Brigham Young University Journal of Public Law

Volume 8 | Issue 2 Article 9

3-1-1994

Religious Freedom Issues in Domestic Relations Law

Mitchell A. Tyner

Religious Freedom Issues in Domestic Relations Law

*Mitchell A. Tyner**

Domestic relations cases involving either judicial preference among religious views and/or the right of parents to inculcate religious values and beliefs in their children occur in a narrow range of fact patterns and receive limited public notice. But the inconsistency of both analysis and result should give pause to those who take their religious liberty seriously.

Three areas in which religious freedom has troubled courts are: (1) religious differences without more as a basis for the divorce, (2) regulation of the custodial parents' right to give religious instruction, and (3) custody grants based on the religious preferences of the parents.

I. Religious Differences as a Basis for Divorce

The use of religious belief or practice as a ground for divorce is rare, but the potential exists. In an Ohio case,[1] both parents had been Catholic at marriage.[2] A year later the wife became a Jehovah's Witness.[3] She stopped going to family gatherings, refused to celebrate holidays, and a divorce action followed shortly.[4]

In affirming the divorce decree, the appellate court distinguished between differences in religious faith and the detrimental consequences that adherence to a particular faith may have:

> Although a difference in the religious faith of a spouse does not constitute a ground for divorce, a religious conviction may

---

 Associate General Counsel for the General Conference of Seventh-day Adventists. B.A. Union College; M.A. Andrews University; J.D. Nashville School of Law.

1 Pater v. Pater, No. C-890553, 1990 WL 162021 (Ohio App. Oct. 24, 1990).

2 *Id.* at *1.

3 *Id.*

4 *Id.*

induce a spouse to do things that would constitute a ground for a divorce. It is permissible for each spouse to have his or her own religious beliefs, but if one carries such beliefs to the extent of disrupting and destroying the family life, her conduct may constitute extreme cruelty.[5]

II. CUSTODIAL AND NON-CUSTODIAL RELIGIOUS INSTRUCTION RIGHTS

Far more common are cases in which a religious practice is an issue in custody proceedings. A typical problem is determining whether the non-custodial parent has a right to teach religious values to the child. The standard in virtually every jurisdiction is that the custodial parent determines religious training.[6] But is that right exclusive or must it be shared with the non-custodial parent?

The Superior Court of Pennsylvania ruled that right to be non-exclusive.[7] The court addressed, (1) whether an order prohibiting a father from taking his children to religious services "contrary to the Jewish faith" during periods of lawful custody violated his free exercise rights, and (2) whether the father could be directed to present the children at synagogue for religious services during his periods of weekend visitation.[8] The court ruled that (1) the restriction was unconstitutional,[9] and (2) the requirement was valid.[10]

Pamela and David Zummo were married in 1978, had three children and were divorced in 1988.[11] Pamela was raised a Jew and actively practiced her faith since childhood.[12] David was raised a Roman Catholic but attended only sporadically.[13] Prior to marriage Pamela and David agreed that any children would be raised in the Jewish faith.[14] The trial court's order in their divorce action provided that David

---

5 *Id.* at *2 (citations omitted).

6 *See generally* Donald L. Beschle, *God Bless the Child?: The Use of Religion in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989).

7 Zummo v. Zummo, 574 A.2d 1130, 1140 (Pa. Super. Ct. 1990).

8 *Id.* at 1132.

9 *Id.* at 1157.

10 *Id.* at 1158.

11 *Id.* at 1141.

12 *Id.*

13 *Id.*

14 *Id.*

was not permitted to take the children to "religious services contrary to the Jewish faith"[15] and that he was obligated during his weekend visitations to arrange for the children's synagogue attendance.[16] David appealed those sections of the order, alleging breach of First Amendment protection.[17]

The trial court noted six factors in support of the challenged restrictions.[18] First, the Zummo's had orally agreed to raise their children as Jews.[19] But, the appellate court found:

> [S]everal persuasive grounds [exist] upon which to deny legal effect to such agreements: 1) such agreements are generally too vague to demonstrate a meeting of minds, or to provide an adequate basis for objective enforcement; 2) enforcement of such an agreement would promote a particular religion, serve little or no secular purpose, and would excessively entangle the courts in religious matters; and 3) enforcement would be contrary to a public policy embodied in the First Amendment Establishment and Free Exercise Clauses (as well as their state equivalents) that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs.[20]

Therefore, said the court, the trial court erred in giving too much deference to the pre-nuptial agreement.[21]

The trial court also cited the children's pre-divorce religious training and concluded that they had asserted personal religious identities that must be respected.[22] The appellate court doubted any such assertion by three, four and eight-year-olds, and stated:

> In order to avoid arrogating to itself unconstitutional authority to declare orthodoxy in determining religious identity, courts only recognize a *legally* cognizable religious identity when such an identity is asserted by the child itself, and then only if the child has reached sufficient maturity and intellectual development to understand the significance of such an assertion. We conclude that whatever religious

---

15 *Id.* at 1142.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 1144.
21 *Id.* at 1148.
22 *Id.*

> training the three, four, and eight-year-old children had received, they lacked capacity to assert a legally cognizable religious identity, and in fact, made no attempt to assert such an identity; consequently, no legally cognizable religious identity had been acquired. Consideration of the children's presumed religious identity, under the circumstances presented here, was constitutionally impermissible and an abuse of discretion.[23]

The trial court also opined that "stability and consistency in a child's religious inculcation has been recognized as an important factor in determining the best interest of the child."[24] Again, the appeals court disagreed:

> [W]e conclude that while the desire to provide or maintain stability in the already tumultuous context of a divorce is generally a significant factor in custody determinations, courts constitutionally cannot have any interest in the stability of a child's religious beliefs. The consideration of the children's presumed interests in spiritual stability was constitutionally impermissible and an abuse of discretion.[25]

The trial court's fourth factor was the contrast between the mother's active Judaism and the father's sporadic Catholicism.[26] The Superior Court said:

> [N]either determination of, nor consideration of, parents' relative devoutness or activeness in religious activities has any place in custody determinations. The United States Supreme Court has held that "no person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or nonattendance," and that, "the Establishment Clause at the very least, prohibits government from . . . making adherence to a religion relevant in any way to a person's standing in the political community."[27]

Consideration of the parents' relative devoutness does precisely what is forbidden.

Factor five was the trial court's perception that "the practice of Judaism and that of Roman Catholicism cannot be squared. To accept and adhere to the teachings of one

---

23 *Id.* at 1149.
24 *Id.* at 1150 (citation omitted).
25 *Id.* at 1152.
26 *Id.*
27 *Id.* (citations omitted).

necessarily requires a rejection of the other."[28] True or not, said the higher court, this was improper.

> [E]ven irreconcilable doctrinal differences in the religious beliefs held by divorced parents would not provide a basis for imposing restrictions upon a parent's visitation or joint custody rights in absence of a showing of a substantial threat of harm to the child arising from those differences in absence of the proposed restrictions.[29]

The trial court's sixth factor cited was the perceived possibility of harmful effects from exposure to "inconsistent" religions.[30] The appellate panel responded:

> [E]ach parent must be free to provide religious exposure and instruction as that parent sees fit, during any and all periods of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in the absence of the proposed restriction . . . . [T]his standard requires proof of a "substantial threat" rather than "some probability." We also emphasize that while the harm involved may be present or future harm, the speculative possibility of mere disquietude, disorientation, or confusion arising from exposure to "contradictory" religions would be a patently insufficient "emotional harm" to justify encroachment by the government upon constitutional parental and religious rights of parents, even in the context of divorce.[31]

In sum, the court held:

> [I]n order to justify restrictions upon parent's rights to inculcate religious beliefs in their children, the party seeking the restriction must demonstrate by competent evidence that the belief or practice of the party to be restricted actually presents a substantial threat of present or future physical or emotional harm to the particular child or children involved in absence of the proposed restriction, and that the restriction is the least intrusive means adequate to prevent the specified harm.[32]

---

28 *Id.* at 1153 (citation omitted).
29 *Id.* at 1154.
30 *Id.*
31 *Id.* at 1154-55 (citations omitted).
32 *Id.* at 1157.

In this case, the mother did not meet this standard of proof.

Finally, on the issue of the requirement that David provide for synagogue attendance during his visitation periods, the court said:

> The trial court found "little if any" distinction between prohibiting the father's affirmative act of taking his children to Catholic services and its direction that the father present the children at the Synagogue for Sunday School. We, on the other hand, find a material and controlling distinction; and consequently, affirm that part of the order requiring the father to present his children at the Synagogue for Sunday School.[33]

The Supreme Court of Nebraska gave lip service to the non-custodial parent's right to share religious beliefs with his children, yet allowed significant restrictions on that right in actual practice.[34] In that case, as in the Ohio case, both Edward and Diane LeDoux had been Catholic at the time of their marriage.[35] Their children, Andrew and Peter, were baptized in the Catholic faith.[36] In July, 1985, Edward began worshipping as a Jehovah's Witness.[37] Diane and Edward separated on April 1, 1986.[38] At the divorce trial, the principal contested issues were visitation rights and specific restrictions that Diane wished to impose on Edward with regard to his religious activities with the children.[39]

The trial court found that numerous differences existed in both belief and practice between Catholics and Jehovah's Witnesses.[40] Concluding that exposing the children to more than one religious practice would have a deleterious effect on them, the court awarded custody to Diane, established a strict visitation schedule, and directed Edward not to "expose or permit himself or any other person to expose the minor children of the parties to any religious practices or teachings that are inconsistent with the religious teachings espoused by the [appellee], being the Catholic religion by which the children

---

33 *Id.* (citation omitted).
34 LeDoux v. LeDoux, 452 N.W.2d 1 (Neb. 1990).
35 *Id.* at 2.
36 *Id.* at 3.
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at 4.

are being raised."[41] It further ordered that while with the children, Edward could not prevent them from engaging in activities normally permitted by the Catholic religion.[42]

The Nebraska Supreme Court affirmed and held that courts have a duty to consider whether religious beliefs threaten the health and well-being of a child.[43] Thus, "when a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat."[44] However, in so doing, "a court must narrowly tailor its order to result in the least possible intrusion upon constitutionally protected parental interests."[45] The court held that:

> The order of the trial court is narrowly tailored in that it imposes the least possible intrusion upon Edward LeDoux's right of free exercise of religion and the custodial mother's right to control the religious training of a child. The custodial parent normally has the right to control the religious training of the child. The dissolution decree merely forecloses the exposure of the LeDoux children to those practices and teachings which are inconsistent with the Catholic religion. The appellant is free to discuss beliefs of the Jehovah's Witnesses with his children so long as they are consistent with the Catholic religion.[46]

Justice Shanahan, in a lengthy dissent, concluded that:

> What the majority has characterized as a "narrowly tailored" visitation order is, in reality, a judicial straitjacket, constricting Edward LeDoux and preventing him from discussing with his children any religious belief or practice which may contradict or conflict with Catholic doctrine. Thus, the LeDoux visitation order prohibits Edward LeDoux's free exercise of his religion in reference to his children and, consequently, constitutes a denial of religious freedom protected by the state and federal Constitutions.[47]

---

41 *Id.* at 4-5.
42 *Id.* at 5.
43 *Id.* (citations omitted).
44 *Id.*
45 *Id.*
46 *Id.* at 5-6 (citation omitted).
47 *Id.* at 12 (Shanahan, J., dissenting).

The Supreme Court of Montana dealt with the question of how religious education compares with other custodial issues.[48] The trial court awarded joint custody but concluded that the child would live with his mother after age six in order to facilitate school attendance.[49] The father argued that such an arrangement effectively prevented him from sharing his Jewish heritage with his son.[50] On appeal, the state high court affirmed.[51] Although ruling that neither parent shall have exclusive right to determine the child's religious education and affiliation, the supreme court upheld the trial court's residency scheme, observing that "an award of custody for the purpose of religious education should not dominate other elements which comprise the best interests of this particular child."[52]

A Canadian court recently went much further, ruling that the custodial parent has the sole and exclusive right to determine religious training, restraining the father from even discussing his religion with his children or taking them to religious services and restraining both parties from making adverse comments to the children about the other's religion.[53] The Court of Appeals of Wisconsin recently agreed,[54] ruling that a state statute gives the custodial parent the right to choose the religion for the children, and construing it to provide that parent with protection from subversion.[55]

III. CUSTODY GRANTS BASED ON RELIGIOUS PREFERENCES

Before courts may decide which parent controls religious training, they must decide which parent wins custody of the child. Here the decisions are at least as inconsistent and even more troubling.

In an Ohio case,[56] both parents had been Catholic at marriage.[57] A year later the wife became a Jehovah's

---

48 *In re* Marriage of Gersovitz, 779 P.2d 883 (Mont. 1989).

49 *Id.* at 884.

50 *Id.* at 884-85.

51 *Id.* at 885.

52 *Id.*

53 Young v. Young, 24 R.F.L.3d 192 (B.C. Sup. Ct. 1989). This case was argued before the Supreme Court of Canada on January 25, 1993.

54 *In re* Marriage of Lange, 502 N.W.2d 143 (Wis. Ct. App. 1993).

55 *Id.* at 146.

56 Pater v. Pater, No. C-890553, 1990 WL 162021 (Ohio App. Oct. 24, 1990).

57 *Id.* at *1.

Witness.[58] She stopped going to family gatherings, refused to celebrate holidays, and a divorce action followed shortly.[59] The trial court awarded custody to the father and the mother appealed, arguing that the court unconstitutionally based its decision on her religious practices.[60] The Ohio Court of Appeals affirmed on the child custody issue:

> [I]f [the mother] were granted custody, the child would be less likely to receive proper medical attention, obtain a college education, or participate in social activities at school or with Robert's family. In addition, the child's relationship with his father would be more likely to be severely damaged as a result of [the mother's] belief that the Catholic Church and Christmas are 'bad' and that non-Witnesses are evil.[61]

Happily, the decision regarding child custody was overturned by the Supreme Court of Ohio.[62] Said the state's high court, focusing on the welfare of the child:

> A parent may not be denied custody on the basis of his or her religious practices unless there is probative evidence that those practices will adversely affect the mental or physical health of the child. Evidence that the child will not be permitted to participate in certain social or patriotic activities is not sufficient to prove possible harm.[63]

In a Pennsylvania case,[64] the trial court found that the father, with whom the children had lived after their mother left, was an exemplary parent.[65] Nevertheless, the trial court awarded the mother custody because the court disapproved of the father's fundamentalist Christian beliefs and his enrollment of the children in a religious school.[66] The trial court stated:

> [I]t is the degree to which the father has pursued "life in the Lord" that has deprived the children of social and educational opportunities and has presented them with a single-minded

---

58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.* at *2.
62 Pater v. Pater, 588 N.E.2d 794 (Ohio 1992).
63 *Id.* at 800.
64 Stolarick v. Novak, 584 A.2d 1034 (Pa. Super. Ct. 1991).
65 *Id.* at 1035.
66 *Id.*

> approach to life that is very restricted in view and allows for no spontaneity, artistic expression or individual development of rationale or logic or even just pursuit of ordinary curiosity. These children are being raised in a sterile world with very rigid precepts, with no allowance for difference of opinion, and no greater breadth than the doctrinaire limits of the religious beliefs.[67]

On appeal, the Superior Court reversed, holding those statements to be only the views of the trial judge, unsupported by the record.[68] Said the court:

> The record in the instant case reveals no basis for the trial court's belief that the children's horizons would be broadened by removing them from the "sterile" environment of a religiously oriented school. Both parents adore the children and are genuinely interested in playing a role in their future. For five years since the separation of their parents, however, they have lived with their father in a single residential home, and their father has ably devoted himself to their care. Under these circumstances, the trial court abused its discretion when it suddenly took them from the only home and family which they have known and awarded them to another whose facilities, if not inadequate, were less desirable and less familiar than those to which the children had been accustomed.[69]

In virtually all American jurisdictions, the paramount consideration in child custody proceedings is the best interest of the child.[70] While that ideal is no doubt proper, its attainment is a highly subjective task. Assumptions about which interests are "best" for a child have been shaped by history and dominant social custom. While such cultural influences are not inherently objectionable, they may allow stereotypes to influence a court's decision when one parent has adopted the values of an unpopular religious minority. Courts may be tempted to adopt some standardized "all-American" ideal as their guide to a child's best interest.

---

67 *Id.* at 1036.

68 *Id.*

69 *Id.* at 1038.

70 *See generally* JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4.02 (1986); JOHN P. MCCAHEY ET AL., CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 10.02 (1987).

A couple of commentators have explained the problem in practical application of this amorphous "best interest" standard:

> Since the trial judge's decision will be reversed only upon a clear showing of abuse, a judge might draft his custody order to promote one belief over another to hide his motivation within the side discretion afforded him by the imprecision of the 'best interest' standard.[71]
>
> The reality is that the exercise of judicial discretion is far less a product of the judge's learning than of his or her temperament, background, interests and biases.[72]

A disturbing example is seen in the case of *Mendez v. Mendez*.[73] Rita and Ignacio Mendez were married in 1981. At that time both considered themselves to be Roman Catholics, although neither practiced that faith. During the course of their marriage, they attended Catholic services on only three occasions.[74]

Rebecca Mendez, the couple's child, was born six months after her parents' marriage. When she was approximately a year old, Ignacio decided that Rebecca should be baptized as a Catholic. Rita did not want Rebecca baptized but arranged for it to please Ignacio.[75]

In April 1983, Rita became involved in the Jehovah's Witnesses faith. She thereafter became a practicing member of that religion, which resulted in the onset of marital difficulties. Ignacio believed that Jehovah's Witnesses were "totally different" and "against society."[76] He felt that his wife had "betrayed him" by her conversion and ordered her to cease attending Jehovah's Witnesses' meetings.[77] When she failed to

---

71 Steven M. Zarowny, Note, *The Religious Upbringing of Children After Divorce*, 56 NOTRE DAME L. REV. 160, 165 (1980).

72 Dorinda N. Noble, *Custody Contest: How to Divide and Reassemble a Child*, 64 SOC. CASEWORK 406, 407 (1983).

73 527 So. 2d 820 (Fla. Dist. Ct. App. 1987).

74 The facts concerning the Mendez' marriage, religious practices, divorce and subsequent court action are essentially those set out in Rita Mendez' *Petition for Writ of Certiorari*, Menendez v. Menendez, 527 So.2d 820 (Fla. Dist. Ct. App. 1987) (No. 87-1166), *cert. denied*, 485 U.S. 942, *reh'g denied*, 485 U.S. 1030 (1988) [hereinafter Petitioner's Brief].

75 Petitioner's Brief, *supra* note 74, at 4.

76 *Id.*

77 *Id.*

do so, Ignacio petitioned for dissolution of the marriage and for custody of Rebecca.

Religion was the central issue during the two-day custody trial. The transcript of the divorce proceeding comprises four volumes. Volumes one through three concern the custody issue and consist of 485 pages. Volume four deals with financial matters and is forty-five pages long. Of the 485 pages concerning custody, 249 pages (51%) contain references to religion.[78]

At trial, Ignacio testified that he sought custody of Rebecca because it was contrary to her best interest to be raised as a Jehovah's Witness. He sought to bolster that allegation by the testimony of two psychologists and one psychiatrist. However, all agreed that Rita was the preferred custodial parent and was the parent with whom Rebecca had the deepest attachment. The court-appointed guardian ad litem concurred, testifying that: "[Rebecca] was either going to cease living with her father, which was going to be difficult for her, or she would cease living with her mother, which was going to devastate her."[79]

The expert witnesses also agreed that Ignacio was not a desirable custodial parent because he had no plans to care for Rebecca. Ignacio testified that if he were awarded custody he would either have to hire a live-in maid or else move to his mother's home and live there with his sister and her two children so that either his mother or his sister could care for Rebecca.[80] Dr. Eli Levy, one of the psychologists, testified that he would not recommend Ignacio as custodial parent for two reasons: "One is the emotional state between the mother and the child. That needs to be taken care of and guarded. Secondly, my understanding of Mr. Ignacio's work is that the man has to go to work and it requires travel at times out of the city."[81]

Each of the experts and the guardian ad litem were troubled by the "problem" of Rita's religion. The "problem" according to Dr. Levy, was that Jehovah's Witnesses are "different."[82] According to Dr. Richard Greenbaum, the second

---

78 *Id.*
79 Petitioner's Brief, *supra* note 74, at A24.
80 Petitioner's Brief, *supra* note 74, at 5-6.
81 *Id.* at 6.
82 *Id.* at 6-7.

psychologist, the religion was problematic in that it "deviates" and is "not mainstream."[83]

Dr. Greenbaum speculated about the difficulties that four-year-old Rebecca might face in the future if she were raised as a Jehovah's Witness but attended public school:

> [A]s a Jehovah's Witness she would have difficulty in dealing with the different values as they apply socially, in terms of school and religious holidays, which are not perceived as religious, exclusively by the children, such as Christmas and in terms of saluting the flag and things of that nature.[84]

Despite their reservations about Ignacio, each of the experts testified that it would be better for Rebecca to be a Catholic, and, therefore, raised by Ignacio and his family, because Jehovah's Witnesses are not part of the mainstream of society. Dr. Levy testified:

> Living in this society, she needs to adapt herself to the mainstream of culture. She is growing up and it is not a country of Jehovah's Witnesses. If the majority of the country was Jehovah's Witnesses, we would not have any problem, except for physically, but, as far as – I am not making the statement because she is a Jehovah's Witness per se, but the philosophy of practicing the religion does not allow Rebecca to benefit and be safeguarded in living in this culture.
>
> I believe that being raised a Jehovah's Witness would not be in the best interest of the child, given the fact that the principles, the way I understand them, do not fit in the western way of life in this society.
>
> Q. You think it is unhealthy for a child to be a Jehovah's Witness in this culture?
>
> A. I say it is unhealthy for this child to be raised as a Jehovah's Witness.
>
> Q. Because she would not fit in the mainstream of society?
>
> A. Yes.[85]

Dr. Levy had previously testified as follows:

> Not that I am stating which one is better, but living in the western society, the part and parcel of the emotional health is the ability of the individual to adapt to a particular culture . . . . Bringing her up Catholic would allow her to

---

83 *Id.* at 8-9.
84 *Id.* at 19.
85 *Id.* at 21-22.

> adapt to our society and have the freedom that Catholic children have in the society, rather than take the chance and possibility and create a definite state in raising her as a Jehovah's Witness.[86]

The custody proceeding ended on October 2, 1985, when Judge Philip Knight determined that it was in the "best interest" of Rebecca that Ignacio be her custodial parent. The court also decreed that:

> All decisions which relate to the religious training, welfare, religious education and teaching are the duty and sole responsibility of the husband. The wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the Catholic religion. Nor shall the wife preclude the child from engaging in any activity which is permitted by the Catholic religion . . . .[87]

On April 28, 1987, Florida's District Court of Appeal, Third District, affirmed the judgment of the trial court.[88] Two members of the three-judge panel concluded that the record did not demonstrate that the trial court granted custody to Ignacio solely because of Rita's religion.[89] They stated that it is the right of a trial court, in a custody case, to consider the effect on the child caused by conflicting religious beliefs of the parents.[90]

On November 10, 1987, the Court of Appeal denied motions for both rehearing and rehearing *en banc*.[91] A majority of the nine-judge court ruled that *Mendez v. Mendez* was nothing more than a "quite ordinary" child custody case.[92] But three others disagreed. Judge Baskin's dissent stated:

> [W]hat does emerge from the record is a demonstration of the experts' personal biases against the mother's religion. Their disdain for the mother's religion induced them to speculate as to the possibility of harm to the child in the future even though no evidence of harm existed. The trial

---

86 *Id.* at 20.
87 *Id.* at 2-3.
88 Mendez v. Mendez, 527 So.2d 820 (Fla. Dist. Ct. App. 1987), *cert. denied*, 485 U.S. 942 (1988).
89 *Id.*
90 *Id.*
91 *Id.* at 822.
92 *Id.*

> court was obviously persuaded by their less-than-objective considerations for removing the child from the custody of her natural mother and its judgment should not stand.
>
> To be forced to choose between one's religion and one's child is repugnant to a society based on constitutional principles. The soft voice of the minority should be audible to a responsible court sensitive to constitutional rights which include the right to practice an unpopular religion.[93]

Because the appeals court decision did not expressly and directly conflict with a decision by another district court of appeal of Florida and because the appeals court refused to certify the question to the Florida Supreme Court, the decision of the District Court of Appeal was not appealable to the Florida Supreme Court.[94] Therefore, a Petition For Writ of Certiorari was filed with the United States Supreme Court. On March 7, 1988, the High Court denied review.[95] Rita Mendez, denied custody of her daughter because of her religious practices, had no further legal recourse.

In the United States there are two distinct and divergent lines of cases on the subject of whether the religious beliefs and practices of parents may be considered in a child custody dispute. One line of cases makes religion one of several factors which may be considered by the court.[96] The second line holds that religion may be considered only in special circumstances.[97] The result is that the determination of one's fitness as a parent is essentially a matter of geography.

Typical of the first line of cases is Pennsylvania's *Morris* decision, which held:

> [W]e are convinced that embraced within the best interests concept is the stability and consistency of the child's spiritual inculcation. It would be an egregious error for our courts in a

---

93 *Id.* at 824.

94 FLA. CONST. of 1980, art. V, § 3(b)(3) (1980); FLA. R. APP. P. 9.030(A)(2)(iv).

95 Mendez v. Mendez, 485 U.S. 942 (1988).

96 *See, e.g.*, Allison v. Ovens, 421 P.2d 929 (Ariz. Ct. App. 1966), *cert. denied*, 390 U.S. 988 (1968); Frank v. Frank, 167 N.E.2d 577 (Ill. 1966); Sinclair v. Sinclair, 461 P.2d 750 (Kan. 1969); Quinn v. Franzman, 451 S.W.2d 665 (Ky. 1970); Dean v. Dean, 232 S.E.2d 470 (N.C. Ct. App. 1977); Morris v. Morris, 412 A.2d 139 (Pa. Super. Ct. 1979).

97 *See, e.g.*, Clift v. Clift, 346 So. 2d 429 (Ala. Civ. App. 1977); *in re* Marriage of Murga, 103 Cal. App. 3d 498 (1980); Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. Ct. App. 1969); *In re* Marriage of Short, 698 P.2d 1310 (Colo. 1985); Osier v. Osier, 410 A.2d 1027 (Me. 1980).

> custody dispute to scrutinize the ability of parents to foster the child's emotional development, their capacity to provide adequate shelter and sustenance, and their relative income, yet not review their respective religious beliefs.[98]

Florida, unfortunately for Rita Mendez, adheres to this line of cases.

Cases from the second line of authority hold that religion may be considered only if there has been a showing that specific religious beliefs or practices are contrary to the child's general welfare. The standards range across a broad spectrum. At one extreme is the Alabama standard:

> [Q]uestions concerning religious convictions, when reasonably related to the determination of whether the prospective custodian's convictions might result in physical or mental harm to the child, are proper considerations for the trial court in a child custody proceeding.[99]

From the opposite viewpoint is a California decision requiring a showing of "actual impairment of physical, emotional and mental well-being contrary to the best interests of the child" before the court may even hear of the religious beliefs of the parties.[100]

Between these poles lie formulations of various state courts that have dealt with the problem. Another California court required a "clear affirmative showing that religious activities will be harmful to the child."[101] In Colorado, consideration of religious beliefs and practices which are "reasonably likely to cause present or future harm to the physical or mental development of the child" is proper.[102] Idaho requires "a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."[103] In Maine, a court may not consider parental religious practices unless the child's well-being is "immediately and substantially endangered by the religious practice in question."[104]

---

98 *Morris*, 412 A.2d at 142.
99 *Clift*, 346 So.2d at 435.
100 *Quiner*, 59 Cal. Rptr. at 516.
101 *Murga*, 163 Cal. Rptr. at 81.
102 *Short*, 698 P.2d at 1313.
103 Compton v. Gilmore, 560 P.2d 861, 863 (Idaho 1977) (citation omitted).
104 *Osier*, 410 A.2d at 1030.

The disparity between the two lines of authority is significant. For instance, in *Morris*, the Pennsylvania Superior Court held that "it is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects.[105] Yet, Massachusetts reached an opposite conclusion:

> The law . . . tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths . . . . And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child.[106]

Such a disparity should be resolved by the United States Supreme Court. Precedent for such an action exists: the High Court has previously held that courts may not consider race or marital status in custody actions.[107] For reasons of its own the Supreme Court did not use *Mendez* to extend those holdings into the area of parental religion. Why not? Several factors seem to have contributed to this unfortunate decision and the High Court's refusal to hear it on appeal.

First, the current Court is suffering from significant internal tension over the proper interpretation and application of the First Amendment religion clauses. Because of this tension, the Court has in the past appeared to use any pretext to avoid hearing a divisive case involving religion. In recent years the Court has rejected or remanded such cases as *ARM v. Baker* and *Oregon v. Black*,[108] and sidestepped consideration of the Equal Access Act, only to have those cases arrive at its doorstep a second time.

But that situation is changing. On April 17, 1990, in *Employment Division v. Smith*,[109] the Supreme Court radically undercut the reach of the Free Exercise Clause. The Court now appears ready to approve virtually any governmental action that is generally applicable and facially neutral. The new standard makes the achievement of protection for religious practices even more difficult than before, both in custody cases and elsewhere. The Religious

---

105 Morris v. Morris, 412 A.2d 139, 142 (Pa. Super. Ct. 1979).

106 Felton v. Felton, 418 N.E.2d 606, 607-08 (Mass. 1981).

107 Palmore v. Sidoti, 466 U.S. 429, 434 (1984); Stanley v. Illinois, 405 U.S. 645, 658-59 (1972).

108 483 U.S. 1054 (1987).

109 494 U.S. 872 (1989).

Freedom Restoration Act[110] will dilute the negative effect of *Smith*, but its practical effect will be determined by litigation as yet only foreseen.

Second, the trial of *Mendez* afforded the Court an easy rationale for denying review—the constitutional issue was not clearly raised by proper objection at the trial level. According to house counsel for the Jehovah's Witnesses organization this case exemplifies:

> what can happen when one is not sufficiently prepared at trial level. We do not make that comment to disparage the trial attorney; rather, the trial attorney was caught off guard, did not anticipate the prejudice which would follow the religious testimony, and tried to 'fight fire with fire,' rather than taking action to have the religious testimony excluded."[111]

Third, the aforementioned Florida appellate rules offered a disinclination to grant review. The High Court usually hears cases from the federal court system or from state supreme courts, not from mid-level state courts of appeal.

Fourth, the possibility of simple prejudice – at all levels – against Jehovah's Witnesses (and other minority religions) should not be taken lightly. In the *American Law Reports* annotation, "Religion as a Factor in Child Custody and Visitation Cases," a separate subsection treats cases involving Jehovah's Witnesses, the only group so treated.[112]

Fifth, we see in this case a reflection of perhaps the greatest problem facing advocates of religious freedom and equality in western societies today: government–and, by extension, society–often does not take seriously those who take religion seriously.

Is there a better way? Yes. It is both possible and necessary to articulate a standard which adequately balances the interests of all concerned.

It cannot be disputed that the state has a substantial interest in the field of domestic relations.[113] The state therefore has a duty to protect the welfare of minor children.

---

110 42 U.S.C. § 2000bb (1993).

111 Letter from James M. McCabe, House Counsel, Jehovah's Witnesses, to Mitchell A. Tyner (Sept. 22, 1989).

112 Annotation, *Religion as a Factor in Child Custody and Visitation Cases*, 22 A.L.R. 4th 971 § 9 (1983).

113 Simms v. Simms, 175 U.S. 162, 167 (1899) (citation omitted).

Thus, where it is clearly shown that parental religious practices endanger a child's well being, the state has a compelling interest in safeguarding the child, and the First Amendment does not bar the court from considering religious practices in such cases.

Yet there are competing interests. One is the parents' interest in safeguarding their free exercise of religion, in not being treated as second-class or undesirable because they adhere to an unpopular, minority religion. Another is the interest of both parents and government (and, in a larger sense, all Americans) in enforcing the constitutional requirement of government neutrality; neutrality between religions and neutrality between religion and non-religion. An adequate standard will balance all those interests. It will safeguard the children whose custody is at issue. It will also guard against prejudice disguised as judicial discretion. And it will guard against inconsistency based only on geography.

Such a standard was enunciated by the Supreme Court of Maine in *Osier v. Osier*.[114] The *Osier* test requires the trial court to make a preliminary determination of the preferred custodial parent without considering either parent's religious practices.[115] If the result is the selection of the parent whose religious practices are not in issue, the process ends.[116] If the result is the selection of the other parent, the court may then take into account the effect on the child of the challenged religious practices, using a two-part analysis:

> [F]irst, in order to assure itself that there exists a factual situation necessitating such infringement, the court must make a threshold factual determination that the child's temporal well-being is immediately and substantially endangered by the religious practice in question and, if that threshold determination is made, second, the court must engage in a deliberate and articulated balancing of the conflicting interests involved, to the end that its custody order makes the least possible infringement upon the parent's liberty interests consistent with the child's well-being. In carrying out that two-stage analysis, the trial court should make, on the basis of record evidence, specific findings of fact

---

114 410 A.2d 1027 (Me. 1980).
115 *Id.* at 1029.
116 *Id.*

> concerning its evaluation of all relevant considerations bearing upon its ultimate custody order.[117]

Such a standard has much to recommend it. After all, "Deprivation of the custody of a child is not a 'slender' . . . punishment: it is a heavy penalty to pay for the exercise of a religious belief."[118]

IV. CONCLUSION

Religious beliefs that are unpopular can sometimes be used either explicitly or inadvertently for the determination of substantive rights in all areas of family law. It should be recognized that religious freedom could be seriously hampered unless courts look only to the effects of the religious practices. Even then, the standards should be the same for any other practices when applied to domestic relations issues.

---

117 *Id.* at 1030.

118 Quiner v. Quiner, 59 Cal. Rptr. 503, 517 (Cal. Ct. App. 1967).