

Blending Cultures and Religions: Effects that the Changing Makeup of Families in our Nation Have on Child Custody Determinations

by

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I. Introduction

In the United States, the best interests of the child are the paramount concern when parents engage in a custody dispute. Each state legislature has enumerated best interests criteria for determining which parent should provide primary care and/or make major decisions for the child. The policy that underlies this general principle is that parents have a fundamental right to the care, custody and control of their children.¹

A recent Population Survey indicates that many bicultural or multicultural families with children are being or have been created.² Likewise, couples who practice different religions often marry and parent children together while continuing to practice their respective religions. As with all families, the divorce rate will affect some of these families and they will be separated.

This article addresses the question of whether culture and religion should be among the mandatory best interests criteria that judges and lawyers should consider when evaluating parents for placements and parenting plans for affected families. Part II defines culture and religion as two distinct criteria. Part III examines a few statutes that expressly include references to culture and religion as factors that should be considered in custody disputes. Parts IV and V respectively focus on culture and religion and how courts have made custody determinations after consid-

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¹ Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

² U.S. Census Bureau, Married Couple Family Groups, 2011, <http://www.census.gov/>.

ering these factors. Part VI discusses international laws that require consideration of a child's heritage and religion in placement decision-making. In Part VII, through analysis of cases and statutes, practice tips are provided regarding how lawyers and judges may utilize these factors even when they are not included in a governing statute.

II. Distinguishing Culture and Religion

Often the ideas of culture and religion are used interchangeably. However, two distinct issues arise with respect to these familial concerns. Culture is "a synthesis of a social and moral code of conduct together with activities that symbolize those codes." It may also be defined as "shared experiences or commonalities" of groups or of individuals within groups.³ "The more distinctly a child's cultural inheritance varies from that of the dominant society, the more it must be taken into account. The more bias or hostility that exists against an aspect of the child's cultural inheritance, the more that cultural component needs to be considered."⁴ In comparison, religion is "[t]he expression of man's belief in and reverence for a superhuman power recognized as the creator and governor of the universe."⁵ As two different criteria, one may be a concern for a particular family while the other is not.

III. Culture and Religion as Best Interests Criteria

Analysis of custody determinations based upon the best interests of the child standard encompasses a review of several statutory criteria. Application of this equitable standard assists judges and attorneys in ascertaining which parent will act in the child's best interest. Each state court that applies the best interests standard makes the custody determination based upon a list

³ GERI S.W. FUHRMANN & ROBERT A. ZIBBELL, *EVALUATION FOR CHILD CUSTODY* 62 (2012).

⁴ WEN-SHING TSENG, DARYL MATTHEWS & TODD S. ELWYN, *CULTURAL COMPETENCE IN FORENSIC MENTAL HEALTH: A GUIDE FOR PSYCHIATRISTS, PSYCHOLOGISTS, AND ATTORNEYS* 207 (2004).

⁵ *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1099 (William Morris, ed., 1976).

of criteria that is set forth in the applicable state's child custody statute. For example, the District of Columbia's statute lists seventeen criteria for consideration including the child's and the parents' preferences, the parties' mental and physical health, the parents' willingness to share parenting, the child's adjustment to the surrounding environment, and the potential for disrupting the child's school and social life. However, neither culture nor religion is on that list. As it considers these criteria, the trial court has broad discretion in making custody determinations.⁶

Only a few states expressly include culture and religion in statutory provisions that delineate best interests criteria.⁷ The Minnesota statute, for example, does include express provisions for considering both criteria. It provides that when there is a custody dispute between two parents, "the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture, religion, or creed" should be considered.⁸ Another Minnesota statutory provision further provides that "the child's cultural background" should be a consideration.⁹ A Minnesota trial court applied these statutes to resolve a custody dispute involving a multi-racial couple. Tubwon is of Black, American Indian, and Irish heritage. Weisberg is Jewish. The trial court acknowledged the children's cultural heritage and made specific findings on culture. It ruled that "both parties [sought] to expose the children [to] and educate them with respect to these different cultures" and that due consideration was given to the children's racial and cultural needs.¹⁰

Legislators in some other states refer to either culture or religion but not the other criterion. The Connecticut statute lists the child's cultural background as a specific criterion to be considered in child custody determinations. It provides that "[i]n making or modifying any order . . . the court shall consider the best interests of the child, and in doing so may consider . . . the

⁶ D.C. CODE § 16-914(a)(3) (LexisNexis 2012).

⁷ See, e.g., CONN. GEN. STAT. § 46b-56(c)(13) (2012); MINN. STAT. ANN. § 257.025 (a)(10)-(11) (West 2012).

⁸ § 257.025(a)(10).

⁹ § 257.025(11).

¹⁰ Tubwon v. Weisberg, 394 N.W.2d 601 (Minn. 1986).

child's cultural background."¹¹ Some other states' statutes, without mentioning culture, also require that parties include provisions for religious training, if applicable, in their parenting plans.¹²

IV. Culture as a Factor in Child Custody Determinations

Where there is no express provision for consideration of culture in many states, some courts have considered this factor under similar or catchall statutory provisions. As a result, a few courts have considered a child's cultural background in making the custody determination. This section discusses the relevance of culture for some families and summarizes courts' findings on this issue.

A. The Relevance of Culture in Child Custody Decisions

Culture is relevant for some families because parents will impart their cultural mores to their children. Culture may shape their parenting practices. It may affect the manner in which they discipline their children. Cultural norms also may result in social restrictions for the child.¹³

B. Courts' Consideration of Culture

A few courts have considered culture regardless of whether it is listed in the best interests statute. Although the Alaska statute does not expressly refer to culture, for example, the statute does reference a child's social needs as a consideration.¹⁴ In *Van Sickle v. McGraw*,¹⁵ the court cited the social needs provision in a custody dispute between a Native American woman and a

¹¹ § 46b-56(c)(13). See also *Sweeney v. Sweeney*, 856 A.2d 997, 1006 (Conn. 2004) (finding that religious upbringing is a compelling interest).

¹² See, e.g., D.C. CODE § 16-914(c)(7) (LexisNexis 2012).

¹³ FUHRMANN & ZIBBELL, *supra* note 3 (advising evaluators to avoid stereotypes); *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. Ct. App. 2004). See generally Cynthia R. Mabry, *The Browning of America: Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 413 (2010).

¹⁴ ALASKA STAT. § 25.24.150(c)(1) (2012).

¹⁵ *Van Sickle v. McGraw*, 134 P.3d 338 (Alaska 2006).

white man. In considering the biracial child's social needs at the custody hearing, the court gave the mother some credit because the father ignored the child's Native American cultural needs. The court also decided that the child would have greater exposure to the Native American heritage in the city where the mother resided. On the other hand, the court noted that primary physical care with the father was in the child's best interests because the child would have better cultural opportunities and contact with extended family members in Sitka, Alaska, where the father resided. The child's Tlingit heritage also more likely would be recognized in Sitka than in the Michigan community where the mother lived.¹⁶

For older children who may want to express a preference to live with one parent, the child's wishes should be considered. In *Rooney v. Rooney*,¹⁷ the court considered the white father's ability to meet the child's cultural needs and the child's preference for placement with him. The child's mother was Tlingit. After discussing several relevant factors, the court decided that the father could meet the child's cultural needs. When the mother appealed the trial court's decision, the appellate court affirmed the trial court's decision. In part, it held that:

[T]he opportunities for [the child] to be exposed to his Tlingit heritage are greater in Sitka than in Wrangell . . . [T]he court must consider the child's cultural needs as one factor in the overall context of his best interests . . . [T]he superior court considered Morgan's cultural needs, and it is implicit that the court believed these needs could be met through its custody order. Morgan will be with his mother for three months each year as well as during various school vacations. She undoubtedly will also see him upon her visits to Wrangell. Additionally, the superior court mandated that Tom take measures with Morgan to assure adequate contact with Virginia's family members in Wrangell and otherwise address his cultural needs. Finally, noting that "Morgan is a child of mixed ethnic background," the GAL stated her belief that it is "imperative that Morgan learn all that he can about both cultures." Thus, we conclude that the superior court adequately considered Morgan's cultural needs and therefore did not abuse its discretion.¹⁸

¹⁶ *Id.* at 342-43.

¹⁷ *Rooney v. Rooney*, 914 P.2d 212 (Alaska 1996).

¹⁸ *Id.* at 218.

The court reasoned that when a child who is old enough to express a mature rationale regarding cultural grounds for living with one fit parent, then the child should be allowed to live with that parent.¹⁹

In *Shady v. Shady*, the court considered several factors including the high risk of child abduction when it was making its initial custody determination.²⁰ Culture was a related concern because of the potential effect on the child if her father abducted her. As a result, the court ordered that the father's parenting time would be supervised because of the high risk of abduction to a place where the child would be exposed to an unfamiliar culture.²¹

Because this child's father had strong family ties to Egypt, the court held that his parenting time would be supervised.²² Some statutes also provide that courts must consider whether a parent has strong familial, emotional, or cultural ties to another country especially when that country is not a signatory to or compliant with the Hague Convention on the Civil Aspects of International Child Abduction.²³

In *In re A.A.M.*,²⁴ as it was considering Latino American children's emotional and physical needs, the court heard testimony from the children's caseworker and counselor. She testified

¹⁹ *In re A.A.M.*, 2005 Tex. App. LEXIS 9836, 2005 WL 3148094 at *9 (Tex. App. Waco Nov. 23, 2005).

²⁰ *Id.*

²¹ *Shady v. Shady*, 858 N.E.2d 128, 136 (Ind. Ct. App. 2006). The risk profile read as follows:

[RISK] PROFILE 5. WHEN ONE OR BOTH PARENTS ARE FOREIGNERS ENDING A MIXED-CULTURE MARRIAGE. Parents who are citizens of another country (or who have dual citizenship with the U.S.) and also have strong ties to their extended family in their country of origin have long been recognized as abduction risks Often in reaction to being rendered helpless, or to the insult of feeling rejected and discarded by the ex-spouse, a parent may try to take unilateral action by returning with the child to [his] family of origin. This is a way of insisting that [his] cultural identity b[e] given preeminent status in the child's upbringing.

²² *Id.* at 141-43. *But see* *Osmanagic v. Osmanagic*, 872 A.2d 897, 899 (Vt. 2005) (finding that the court has discretion in considering criteria such as a "cultural problem" and is not required to consider it).

²³ CAL. FAM. CODE § 3048(b)(1)(D) (2012); 42 U.S.C. § 11601 (a)(4).

²⁴ *In re A.A.M.*, 2005 Tex. App. LEXIS 9836 at *9 (2005).

that the children would suffer “culture shock” if they were placed with their paternal grandparents who were strangers to the children.²⁵ The grandparents had not developed a relationship with the children and only spoke Spanish. The children were born in the United States, had spent all of their lives in the United States, and they did not speak Spanish. On the other hand, the parties agreed that preserving the children’s Latino heritage was important even though they were not raised as Mexican Americans.²⁶ The children were placed with their American foster parents who wanted to adopt them.²⁷

In *Foster v. Waterman*,²⁸ Anjela, a young child whose paternal grandmother was Korean, was one-fourth Korean. As a result, Anjela’s father insisted upon her immersion in Korean heritage. To ensure that she would be exposed to her Korean culture, he sought primary physical care of Anjela. When the trial court ruled that the mother would have primary care, the father appealed the decision.²⁹ The Court of Appeals of Iowa agreed that Anjela’s ethnic heritage was an important consideration; however, it refused to modify the custody order because both parents lived in diverse communities. Anjela’s mother also supported Anjela’s relationship with her paternal grandmother; she shared Anjela’s interest in Korean culture; she enrolled Anjela in martial arts classes; and, she practiced speaking the Korean language with Anjela.³⁰

In another Iowa case, the trial court also considered the cultural differences between a white father who was born and raised in Minnesota and a Latino mother who was born and raised, for some part of her childhood, in Havana, Cuba.³¹ At the custody hearing, the mother argued that she should have primary care of the couple’s biracial daughter, Juliana, because in the Latino community, motherhood is sacred. She explained that Latino cultural teachings command that mothers assume the primary care-

²⁵ *Id.* at 16.

²⁶ *Id.* at *16-18.

²⁷ *Id.* at *21-22.

²⁸ *Foster v. Waterman*, 2007 Iowa App. LEXIS 857, at *6 (Iowa. Ct. App. July 25, 2007).

²⁹ *Id.* at 2.

³⁰ *Id.* at *6-8.

³¹ *In re Marriage of Kleist*, 538 N.W.2d 273, 274 (Iowa 1995).

taker role for young children, especially girls. The mother also contended that she needed to be the residential parent so that she could provide continuous instruction in Spanish and English.³² Thus, along with other best interest factors, the trial judge considered the mother's cultural beliefs and awarded the mother primary residential care.³³

The Court of Appeals of Iowa overruled the lower court's custody decision and granted primary care to the father because, in its opinion, the trial judge had given undue consideration to the mother's cultural beliefs.³⁴ When it was presented with the question of whether culture should have an impact on custody decisions, the Supreme Court of Iowa vacated the appellate court's decision with a lengthy explanation of the role of culture in child custody cases:

The fighting issue is the extent to which Adriana's Hispanic heritage should be permitted, if at all, to impact the custody decision. On the one hand, we agree entirely with the court of appeals' expressed view that "we cannot let a person's cultural beliefs put him or her in a superior position when we assess the custody issue." At the same time, we do not believe a court should ignore the way in which a person's background shapes their attitude toward parenting. If a litigant held a fixed cultural belief that the genetic superiority of boys entitled them to greater opportunity than girls, for example, we would surely consider such a factor in the placement of a child. Likewise here, Adriana's beliefs translate into a distinctive parenting style. Neither the ethnic origin of such a belief, nor the fact that she holds it, is controlling. What is important is the *impact* of that belief on her role as a parent.³⁵

In these cases, the courts recognized that culture is a relevant factor even though it is not the sole or dominating factor for consideration. Also, it must be emphasized that cultural beliefs are important not because of the impact of custody on the parent as the court seemed to find in *Kleist*, but because of its impact on the child. Courts tend to address the concern when the parties raise it. The parent who is more willing to indoctrinate the child in her culture is more likely to receive a credit for this criterion.

³² *Id.* at 275-77.

³³ *Id.* at 275-76.

³⁴ *Id.* at 276.

³⁵ *Id.* at 277.

V. Religion as a Factor in Child Custody Determinations

The First Amendment's Free Exercise Clause of the U.S. Constitution forbids governmental interference with a parent's decision to practice or not to practice religion and the parent's choice of religion. Recently, the Katie Holmes and Tom Cruise divorce thrust religion as a factor in custody determinations to the forefront. Tom Cruise reportedly is a strong follower of Scientology and Katie Holmes had concerns about raising their daughter in accordance with Scientology principles.³⁶

Parents have a fundamental right to control their children's religious training as long as the practice is not harmful to the child.³⁷ When parents separate, unless they agree otherwise, residential parents have the right to control the child's religious upbringing.³⁸ When the parents have joint custody, however, both parents have equal rights to control the child's religious beliefs.³⁹ If the parents practice different religious teachings that are not harmful to the child, a child's exposure to different religions may be a healthier approach.⁴⁰ A parent who claims that the court improperly infringed the parent's free exercise of religion must provide "evidence of the nature of [the] religious belief and how [the parent's] free exercise of religion is burdened by the action."⁴¹

³⁶ Katie Holmes, Tom Cruise Fought "Viciously" Over Scientology Parenting, <http://www.usmagazine.com/celebrity-news/news/katie-holmes-tom-cruise-fought-viciously-over-scientology-parenting-201257> (last visited November 26, 2012) (reporting that the couple fought over religious practices such as schooling and treatment of children as adults).

³⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (describing parent's rights to direct the child's religious upbringing).

³⁸ See, e.g., IND. CODE ANN. § 31-17-2-17(a)(2)(West 2012); KY. REV. STAT. ANN. § 403.330(1)(West 2012); MONT. CODE ANN. § 40-4-218(1)(2012). See also *In re Marriage of Minix*, 801 N.E.2d 1201, 1207 (Ill. 2003) (permitting the custodial parent to control as long as the religious practice is not harmful to the child); *Tripathi v. Tripathi*, 787 A.2d 436, 442 (Pa. 2001) (noting that the mother allowed the child to study Hindu teachings even though the mother had embraced a non-denominational religion).

³⁹ *Burrows v. Brady*, 605 A.2d 1312, 1316 (R.I. 1992).

⁴⁰ *McSoud v. McSoud*, 131 P.3d 1208, 1217 (Colo. 2006).

⁴¹ *Id.*

A. *The Relevance of Religious Beliefs in Child Custody Cases*

When custody decisions are made, religion may be relevant because it may require imposition of one parent's religious practice on another parent. It may affect the non-custodial parent's parenting time schedule (i.e., observance of religious holidays during visitation). As a result, in the divorce decree, the court may specify certain duties for the noncustodial parent. For some families, religion plays a major role because it shapes their identities. Often religion is utilized to decide family disputes. It may affect the parties' agreement or prior arrangements regarding the child's religious practices before the couple is separated.⁴²

Religion also may affect decision-making in a number of ways. Tension between religious law and secular law regarding where the child should reside may arise. Some religions do not recognize a mother's custody rights. The method of resolving the custody dispute may be dictated by religious practices. Religious practices may influence the child's wishes. Religion may even determine whether the state court has subject matter jurisdiction.⁴³

B. *Permissible and Impermissible Considerations of Religion in Child Custody Cases*

Courts may appropriately consider religion in custody cases.⁴⁴ When a parent's religious beliefs are at the center of a custody dispute, one of three approaches is used in U.S. courts. A court may consider: 1) religion as one, but not the sole factor; 2) the impact that religion will have on the child's secular well-being; or 3) the child's ascertainable preferences and whether re-

⁴² AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, *Summary of the Practice Parameters for Child Custody Evaluation*, RELIGION 36 (1997); M. Christian Green, *Religion, Family Law, and Recognition of Identity in Nigeria*, 25 EMORY INT'L. L. REV. 945, 947-49, 957 (2011).

⁴³ *Glauber v. Glauber*, 192 A.D.2d 94, 97-98 (N.Y. App. Div. 1993); *Multi-tiered Marriage*, at 162, 192, 255, 262-63, 320.

⁴⁴ *Luminella v. Macocci*, 814 A.2d 711, 717-18 (Pa. 2002) (ruling that the father did not force the children to participate in his religion and there were not any harmful effects even though it was an unusual religion). *See generally* George L. Blum, J.D., *Religion as Factor in Child Custody Cases*, 124 A.L.R.5th 203 (2012); Schneider, *Religion and Child Custody*, 25 U. MICH. J. L. REF. 879 (1992).

ligion plays an important role in shaping the child's identity.⁴⁵ In addition, ALI Principles provide that neither the parent nor the child's religious practices should be considered in custody proceedings unless those practices severely and almost certainly harm the child or the religious practice "has been a significant part of the child's life."⁴⁶ When restrictions are necessary, ALI Principles require the least restriction necessary to prevent harm to the child.⁴⁷

When a parent engages in religious practices, the "court may not examine the truth behind [that parent's] religious beliefs."⁴⁸ Neither may the court "evaluate the merits of the religious doctrine or defin[e] the contents of that doctrine."⁴⁹ The court cannot exercise religious bias or decide that one parent's religion is preferable to the other parent's religion.⁵⁰

On the other hand, it is constitutionally permissible for a court to inquire about "the sincerity of a [parent's] professed belief."⁵¹ A court may make some permissible inquiries about a parent's religious beliefs that do not infringe upon the parent's constitutional rights:

There are, [] legitimate reasons for the court to consider [religion] evidence. For instance, the court is empowered to order the noncustodial parent to refrain from allowing the child to participate in activities that are inconsistent with the custodial parent's religious beliefs. The court might also need to know of the custodial parent's religious beliefs in fashioning its visitation schedule. The court also might need information about the parties' religious beliefs for purposes of determining the noncustodial parent's duties under the decree of dissolution. In short, there are practical, value-neutral reasons for the court

⁴⁵ D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *Modern Family Law Cases and Materials* 695 n.1 (4th ed. 2010); *Bienenfeld v. Bennett-White*, 605 A.2d 172, 179 (Md. App. 1992).

⁴⁶ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.12(1)(c) (2002).

⁴⁷ *Id.*

⁴⁸ *Sagar v. Sagar*, 781 N.E.2d 54, 58 (Mass. App. Ct. 2003).

⁴⁹ *Id.* at 57-58.

⁵⁰ *Pawlik v. Pawlik*, 823 N.E.2d 328, 333 (Ind. App. 2005); *Pater*, 588 N.E.2d at 798. See also Jennifer Ann Drobac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1611 (1998) (concluding that court's often favor one parent's religion over the other parent's religion).

⁵¹ *Id.* at 58 (inquiring about whether the father's reason for demanding a religious ceremony for the child "was purely religious").

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to consider the parties' religious beliefs and practices that do not infringe on any of the parents' religious constitutional rights and liberties.⁵²

In *Johnson v. Johnson*, the appellate court overturned the trial court's award of primary care to the father because he practiced the Lutheran religion while the children were raised as Catholics. At the custody hearing, the father insisted that he would raise them in the Lutheran faith despite the court's order that they should continue to be raised in the Catholic faith. The appellate court decided that the trial court had not realistically considered each parents' ability to continue to practice Catholicism. Therefore, it ruled that the children's mother should have been awarded primary care because she would have continued to raise the children in the Catholic faith.⁵³

Courts may consider a parent's religious views to protect the child from "any harmful impact the [parent's] belief system may have on the child[']s physical or mental health."⁵⁴ Courts justifiably may intervene because states have a compelling state interest in protecting children from emotional or physical harm.⁵⁵ A North Dakota court intervened when it determined that the children should be placed in their father's care because the mother intended to raise them with her harmful teachings and religious beliefs that people who were not Winrod followers like her were God's enemies, evil and should be hated. The religious teachings also included refusal to pay taxes and ignoring certain governmental laws such as registration with selective service, licensing regulations, and purchasing automobile liability insurance.⁵⁶

⁵² *Pawlik*, 823 N.E.2d at 333-34 (citations omitted) (questioning the paternal grandmother about her religious beliefs because the father who sought custody lived with the grandmother).

⁵³ *Johnson v. Johnson*, 424 N.W.2d 85, 88-89 (Minn. 1988).

⁵⁴ *Leppert*, 519 N.W.2d at 291. *Accord* *Bienenfeld v. Bennett-White*, 605 A.2d 172, 180-81 (Md. App. 1992); *In re Marriage of Gersovitz*, 779 P.2d 883, 885 (Mont. 1989) (finding that religion is a factor but that it "should not dominate other [best interests] elements"); *Pater v. Pater*, 588 N.E.2d 794, 798-99 (Ohio 1992). *But see* *In re Marriage of Wang*, 896 P.2d 450, 151 (Mont. 1995) (refusing to include findings regarding the father's church affiliation and its affect on the child because it did not affect his ability to care for the child).

⁵⁵ *Hoeing v. Williams*, 880 N.E.2d 1217, 1222 (Ind. App. 2008); *McSoud*, 131 P.3d at 1216.

⁵⁶ *Leppert v. Leppert*, 519 N.W.2d 287, 288-89, 290 (N.D. 1994). *Accord* *In re E.L.M.C.*, 100 P.3d 546, 563 (Colo. Ct. App. 2004); *Battaglia v. Battaglia*,

Courts also may restrict a child's exposure to the parents' conflicting religious practices when the child experiences confusion and guilt as a result of the competing religious tenets.⁵⁷ A parent's mere accusation that the parents' differing religions are confusing the child is not enough to prove harm.⁵⁸ However, a "substantial threat"⁵⁹ as evidenced by a psychological evaluation or opinion or the social services' intervention may provide "strong support" of a religious practices' negative impact.⁶⁰ The parent's religious practices may endanger the child's health or safety when the parent prohibits medical treatment such as a blood transfusion because of her religious beliefs, when the child identifies with one religion but the parent prevents the child from participating in that religion, the parent demeans the child's religious beliefs, or when the parent is otherwise hostile towards the child's religion.⁶¹ The child's secular well-being may be harmed when one parent uses her religious beliefs to restrict the child's ability to spend time with the other parent.⁶² Parents' differing religious beliefs that cause substantial confusion and anxiety that is manifested by the child's confusion over participation in school activities, nightmares, feelings of guilt, and stomach aches are considered negative impacts associated with the parents' conflicting beliefs.⁶³ In some families, different religious practices may cause added strain on the child and that may be considered a negative effect.⁶⁴

172 N.Y.S.2d 361, 398-99 (1958) (refusing to allow the mother to impose the hazards of her religion which forbade blood transfusions on the children).

⁵⁷ Holder v. Holder, 872 N.E.2d 1239, 1242-43 (Ohio Ct. App. 2007). *But see Minix*, 801 N.E.2d at 1207 (determining that there were not "doctrinal differences" in the parents' religions).

⁵⁸ *Minix*, 801 N.E.2d at 1207.

⁵⁹ Hicks v. Hicks, 868 A.2d 1245, 1252 (Pa. 2005) (concluding that there was not competent evidence of substantial harm).

⁶⁰ *Jakab*, 664 A.2d at 265-66 (deciding that religious practices may be considered in custody proceedings when there is a "direct and immediate negative impact"). *See also McSoud*, 131 P.3d at 1216-17 (requiring a detailed and "clear showing of substantial harm").

⁶¹ *Hudema v. Carpenter*, 989 P.2d 491, 499-500 (Utah 1999).

⁶² *Bienenfeld*, 605 A.2d at 179, 183.

⁶³ *Meyer v. Meyer*, 789 A.2d 921, 924-25 (Vt. 2001) (finding that consideration of the father's religious practices was not unconstitutional per se).

⁶⁴ *Daubert v. Daubert*, 211 A.2d 323, 327 (Md.1965) (raising concerns about different religions for father and the child's siblings).

A parent may not be denied primary care solely because his or her religious beliefs differ from the other parent's religious beliefs.⁶⁵ Courts may require one parent to support the other parent's religion when it significantly affects the non-residential parent's time with the child.⁶⁶ However, the court may not restrict a parent's constitutional rights by forbidding a parent from practicing her own religion unless the teachings and practices cause actual or potential harm to the child.⁶⁷

Similar to cultural considerations, a child's religious preference may play a role in decision-making. An Oregon court decided that, unless the parents entered into a written agreement, the Hindu Chadakarana blessing ceremony that involved shaving and marking a baby girl's head would be delayed until she was old enough to make the determination herself.⁶⁸

VI. International Emphasis on Culture and Religion for Placements

International laws also expressly require decision-makers to give due consideration to the child's cultural and religious background. In this context, both culture and religion routinely are considered in placing children. In the Convention on the Rights of the Child, for example, the United Nations included a provision that "State Parties shall . . . ensure alternative care for . . . a child When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."⁶⁹

⁶⁵ *Id.*

⁶⁶ *Cf. Wireman v. Perkins*, 229 S.W.3d 919, 922 (Ky. Ct. App. 2007) (finding that "requir[ing] accommodation of regular worship services, [], in effect permanently deprives the non-custodian of a significant portion of his or her visitation"); *McLemore v. McLemore*, 762 So.2d 316, 320 (Miss. 2000) (ordering both parents to see that the children received "regular and systematic spiritual training"); *Gerson v. Gerson*, 868 N.Y.S.2d 551, 551 (N.Y. App. Div. 2008) (ordering the father to observe Catholic traditions even though he was a Jew and allowing the mother parenting time on Easter Sunday).

⁶⁷ *McSoud*, 131 P.3d at 1214; *Leppert*, 519 N.W.2d at 288.

⁶⁸ *Sagar*, 781 N.E.2d at 58 (ordering the least intrusive and narrowly tailored approach to resolving the religious dispute). *See also In re Marriage of Boldt*, 176 P.3d 388, 394-95 (Or. 2008) (considering the child's wishes in a dispute about circumcision after the father converted to Judaism).

⁶⁹ Convention on the Rights of the Child, 28 I.L.M. 1448, art. 21 (1989).

In 1996, drafters for the Republic of South Africa recognized rights with respect to cultural and religious practices in its Constitution. Article 31 provides that:

Cultural, religious and linguistic communities—(l) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
(a) to enjoy their culture, [practice] their religion and use their language; and
(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.⁷⁰

More states in the United States should incorporate culture and religion as best interest factors with strong language like the language that is used in the Convention on the Rights of the Child and in the South African Constitution. The express language in these two sources appears to be consistent with common law and statutory law in the states that have considered these criteria in that it promotes due regard for the child's culture and religion.

VII. Practice Tips and Conclusion

Culture and religion are factors that judges and lawyers may need to address more often because the number of multicultural and bicultural families is increasing. A few statutes and cases are instructive. First, standing may be an issue for a parent who seeks to restrict a child's cultural and religious practices. The Supreme Court of the United States ruled that the nonresidential atheist father did not have the right to bring a lawsuit to prevent the child from reciting the Pledge of Allegiance that included the phrase "under God." The father had no standing to "dictate to others what they may and may not say to his child respecting religion."⁷¹

A. Advocating for Legislative Amendments

To ensure that culture and religion enter into the discussion when it is appropriate for a family, lawyers should lobby council members and other legislators to make culture and religion express provisions in the list of best interests criteria. The Minne-

⁷⁰ CONST. OF THE REPUBLIC OF S. AFR., No. 108 of 1996, arts. 30, 31 (1996), available at <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

⁷¹ Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15-16 (2004).

sota statute and the South Africa Constitution could serve as models for proposed statutory amendments.⁷² A court's failure to consider relevant and minimum factors is an abuse of discretion. However, because few statutes expressly include culture and religion as criteria for consideration, these factors may be overlooked in many cases. Placing culture and religion in the statute would ensure that judges and lawyers remember to include appropriate consideration of those factors in their analysis. Realizing, however, that amending statutes takes years in some states, an alternative is to encourage judges, family lawyers and mental health professionals to raise the issue themselves.

B. *The Attorneys' Role*

Therefore, to ensure that these issues are raised in appropriate cases, lawyers should include these criteria on their checklists and on client interview questionnaires. On a case-by-case basis, lawyers could argue culture and religion as factors, in petitions, case briefs and pleadings. They should assist the parents to prepare a detailed parenting plan that addresses their children's cultural and religious needs.

When a lawyer represents a parent who contends that a religious ceremony should be performed or a religion should be practiced, the lawyer must show that failure to participate would cause "the child significant harm by adversely affecting the child's health, safety, or welfare."⁷³ A "reasonable and substantial likelihood of immediate or future impairment" of the child's well-being must be shown.⁷⁴ When there is not actual or substantial harm, the lawyer should provide evidence of a *risk* of harm.⁷⁵

An attorney who endeavors to negotiate an agreement between parents with conflicting religious beliefs may endeavor to get the parents to agree on the religion that the child will practice when the child is in their care. An attorney may also help the custodial parent who does not want to take the child to a particular type of religious service to make transportation arrangements for someone other than the custodial parent to take the child to

⁷² See *supra* §§ III and VI.

⁷³ *Blixt v. Blixt*, 774 N.E.2d 1052, 1071 (Mass. 2002); *Pater*, 588 N.E.2d at 799-800.

⁷⁴ *In re Marriage of Hadeen*, 619 P.2d 374, 382 (Wash. Ct. App. 1980).

⁷⁵ WEISBERG & APPLETON, *supra*, at 696 n.3.

the service. If the noncustodial parent must give up some of his or her parenting time so that the child may attend religious events, that parent should be able to reschedule that time with the child. Finally, the other parent may agree to respect the other parent's "religious and moral instruction."⁷⁶

C. *The Judges' Role*

Judges could make inquiries based upon facts included in the record such as when parents cannot agree about which religious or cultural indoctrination the child should receive or when different religions and cultures are reported in the parents' profiles. In custody evaluation orders, judges could direct custody evaluators such as mental health professionals to evaluate the parents' ability to agree or cooperate on culture and religion issues in their parenting plans and to make recommendations to the court on those concerns. Judges may consider the parents' past practices before the divorce such as which religion they practiced or indoctrinated the child when the parents practice different religions.⁷⁷

D. *Factors for Religion and Culture Checklists*

An analysis of the cases and statutes reveals a checklist for considering culture in custody cases. Lawyers and judges may consider the following aspects of culture:

- Opportunities for cultural experiences in the parent's community,
- Opportunities to interact with extended family members,
- Exposure to heritage in the home,
- Each parent's ability to meet the child's cultural needs,
- Each parent's willingness to educate the child in the other parent's culture,
- Each parent's practices and whether they are typical for that culture,
- The child's preference,
- The parents' preferences,
- A parent's cultural ties to another country,

⁷⁶ See *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 775-76 (Vt. 2010) (expressing a willingness to make other arrangements for the child to receive religious instruction); *McSoud*, 131 P.3d at 1220.

⁷⁷ *Burrows*, 605 A.2d at 1316-17 (noting that the father had taken the children to Catholic Mass and classes every Sunday and the mother had gone to the Episcopal Church after the couple divorced).

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- The likelihood of abduction to fulfill cultural identity,
- The impact of cultural beliefs on parenting styles,
- The child's ability to cope in a different cultural environment,
- The influence of external factors; and,
- The effect of choosing one parent's culture on a bicultural or multicultural child.⁷⁸

Permissible considerations when parents cannot agree on religion include: "the sincerity of a [parent's] professed belief;"⁷⁹ each parent's willingness to continue to raise the child with the same religious practices previously practiced;⁸⁰ whether a nonresidential parent should be ordered to refrain from allowing the child to participate in activities that are inconsistent with the custodial parent's religious beliefs;⁸¹ whether parents' conflicting religious beliefs have a negative impact such as substantial conflict and guilt on the child;⁸² whether supporting the parent's religious beliefs will have an adverse effect on the other parent's parenting time;⁸³ the child's wishes;⁸⁴ whether there is "a reasonable and substantial likelihood of immediate or future impairment" of the child's well-being;⁸⁵ and, whether demonstrable physical or psychological harm to the child would occur.⁸⁶ In addition, courts and lawyers may consider whether the parents' beliefs are typical or atypical; whether a parent's discussion of religious views have an adverse effect on the child; and, the parents' ability to agree on which religion the child will practice as well as which religious institution the child will attend.⁸⁷

⁷⁸ *Van Sickle*, 134 P.3d at 342-43; *Shady*, 858 N.E.2d at 136, 141-43; *Kleist*, 538 N.W.2d at 274-77; *Foster*, 738 N.W.2d at 662; *A.A.F.*, 2005 WL 3148094 at *3; FUHRMANN & ZIBBEL, *supra* note 4, at 171.

⁷⁹ *Pater*, 588 N.E.2d at 798.

⁸⁰ *Johnson v. Johnson*, 424 N.W.2d 85, 88-89 (Minn. 1988).

⁸¹ *Pawlik*, 823 N.E.2d at 333.

⁸² *Holder v. Holder*, 872 N.E.2d 1239, 1243 (Ohio Ct. App. 2007).

⁸³ *Wireman v. Perkins*, 229 S.W.3d 919, 922 (Ky. Ct. App. 2007).

⁸⁴ *Boldt*, 176 P.3d at 392-93.

⁸⁵ *Hadeen*, 619 P.2d at 382.

⁸⁶ *Leppert*, 519 N.W.2d at 289, 290.

⁸⁷ Henry S. Gornbein & Alisa A. Peskin-Shepherd, *Sensitivity to Culture in Divorce*, <http://www.familylawofmichigan.com/divorce> (last visited Aug. 30, 2012).

E. *Cultural and Religious Competency for Lawyers and Judges*

In addition, family lawyers should be culturally and religiously competent. This competency is of critical importance when lawyers represent parents of multicultural or bicultural unions or different religious groups. Cultural and religious competence is the “ability of individuals [] to respond respectfully and effectively to people of all cultures, . . . and faiths or religions—in a manner that recognizes, affirms, and values the worth of individuals, families, tribes, and communities, and protects and preserves the dignity of each.”⁸⁸

Such competence requires that the lawyer: “(1) respect the dignity of all individuals and families; (2) approach every child as a member of a family system; (3) respect individual, family, and [] differences; (4) adopt a non-judgmental posture that focuses on identifying strengths and empowering families; and (5) appreciate that families are not replaceable.”⁸⁹

Judicial training to recognize and address these concerns is also recommended. In this regard, the Illinois State Court Rules provide that “meeting the challenge of deciding child custody cases fairly and expeditiously requires experience or training in a broad range of matters including, but not limited to . . . cultural and diversity issues.”⁹⁰ Likewise, the Association of Family and Conciliation Courts announced that “expected training for all child custody evaluators [should] include: . . . (4) the significance of culture and religion in the lives of parties[.]”⁹¹

Culture and religion are important considerations for many families. Many families’ cultural and religious practices reflect the changing color and diversity of our nation. When a couple’s marriage dissolves, lawyers and judges may be called upon to

⁸⁸ Child Welfare League of America, *Cultural Competence Defined* (2001), <http://www.cwla.org/programs/culturalcompetence/culturalabout.htm> (last visited Aug. 30, 2012).

⁸⁹ Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 745 (2006). See also Solangel Maldonado, ABA Family Law Section, Remarks at the Spring 2008 Meeting, *The Role of Race, Ethnicity and Culture in Custody Disputes 2* (unpublished ABA Family Law Section CLE Meeting Materials 2008).

⁹⁰ IL. ST. S. CT. RULE 908(b) (2012).

⁹¹ Association of Family & Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation 8* (May 2006), <http://www.afccnet.org/pdf-sModel%20child%20Eval%20Sept%202006.pdf>. (last visited Aug. 30, 2012).

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help these families resolve issues concerning culture and religion. Changing laws to reflect the changes in these families should be a priority. In addition, training and educating lawyers and judges who will help families to properly address these concerns is necessary.