Resolving Religious Disputes in Custody Cases: It's Really Not About Best Interests

by
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It is generally accepted as gospel that custody decisions are made in accordance with the best interests of the child. There are two major exceptions to this general rule: racial prejudice and religion. Failure to recognize these exceptions results in protracted litigation, intractable disputes, and an unusually high number of reversals, remands, and dissents from appellate courts.

The issue of racial prejudice as a factor in custody determinations was substantially resolved by the United States Supreme Court in *Palmore v. Sidoti*[1] holding that the reality of racial prejudice might negatively impact a child living in a mixed race family, but racial prejudice could not constitutionally support a change of custody from an otherwise fit parent. The Court readily acknowledged that racial prejudice could cause pressures and discomfort at odds with a child's best interests, but such considerations must be subordinate to constitutionally protected rights.

In *Palmore*, the trial court found the fact of mother's racially mixed household to be the tie-breaker between otherwise fit parents because of the likelihood of peer problems and social stigma in the context of racial prejudice resulting to the child, contrary to her best interests. The Supreme Court reversed, holding that a best interests analysis is impermissible in this context and the best interests of an individual child must be subordinated to overarching public policy that racial prejudice cannot be acknowledged or sanctioned by the law. Although some courts

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[1] Palmori v. Sidoti, 466 U.S. 429 (1984). Prior to *Palmore*, some state courts held that racial prejudice could not be a factor in custody determinations. *See, e.g.*, In re Custody of Temos, 450 A.2d 111 (Pa. Super. 1982) (a court must never *yield* to prejudice because it cannot *prevent* prejudice).

have found ways to consider race in the best interests context by distinguishing *Palmore*,[2] racial prejudice is not generally included in the laundry list of factors considered by courts in determining best interests in custody cases. *Palmore* is about as close to a bright line holding as can be found in custody litigation.

Issues of religion, including religious prejudice, lack the clarity of the racial prejudice issues with the result that courts continue to struggle over placing religious issues in context and determining how far to go in terms of assessing the children's best interests when the parents' religious beliefs and practices are at issue. A review of the case law reveals that attempts to impose a best interests analysis on religious issues in custody cases nearly always create an intractable conflict with the parents' constitutionally protected right to freedom of religion. As the New Jersey Superior Court noted, "Intervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark."[3] In fact, courts regularly embark on this perilous adventure, attempting to serve the best interests of children only to run aground.

Parental Prerogatives and Freedom of Religion

The Free Exercise Clause of the First Amendment guarantees the right of all citizens to freely pursue their religious beliefs, and applies to the states through the Due Process Clause of the Fourteenth Amendment. Free exercise of religion means the right to religious beliefs, including assembling for worship services, proselytizing, and observing dietary restrictions,[4] although not necessarily religious activities.[5]

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[2] *See, e.g.*, *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989) (upholding the removal of black children from white foster parents on grounds of racial disparity, reasoning that foster care placement was sufficiently different from custody determinations that *Palmore* did not apply).

[3] Wojnarowicz v. Wojnarowicz, 137 A.2d 618 (N.J. Super. 1958).

[4] Employment Div., Dep't of Human Res. of Oregon.v. Smith, 494 U.S. 872 (1990).

[5] Employment Div., Dep't of Human Res. of Oregon v. Smith, 485 U.S. 660 (1988) (religious use of peyote, a controlled substance, is not an exception to consequences of criminal statute.)

Parents have a fundamental right to make decisions regarding the care, custody, and control of their children.[6] The parental right to determine the child's religious upbringing derives both from the parents' right to the free exercise of religion and to the care and custody of their children.[7]

The child's religion is generally determined by the primary custodial parent. The secondary custodian generally has the right to expose the children to his or her religion but not to enroll the children in classes or programs in a religion different from that chosen for the child by the primary custodian.[8] Some courts show extraordinary deference to the religion chosen for the children by the custodial parent. For example, an Indiana Court upheld an order requiring father to avoid activities that conflicted with the Jehovah's Witness faith in which mother, the custodial parent, decided to raise the children. Father's objection that he was restricted from gift giving, taking the children trick or treating on Halloween and discussing with them his religious faith was rejected by the court, holding that he was not permitted to impose his own religious views on the children because that was the custodial parent's prerogative. The court explained that mother, as the custodial parent, had the right to make all of these decisions as long as there was no unreasonable restriction on father's *time* with the children.[9]

In *Boldt v. Boldt*,[10] the parties were members of the Russian Orthodox Church during their marriage and raised their son in that faith. When they separated, the child, then four, was placed in the custody of father, who converted to Judaism several years later. When the child was nine, father informed mother that the child would be converting to Judaism and would be circumcised in connection with the conversion. Mother did not object to the conversion to Judaism but opposed circumcision. She sought a change in custody or, in the alternative, an injunction against the circumcision. Mother appealed the order denying the change in custody but granting the injunction against circumcision. The Oregon Supreme Court reversed and remanded to the trial court

6 Troxel v. Granville, 530 U.S. 57 (2000).
7 Wisconsin v. Yoder, 406 U.S. 205 (1972).
8 Feldman v. Feldman, 874 A.2d 606 (N.J. Super. 2005).
9 Conflenti v. Huff, 815 N.E. 2d 120 (Ind. 2004).
10 Boldt v. Boldt, 176 P.3d 388 (Or. 2008).

for a determination as to whether the child, now twelve, desired the circumcision, noting that the child's preference might well negate father's right as the custodial parent to choose the child's religion, and even that the child's decision might require a change in custody.

Some state courts are required by statute to assign decision-making responsibilities to one or both parents.[11] In making the assignment, the court must consider the ability of the parents to cooperate and make joint decisions. In *Marriage of McSoud*,[12] the court assigned decision-making responsibilities for the child's religious upbringing and medical care to father with all other decisions to be shared by the parents. The court based the exceptions to the joint decision-making arrangement on the history of serious disputes between the parties with respect to medical care and religion. A hearing had been required to resolve a disagreement regarding routine immunizations, and the record revealed ongoing disputes between the parents regarding their disparate religions and insistence on involving their child in their personal religious wars. The trial court included a provision restricting mother's right to take the child to her Protestant church unless she supported the Catholic religion selected by father for the child.

On appeal, mother raised First and Fourteenth Amendment challenges, claiming that the order delegating decision-making as to her child's religious upbringing exclusively to father violated her right to raise her child and improperly restricted her influence on the child's religious development. The appellate court remanded to the trial judge to determine whether a compelling state interest supported any restriction, noting the difference between decision-making and direct restrictions on a parent's right to expose the child to his or her religion.[13] The appellate court also directed the trial court on remand to address the frequency of the religious activities scheduled by father for the child, to determine the extent to which these activities interfered with mother's parenting time, and the consequences of the child missing some of those activities. Further, the court noted that mother could not be required to accompany the child to religious activi-

11 *See, e.g.*, Colorado (§14-10-124) 1.5, (C.R.S. 2005).
12 In re Marriage of McSoud, 131 P.3d 1208 (Colo. 2006).
13 *Id*.

ties scheduled during her parenting time. Other courts have placed restrictions on the extent to which the decision-making parent can interfere in the non-custodial parent's parenting time by involving the children in extensive religious activities. A non-custodial parent may not be required to take the child to all activities scheduled by the custodial parent just because these activities have been designated "religious."[14] A New Jersey court held that while an order simply requiring a parent to provide transportation to religious activities would not be violative of that parent's constitutional rights, a non-Jewish father could not be required to enforce Jewish dietary laws during his parenting time absent a showing of harm to the children.[15] One court has articulated the theory that requiring a parent to transport children to a religious activity of the other parent is constitutionally permissible because it is simply a transfer of custody for a limited period of time.[16]

The right to free exercise of religion is not without limitations. For example, an individual may not require the government to conform to particular religious beliefs. In *Bowen v. Roy*,[17] the parents of Little Bird of the Snow, age 2, applied for welfare benefits for the child. The applicable regulations required a Social Security number in order to establish eligibility for benefits. Little Bird's parents objected to this requirement and argued that assigning their daughter a Social Security number violated their Native American religious beliefs. The trial court attempted to fashion a remedy by noting that a Social Security number had already been assigned to the child thereby satisfying the regulation requiring a number but then issued an injunction against its use in an effort to address the parents' concerns. The Supreme Court reversed the injunction against the use of Little Bird's Social Security number, holding that while the parents' religious beliefs are constitutionally protected, this protection does not extend to the right to require conformity with those beliefs by waiving otherwise universal regulations. The fact that a particular benefit is conditioned on some requirement like a Social Security number does not run afoul of the First Amend-

[14] Johnson v. Nation, 615 N.W. 2d 141 (Ind. Ct. App. 1993).
[15] Brown v. Szakal, 514 A.2d 81 (N.J. Super. Ct. 1986).
[16] Zummo v. Zummo, 574 A.2d 1130 (Pa. Super. Ct. 1990).
[17] Bowen v. Roy, 476 U.S. 693 (1986).

ment because individuals are free to reject any benefit that is inconsistent with their religious beliefs.

Conditions attached to benefits offered by the government differ from governmental compulsion. For example, in *Hamilton v. Regents of University of California*,[18] a First Amendment challenge to mandatory military courses was unsuccessful because students were only required to take the courses if they attended that particular college. If the students did not wish to take those courses, they could opt to attend a different institution. In contrast, another case involving education, *Wisconsin v. Yoder*,[19] involved compulsory school attendance. The students in *Wisconsin* were not afforded a choice. The statute requiring school attendance was contrary to their Amish religious beliefs and therefore unconstitutional. The fundamental right to parent one's children and the constitutional guarantee of freedom of religion are protections afforded to individuals and are defensive in nature. Consequently, these rights do not support affirmative actions against others, including the government.

Conflicting Religious Messages

Reflecting the trend toward joint parenting and greater involvement in parenting by the nonresidential or noncustodial parent, many courts have rejected the theory that conflicting religious beliefs and practices on the part of the parents is confusing to children and therefore *per se* contrary to their best interests. Exposing a child to other religious beliefs and practices may even be beneficial to the child.[20] Harm does not necessarily flow from conflicting religious instructions or practices, and it is not sufficient in most instances to simply demonstrate conflict. Rather, actual harm must be demonstrated to justify intrusion in the parents' right to raise their children by exposing the children to the parents' religious beliefs, even where these beliefs are at odds with each other. Even where harm to the child is established, courts tend to use the least restrictive means to protect

[18] Hamilton v. Regents of Univ. of California, 293 U.S. 245 (1934).

[19] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[20] *See, e.g.*, In re Marriage of Gersovitz, 779 P.2d 883 (Mont. 1989); Smith v. Smith, 367 P.2d 230 (Ariz. 1961); Frank v. Frank, 833 A.2d 194 (Pa. Super. Ct. 2003).

the child. In one case, instead of restricting the child's involvement in mother's extreme religious beliefs, the court found that mother's insistence on prohibiting television, haircuts, ordinary pre-teen clothing and many activities resulted in actual harm to the child, and awarded sole custody to father, but specifically refused to restrict mother's expressions of her religious beliefs during her periods of partial custody.[21]

Some courts have attempted to solve the problem of conflicting religious beliefs on the part of parents by enjoining the parents from disparaging the other's religion. For example, a parent may be prohibited from making statements to the children to the effect that people who do not share that parent's fundamentalist faith, including the other parent, are "dammed" or will "go to hell."[22] Limitations are sometimes placed on the expression of religious beliefs that are so critical of the other parent as to constitute harm to the children. For example, a father was enjoined from expressing his religious belief that certain holidays celebrated by mother are pagan and therefore evil, the court finding that his statements to the children were so upsetting to them that significant harm resulted.[23]

The problem with this approach is that it is difficult if not impossible to formulate a "no disparagement" provision that does not infringe upon the constitutionally protected rights of one parent or the other. Such a provision cannot pass constitutional muster if it goes beyond negative statements and requires a parent to support religious beliefs or practices that he or she does not share. Prohibitions on negative statements are generally unworkable because such statements are often implicit in religious teaching that promotes the subject religion at the expense of others.

One mother sought unsuccessfully to restrict her children's exposure to father's fundamentalist religious teaching encompassing male supremacy and female inferiority.[24] Similarly, a prohibition against exposing a child to "homophobic" religious teachings was reversed and remanded to the trial court because

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21 Holder v. Holder, 872 N.E. 2d 1239 (Ohio App. 3d 2007). *Contra* Conflenti v. Huff, *supra*.

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

23 In re Marriage of Jensen-Branch, 899 P.2d 803 (Wash. 1995).

24 Hanson v. Hanson, 695 N.W.2d 205 (N.D. 2005).

the restriction was unsupported by evidence of harm to the child. The parties were former same-sex partners, one of whom was the child's biological parent and the other of whom was found by the court to stand *in loco parentis* to the child.[25]

The affirmative teaching of one religion may necessarily disparage the other, and a blanket gag order prohibiting religious teaching at variance with the belief of the other parent is just not workable in many situations. For example, as noted by a dissenting judge,[26] if one parent is a Christian and the other is a witch, the Christian parent would be precluded from teaching that the Bible condemns witchcraft as an "abomination."[27] To teach the child what the Old Testament says about witchcraft is tantamount to disparaging the parent who practices witchcraft. A suggested solution could be directing parents to qualify their statements, noting that sometimes parents disagree, and acknowledging differences of opinion.[28] Such provisions would appear to promote honest dialogue between parents and children without infringing upon anyone's freedom of religion.

A more workable and less restrictive means of protecting children is to require a showing of "substantial harm" before imposing any restrictions on the parents with respect to religion. Absent a clear showing of substantial harm to the child, a parent who does not have decision-making authority with respect to religion nevertheless retains a constitutional right to educate and expose the child to that parent's religion.[29] One parent's disparagement of the other's religion or of the child's religion could lead to a finding of substantial harm to the child justifying a limitation on the parental right to expose the child to his or her own religious beliefs.[30]

Governmental interference with fundamental constitutional rights is subject to a strict scrutiny analysis. Infringement is constitutionally permissible only upon a showing that the restriction is necessary to promote a compelling state interest, and that this interest is served in the least restrictive manner possible. Limita-

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25 In the Interest of E.L.M.C., 100 P.3d 546 (Colo. 2004).
26 Ex parte Snider 929 So.2d 447 (Ala. 2005) (Dissent).
27 Deuteronomy 18:10.
28 *Snider, supra* note 27.
29 *McSoud, supra* note 13.
30 *Kendall, supra* note 23; *Jensen-Branch, supra* note 24.

tions on parents' fundamental right to raise their children arise out of the state's interest as *parens patriae.* As such, the state has a compelling interest in protecting children from harm. Therefore, a finding that a parent's actions cause actual or threatened harm to a child establishes a compelling state interest sufficient to permit state interference with parental rights.[31]

A showing of actual harm to the health or safety of a child is even a necessary prerequisite to prohibiting a parent from advocating religious beliefs that would constitute a crime if actually pursued. In *Shepp v. Shepp*,[32] the court declined to find father's advocacy of polygamy, a crime, to be *per se* harmful to his adolescent daughter and held that restricting father's constitutionally protected right to expose his child to his religious beliefs required an actual showing of harm. Although mother feared that father's promotion of polygamy was dangerously close to compromising their daughter's morals, there was nothing but speculation in the record to support this conclusion. The court rejected the intermediate appellate court's holding that advocacy of criminal conduct is *per se* harmful to the subject child and could be restricted strictly on the nature of the subject matter. One can conclude that the substantial harm bar has been set sufficiently high to require expert testimony.[33]

The Best Interests Trap

Some courts take the position that church attendance is in the best interests of children and by leaving it up to the parents to select from the available options for spiritual training eliminates the First Amendment problem. In *McLemore v. McLemore,*[34] the court ordered the parents to get the children to church or Sunday school, noting that the parents are not ordered to go to church themselves. Favoring religion and church attendance ignores the fact that freedom of religion means that one is free to reject all religions, and that the Free Exercise Clause pro-

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31 *McSoud, supra* note 13.

32 Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006).

33 *See, e.g.*, Taylor v. Taylor, ___ S.E.2d ___ (2007), 2007 WL 1582347 (Ga. 2007); Berrouet v. Greaves, 35 A.D.3d 460 (NY 2 Dep't 2006); McCown v. McCown, 649 A.2d 418 (N.J. App. Div. 1994); Funk v. Ossman, 724 P.2d 1247 (Az. App. 1986).

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

tects "the infidel, the atheist, [and] the adherent of a non-Christian faith. . ."[35] Moreover, a preference for the religious parent over the non-religious parent or the more religious over the less religious effectively punishes the latter for exercising a constitutionally protected right by placing the court, an arm of the government, on the side of organized religion, exactly the situation that the Establishment Clause is designed to prevent.[36]

Sometimes courts take issue with the parents' religious beliefs even when the parents are in agreement. In *Jones v. Jones*,[37] the trial court *sua sponte* imposed a restriction on the parents, both practitioners of Wicca, a form of paganism, ordering them to "shelter their child from involvement in and observation of 'these non-mainstream religious beliefs and rituals.'" The appellate court reversed, finding that the record revealed no evidence of harm to the child and noting that the trial court improperly attempted to impose his own "mainstream" religious beliefs on the parents.

Religious issues are sometimes considered in terms of moral fitness.[38] For example, a trial court specifically considered the issue of church attendance in weighing the moral fitness of the parties. The appellate court affirmed, finding that there was sufficient evidence of record, other than strictly religious factors, to support the decision to change custody from mother who was inattentive to the children and exposed them to her lesbian relationships. The dissent argued that the trial court appeared to have equated church attendance with moral fitness and therefore placed undue weight on that factor. The trial court had stated on the record, "I want the children in church wherever they may be." The dissenting judge noted that the trial court had questioned mother as to whether she took the children to church, suggesting that the judge thought that the children should not only go to church, but that their mother should be there with them, and noting that favoring attendance at religious services over-

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

36 Hudema v. Carpenter, 989 P.2d 491 (Utah Ct. App. 1999); Osteraas v. Osteraas, 859 P.2d 948 (Idaho 1993); Zucco v. Garrett, 501 N.E. 2d 875 (Ill. App. 1986)

37 Jones v. Jones, 832 N.E.2d 1057 (Ind. App. 2005).

38 Davidson v. Coit, 899 So.2d 904 (Miss. 2005).

looks the fact that the Free Exercise Clause includes the right not to exercise any religion.[39]

Some courts attempt to avoid the conflict by holding that the custody decision was not based on religious beliefs or practices but on parenting consistent with the child's best interests. In those cases, the fact that the preferable parenting practices may be grounded in religious beliefs is held to be merely coincidental.[40] However, focusing on the secular benefits believed to derive from involvement in religious activities does not cure the Free Exercise violation because it improperly includes a preference for some religion over no religion.[41] On the other hand, courts should not refuse to decide disputes merely because of a religious aspect not central to the issue. For example, when mother argued that the Establishment Clause mandated a preference for public school over parochial where father taught and coached at a parochial school that he wanted son to attend over mother's objection, the trial court opted for the "neutral environment" of public school. The appellate court reversed, holding that other important factors having nothing to do with the parties' conflicting religious preferences militated in favor of the parochial school. Moreover, a presumption in favor of public school would offend the Establishment Clause by expressing a governmental bias against religious schools rather than neutrality.[42] It has been noted that there are studies indicating that more women than men regularly attend church, so a preference for the church-going parent might also raise equal protection concerns.[43]

Absent substantial harm to the child, the best interest standard is insufficient to support a compelling state interest that supersedes the parents' fundamental rights.[44] In other words, a finding of best interest does not constitutionally support a custody decision that infringes a parent's fundamental right to freedom of religion or to parent the child. The prevalence of decisions in which judges attempt, sometimes successfully, to im-

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39 *Id.* at 913 (King, J., dissenting). .

40 *Snider*, *supra* note 27.

41 *Zummo, supra* note 17.

42 Yorndy v. Osterman, 149 P.2d 874 (Kan. App. 2007).

43 *Zummo, supra* note 17.

44 In re Marriage of Ciesluk, 113 P.3d 135 (Colo. 2005).

pose their own religious beliefs and codes of morality in the face of settled constitutional principles is tantamount to judicial nullification of constitutional principles in favor of a subjective application of the best interests standard.

Some courts have sought to resolve religious disputes between parents by deferring the problem, presumably in the hope that it will either disappear or get resolved by someone other than the court.[45] In Hicks v. Hicks, The trial court found that the subject child would be harmed by the increasing stress between the parents if the court permitted the child to be baptized at mother's request and over father's objection. The court further directed that the matter be deferred until the child's age 13, at which time she could decide for herself what, if any, religion in which she wished to be baptized. The appellate court reversed, holding that "stress" does not rise to the level of establishing harm to the child and that investing the child at age 13 with the power to decide on her religion unconstitutionally usurped the parents' fundamental right to raise their child as they saw fit.

That the fundamental right to parent one's children, including their religious upbringing, supersedes any best interest analysis is illustrated by the starkly contrasting opinions in *Wisconsin v. Yoder*, holding invalid Amish parents' convictions for violating Wisconsin's compulsory school attendance law by refusing to send their teenaged children to school. The courts treated the children's interests as identical to those of their parents, deferring to the parents' fundamental rights without a separate inquiry into the best interests of the children as vigorously promoted by Justice Douglas in dissent. He argued that deference to the parents' right to parent and freedom of religious expression ignored the best interests of the children by imposing potentially limiting and permanent consequences on them. Justice Douglas argued that the case should be remanded to the trial court to afford the children who would be affected by their parents' decision to keep them out of school an opportunity to be heard. This view gained no traction with the solid majority in *Wisconsin v. Yoder* and the majority decision remains the law of the land.

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[45] 868 A.2d 1245 (Pa. Super. Ct. 2005)

Enforceability of Agreements

Not only does the Free Exercise Clause protect the parents' right to exercise religious beliefs but protects the right of the parent to change religious beliefs. Enforcing an agreement provision that was appropriate at one point in time but no longer is consistent with the parent's current religious thinking is viewed by a majority of state courts as an unconstitutional violation of the parent's religious freedom. It therefore appears that an agreement that attempts to determine in advance the child's religion or participation in religious activities, being subject to changes in the religious beliefs of the parents, is by its very nature unenforceable.[46] Several states uphold such agreements unless the parent challenging the agreement establishes that enforcement will be harmful to the child.[47]

One way around the problem might be an agreement requiring joint decision-making, with intractable disputes to be submitted to the court or alternative dispute resolution for a decision. As long as the issue can be framed in secular terms, it is justiciable. For example, mother's unilateral decision to place the parties' child in a Christian daycare program over father's objection was held to be a violation of their agreement requiring joint decision-making or, in the alternative, submission to mediation.[48]

Conclusion

The "best interest of the child" standard is not the appropriate test for resolving religious issues in custody cases and is likely to produce an unconstitutional result. Rather, it is important to recognize the parental rights implicit in these issues and accord appropriate deference to these rights, abrogating them only when necessary to protect the child from substantial harm.

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46 *See e.g.*, Abbo v. Briskin, 660 So.2d 1157 (Fla. Dist. Ct. App. 4th Dist. 1995); *Zummo, supra* note 17.

47 *See, e.g.*, *Perlstein v. Perlstein*, 76 A.2d 49 (N.Y. 1980); Butler v. Butler, 132 So.2d 437 (Fla. Dist. Ct. App. 1961).

48 In re Marriage of Davisson, 126 P.3d 76 (Wash. App. 2006)