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Religious Divide

Time for another look at religious-upbringing provisions in prenuptial agreements.

By Marshall S. Zolla & Deborah Elizabeth Zolla

Within several weeks of meeting one another, David and Martha knew they were very much in love. But David was Jewish and Martha was Christian. At first this difference did not seem like such a big deal. As their relationship grew more serious, however, the religious differences became an issue. Martha agreed to convert to Judaism and raise their children as Jews. They even got lawyers to draft an agreement detailing that their prospective children's religious education and upbringing would be performed according to the practices and beliefs of Reform Judaism. Nevertheless, when David and Martha eventually separated, Martha returned to the Christian church and enrolled their two children in religious school at her church.

If David asks a California court for an injunction to keep his children out of a Christian school or church, he will probably lose, unless he convinces the court that exposure to both religions will substantially harm the children.

JUDICIAL INTERVENTION

In general, courts have been unwilling to interfere with a child's religious training because courts refuse to get entangled in religious matters. *In re Marriage of Murga* (1980) 103 CA3d 498 (refusal to restrain noncustodial parent from sharing religious beliefs); *In re Marriage of Mentry* (1983) 142 CA3d 260 (invalidating religious restraining order). To some courts, "the question of a child's religion must be left to the parents even if they clash [because] a child's religion is no proper business of judges." *Abbo v Briskin* (Fla App 1995) 660 So2d 1157, 1161. (However, if David, in the hypothetical, asks the court for custody on days that will let him take the children to temple for Jewish religious training, he will probably get them.)

Courts will intervene in parental choices about raising children, including religious training, when it is necessary to prevent harm to the child. *Prince v Massachusetts* (1944) 321 US 158 (Jehovah's Witness violated child labor law by taking child to preach on public highway); *Rogers v Rogers* (Fla App 1986) 490 So2d 1017 (mother awarded custody subject to ceasing contact with religious cult); *Jehovah's Witnesses v King County Hospital* (WD Wash 1967) 278 F Supp 488, affd (1968) 390 US 598 (permitting blood transfusion over parents' religious objection).

A majority of courts follow the standard of *Wisconsin v Yoder* (1972) 406 US 205, 230, which requires a showing of substantial mental or physical harm to the child, or to public safety, peace, order, or welfare, in order to encroach on parental authority in matters of religious upbringing. Some courts have held that in certain cases the emotional stress of being exposed to conflicting religions constitutes sufficient harm. See, for example, *LeDoux v LeDoux* (Neb 1990) 452 NW2d 1; *Bentley v Bentley* (NY App 1982) 448 NYS2d 559.

While harm to the child is the most important factor to consider in the enforcement of a religious upbringing clause, courts have been especially reluctant to require a parent to provide religious training contrary to the parent's beliefs or practices. *Schwarzman v Schwarzman* (NY Sup Ct 1976) 388 NYS2d 993 (refusing to order practicing Catholic mother to raise children Jewish despite prenuptial agreement); *People ex rel Portnoy v Strasser* (1952) 303 NY 539 (failure to provide religious training is not reason to change custody). But see *Ross v Ross* (NY Sup Ct 1956) 149 NYS2d 585 (enforcing prenuptial agreement and ordering non-Catholic mother to continue Catholic training).

Agreements about religious upbringing have thus met with varied responses. Some courts

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have upheld them. See *Gottleib v Gottleib* (Ill App 1961) 175 NE2d 619 (enforcing divorce decree that incorporated agreement between parties to raise children Jewish); *Shearer v Shearer* (NY Sup Ct 1947) 73 NYS2d 337; *Ramon v Ramon* (Dom Rel Ct 1942) 34 NYS2d 100; *In re Sohn* (NY Surr Ct 1986) 507 NYS2d 969 (adoption vacated where adoptive mother recanted promise to raise children Jewish). The majority have not. See, for example, *In re Marriage of Weiss* (1996) 42 CA4th 106; *Denton v Jones* (Kan 1920) 193 P 307 (ignoring promise made to deceased mother); *Sotnick v Sotnick* (Fla App 1995) 650 So2d 157; *Wood v Wood* (Del 1961) 168 A2d 102; *McLaughlin v McLaughlin* (Conn Super Ct 1957) 132 A2d 420; *Hackett v Hackett* (Ohio App 1958) 97 A2d 419.

THE *ZUMMO* CASE

In the leading modern case, *Zummo v Zummo* (Pa App 1990) 574 A2d 1130, a couple orally agreed prior to marriage that any children they had would be raised as Jews. After their separation, the husband wanted to take his three children to Roman Catholic services while they were in his custody. In her divorce complaint, which included a request for custody, the wife objected to this on the ground that it would disrupt their formal Jewish training and that exposing them to a second religion would confuse them. The trial court restricted the husband from taking the children to Roman Catholic services but the appellate court reversed, holding that the trial court should not have relied on the prenuptial agreement because it was vague, entangled the court in religion, and unconstitutionally limited the parents in religious matters. 574 A2d at 1144. The majority also held that the trial court erred in deciding that the children would be harmed by exposure to two religions, absent persuasive evidence of substantial harm. 574 A2d at 1154-1157. After all this, the court affirmed the portion of the trial court's order requiring the Catholic father to deliver the children to synagogue for (Jewish) Sunday School. 574 A2d at 1157.

THE *WEISS* AND *KENDALL* CASES

The sole California decision in this area, *In re Marriage of Weiss* (1996) 42 CA4th 106, rev den, cert den 519 US 1007, is factually similar to *Zummo*. The prospective marriage partners were a Jew and a Christian who executed a written prenuptial declaration in which she agreed to raise children of the marriage as Jewish. When the parents separated, the wife enrolled the child in her church's Sunday school and summer camp. The husband sought an injunction to restrain her from allowing their child to participate in religious activity inconsistent with the declaration. The trial court denied the requested injunction, and the court of appeal affirmed, following *Zummo*. It refused to enforce the prenuptial agreement and held that there is no presumption that exposing a child to two different religions constitutes harm. The father failed to present evidence of substantial harm. 42 CA4th at 111-116.

A later Massachusetts case, *Kendall v Kendall* (1997) 687 NE2d 1228, had a slightly different outcome. The trial court enjoined a noncustodial parent from exposing his children to fundamentalist Christianity contrary to the prenuptial agreement to raise the children Jewish, based on demonstrative evidence in a report from the custody evaluator to the effect that allowing the children to be exposed to the father's new "hellfire" beliefs would be substantially damaging to the children. However, instead of analyzing the validity of the agreement, the *Kendall* opinion went directly to the question of whether exposing the children to two different religions had met the required standard of harm. The court ultimately required the father to limit sharing certain aspects of his beliefs that would "substantially promote alienation" from the other parent, an Orthodox Jew. The father was directed not to take the children to his church services or Christian Sunday school, although they could participate in "family" celebrations of Christmas and Easter. The court claimed that it avoided impermissible entanglement in religion by looking only at the emotional or physical harm to the children.

RECENT DEVELOPMENTS

Since *Kendall*, law review commentors have begun to question the position that prenuptial religious provisions should not be enforced. See Rocha, *Getting Married: Should Religious Upbringing Antenuptial Agreements Be Legally Enforceable?* (2000) 11 J Contemp Legal Issues 145; Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable* (1998) 47 Duke LJ 971, 982-983.

Recent California developments, when read and analyzed together, signal that despite *Weiss*, "a more favorable judicial climate lies ahead regarding the allowable scope of premarital agreements as well as the factual circumstances under which they will be enforced." Wasser, *Prenuptial Disagreements* (December 2000) Los Angeles Lawyer p26.

For example, in 2000, the California Supreme Court held in a 6-to-1 decision that "no public policy is violated by permitting enforcement of a [prenuptial] waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they executed this waiver." *In re Marriage of Pendleton & Fireman,* 24 C4th 39, 53–54.

At the same time, another California Supreme Court decision, *In re Marriage of Bonds* (2000) 24 C4th 1, strengthened the validity and enforceability of prenuptial agreements. The court enforced a prenuptial agreement providing that each party waived any right to the other's earnings and accumulations from personal services rendered during marriage, holding the agreement was entered into voluntarily despite the fact that the wife did not have independent counsel. 24 C4th 39, 29-30.

Neither *Pendleton* nor *Bonds* had occasion to clarify how adults' freedom to contract extends to rights concerning children of the marriage. Family Code section 1612 expressly permits parties to make prenuptial agreements on

specified matters and also as to "[a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Fam C §1612(a)(7); but see Fam C §1620.

NEW STATUTES

The California Legislature swiftly reacted to *Bonds* and *Pendleton* in amending sections of the Family Code to tighten the requirements for valid and enforceable prenuptial agreements. Effective January 1, 2002, amended Family Code section 1615 now requires a court to make certain affirmative findings (mostly going to informed and voluntary consent) before upholding any challenged prenuptial agreement. This reverses prior law, which put the burden of setting aside a premarital agreement on the person challenging it. In response to *Pendleton,* the new statute makes any premarital agreement regarding spousal support unenforceable unless the party against whom enforcement is sought had independent counsel. However, a spousal support provision does not become enforceable just because the party had independent counsel. Fam C §1612(c).

There is a new express factor in creating an enforcement prenuptial agreement. The new statutes permit the court to set aside a prenuptial agreement for being "unconscionable," without defining that term in this context. Fam C §1612(c) (unconscionable at time of enforcement); Fam C §1615(a)(2) (unconscionable at time of execution).

However, if new premarital agreements are executed in compliance with these safeguards for voluntary informed consent (which include a seven-day waiting period and potentially three new documents: a written waiver of independent legal counsel, a written explanation of the rights and obligations being given up, and a signed receipt for that explanation identifying the provider), and if they avoid being "unconscionable," they should be enforceable—even if they affect the children's upbringing.

CONSTITUTIONAL PRINCIPLES

Although prospective spouses have the freedom to contract on almost any right, prenuptial agreements must also be constitutionally sound before courts will enforce them. According to *Weiss* and *Zummo,* prenuptial agreements regarding a child's religious upbringing are not legally enforceable because the parent's inalienable right to change religion and to share those beliefs with offspring may not be bargained away. 42 CA4th at 117–118; 574 A2d at 1148. Critical analysis warrants a second look.

A valid prenuptial agreement with religious provisions may be enforced like a secular contract if it does not involve constitutional conflicts. At least one court has enforced by injunction a religious marriage contract by which the parties agreed to bring any marital dispute before a Jewish tribunal. This provision was important because if the husband refused to obtain a Jewish divorce, under Orthodox Judaism the wife could not remarry even if he obtained a civil divorce. The highest New York court said it found nothing in law or public policy to prevent judicial recognition and enforcement of the secular terms of such an agreement. *Avitzur v Avitzur* (1983) 58 NY2d 108.

If parents are legally entitled to exercise control over their children's upbringing, it follows that they should be able to enter into agreements regarding their children's religion as they would their own. The U.S. Supreme Court has articulated a doctrine of parental primacy that is supported by constitutional principles, including the right of parents to bring up children and control their education. In *Wisconsin v Yoder,* 406 US 205, the Supreme Court upheld the right of Amish parents to withdraw their children from public schools after the eighth grade to educate them according to Amish beliefs, on the basis of First Amendment protections and "the fundamental interest of parents, as contrasted with that of the State." 406 US at 232.

The recent United States Supreme Court decision in *Troxel v Granville* (2000) 530 US 57 reemphasized the doctrine that the parents have primary control of their children's upbringing. It found a Washington State law unconstitutional as applied when the court granted grandparents more time with their grandchild than was desired by a parent whose fitness was not questioned.

The doctrine of parental primacy and the constitutional right of parents to make decisions about their children's upbringing is now before the California Supreme Court. *In re Marriage of Harris,* No. S101836 (rev granted January 3, 2002). The court of appeal held that the fundamental right to parent is constitutionally protected, and that application of the California grandparent visitation rights statute violated the mother's due process rights to make decisions concerning care, custody, and control of her child. 92 CA4th 499.

In practice, a prenuptial "religious upbringing" clause has never been enforced in California. However, an analogy can be drawn to prenuptial spousal support waivers, which also were not enforceable in California until a few years ago, although they were much in demand by clients before then. See *In re Marriage of Pendleton & Fireman,* 24 C4th 39; see also Fam C §1612(c). As a matter of good practice, when clients desire a religious upbringing clause in a prenuptial agreement, the prudent family law attorney will warn the clients in writing that such a prenuptial clause may not be enforceable; however, its inclusion is nevertheless worthwhile because it reflects the intentions of the parties, and the law may change.

It is time to revisit these significant personal issues so that proper constitutional guidelines can be established to inform prospective marital partners who knowingly, thoughtfully, and voluntarily wish to privately order their family life. Undoing agreements years after children are born does nothing to foster family harmony, undercuts the sanctity of contract, and erodes the best interests of both the parents and the children involved.

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1. There is no point in California to drafting a prenuptial clause concerning the religious upbringing of children.
☐ True ☐ False

2. In general, courts are committed to judicial neutrality towards both parents' religious viewpoints.
☐ True ☐ False

3. A court might encroach on a parent's authority in matters of religious upbringing on a showing of substantial mental or physical harm to the child.
☐ True ☐ False

4. A majority of courts in the country have refused to uphold prenuptial agreements about religious upbringing.
☐ True ☐ False

5. Pennsylvania, California, and Massachusetts are states that routinely uphold prenuptial agreements about religious upbringing.
☐ True ☐ False

6. New York frequently upholds prenuptial agreements about religious upbringing.
☐ True ☐ False

7. The emotional stress of being exposed to conflicting religions may justify judicial intervention on behalf of a child.
☐ True ☐ False

8. There is a presumption in California that exposure to conflicting religions is bad and requires judicial intervention.
☐ True ☐ False

9. A California court might restrict a parent's right to expose children to his or her religion in the face of persuasive evidence of substantial harm.
☐ True ☐ False

10. Some courts say that it is constitutionally impermissible for a parent to bargain away his or her right to change religious beliefs and, by extension, which religion to teach a child.
☐ True ☐ False

11. A court will never restrict a parent's right to share his or her religion with his or her child.
☐ True ☐ False

12. One court making custody decisions said it avoided impermissible entanglement in religion by looking only at the emotional or physical harm to the children.
☐ True ☐ False

13. The California Supreme Court has shown itself to be willing to uphold prenuptial agreements in general.
☐ True ☐ False

14. Californians may only make prenuptial agreements on specified topics.
☐ True ☐ False

15. The person challenging a premarital agreement has the burden of showing that it is defective.
☐ True ☐ False

16. A premarital provision waiving spousal support is unenforceable per se unless the party against whom enforcement is sought had independent counsel.
☐ True ☐ False

17. A premarital provision waiving spousal support is always enforceable if the party who wants spousal support had independent counsel.
☐ True ☐ False

18. Spousal support waivers can never be enforced in California.
☐ True ☐ False

19. New prenuptial agreements must be executed with a seven-day waiting period.
☐ True ☐ False

20. U.S. Supreme Court cases support the primacy of a parent's decisions regarding children's upbringing.
☐ True ☐ False

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