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AN OVERVIEW OF RELIGIOUS CONSIDERATIONS IN CHILD CUSTODY DISPUTES

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I. INTRODUCTION

The paramount consideration in custody disputes is the welfare of the child, *i.e.*, what is in his or her best interest.¹ In making this decision, courts consider various factors. Most courts, however, are reluctant to use religion as an element, arguing that such a consideration violates the first amendment of the United States Constitution. Some courts, however, emphasize the spiritual well-being of the child, and hold that the religious beliefs or practices of the parents and the child are important to the child's welfare.² These contradictory considerations have placed courts in a seemingly insoluble dilemma: having to choose between competing religions or ignoring a contributing factor to the child's welfare.

This Article addresses the standards used by the courts to determine custody. It then describes the varying and often contradictory uses of religion as a factor in custody disputes and highlights the standards advanced by courts and commentators in this area. It then addresses the issue of decisionmaking when parents disagree about the child's religious upbringing. The Article specifically highlights the dilemma faced by com-

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¹ See *Baine v. Baine*, 510 So. 2d 262, 263 (Ala. Civ. App. 1987); *Pacheco v. Pacheco*, 246 So. 2d 778, 782 (Fla.), *appeal dismissed*, 404 U.S. 804 (1971); *In re Marriage of Sparks*, 323 N.W.2d 264, 266 (Iowa 1982).

² See, e.g., *Dean v. Dean*, 32 N.C. App. 482, 484, 232 S.E.2d 470, 471-72 (1977); *Randolph v. Randolph*, 146 Fla. 491, 495, 1 So. 2d 480, 482 (1941).

peting parents trying to raise their children according to different religious tenets, and explains the often contradictory and controversial solutions advanced by the courts.

II. FACTORS USED IN CUSTODY DETERMINATIONS

The salient consideration in custody disputes is "the 'best interest' of the child."³ In making this determination, courts must weigh numerous factors. These include the preference of the child; the child's interaction with siblings; the mental, physical, and moral well-being of the competing parents; and the child's adjustment to home, school, and community.⁴ This list of factors, however, is not exhaustive, and the court must balance numerous other elements and values before reaching the ultimate decision: what custody determination best promotes the child's welfare.

In making such a determination, some courts have weighed the moral fitness of each spouse, and have inquired into the lifestyle of the parents. For example, some courts have emphasized a parent's adulterous behavior in awarding custody.⁵ Other courts have held that a parent's homosexuality is a relevant consideration, and have noted that homosexual or adulterous behavior may cause the child to endure the disapproval of society.⁶ Moreover, some courts have deemed such behavior to be evidence of a parent's deceitfulness, dishonesty, and general moral unfitness.⁷

Most courts, however, have held that evidence of a parent's adulterous or homosexual behavior can only be considered when there is a showing that such conduct will adversely affect the child.⁸ Consequently, some courts have awarded custody to an adulterous parent,⁹ and others have held that a spouse's homosexuality, absent a showing of actual harm to the child, is not a relevant or conclusive factor.¹⁰

³ Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1704 (1984). This standard is applied throughout the United States. See *id.*

⁴ See *Viltz v. Viltz*, 384 So. 2d 1348, 1349 (Fla. Dist. Ct. App. 1980); *Critchlow v. Critchlow*, 347 So. 2d 453, 455 (Fla. Dist. Ct. App. 1977).

⁵ See, e.g., *Claughton v. Claughton*, 344 So. 2d 944, 947 (Fla. Dist. Ct. App. 1977).

⁶ See *Hall v. Hall*, 95 Mich. App. 614, 615, 291 N.W.2d 143, 144 (1980); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982).

⁷ The Supreme Court of North Dakota has held that forcing the children to live in the same house with the mother and her lover, a person of the same sex, "may well cause the children to 'suffer from the slings and arrows of a disapproving society' to a much greater extent than would an arrangement wherein the children were placed in the custody of their father with visitation rights in the mother." *Jacobson*, 314 N.W.2d at 81.

⁸ For a thorough discussion of this issue, see *D.H. v. J.H.*, 418 N.E.2d 286, 291-93 (Ind. Ct. App. 1981).

⁹ See, e.g., *Isaacs v. Isaacs*, 358 S.E.2d 833, 835 (W. Va. 1987).

¹⁰ *D.H.*, 418 N.E.2d at 291-93. In reaching this conclusion, the Court of Appeals of Indiana, First District, held that "homosexuality standing alone without evidence of any adverse ef-

In making a custody determination, the child's preference is sometimes considered.¹¹ However, that preference is neither a controlling nor a determinative factor since the court may determine that the child's preference contradicts the court's conclusions concerning the minor's welfare. Nonetheless, a few courts place strong emphasis on the child's preference. In fact, some state statutes dictate that a mature child's preference should be controlling absent specific findings about the preferred parent's unfitness.¹²

Courts also often invoke the tender age doctrine in awarding custody.¹³ The tender age doctrine states that children of tender years, usually defined as children below the age of three, should be awarded to the mother. Invoking this principle, courts are generally guided by the belief that maternal care is of utmost necessity during an infant's life. However, many courts and commentators feel that the use of this doctrine discriminates against fathers. As such, the tender age doctrine, although still relevant in some states, is no longer widely used as a determining factor in custody disputes.

Courts generally invoke the foregoing factors, as well as numerous other elements, when attempting to answer the overriding question: how to promote the best interest of the child. This overriding concern with the child's welfare, however, often forces a court to focus on a different factor, one replete with constitutional, psychological, and moral implications: religion. This concern with religion, not surprisingly, has given rise to contradictory and varying judicial holdings. Moreover, it has spawned controversy and concern, forcing courts and commentators to balance competing and seemingly irreconcilable interests.

III. RELIGION AS A FACTOR

A. General Rule

The first amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁴ Most courts have traditionally held that these religious clauses forbid courts from deciding among competing religions, and have "consistently refuse[d] to choose between par-

fect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child." *Id.* at 293.

¹¹ See Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R.3d 1396, 1399 (1965).

¹² See 24 AM. JUR. 2D *Divorce and Separation* § 975 (1983).

¹³ *Id.* § 976; see *J.B. v. A.B.*, 161 W. Va. 332, 339-40, 242 S.E.2d 248, 251 (1978).

¹⁴ U.S. CONST. amend. I.

ents of different faiths on the basis of religion."¹⁵

In deciding child custody matters when religion becomes an issue, most courts have adopted an overriding principle: a court will not pass on the comparative merits of different religions. As the Idaho Supreme Court explained:

"[T]he rule appears to be well established that the court should maintain an attitude of *strict impartiality* between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."¹⁶

Accordingly, courts strive to avoid the religion issue, and try to choose the proper custodial parent based on nonsectarian considerations. Those efforts, however, are often futile, since religion sometimes plays a paramount role in determining the child's well-being. Therefore, religious considerations often must be balanced, even as courts strive scrupulously to stay within the parameters set by the first amendment.

B. Religion

Given the importance of religion as a factor in a child's life, courts sometimes weigh religious considerations when determining custody. Cases that consider religion as an element are generally divided into two categories: the first concerns the child's prior religious upbringing, and the second concerns when a parent's religious practices are deemed detrimental to the child's well-being. As noted by a New York court:

[C]ourts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent than the other; when a religious belief violates a State statute; and when a religious belief poses a threat to a child's well-being.¹⁷

1. Prior Religious Upbringing

The prior religious upbringing of the child, although not conclusive, is often a relevant factor in custody determinations. In *Spencer v. Spencer*,¹⁸ for example, the children, who had always resided with their mother, attended a Protestant church, and were raised according to that faith. After the dissolution of their parents' marriage, the court awarded

¹⁵ Note, *supra* note 3, at 1703.

¹⁶ *Compton v. Gilmore*, 98 Idaho 190, 192, 560 P.2d 861, 863 (1977) (emphasis added) (quoting *Munoz v. Munoz*, 79 Wash. 2d 810, 813, 489 P.2d 1133, 1135 (1971)).

¹⁷ *Aldous v. Aldous*, 99 App. Div. 2d 197, 199, 473 N.Y.S.2d 60, 62 (3d Dep't 1984).

¹⁸ 132 Ill. App. 2d 740, 270 N.E.2d 72 (1971).

custody to the father. The father's new wife was a practicing Catholic and was raising her own children as Catholics. After considering these factors, the appellate court reversed the custody determination, noting that custody by the father would result in instability given the conflicting religious beliefs.¹⁹

The importance given to the child's religious upbringing is greater when the child has already received formal religious instruction. For example, in *Shepley v. Szobocsan*,²⁰ the father was awarded custody of his two children after the divorce proceedings. The children attended parochial school and received regular religious instruction. The mother, who attended a Protestant church regularly, petitioned to obtain custody. She stated that if she was awarded custody, the children would receive a Protestant upbringing. The court denied her petition, stating that the boys should be permitted to continue the religious instruction in which they had become oriented, and the religion into which both parents had formally committed them prior to birth.²¹

The use of religion as a factor, when the child has been reared in a specific faith, is seldom controversial. Courts not only weigh this as one factor among many elements to be considered, but also couch their considerations in less controversial language. In fact, courts do not emphasize the competition between different religions, but rather, note their concern for stability and consistency in the child's life. However, the use of religion as a relevant factor when the parents' religious beliefs and practices are scrutinized directly is more controversial.

2. Parents' Religious Background

Trial courts, although hesitant to choose among competing religions, often consider the parents' religious beliefs and practices in their custody decisions. This inquiry is sometimes limited to determining whether a particular practice violates a statute or public policy. Sometimes, however, the inquiry is more open-ended, seeking to determine whether particular practices or beliefs violate the child's well-being. Such considerations inevitably force courts to draw implied, or even explicit conclusions about specific sectarian beliefs, and sometimes imply controversial value judgments. Not surprisingly, such inquiries have drawn the ire and criticism of numerous commentators.

Courts will not hesitate to use religion as a factor where a parent's religious practices violate public policy. As noted by one commentator, "[t]he Supreme Court has declared that the state has a 'compelling' inter-

¹⁹ *Id.* at 743, 270 N.E.2d at 74.

²⁰ 84 Dauph 7 (Pa. 1965).

²¹ *Id.*

est in 'safeguarding the physical and psychological well-being of a minor.'"²² As such, the first amendment to the United States Constitution does not bar a court from considering religion "when one parent's religious practices threaten the child's temporal health or physical safety."²³

Courts, however, do not limit their inquiry to those instances when religious practices violate public policy. Some courts, although hesitant to choose among different religions, openly prefer religious to nonreligious parents.²⁴ In *Murray v. Murray*,²⁵ for example, the father stated that he would provide religious training for the child. The child was living with the mother, who was living with and was pregnant by a man who was not her husband. The court awarded custody to the father, holding that the child's best interests were protected by such a decision.²⁶ The court specifically stated that the mother demonstrated a disregard for moral principles.

Some courts' preference for religious over nonreligious parents is evident in spite of assertions by the courts that they are adhering to constitutional principles. In *Schreifels v. Schreifels*,²⁷ the Washington Supreme Court insisted that it would not prefer one religion over another. Nonetheless, the court awarded custody to the father and emphasized that one of the deciding factors was that the mother was not giving the children proper religious training.²⁸ The court specifically noted that the father was a devout Catholic, while the mother engaged in adulterous behavior.²⁹

The preference of religious over nonreligious parents has come under intense criticism, as commentators note that such preference violates the constitutional prohibition against the establishment of religion. Critics specifically contend that preferring religious parents has the primary effect of advancing religion.³⁰ As a result, the consideration of religion as a factor has evolved along generally accepted parameters: religion will not be considered a factor unless such an omission will have a negative impact on the child's well-being. As the Alabama Supreme Court explained:

When presented with a situation where the involvement of the parents in religious activities could have a direct and adverse effect upon the children,

²² Note, *supra* note 3, at 1705 n.15 (quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)).

²³ *Id.* at 1705.

²⁴ See *Provencal v. Provencal*, 122 N.H. 793, 799, 451 A.2d 374, 378 (1982).

²⁵ 220 So. 2d 790 (La. Ct. App.), *cert. denied*, 254 La. 290, 223 So. 2d 411 (1969).

²⁶ *Id.* at 794.

²⁷ 47 Wash. 2d 409, 287 P.2d 1001 (1955).

²⁸ *Id.* at 416, 287 P.2d at 1004.

²⁹ *Id.*

³⁰ For a detailed examination of the issues raised by the use of religion in custody disputes and its implications, see Mangum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981).

the trial judge is free to examine the extent of that involvement and, if he determines that such involvement will threaten the welfare of the child, then the court may award custody to whomever it deems to be the most appropriate custodian.³¹

However, limiting the inquiry to the child's welfare, without violating the first amendment's religion clauses, has often proved elusive. This has been specifically evident where both parents, even after a custody determination, seek to influence the child's religious upbringing.

IV. DECISIONS CONCERNING RELIGIOUS UPBRINGING

A final custody determination does not end the controversy surrounding religion and custody disputes. In fact, such a determination often leads to a new, more perplexing issue: what happens when the competing parents disagree about the child's religious upbringing? Such a dilemma implicates the traditional province of the custodial parent and the emerging trend toward shared decisionmaking. It implicates, moreover, the constitutional rights of the noncustodial parent who, through his or her visitation rights, may seek to influence the child's religious upbringing. It implicates, finally, the polestar of all custody-related decisions: the best interest of the child.

A. *Traditional View*

Courts have traditionally allowed the custodial parent sole responsibility over the child's religious upbringing. Generally, "the party to whom custody of children is granted in a divorce decree has the prerogative of selecting the religious, cultural, and educational institutions which the child should attend."³² This rule, although often criticized, is still followed overwhelmingly throughout the United States.

The general rule usually applies to all aspects of a child's religious upbringing. In *Spring v. Glawon*,³³ a New York appellate court noted that:

As a matter of policy, the initial posture of the courts with respect to the religious upbringing of a child should be one of noninterference. The determination of that matter is best left to the child, if of sufficient age and intelligence, agreement of the parents or, where there is no agreement, to the custodial parent.³⁴

³¹ *Hilley v. Hilley*, 405 So. 2d 708, 711 (Ala. 1981).

³² *Connelly v. Connelly*, 409 So. 2d 175, 176 (Fla. Dist. Ct. App. 1982) (citing *Montandon v. Montandon*, 242 Cal. App. 2d 886, 52 Cal. Rptr. 43 (1966)).

³³ 89 App. Div. 2d 980, 454 N.Y.S.2d 140 (2d Dep't 1982).

³⁴ *Id.* at 981, 454 N.Y.S.2d at 142 (emphasis added) (citations omitted).

As such, the courts have developed a reliable test to decide the question of the proper decisionmaker: when the parents cannot agree, the custodial parent determines the child's religious upbringing. This seemingly simple solution, however, has raised numerous concerns. Specifically, courts and commentators have begun to wonder whether the traditional view undermines the noncustodial parent's constitutional rights.

B. Rights of Noncustodial Parent

While questioning the traditional decisionmaking model, which allows the custodial parent to make final decisions concerning the child's religious upbringing, critics have specifically emphasized the first amendment rights of the visiting parent, who is often denied a chance to influence the child's religious upbringing. Commentators have increasingly emphasized the noncustodial parent's privacy rights and have argued that the definition of these rights may be broad enough to encompass the visiting parent's right to influence the child's upbringing. These concerns, consequently, have forced courts and legislators to seek novel ways of addressing the decisionmaking issue.

The first amendment's religion clauses not only bar courts from choosing between competing religions, but also guarantee both parents' religious freedom.³⁵ As a practical matter, the visiting parent may not be able to take the child to church, teach him or her specific religious tenets, or share aspects of his or her religious practice. Such conditions, which flow from the practical implications of the traditional rule, have led some critics to argue that allowing the custodial parent to make the major decisions about the child's life violates the noncustodial parent's religious freedom.³⁶

A second concern, although not as widespread, is the parent's right to privacy. The Supreme Court has held that the Constitution embraces an implied right to privacy.³⁷ The Court has expanded that right to include such traditional family concerns as choices regarding contraceptives and a woman's decision to have an abortion.³⁸ Consequently, some commenta-

³⁵ The first amendment's religion clauses are often at odds with each other. Consequently, they often lead to varying and contradictory results, leading many commentators to suggest innovative ways of addressing freedom of religion and establishment clause issues. For an examination of these issues, see F. SORAU, *THE WALL OF SEPARATION* (1976).

³⁶ See Skoloff, *Divorce Poses Peculiar Problems for a Child's Religious Learning*, Nat'l L.J., Dec. 1, 1986, at 23.

³⁷ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁸ See *id.*; see also *Roe v. Wade*, 410 U.S. 113 (1973) (holding that right of privacy was broad enough to encompass woman's right to abortion). Although the decisions and their progeny have been thoroughly criticized, they remain the prime examples of the Supreme Court's extension of the right to privacy.

tors have opined that this right may encompass the noncustodial parent's right to influence the child's upbringing, including decisions concerning religious and educational considerations.

These considerations have led some courts to expand the role played by the noncustodial parent. As noted by a commentator: "Recently, many courts, in an effort to simplify the problem, have decided that a noncustodial parent may attempt to impart his or her religious beliefs on the children, or abstain from enforcing the custodial parent's beliefs as long as no harm is threatened to the children."³⁹ The requisite showing of harm, however, is difficult to define.⁴⁰ Expanding the role of the noncustodial parent may, moreover, raise practical problems, including how to decide between conflicts emanating from competing attempts to influence the child. As such, many courts have been forced to continue with the traditional rule: the custodial parent decides any questions concerning the child's religious upbringing.

C. Shared Parental Responsibility

In an attempt to meet the practical effects of the traditional rule, preserve the requisite constitutional guarantees, and promote stability in the child's life, many states have adopted shared parental responsibility acts. These statutes generally seek to ensure that the child will enjoy frequent and continuing visits with both parents, and seek to encourage both parents to share the rights and responsibilities of child rearing. As such, these statutes usually require that both parents "confer so that major decisions affecting the welfare of the child will be determined jointly."⁴¹

In enacting these statutes, legislatures sought to mandate that courts "require shared parental responsibility in all cases unless it would be detrimental to the child."⁴² In doing so, they sought to ensure that all major decisions in the child's life, such as educational and religious training, would be undertaken together. However, these acts, while setting a desirable standard, have not ended the controversies surrounding decisions about the child's life. In fact, parents' frequent inability to reach an accord not only frustrates the intent of shared parental responsibility statutes, but also fails to answer the fundamental issue: who decides when parents cannot agree about the child's religious upbringing? Accordingly, courts are again forced to rely on the traditional rule, and allow the custo-

³⁹ Skoloff, *supra* note 36, at 23.

⁴⁰ *See id.*

⁴¹ FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 1988). Florida's Shared Parental Responsibility Act is similar to many statutes enacted throughout the United States.

⁴² *Vazquez v. Vazquez*, 443 So. 2d 313, 314 (Fla. Dist. Ct. App. 1983).

dial parent sole responsibility.

V. CONCLUSION

Courts have traditionally been reluctant to use religion as an element in custody determinations, and, therefore, usually decide custody disputes based on other factors. Sometimes, however, courts are forced to take religious factors into consideration, especially when a parent's religious practices violate public policy or threaten to harm the child. Some courts also openly prefer religious over nonreligious parents. In fact, many courts have made references to the moral and religious stature of the competing parents, thereby elucidating the role that religious and moral considerations play in custody determinations.

After a custody determination is made, courts traditionally allow the custodial parent to make all decisions concerning the child's religious upbringing. This traditional view, however, is being eroded. Critics are especially concerned about the visiting parent's constitutional rights. Consequently, legislators have adopted shared parental responsibility statutes, seeking to have both parents share the decisionmaking role. In spite of these developments, most courts still allow the custodial parent to make all decisions concerning the child's religious upbringing, a fact that highlights the importance of the initial custody decision, and emphasizes the place given religion as a factor in reaching such a decision.