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When the best interests of the child and the rights of the parents collide

Religious Differences In Child Custody And Visitation Disputes

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The modern American family not only is becoming more extended – with stepparents, grandparents, nonmarital significant others, and a heretofore unimagined mixture of complex relationships – but it is also more religiously blended. As a result, child custody and visitation issues in marital dissolution proceedings, already complex and emotional, are becoming even more sensitive as more and more parents bring differing religious backgrounds and beliefs to their marriages.

Yet this country's religious diversity is one of its distinguishing banners. Courts are constitutionally forbidden to interfere with religious freedom or to take judicial action preferring one religion to another.[1] However, given the well - known rates of both interfaith marriage and divorce, the issue of whether courts should consider diverse religious beliefs when making an award of child custody or visitation has become increasingly sensitive and important.

It is becoming clear that the decision to give or not give religious training to a child has important long-term consequences. These considerations of constitutional limitation and a child's best interests[2] present courts with a dilemma when faced with a child custody or visitation dispute involving parents of different faiths or beliefs. The issue is difficult enough when the parents follow different religious beliefs; it is no less easy when the parents practice the same religion but to differing degrees in a conflicting manner.

In the majority of American jurisdictions that have considered the question,[3] courts have refused to restrain the noncustodial parent from exposing a minor child to his or her religious beliefs or practices absent a clear, affirmative showing that these religious activities will be harmful to the child. In analyzing the issue, recognition also must be given to the wide range of judicial views and law review comments on this issue.[4] Yet, as evidenced by recent appellate court decisions and despite the constitutional mandate providing for separation of church and state, it is not always necessary for courts to remain blindfolded to religious disputes affecting minor children.

Recent Case Law

In 1980, *In re Marriage of Murga*[5] adopted a rule of nonintervention with respect to a non- custodial parent's right to express his or her religious beliefs. The question presented in *Murga* was "whether, in the absence of a showing of harm to the child, the custodial parent may enjoin the noncustodial parent from discussing religious subjects with the child or from involving the child in the noncustodial parent's religious activities."

In holding that the noncustodial parent may not be so enjoined, the *Murga* opinion looked to the case law of other states and found that "in the majority of American jurisdictions that have considered the question, the courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices absent a clear, affirmative showing that these religious activities are harmful to the child."

Examples of conflict that might be harmful to a child include emotional distress if a child perceives choosing a religion as choosing between parents, and emotional distress caused by engaging in certain activities mandated by one religion that pleases one parent while displeasing or disobeying the other. Harmful consequences could arise, for example, if accepting the religious beliefs of one parent causes the children to view the other parent negatively, resulting in an adverse relationship or difficulty in accepting guidance and nurturing from that parent.

In 1983, in *In re Marriage of Mentry*,[6] the father and mother of two minor children were observant members of the Mormon Church. The children were six and seven years old when their parents divorced and, at the time of separation, the mother joined a different church. When the father sought to expand his visitation rights, the mother sought an order enjoining him from requiring the children to engage in any religious activities other than those approved by her. The trial court entered a restraining order that prohibited the father from engaging the children in any religious activity, discussion, or attendance during his visitations and from providing the children with articles, publications, or other religious material while they were in his presence. The court of appeal reversed the order due to the absence of evidence of harm to the children and because the trial court order represented an unwarranted intrusion into family privacy.

Following *Murga*, the appellate court emphasized that when the best interests of children must be adjudicated on the basis of debatable value judgments, the decision of a court to intervene must be conditioned upon both a clear affirmative showing of harm or likely harm to the children and a showing that such harm presents a graver problem than coercive intervention into family privacy. The dissenting opinion would have affirmed the trial court restraining order on the ground that the governing standard did not require a showing of actual harm but a requirement of future harm to the children. The dissenting judge believed that the evidence presented in the trial court concerning religious differences and their impact upon the children was sufficient to affirm the trial court's restraining order.[7]

Avitzur v. *Avitzur,*[8] a 1983 New York case, addressed the proper role of civil courts in deciding a matter whose origins lay in religious observance. This case illustrates the point that a civil court can, without violating the constitutional prohibition against excessive intrusion by the state into religious matters, decide a case involving a contract entered into as part of a religious marriage ceremony. In *Avitzur*, the issue was the enforceability of the terms of a ketubbah, a Jewish marital contract. The trial court held the ketubbah to be a religious prenuptial agreement and a religious covenant beyond the jurisdiction of the civil courts. However, the New York Court of Appeals found nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such a religious contract and enforced the agreement. The appellate court decided the case solely on the application of neutral principles of contract law, without the necessity of reference to religious principles.[9]

Zummo v. *Zummo,*[10] an impressively researched 1990 Pennsylvania case, involved a 10-year marriage between a Roman Catholic father and a Jewish mother. Prior to their marriage, the parties discussed their religious differences and orally agreed that their children would be raised as Jews. Following a divorce, disagreement arose over exposing their three children to their father's religion during his custodial periods. The trial court made a custody order requiring the father to arrange the children's attendance at their synagogue Sunday school during his weekend visitation. The trial court order also prohibited the father from taking the children to religious services "contrary to the Jewish faith" during his periods of custody or visitation. The father appealed, asserting that the trial court order violated his constitutional rights and those of his children regarding the free exercise of religion.

The *Zummo* appellate majority struck down that restriction, holding that under Pennsylvania law each parent has parental authority during lawful periods of custody or visitation to pursue whatever course of religious indoctrination that parent sees fit. If the other parent objects and seeks restrictions, the objecting parent must establish a substantial risk of harm to the child in absence of the proposed restriction. The appellate court framed the issue as a constitutional one. Whether limitations could be placed upon the spiritual well-being of a child requires a best-interests analysis. The *Zummo* Court determined that to justify restrictions upon parents' rights to inculcate religious beliefs in their children, the party seeking the restriction must demonstrate both 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 children involved and that the restriction is the least intrusive means to prevent the specified harm.[11] The dissenting opinion in Zummo would have upheld the restriction, framing the issue as one of time sharing and the father's visitation rights, not one of religious differences or First Amendment rights.[12]

The California Court of Appeal joined in this train of decisions in its 1996 opinion in In re Marriage of Weiss,[13] which held that a Christian mother's written premarital agreement with her Jewish husband concerning the future religious upbringing of children born of the marriage was not legally enforceable. Thus, she could not be enjoined from engaging in religious activity with her child without an affirmative showing that her conduct would harm the child. Citing *Murga* and *Mentry*, the *Weiss* decision observed that California courts have refused to enjoin a noncustodial parent from discussing religion with children or from involving the children in a parent's religious activities absent a clear, affirmative showing that the children will be harmed by the proposed religious activity. The *Weiss* court determined that the wife's written antenuptial promise to raise her son in the husband's Jewish faith was unenforceable. Placing great reliance upon the majority opinion in *Zummo*, *Weiss* held that the father failed to show that the religious activities to which his former wife was exposing the minor child were harmful to the child. Thus, the trial court properly refused to enjoin the mother from involving the child in her chosen religious activity.

But in Kendall v. Kendall,[14] a 1997 Massachusetts case, a trial court judge

found it substantially damaging to the minor children to allow each parent to expose the children, as he or she wished, to his or her own religious beliefs. At the time of their marriage in 1988, the mother was Jewish and the father Roman Catholic. Before they were married, the parties discussed the potential religious upbringing of any children and agreed that the children would be raised in the Jewish faith. Ultimately, the father's Christian views conflicted with the mother's adherence to the principles of Orthodox Judaism and her attempt to raise the children as Orthodox Jews.

The determinative issue in *Kendall* was whether the harm to the children was so substantial as to warrant a limitation on the father's religious freedom. Acknowledging that other states have struggled to define what constitutes substantial harm to minor children in this context, the *Kendall* opinion adhered to the line of cases requiring clear evidence of substantial harm and found that substantial harm did, in fact, exist. Fully aware of the complexities and nuances involved, the *Kendall* court concluded that since the trial judge found demonstrative evidence of substantial harm to the children in a comprehensive report from the custody evaluator, the father's argument that the divorce judgment burdened his rights to practice religion under the free exercise provisions of the Massachusetts and U.S. Constitutions could not be sustained. Because the restrictions upon religious exposure imposed by the trial court intended a wholly secular purpose – specifically, to limit the emotional harm to the children caused by the negative messages presented by the father's religion – and the finding that the father's behavior toward his children fostered a distorted image of the Jewish culture and induced guilt in his son for having the beliefs that he does,[15] the restrictions did not violate the father's right of free exercise of religion.

An intriguing but as yet undefined issue in these cases is reconciling the best interests standard generally applied in custody matters with the "harm to the child" standard required for enjoining a parent's constitutional right of free exercise of religion. The effect on a child of parental religious differences is not measured by a best interest standard.[16] The requirement of "substantial harm" to counter a parent's freedom of religion requires a finding of detriment to the child.[17] While a best interest standard requires only a preponderance of the evidence, detriment requires a showing by clear and convincing evidence[18] – a higher, but reasonable standard, because a constitutional right is being restricted.

Federal Legislation

This standard might have been given a federal statutory basis by the Religious Freedom Restoration Act of 1993 (RFRA).[19] *Instead, in City of Boerne* v. *Flores, Archbishop of St. Antonio*,[20] the U.S. Supreme Court held that RFRA exceeded Congress's power and was therefore unconstitutional. The exquisite complexity of this issue and its interpretive nuances is illustrated by the fact that the 6-3 Supreme Court decision engendered six separate opinions. The majority opinion found that the substantive change and constitutional protections of RFRA were out of proportion to the incidental burdens on religion imposed by permissible laws of general application and that the act's compelling interest/least restrictive means test was disproportionately stringent when compared to the ends the act sought to achieve.

New federal legislation was recently introduced in Congress[21] that would mandate the application of a "compelling state interest" test to a governmental action if it interferes with religious expression. Thus the act must be of utmost importance to the good of society, and further, if it infringes upon religious expression, it must do so in the least harmful way. In essence, the Religious Liberty Protection Act of 1998 attempts to protect religious practices from burdensome and unnecessary governmental interference.

Before the Supreme Court declared it unconstitutional, RFRA was considered by several state appellate courts deciding child custody cases. For example, in Hunt v. Hunt,[22] a father was held in contempt for failure to comply with an order to pay child support. He appealed, contending that he belonged to the Northeast Kingdom Community Church, whose members renounce all personal pos- sessions, work for nonprofit church-run businesses, and have no access to income or personal funds. The church provides housing and living expenses for the members and forbids a member to support an estranged spouse or children who live outside the community. The Vermont Supreme Court, basing its holding both on Vermont law and interpreting RFRA, held that the child support order, though a substantial burden on the defendant-father's rights to free exercise of religion under the U.S. and Vermont Constitutions, was the least restrictive means of furthering the compelling governmental interest obligating a parent to support minor children. The contempt order, however, was vacated because the state did not demonstrate that contempt and incarceration constituted the least restrictive means to enforce the support order.

RFRA was considered by the California Court of Appeal in the religious differences custody case of *In re Marriage of Weiss*.[23] The Weiss court held that the act, which prohibits the government from substantially burdening a person's exercise of religion unless the infringement is essential to the furtherance of a compelling state interest, is easily reconciled with case law, which requires a clear, affirmative showing that the religious activities will be harmful to the child before a parent will be enjoined.[24] The prevention of harm to the child is a compelling state interest. Therefore, burdening a parent's exercise of religion can be consistent with RFRA.

Though RFRA has been declared unconstitutional, its analysis and impact on case law remains relevant. First, the Religious Liberty Protection Act is similar in scope and intent to the Religious Freedom Restoration Act of 1993 and was drafted to overcome the constitutional infirmities of the 1993 act. Second, in striking down RFRA, the U.S. Supreme Court did not preclude states from enacting their own legislation in this area.[25] A religious liberty bill similar to the federal legislation, AB 1617, was enacted by the California Legislature during the past session but was vetoed by Governor Wilson.[26]

Courtroom Strategies

The legal complexities and emotional nuances of the issues arising from religious differences require attorneys to consider what type of evidence to present to either prove or defend competing contentions of this nature. Research discloses little or no published data in the mental health literature regarding the effect of religious differences upon minor children. Many times, in an attempt to circumvent the burden of proof, a complaining parent will assert his or her personal assumptions and testimony that dual religious training is confusing and harmful to the child and will attempt to use such assumptions as a substitute for probative evidence of actual harm. There is no psychological or sociological study that indicates that different religious training is in itself harmful to a child.[27]

Proper analysis and case preparation by an expert witness should take into consideration the chronological and developmental age of the child in question. Cognitive concepts and the ability to understand religious beliefs will have a different effect upon children of different ages. That is, a child of 3 or 4 may not yet have the capacity to understand

different religious beliefs, whereas a child of 12 or 13 may well be conflicted by parental tensions in this regard.[28]

Practitioners should note that the testimony of a mental health expert was not presented in either *Zummo* or *Weiss*. In contrast, in *Kendall*, the trial judge supported her conclusion that substantial harm to the children had been demonstrated in 68 express findings by giving substantial weight to the report of the guardian ad litem/ investigator/ evaluator with respect to the impact the religious differences between the parents had on the minor children. That well-supported trial court order was affirmed on appeal.

Splitting a family through divorce is painfully difficult. King Solomon's suggestion to "split the baby"[29] is not a modern-day answer, and judicial precedent often falls short of providing workable solutions in today's child custody disputes. The issues raised and addressed in religious differences cases can be sources of great bitterness and heartbreak. They demand the wisdom of Solomon and sensitive advocacy precisely because courts have failed to establish coherent and consistent standards of reconciling the best interests of children with the basic constitutional rights of parents in the free exercise of their religious beliefs. How to achieve workable and meaningful solutions to the problem of religious differences confronting so many families is worthy of our best efforts and constant, creative attention. ■

[1] U.S. CONST. amend. I.

[2] FAM. CODE §§3011, 3020.

[3] *See Religion As a Factor in Child Custody and Visitation Cases*, 22 A.L.R 4th 971-1039.

[4] *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?* 24 CREIGTON L. REV. 445, (1991); *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise of Custodial Parents*, 138 U. PA. L. REV. 583 (1989); *The Solomonic Paradox Revisited: Should Custody Proceedings Determine a Child's Religion?* 33 SANTA CLARA LAW R. 313 (1993); *Religion As a Factor in Best Interest Hearings, in* WILEY FAMILY LAW UPDATE (1997).

[5] In re Marriage of Murga, 103 Cal. App. 3d 498,163 Cal. Rptr.79(1980).

[6] In re Marriage of Mentry, 142 Cal. App. 3d 260,190 Cal.Rptr.843 (1983).

[7] *Id.*, 142 Cal. App. 3d at 270.

[8] Avitzur v. Avitzur, 58 N.Y. 2d 108,446 N.E. 2d 136, *cert. denied*, 464 U.S. 817 (1983).

[9] Id., 58 N.Y. 2d at 115.

[10] Zummo v. Zummo, 394 Pa. Super. 30, 574 A. 2d 1130 (1990).

[11] *Id.* at 83.

[12] *Id.* at 85.

[13] In re Marriage ofWeiss, 42 Cal. App. 4th 106,49 Cal. Rptr. 2d. 339 (1996), *rev. denied, cert. denied* (1996).

[14] Kendall v. Kendall, 426 Mass. 238,687 N.E. 2d 1228 (1997), *cert. denied* (June 26,1998).

[15] The court also rejected the husband-father's argument that the divorce judgment requiring the guardian ad litem to explain the court's judgment to the children was an unconstitutional establishment of religion.

[16] FAM. CODE §§3011, 3020.

[17] FAM. CODE §§3040, 3041.

[18] Guardianship of Jenna G., 63 Cal. App. 4th 387,74 Cal. Rptr. 2d 47 (1998).

[19] In 1993, the U.S. Congress passed and the president signed into law the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb *et seq*. For a full discussion of the background and enactment of RFRA, *see* David B. Cruz, *State of Sovereignty*, LOS ANGELES LAWYER, M/Aug. 1998, at 32. Upon passage, RFRA immediately became the subject of law review comment and judicial interpretation. *See Restoring Rites and Rejecting Wrongs: The Religious Freedom Restoration Act*, 18 SETON HALL LEGIS. J. 821 (1994); Hunt v. Hunt, 648 A. 2d 843 (Vt. Sup. Ct 1994); In re Marriage of Weiss, 42 Cal. App. 4th 106,49 Cal. Rptr. 2d 339 (1996).

[20] City of Boeme v. Flores, Archbishop of St. Antonio, 117 S. Ct. 2157,138 L. Ed. 2d 624 (1997).

[21] The Religious Liberty Protection Act of 1998, H.R. 4019/S. 2148,105th Cong., 2d Sess. (1998).

[22] Hunt, 648 A 2d 843.

[23] Weiss, 42 Cal. App. 4th 106.

[24] Mentry, 142 CaL App. 3d 260.

[25] City of Boeme v. Flores, Archbishop of St. Antonio, 117 S. Ct. 2157,138 L. Ed. 2d 624 (1997).

[26] AB 1617, Religious Freedom Protection Act (passed the Assembly by a vote of 76-0 (Jan. 20,1998); amended and passed the Senate by a vote of 25-3 (Aug. 12,1998); Assembly concurrence in Senate amendments (Aug. 20, 1998); enrolled and sent to the governor (Aug. 27, 1998); vetoed by governor (Sept. 28,1998)). Internet tracking of California legislation can be found on the World Wide Web at <http://www.leginfo.ca.gov/>.

[27] *Religion As a Factor in Best Interest Hearings, supra* note 4, at 130-31.

[28] In Zummo v. Zummo, 574 A. 2d 1130,1149 (1990), the trial court concluded that the three-, four-, and eight-year-old children had asserted personal religious identities that were entitled to consideration and protection. The appellate court reversed that finding, holding that children of that age were too young to assert a religious identity for themselves and, after establishing age 12 as a benchmark, ruled that judges should exercise broad discretion on a case-by-case basis in determining whether a child has sufficient capacity to assert for himself or herself a personal religious identity.

[29] 1 *Kings* 3:16-28.