weigh the relative merits of different religions or, for that matter, non-religions. An inquiry into the sincerity of a person's religious belief is constitutionally permissible,[50] but subjecting the belief to scrutiny to determine the truth of the belief is not because people can sincerely believe religious principles that are not necessarily true.[51] The reality is that courts are predisposed to treat religions differently.

A. *Religion as a Factor in Custody Determinations*

Traditionally, the moral and spiritual welfare of the child is considered by the court in rendering custody decisions. Courts have taken this to mean that religious issues play a part in custody decision-making. Reversing an order permitting a mother to relocate with the children, the Pennsylvania Superior Court stated "[A]side from stating that Father takes the children to church on the weekends, the trial court failed to consider Mother's and Father's religions, their mental and physical status, or other factors which legitimately affect the children's physical, intellectual, moral, and spiritual well-being."[52] A few states have enacted statutes requiring the court to consider the child's spiritual as well as physical and emotional welfare, and even the religious "needs" of the child.[53]

Other courts are much more cautious in allowing consideration of religion and will exclude such evidence from consideration unless it is affirmatively likely to cause present or future harm to the child's physical or mental well being.[54] Similar restraint is shown by other courts holding that religious factors may be considered but may not be the sole determining factor for the custody award.

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49 Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. 1990); Felton v. Felton, 418 NE 2d 606 (Mass. Ct. App. 1981).

50 Wisconsin v. Yoder, 406 U.S. 205 (1972).

51 United States v. Ballard, 322 U.S. 78 (1944).

52 McAlister v. McAlister, 747 A.2d 390 (Pa. Super. 2000).

53 Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).

54 *E.g.,* In re Marriage of Short, 698 P.2d 1310 (Colo. 1985); In re Marriage of Hadeen, 619 P.2d 374 (Wis. Ct. App. 1980).

It is generally viewed as improper to suggest that religious training is in and of itself a benefit to the child, but courts do this anyway despite pious disclaimers. For example, in Dean v. Dean,[55] the trial court's finding that a parent's failure to take the child to Sunday school negatively impacted the child's spiritual welfare did not rise to the level of a constitutional violation. Similarly in *McLemore v. McLemore*,[56] the court upheld an order directing the parents to see that the children attended church or Sunday school.

Even in states where courts are precluded from considering religion as a deciding factor, this appears to occur in some other context. If the issue is framed as secular, the court is more likely to ground a decision on the evidence. On the other hand, an issue that is presented as a religious matter is more likely to be avoided by the court.

Some states permit evidence of religious beliefs or practices in much the same way as other factors. Religious practices may therefore be considered if it can be demonstrated that these matters impact on the child's best interests.[57] In other words, the religion factor will be relevant if it has a significant effect on the secular interest of the child.

Religious *prejudice* may be an exception to the rule that all factors relevant to the child's best interests must be considered by the court in making a custody determination, in much the same way that the court is precluded from considering racial prejudice in awarding custody, even where there is a direct and substantial impact on the child's best interests. In Palmore v. Sidoti,[58] the United States Supreme Court held that a custody decision based on racial prejudice is unconstitutional, however real the impact on the child. In such cases the best interests of an individual child are subservient to overarching public policy concerns that acknowledging prejudice serves to promote it.[59]

A parent's religious practices may not be used to deny that parent custody, or to support an award of custody to the other

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55 232 S.E.2d 470 (N.C. Ct. App. 1977).

56 *Id*. at 22.

57 *See, e.g.*, Bienenfeld v. Bennett-White, 605 A.2d 172 (Md. Ct. App. 1992).

58 466 U.S. 429.

59 In re Custody of Temos, 450 A.2d 111 (Pa. Super. 1982)

parent where the possibility of harm is speculative and not immediate. For example, the fact that a Jehovah's Witness mother would not consent to blood transfusions for her children should not be a factor in the custody decision between parents where none of the children is currently in need of a blood transfusion or likely to be in such need in the foreseeable future.[60]

Courts appear most comfortable addressing problems in terms of parental conflict as opposed to religious issues. For example, a parent accused of discrediting the other parent to the children may deny any derogation or criticism of the other parent. However, that parent's religion may teach that persons who have not ascribed to a particular religious tenet are bad people. The parent professes only to exercise his or her right to expose the child to the parent's religious beliefs, and if the other parent is shown to the children in a bad light as a consequence, this cannot be helped. In *Leppert v. Leppert*,[61] a custody award to the mother was reversed, the court finding that her strict adherence to the teachings of the religious sect to which she belonged was likely to have an adverse impact on the children. There was evidence that the mother was actively working to estrange the children from their father and paternal relatives because these people, not being adherents of her favored religious sect, were "evil" by definition. Similarly, a Massachusetts court upheld restrictions on father's rights to expose his Jewish children to his recently acquired fundamentalist Christian beliefs by prohibiting him from exposing the children to teachings that they would "burn in hell" unless they accepted Jesus as their savior.[62]

Religion is one way, for parents who are so inclined, to actively interfere in the other parent's relationship with the children. For example, in *Gottlieb v. Gottlieb*,[63] the parents entered into an agreement incident to their divorce providing that the mother would have custody of the children but was required to raise them in the Jewish faith. The mother promptly enrolled the children in Catholic schools and later attempted unsuccessfully to avoid the consequences of the agreement on the basis that the children were accustomed to their schools, were now practicing

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60 Osier v. Osier, 410 A.2d 1027 (Me. 1980).

61 519 N.W. 2d 287 (N.D. 1994).

62 Kendall v. Kendall, 687 N.E.2d 1228 (Mass. App. 1997).

63 175 N.E.2d 619 (Ill. App. 1961).

Catholics, and that to remove them from this environment would be unsettling and contrary to the children's religious freedom. The trial court's finding that the agreement was in the best interests of the children and that mother acted in bad faith in attempting to subvert it was upheld on appeal.

Religious training in the home may be seen as evidence of parental concern for instilling moral values in the children. In *Allison v. Owens*,[64] the court held that the fact that the children were taken to Sunday school on a regular basis had nothing to do with religion *per se* but constituted evidence of morality, discipline and parenting skills.

Then there is the parent who has no time for the children because of her religious activities. An Alaska mother lost custody because her activities as an evangelist required her to attend services, revivals and choir performances that typically lasted until almost midnight. She took the children along with her and they often fell asleep on the church pews and had to be awakened when their mother was ready to go home.[65]

Smoking cigarettes can be not only a health issue but can implicate religion issues in custody litigation. In Johnson v. Johnson,[66] the father was "disfellowshiped" from the congregation of Jehovah's Witnesses for willfully smoking cigarettes. A disfellowshiped member of the Jehovah's Witnesses is believed to be under satanic control and must therefore be avoided by other members of the congregation, including, presumably that person's children. The father correctly feared that he would be permitted very little involvement with his children. Similarly, a trial court decision conditioning the father's custody rights on his abstaining from marijuana use despite the father's claim that the ruling interfered with his religious freedom because his Rastafarian faith encouraged marijuana use was upheld.[67] Illegal activities are not entitled to constitutional protection just because

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64 421 P.2d 929 (Ariz. Ct. App. 1966), *cert. denied*, 390 U.S. 988 (1968).

65 Hilley v. Hilley, 405 So.2d 708 (Ala. Civ. App. 1981). *See also* Birch v. Birch, 463 N.E.2d 1254 (Ohio 1984) (upholding the denial of custody to the mother whose religious fanaticism caused her to neglect her children).

66 Supra, note 3.

67 Washington ex rel. Hendrix v. Waters, 951 P.2d 317 (Wash. Ct. App. 1998).

they occur in a religious context.[68] Advocacy of polygamy, plural marriages, and multiple wives by a fundamentalist father has been held to be a *per se* threat to his children justifying limitations on his right to promote his religious views to them.[69]

B. *Agreements to Raise Children in a Particular Religious Faith*

Implicit in the right of religious freedom is the right to change one's beliefs. Accordingly, agreements to raise one's child or future children in a particular religion tend not be to binding, although they may be an evidentiary factor.[70]

Agreements to raise a child in a particular religion may be unenforceable for vagueness or lack of specificity where the parties do not define terms or spell out the duties of the parents. For example, an Iowa court found that an agreement to rear a child in a particular religion failed for lack of certainty because it was impossible to know whether "rearing" the child meant that he was to be taken to church once a week, or once every other week, or during the week, or for additional classes, or what holidays must be observed and in what manner.[71]

Where agreements are found to be enforceable, they are usually in writing.[72] Oral agreements tend to be unenforceable due to vagueness.[73]

Some courts have held that enforcement of agreements to raise one's children in a particular religion amount to the state promoting that religion, thereby running afoul of the Establishment Clause of the First Amendment.[74] Other courts have held that such agreements do not implicate public policy and are valid and binding[75] in accordance with general contract law.

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68 *Id.*

69 Shepp v. Shepp, 821 A.2d 635 (Pa. Super. 2003). The dissent argued that an actual threat to the child should be demonstrated before restricting father's conversations with his children.

70 *See, e.g.*, In re the Marriage of Bennett, 587 N.E.2d 577 (Ill. App. Ct. 1992); In re the Marriage of Neuchterlein, 587 N.E.2d 21 (Ill. App. Ct. 1992); Johns v. Johns, 918 SW2d 728 (Ark. Ct. App. 1996); In re Marriage of Wolfert, 598 P.2d 524 (Colo. Ct. App. 1979).

71 Lynch v. Uhlenhopp, 73 N.W.2d 401 (Iowa Ct. App. 1988).

72 *See, e.g.,* Stevenot v. Stevenot, 520 N.Y.S.2d 197 (N.Y. App. Div. 1987).

73 Lowinger v. Lowinger, 733 N.Y.S.2d 33 (N.Y. App. Div. 2001).

74 Zummo v. Zummo, 574 A 2d. 1130 (PA Super. 1990).

75 Lowinger v. Lowinger, 733 N.Y.S. 2d 33 (NY App. Div. 2001).

C. *Relative Devoutness*

An early English Chancery Court was able to avoid the paternal custodial preference by finding the father unfit, and awarded custody of the child of poet Percy Bysshe Shelley to the mother primarily because of Shelley's atheistic beliefs.[76]

Active church-going versus sporadic participation has been mentioned in many cases and is usually one factor among many that the court must consider in determining the child's best interests.[77] Some cases, however, have held that the relative devoutness of the parties cannot be a factor in the custody determination.[78] Rejecting a request to change custody on grounds that the petitioner was more actively involved in the child's religious life, the Utah Court of Appeals stated that it would not make a decision that was tantamount to determining which parent was the "better Mormon."[79]

Exhibiting a preference for organized religion, or for the more religious over the less or non-religious, places the state on the side of organized religion, seemingly a clear violation of the Establishment Clause.[80]

D. *The Child's Religious Preference*

The parent has the right to choose the child's religion and to direct the child's religious upbringing. The child is not consulted, even where the parent's choice may have far-reaching and permanent effects on the child. Justice Douglas's dissent in *Wisconsin v. Yoder*,[81] where the majority upheld a Free Exercise Clause challenge to the Wisconsin compulsory school attendance law, attests to this. The Amish parents argued that their religion required a separate social and spiritual focus and that the educational aims of the Wisconsin public school system were irreconcilable with their religion. Justice Douglas argued that the whole purpose of compulsory education is to provide children with the educational tools for adulthood and that these parents were harming their children by deliberately foreclosing options

76 Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817).

77 *See, e.g.,* Storlien v. Storlie, 386 N.W.2d 812 (Minn. Ct. App. 1986).

78 Zummo v. Zummo, 574 A2d 1130 (Pa. Super. 1990).

79 Hudema v. Carpenter, 989 P.2d 491 (Utah Ct. App. 1999).

80 *See, e.g.*, Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).

81 406 U.S. 205.

for them. The majority did not find it necessary to disagree, emphasizing that the choice of religion belongs to the parent.

In *Prince v. Massachusetts*,[82] the court noted the preference of the child to express her own religious beliefs by handing out copies of the Watchtower, but afforded it no weight in the conviction of the child's guardian for violation of the Massachusetts child labor laws. The ability of the children to make their own religious choices in the future can receive greater deference where it is possible to postpone the performance of a disputed religious rite. For example, an order deferring the Hindu ceremony, Chudakarana, until the child could decide for herself absent agreement of the parents survived a father's Free Exercise challenge.[83]

As a practical matter, the child's religion is imposed by the parent on younger children who are unable to choose a religious identity. When the parents are separated, the child's religion is generally chosen by the custodial parent.[84] Most courts that have addressed the issue treat religious preferences in much the same way as other preferences expressed by the child in custody disputes. The child's preference is afforded appropriate weight, depending upon the age and maturity of the child, and the reasons for the preference. The issue is whether the child has sufficient capacity to assert a personal religious identity independent of that of the parents.[85] Once children have established a religious identity, it may be appropriate to limit their exposure to a parent's recently adopted religious views.[86]

E. *The Use of Experts*

In those cases in which a parent's custodial rights have been restricted due to religious beliefs or practices, the court has invariably relied upon expert testimony from a psychologist or other professional.[87] For example, in *Meyer v. Meyer*,[88] the Vermont

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82 321 U.S. 158.

83 Sagar v. Sagar, 781 N.E.2d 54 (Mass. App. Ct. 2003).

84 LeDoux v. LeDoux, 452 N.W.2d 1 (Neb. 1990).

85 Zummo v. Zummo, 574 A2d 1130 (Pa. Super. 1990).

86 Kendall v. Kendall, 687 N.E. 2d. 1228 (Mass. App. 1997).

87 See Baker v. Baker, 1997 Tenn. Ct. App. LEXIS 837 (Nov. 25, 1997); Bienenfeld v. Bennett-White, 605 A. 2d 172 (Md. Ct. App. 1992); Morris v. Morris, 412 A 2d. 139 (PA Super. 1979).

Supreme Court upheld an order enjoining the father from exposing the children to his Jehovah's Witness faith based upon testimony by the children's teachers about conflict regarding the children's participation in school parties and holiday activities prohibited by the father's religion and testimony by the pediatrician regarding symptoms of anxiety exhibited by the children and their need for counseling as a result of the conflict between the parents over religion. Uncorroborated testimony of a parent has been held to be insufficient to demonstrate harm, and evidence from school, church or medical experts may be necessary.[89]

Sometimes experts can express opinions about matters that would otherwise be impermissible. See, for example, *Mendez v. Mendez*,[90] in which the experts testified that contact with the mother's Jehovah's Witness religion would be contrary to the child's best interests because she needed "to adapt herself to the mainstream of culture."[91] Preference was accorded to the father's Catholic faith which, according to the experts, would enable the child to more readily adapt to society and experience the freedom enjoyed by Catholic children as opposed to Jehovah's Witnesses. In *Pater v. Pater*,[92] the court reached a contrary result. The *Pater* court distinguished value judgments about the quality of life from actual harm to the child, and found that such activities as socializing with non-Witnesses, participating in extracurricular activities and celebrating birthdays and holidays were not a basis for changing custody.

The expert need not have special expertise in religion or even any familiarity with the religions at issue, since the focus is upon the child in question and not the relative merits of the religions.[93] Testimony from an adherent or leader of a specific religion to establish the prevalence of practices in the particular religion that may negatively affect the child is easily discredited because of differences in the ways individuals observe their faith. While a given practice may be prescribed by the religion, the par-

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88 789 A.2d 921 (Vt. 2001).

89 See also Kendall v. Kendall, in which the court appointed a psychologist to act as a guardian ad litem.

90 527 So.2d 820 (Fla. Dist. App. 1987).

91 *Id.* at 821 (Baskin, J., dissenting).

92 588 N.E.2d 794 (Ohio 1992).

93 Andros v. Andros, 396 N.W.2d 217 (Minn. Ct. App. 1986).

ent in question may not follow that particular aspect of the religion, or may deviate from it if confronted with a problem.[94]

The expert testimony must be specific to the child in question. The Ohio Supreme Court rejected expert testimony that mental illness is more prevalent among members of a particular religious group as "a blatant attempt to stereotype an entire religion."[95] The court viewed the testimony as meaningless in the context of the custody dispute because the expert had no evidence regarding the individual child in question. Similarly, the expert who testified that extracurricular activities are generally beneficial to a child had never conducted any clinical interviews of the subject of the custody dispute. In the absence of any showing that the child was suffering any ill effects, the trial court was not justified in relying on the speculative expert testimony. The Supreme Court of Ohio, in reversing both the trial court and the intermediate appellate court, noted that the trial court's statement that it was not deciding custody on the basis of the Mother's religious beliefs "will not insulate the court's decision from review."[96]

IV. What Relief?

Careful consideration should be given to the type of relief being requested in view of the general practice of imposing the least intrusive restrictions on a parent's right to rear his or her children.[97] The type of relief should be carefully tailored to the identified problem. Some possible remedies, that can be used separately or in combination, are as follows:

1. Change of custody.
   A. Joint legal custody to enable both parents to participate in the child's religious upbringing.
   B. Physical custody to one parent, with legal custody in the other.
2. Change of visitation arrangements.

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94 See Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (reversing the denial of unemployment compensation to a Jehovah's Witness who refused to accept a job involving the manufacture of weapons although there was evidence that others of the same faith were so employed).

95 Pater v. Pater, 588 N.E.2d at 800.

96 *Id.* at 801.

97 In re Marriage of Mentry, 142 Cal. App. 3d 260 (1983).

A. Increasing the visitation time with the non-custodial parent to neutralize the effects of the custodial parent's efforts at indoctrination, or providing for custody with the noncustodial parent when the custodial parent is involved with religious activities.[98]

B. Changing the day of the visitation or partial custody to avoid the problem.[99]

3. Injunctions.

A. Injunctions work best when they are limited to specific activities that are clearly described as opposed to a blanket prohibition against "indoctrination." For example:

a. Prohibiting certain types of religious meetings. In *Andros v. Andros*,[100] the father's taking the child to a five hour faith healing meeting to cure her scoliosis condition for which she had been receiving medical treatment was the "straw" that convinced the court to award sole legal custody to the mother.

b. Distinguishing between attending services with the parent and enrolling the child in religious classes.[101]

c. Prohibiting or limiting proselytizing, distributing literature and other materials, going door-to-door, soliciting donations.[102]

d. Prohibiting certain topics of conversation (e.g., "Your father will burn in hell for eternity be-

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98 See Palmer v. Palmer, 545 N.W.2d 751.

99 *See, e.g.*, Kirchner v. Caughey, 606 A.2d 257 (directing the substitution of a day other than Sunday for visitation).

100 396 N.W.2d 917 (Minn. Ct. App. 1986).

101 *See, e.g.*, Funk v. Ossman, 724 P.2d 1247 (Ariz. App. 1986).

102 See Palmer v. Palmer, 545 N.W.2d 751 (holding that restrictions on a custodial Mother taking her child with her to church services and on door-to-door religious visitation were not based on evidence of any harm to the child and were therefore constitutionally impermissible). *See also* Lange v. Lange, 502 N.W.2d 143 (requiring supervised visitation to prevent the father from indoctrinating the children with his fundamentalist beliefs, even though no harm to the children had been shown) and Shepp v. Shepp, 821 A.2d 635 (prohibiting father from advocating polygamy to his children).

cause he has not been saved"); or limiting religious discussions to a response to specific inquiries from the children.[103]

e. Directing a parent to take the child to a particular religious event, such as Sunday school.[104]

f. Deferring a controversial religious ceremony until the child is old enough to express a preference.[105]

Imposing an affirmative obligation on a parent to take children to particular religious services is far less intrusive than prohibiting the parent from exposing the child to his or her own religion. On the other hand, conditioning an award of custody on the parent's restricting her own religious activities may be an impermissible infringement upon the parent's freedom of religion,[106] unless the religious activity happens to be illegal.[107]

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103 Baker v. Baker, 1997 Tenn. Ct. App. LEXIS 837; Kendall v. Kendall, 687 N.E.2d 1228 (Mass. App. 1997).

104 See Johns v. Johns, 918 S.W.2d 728 (Ark. Ct. App. 1996).

105 Sagar v. Sagar, 781 N.E.2d 54.

106 See Pater v. Pater, 588 N.E.2d 794.

107 Washington ex rel. Hendrix v. Waters, 951 P.2d 317 (holding that a Rastafarian father's marijuana use could properly be prohibited during the father's custody time although the father claimed that his illegal drug use was religion based).