A GUIDE FOR LOWER COURTS IN FACTORING RELIGION INTO CHILD CUSTODY DISPUTES

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I. INTRODUCTION

What may a court consider in determining the outcome of a child custody dispute? Religion? Courts continuously confront child custody disputes involving religion both because more than fifty percent of marriages end in divorce, and because of the increasing number of "religiously mixed marriages."[1] Constitutional issues arise, however, forcing policymakers to consider First Amendment issues "regarding the propriety of courts considering religion in making child custody decisions."[2] Many state legislatures, therefore, attempt to limit courts' discretion by enacting precise child custody

1. Donald L. Beschle, *God Bless The Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 383 (1989).

2. *Id.*

statutes regarding this specific issue.[3] Lower courts need these established guidelines when considering religious factors in child custody disputes.[4]

This Note analyzes the need for lower courts to consider religion as a factor in the best interest equation in child custody disputes. Parts II and III of this Note discuss the evolution of child custody decisions in the United States, and the constitutional aspects of considering religion in child custody cases. Parts IV and V detail approaches that courts around the country generally take with regard to religion and child custody disputes. The first approach "puts religion as a factor beyond the scope of a court's inquiry unless there are compelling reasons to justify the court's intervention in order to protect the child."[5] The second approach "allows religious factors to be considered in determining the best interest of the child equation."[6]

This Note discusses the differences between the broad best interest test found in state statutes and alternatives which specify religion as a factor to consider in determining the best interest of the child. The alternatives offer more certainty in resolving child custody cases. Finally, this Note emphasizes the need for state legislatures, specifically the Iowa legislature, to explicitly include religion as a factor in their state statutes in order to guide the lower courts when they are confronted with this issue.

II. THE EVOLUTION OF CHILD CUSTODY DECISIONS IN AMERICA

A. *The Rule of Paternal Preference in the Early Nineteenth Century*

Child custody law evolved from the ancient Roman rule of *patria potesta*[7] to the modern standard of best interest of the child.[8] Historically, the father, as the legal, religious, and moral head of the family, was presumptively entitled to custody of his children.[9] English authorities were cautious about interfering with the father's presumptive, yet not absolute, power over his children.[10] English courts regarded the father as the "natural guardian, invested by God and the law of the country" with ruling power over his chil-

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3. *See* Sanford N. Katz, *"That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption*, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 129 (1992).

4. *See* Nelson A. Méndez, Note, *Child Custody Entangled with Religion:* Osteraas v. Osteraas, 31 IDAHO L. REV. 339, 347 (1994).

5. *Id.* at 345 (citing Bonjour v. Bonjour, 592 P.2d 1233, 1238 (Alaska 1979)).

6. *Id.*

7. According to Roman law, this term "denotes the aggregate of those peculiar powers and rights which, by the civil law of Rome, belonged to the head of a family in respect to his wife, children (natural or adopted), and any more remote descendants who sprang from him through males only." BLACK'S LAW DICTIONARY 1127 (6th ed. 1990).

8. *See generally* Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 325-29 (1978).

9. JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 4 (1989).

10. *Id.*

dren.[11] The English system put the father's interest ahead of the mother's and even before the child's interest in particular circumstances.[12]

Although the English courts rigorously adhered to the principles regarding paternal preference, American courts underwent significant changes during the late nineteenth century.[13] Prior to that time, most states followed the rule "that the father's right to custody was not absolute, but could be lost through some showing of unfitness."[14] Courts considered the father's past and present behavior to determine child custody.[15] By the end of the nineteenth century, concerns over child welfare became the courts' first priority, shifting the "rebuttable presumption in favor of paternal custody toward a strong presumption of maternal custody."[16] This concern for child welfare led to the adoption of the "tender years doctrine."

B. *The Tender Years Doctrine*

The tender years doctrine is based on the "presumption that when the children are of 'tender years' the mother, unless shown to be unfit, should be given preference over the father in the award of custody."[17] It first emerged in the early nineteenth century when the Supreme Court of Illinois "blessed the 'tender age' or 'tender years' doctrine."[18] Courts justified the application of the tender years doctrine by assuming that the mother was, by virtue of her sex and maternal bond, uniquely able to provide the love and nurturing essential to raising a young child.[19] The determination of whether a child was of tender years varied from state to state.[20] For example, some state courts did

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11. *Id.* (citing The King v. De Manneville, 102 Eng. Rep. 1054, 1054-55 (K.B. 1804)).

12. *Id.*; *see, e.g.*, State v. Jones, 95 N.C. 465, 466-68 (1886) (holding that the whipping and choking of a child by her father was not a criminal act because it was an act that should be controlled by a father rather than a judge).

13. Beschle, *supra* note 1, at 385 (citing William A. Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAV. SCI. & L. 119, 127 (1986)).

14. *Id.*

15. Many English courts, however, determined that unfitness for guardianship should be based upon the father's blameworthy conduct, usually adultery or physical abuse. *See, e.g.*, Rex v. Delaval, 97 Eng. Rep. 913, 915-16 (K.B. 1763); The King v. Greenhill, 111 Eng. Rep. 922, 924-28 (K.B. 1836).

16. Beschle, *supra* note 1, at 386 (citing Einhorn, *supra* note 13, at 128-30). Absent legislative enactments, courts took it upon themselves to shift the presumption in favor of maternal custody. *Id.* at 386 n.13.

17. Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1977).

18. BLACK & CANTOR, *supra* note 9, at 8 (quoting Miner v. Miner, 11 Ill. 43, 49-50 (1819)) (holding that an infant of tender years is generally left with the mother, absent any objection, even when the father is without blame).

19. *Id.* at 13.

20. *Id.* at 10-11.

not consider a five-year-old child to be of tender years, while other courts considered an eight-year-old child to be within the tender years doctrine.[21] While state courts independently addressed child custody issues, there remained a need for statutory enforcement.

In 1825, only eight states had statutes granting their courts extensive authority in child custody issues in divorce proceedings.[22] The broad statutory language of these statutes simply allowed courts to "make such further order and decree, as to them may appear expedient, concerning the care, custody, and support of such minor children, and to determine, with which of the parents the said children shall remain."[23] By the end of the century, however, more states had enacted statutes regarding the tender years doctrine, each with its own nuances.[24] This trend continued, and by 1950, forty states had formally adopted the tender years doctrine through state statutes or case law.[25] During the first half of the twentieth century, however, the developing best interest of the child doctrine "displaced this maternal preference and subordinated the interest of both parents to the child's welfare."[26]

C. *The Best Interest of the Child*

Beginning in the early 1970s, the best interest of the child doctrine emerged as the dominant rule in child custody cases.[27] Courts were no longer limiting their decisions based on the age of the child; rather, courts evaluated each parent and child on a case-by-case basis.[28] Applying the best interest of the child doctrine was the "most obvious alternative"[29] because this rule required individual inquiry into the best interest of each child.

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21. *Id.* Tennessee considered the age of five to be tender. *Id.* A New Jersey court granted maternal custody to two children, ages one and three, but granted paternal custody to the oldest child who was five years old. *Id.*

22. *Id.* at 6 (citing statutes of Alabama, Illinois, Louisiana, Massachusetts, Mississippi, New Jersey, New York, and Ohio).

23. *Id.* at 6-7 (citing MASS. GEN. LAWS ch. 56, § 3 (1824)).

24. *Id.* at 13 (citing Alabama, Minnesota, Oregon, Texas, and Wisconsin statutes that required courts to consider not just the age of the children, but also the sex).

25. BLACK & CANTOR, *supra* note 9, at 13.

26. Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121, 1125 (1991). The preference for the mother was evaluated as an independent principle by numerous courts which held that a mother's love was so important to a child that custody should be given to the mother instead of the father. *See* Thomas R. Trenkner, Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262, 267 (1950).

27. Beschle, *supra* note 1, at 387.

28. *Id.*

29. *Id.*

This standard, however, was regarded as too vague.[30] Therefore, judges often had "an opportunity to use their own cultural values and rules of thumb to define and apply the [best interest] standard."[31] As Judge Gary Crippen of the Minnesota Court of Appeals noted, "the best interest standard 'risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law.'"[32] This lack of uniformity gave state legislators the incentive to develop a proper definition for their respective states.

In an effort to prevent judges from making arbitrary decisions, states directly and indirectly included definitions of the best interest of the child factor in their statutes. In at least twelve states, specific statutes require that the "best interest" of the child or the "general welfare" of the child be used by courts in determining custody.[33] Other states adopted or based their statute on the Uniform Marriage and Divorce Act[34] which enumerates a list of factors for a judge to consider in a child custody dispute.[35] Other states direct their courts to examine specific factors such as the emotional ties between the parent and the child,[36] the physical and mental health of each parent,[37] the

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30. FAMILY LAW SECTION, ABA, CHILD CUSTODY DISPUTES: SEARCHING FOR SOLOMON 291 (1989). Commentators compared the best interest of the child standard to that of an "empty box that nobody knows what it's supposed to contain." *Id.*

31. Katz, *supra* note 3, at 128.

32. *Id.* at 128-29 (quoting Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990)).

33. *See* ARIZ. REV. STAT. ANN. § 25-322 (West 1991); CAL. CIV. CODE § 4608 (West 1983 & Supp. 1987); FLA. STAT. ANN. § 61.13 (West 1985); IND. CODE ANN. § 31-1-11.5-21 (Michie 1987); KY. REV. STAT. ANN. § 403.270 (Michie 1984); MD. CODE ANN., FAM. LAW § 5-203 (1984 & Supp. 1986); MO. ANN. STAT. § 452.375 (West 1986); N.J. STAT. ANN. § 9:2-4 (West 1993); TENN. CODE ANN. § 36-6-101 (1996); TEX. FAM. CODE ANN. § 153.002 (West 1996); WIS. STAT. ANN. § 767.24 (West 1993).

34. UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

35. *See id.* Section 402 states:

> The court shall consider all relevant factors including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.

Id.

36. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A)(3) (West Supp. 1996).

37. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-124 (1.5)(e) (West 1987).

capacity of each parent to provide for the child's material needs,[38] or other relevant factors.[39]

Numerous states were including a variety of factors in their best interest equations, but they were neglecting one important factor—religion. Only seven states specifically include religion as a factor to be considered in awarding custody.[40] Other states do not specifically include religion as a factor in their statutes, but regard "moral" factors as proper considerations and endorse considerations of a child's "spiritual well-being."[41]

Many judges, however, in one way or another factor religion into their evaluation of the child's best interest.[42] Courts uniformly agree that they may not prefer one religion over another, unless they find that the religion "poses a clear threat to a child's well being."[43] Other courts have held that they may constitutionally prefer a religious parent over a nonreligious parent.[44] Courts are still careful not to create rules to evaluate a parent's religion or religious activities that may compromise the parent's First Amendment rights.[45] Balancing the best interest of the child with the parent's First Amendment rights often creates "complex issues for the courts" in custody disputes.[46]

III. THE CONSTITUTIONAL ISSUES

The conflict between the best interest determination and the constitutional rights of parents has been a problem for decades. Although religious

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38. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23(3)(c) (West 1993) (requiring courts to consider, among other factors, "[t]he capacity . . . to provide the child with food, clothing, medical care . . . and other material needs").

39. *See, e.g.*, ILL. COMP. STAT. ANN. § 602(a)(2) (West 1989) (stating that the court shall consider all relevant factors including "the wishes of the child as to his custodian").

40. *See* ALASKA STAT. § 25.24.150(c)(1) (Michie 1995); HAW. REV. STAT. § 571-46(5) (1993); LA. CIV. CODE ANN. art. 134(2) (West Supp. 1997); MICH. COMP. LAWS ANN. § 722.23(b) (West 1992 & Supp. 1996); MINN. STAT. ANN. § 518.17(10) (West Supp. 1996); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985); WIS. STAT. ANN. § 767.24(5)(d) (West 1993).

41. *See, e.g.*, Dean v. Dean, 232 S.E.2d 470, 472 (N.C. Ct. App. 1977) (holding that a court may consider the spiritual welfare of the child in determining custody); Morris v. Morris, 412 A.2d 139, 141 (Pa. Super. Ct. 1979) (holding that the best interest test "embraces the child's physical, intellectual, moral, and spiritual well-being").

42. Beschle, *supra* note 1, at 397.

43. *Id.* at 400-01. For example, in some "highly unconventional sect[s]," courts have found the child to be in serious physical and/or emotional harm due to the teachings of that specific sect. *Id.* at 400.

44. *Id.* at 401-02. In *McNamara v. McNamara*, the Iowa Supreme Court awarded custody to the children's father, finding that he "conscientiously adheres to religious teachings and would apparently rear his children in the same manner." McNamara v. McNamara, 181 N.W.2d 206, 209 (Iowa 1970).

45. Beschle, *supra* note 1, at 414.

46. Gary M. Miller, *Balancing the Welfare of Children with the Rights of Parents:* Petersen v. Rogers *and the Role of Religion in Custody Disputes*, 73 N.C. L. REV. 1271, 1283 (1995).

equality remains a "sacred ideal in the United States, protection of this right may be limited when the welfare of a child is at stake."[47] Difficulties arise, however, in attempting to consider an individual's religion, while at the same time preserving that individual's First Amendment rights.[48]

The First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ."[49] Thus, appellate courts are reluctant to articulate specific guidelines for lower courts to follow when it becomes necessary to consider religion as a factor in child custody disputes. Courts must consider the "jurisprudence of the religion clauses and the findings of social science concerning the relationship between religion and the welfare of individuals and society."[50]

A. *The Establishment Clause*

Judicial consideration of an individual's religious values often warrants concern for possible violations of the Establishment Clause of the First Amendment.[51] Judges must be careful of "impermissibly favoring religion over irreligion or favoring one religion over others, primarily advancing or endorsing religion generally, or excessively entangling the government with religion—any or all of which could be considered an 'establishment' under the clause."[52]

When examining the constitutional limitations on the use of religion as a factor in child custody and visitation decisions, one must consider the Supreme Court's decision in *Lemon v. Kurtzman*.[53] In *Lemon*, the Supreme Court articulated a three-prong test, commonly referred to as the Lemon Test, for determining whether state action violates the Establishment Clause.[54] Under the Lemon Test, a government activity is constitutionally prohibited if it (1) lacks a secular purpose; (2) has a primary effect of advancing or inhibiting religion; or (3) constitutes excessive government entanglement with religion.[55] The Court in *Lemon* explained that the objective behind the entanglement test is to prevent, as much as possible, the intrusion of the secular state into religion.[56] The Court, however, noted that "some involvement and entanglement are inevitable" and thus "lines must be drawn."[57] The Supreme Court concluded that the Establishment Clause of the First Amend-

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47. *Id.* at 1271-72.
48. Méndez, *supra* note 4, at 340.
49. U.S. CONST. amend. I.
50. Beschle, *supra* note 1, at 384.
51. Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 456 (1993).
52. *Id.* at 457-58.
53. Lemon v. Kurtzman, 403 U.S. 602 (1971).
54. *Id.* at 612.
55. *Id.* at 612-13.
56. *Id.* at 614.
57. *Id.* at 625.

ment prohibits courts from resolving "controversies over religious doctrine and practice."[58]

The goal of the Establishment Clause is to maintain "a wall of separation between the church and state."[59] Under the Establishment Clause, laws granting a denominational preference are regarded as suspect and are subject to the strict scrutiny of the court.[60] These laws may be justified only by demonstrating a compelling governmental interest and that the law is narrowly drawn to further that interest.[61] Thus, the Establishment Clause prohibits courts from deciding custody disputes by choosing one parent's religion over another.[62]

B. *The Free Exercise Clause*

The other First Amendment provision regarding religion—the Free Exercise Clause—commands that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[63] The modern invocation of the Free Exercise Clause is quite different from the Establishment Clause.[64] Prior to the 1960s,

> there was little need to dwell on the tension between the religion clauses, because there was very little independent force to the [F]ree [E]xercise [C]lause. Cases rejecting Mormon claims of constitutionally compelled exemption from anti-polygamy laws established the principle that the clause

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58. Beschle, *supra* note 1, at 415 n.210.

59. *Id.* at 390 n.42 (citing Thomas Jefferson, Reply to a Committee of the Danbury Baptist Association, *in* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (H.A. Washington ed., 1854)).

60. Larson v. Valente, 456 U.S. 228, 229 (1982). *But see* Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (refusing to apply strict scrutiny to analyze the presence of a publicly owned crèche in the midst of a Christmas display on public property because the crèche had secular purposes as well as religious purposes).

61. Larson v. Valente, 456 U.S. at 246-47. The Supreme Court considered a Minnesota law that granted certain preferences to religious organizations receiving "more than half of their total contributions from members or affiliated organizations." *Id.* at 231-32. The Court stated that the law granted "denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* at 246. Thus, the law could be justified only if it served a compelling governmental interest and was "closely fitted to further that interest." *Id.* at 247.

62. Jonathan Pfeffer, *Religion in the Upbringing of Children*, 35 B.U. L. REV. 333, 366 (1955). Courts generally agree that in most cases "the unconventionality or unpopularity of the applicant's religion may not be considered in fixing custody." *Id.*

63. U.S. CONST. amend. I.

64. Beschle, *supra* note 1, at 392; *see also* Thorton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding that a Connecticut state statute allowing an employee the right to refuse to work on the employee's Sabbath violated the Establishment Clause, regardless of the fact that it upheld the employee's Free Exercise right).

> protected only belief and expression of belief, and not "actions which were in violation of social duties or subversive of good order."[65]

The Free Exercise Clause strongly resembled the Free Speech Clause in that it protected religious beliefs or expression, but not actions.[66]

The Supreme Court in 1963 explicitly extended the Free Exercise Clause to cover religious activity.[67] The Court in *Sherbert v. Verner*[68] considered whether the state had a compelling interest which would justify the "substantial infringement of [an individual's] First Amendment right."[69] The Court ruled that a South Carolina law violated the Free Exercise Clause when an unemployment compensation statute denied benefits to a claimant who refused to work, because of religious beliefs, on her Sabbath.[70] Furthermore, the Supreme Court held in *Wisconsin v. Yoder*[71] that parental authority in matters of religious upbringing may be encroached upon only on a showing of a "substantial threat" of "physical or mental harm of the child or to the public safety, peace, order, or welfare."[72] Many courts, however, have been forced to inquire into the parent's religion. The inquiry should be allowed only when it is necessary to determine whether the parent's religion will adversely affect the child's health or safety.[73]

Other courts have been allowed to intervene more freely into a parent's religious practices during custody disputes.[74] "The reason for this judicial intervention into religion is rooted in the nature of child custody cases."[75] Child custody cases arise when marriages dissolve and battles for the children ensue, requiring the judicial system to determine which parent would provide the best care for the child.[76] The United States Supreme Court has repeatedly opined that the state has an interest in "safeguarding the physical and psychological well-being of a minor."[77] While judicial intervention cannot

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65. Beschle, *supra* note 1, at 392 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

66. *Id.*

67. *Id.* at 393.

68. Sherbert v. Verner, 374 U.S. 398 (1963).

69. *Id.* at 406.

70. *Id.* at 403.

71. Wisconsin v. Yoder, 406 U.S. 205 (1972).

72. *Id.* at 230.

73. Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1705 (1984) [hereinafter *Factoring Religion into the Best Interest Equation*].

74. Méndez, *supra* note 4, at 341. For example, a Michigan court held that "[i]t is difficult to conceive of a more compelling or vital state interest than the welfare of minor children as it is affected by the dissolution of their parents civil marriage union." Fisher v. Fisher, 324 N.W.2d 582, 584 (Mich. Ct. App. 1982) (applying a constitutional balancing test to determine whether a parent's "religious convictions may be subordinated" to the state).

75. Méndez, *supra* note 4, at 341.

76. *Id.* at 341-42.

77. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

destroy the basic right of freedom of religion, "clear guidelines must exist as to the extent religious factors are to be considered in a child custody determination."[78]

IV. JUDICIAL POSITIONS IN ANALYZING RELIGION AS A FACTOR IN CUSTODY DISPUTES

There are a variety of positions courts around the country take with regard to considering religion in child custody disputes. A limited number of courts place religion beyond the scope of the inquiry altogether.[79] Other courts, however, consider the impact of religion, particularly when the religious practices of one parent pose immediate and substantial threats to the child's well-being.[80] These courts, however, are impartial as to a parent's religion and do not disqualify any parent because of particular beliefs.[81]

A. *Considering Religion Only When Religion Threatens the Well-Being of the Child*

Many courts believe a parent's religious practice becomes relevant when the practice is illegal, immoral, or presents a substantial threat of imminent

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78. Méndez, *supra* note 4, at 342.

79. *See* Osteraas v. Osteraas, 859 P.2d 948, 952 (Idaho 1993) (stating that courts should "refrain from entering the tangled web of religion altogether" in deciding child custody cases); *see also* Salvaggio v. Barnett, 248 S.W.2d 244, 247 (Tex. Civ. App. 1952) (holding that the principle of separation of church and state restrains the powers of the court in interfering with the religious views or teachings of either parent).

80. *See* Bonjour v. Bonjour, 592 P.2d 1233, 1239 (Alaska 1979) (remanding the trial court determination of custody when the trial court relied on religious affiliation without a finding of the child's actual religious needs or that the parent's beliefs would pose a threat to the child); *see also* Osier v. Osier, 410 A.2d 1027, 1029-30 (Me. 1980) (stating that a custody determination must first be made in accordance with the best interest of the child without reference to religious practices, and, if the court finds a conflict of interest, then the custody order must be issued with the least possible infringement on the parent's religious freedom); Levitsky v. Levitsky, 190 A.2d 621, 626 (Md. 1963) (finding that the mother's religious beliefs were a serious threat to the child's life; the court left custody with the mother, but entered an order eliminating any requirement for her consent to blood transfusions for the child); Munoz v. Munoz, 489 P.2d 1133, 1135 (Wash. 1971) (finding that the court's order prohibiting the father from instructing his children on his religious faith was an abuse of discretion absent a showing that such instruction would be detrimental to the well-being of the children).

81. *See* Compton v. Gilmore, 560 P.2d 861, 863 (Idaho 1977) (holding that the court should be "strictly impartial" regarding the parent's religious preference unless there is an "affirmative showing" that the child's general welfare is affected); Kirchner v. Caughey, 606 A.2d 257, 262 (Md. 1992) (balancing physical safety against religious freedom); Fisher v. Fisher, 324 N.W.2d 582, 585 (Mich. Ct. App. 1982) (holding that after a purely secular decision is made regarding custody, the court will consider a parent's religion only if religious practices threaten the best interest of the child).

harm to the child as a direct result of exposure to that practice.[82] Courts, however, have inconsistently determined when religious factors may be relied upon by a court in evaluating child custody disputes.[83] The narrowest view, the "actual harm" approach, considers religion to be a "proper factor only upon the showing of actual physical or mental harm to the child due to the religious practices of [the parent]."[84] A broader view, the "threatened harm" approach, considers religion if the "religious practices have harmed or threaten to harm the physical or mental well-being of the child."[85]

A judge may require proof that actual harm is being done to the child,[86] while other judges will deny custody when "the prospective custodian hold[s] views which *might* reasonably be considered dangerous to the child's health or morals."[87] Many jurisdictions disagree on the type of harm that is necessary before a court can intervene and consider religion in a custody suit.[88] These contradictions demonstrate the lack of precision in custody suits, precision that would be useful to a trial judge in making child custody determinations.[89]

B. *Considering Religion as a Factor in the Best Interest of the Child Equation*

The least restrictive approach considers religion to be a proper factor in the best interest analysis if it is related to the temporal welfare of the child.[90] Jurisdictions considering religion in the best interest of the child equation also widely differ in determining the degree of importance religion should be given in determining the temporal well-being of a child.[91] Courts allowing

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82. Carolyn R. Wah, *Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation*, 28 FAM. L.Q. 269, 271 (1994).

83. Miller, *supra* note 46, at 1285.

84. *Id.* at 1286.

85. *Id.*

86. Quiner v. Quiner, 59 Cal. Rptr. 503, 516 (Ct. App. 1967) (holding that "[e]vidence must be produced which will sustain a finding that there is actual impairment of physical, emotional and mental well-being contrary to the best interest of the child"); *see, e.g.*, *In re* Marriage of Hadeen, 619 P.2d 374, 382-83 (Wash. Ct. App. 1980) (holding that religious considerations were improper because the trial court had not determined that the mother's church membership "posed a threat to the mental or physical welfare of the children").

87. Welker v. Welker, 129 N.W.2d 134, 138 (Wis. 1964) (emphasis added).

88. *Compare* Osier v. Osier, 410 A.2d 1027, 1028 (Me. 1980) (holding that the court could not consider the fact that the mother, a Jehovah's Witness, would not consent to a blood transfusion for her son should it become necessary, when there was no showing concerning the child's proneness to accidents or illnesses requiring transfusions) *with* Battaglia v. Battaglia, 172 N.Y.S.2d 361, 362 (Sup. Ct. 1958) (granting custody to the father upon a showing that the mother, a Jehovah's Witness, actively followed her religion, which refused to permit their children to have blood transfusions).

89. Méndez, *supra* note 4, at 339.

90. Miller, *supra* note 46, at 1285-86.

91. *Id.* at 1285.

religion as a factor in the best interest equation strictly maintain the position that impartiality must prevail by not favoring one religion over another.[92]

The Supreme Court of Kansas has repeatedly held that "[r]eligion and church attendance, although factors to be considered, are not alone sufficient to determine the best interest of minor children."[93] Missouri courts similarly hold that while they may not prefer one religion over another, they may consider the child's religious training.[94] In this situation, the courts do not choose one religion over another, rather, the courts permit the use of religious training as a defense to a custodial challenge.[95] New Jersey courts also consider a child's religious training in determining the general welfare of the child.[96] "Two North Carolina cases have recognized that religious practices of a particular party can be a favorable factor; that is, the religious environment provided by one parent can work to his advantage" in custody disputes.[97] The general rule of factoring religion into the best interest of the child equation allows courts to acknowledge the parents' religious practices as they relate to the health and safety of the child, but does not permit an inquiry into the general beliefs and doctrines of a specific religion.

Courts holding that religion can be considered in custody disputes have not expounded on the extent to which courts may consider religion. Consequently, these courts "have raised as many questions as they have answered."[98] The answer lies in the hands of the state legislatures to establish clearly whether religion may be considered as a factor in the best interest of the child.

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92. Méndez, *supra* note 4, at 347-48.

93. *See, e.g.*, Anhalt v. Fesler, 636 P.2d 224, 226 (Kan. 1981).

94. *See* Waites v. Waites, 567 S.W.2d 326, 332 (Mo. 1978).

95. *Id.*

96. *See* Hoefers v. Jones, 672 A.2d 1299, 1309 (N.J. Super. Ct. 1994).

97. Miller, *supra* note 46, at 1283. *See* Spence v. Durham, 198 S.E.2d 537, 543 (N.C. 1973) (awarding custody to the children's mother upon a finding that, among other factors, she was "an active member of Trinity Methodist Church" and attended to the religious education of her children); *In re* King, 181 S.E.2d 221, 221 (N.C. 1971) (listing the mother's participation in the local church as a favorable attribute for the mother).

98. Beschle, *supra* note 1, at 397-98.

> If the statement means that religious factors may never outweigh more tangible factors, then apparently religion can be used only to bolster the same decision that would have been made without its consideration and would never tip the balance one way or the other. Such an interpretation would make religion irrelevant. On the other hand, if the statement means only that some secular interests, in addition to religious interests, must support a custody award, then it is scarcely a limitation on courts at all.

Id. (citations omitted).

C. *Maine's Two-Prong Approach for Considering Religion*

The Supreme Court of Maine in *Osier v. Osier*[99] developed a two-prong test to guide Maine courts when considering religion in child custody disputes. Under the *Osier* approach, a court must first make a preliminary determination of which parent would be the better custodian independently of "any consideration [of] either parent's religious practices."[100] If the parent without a special religious consideration prevails on the preliminary inquiry, the entire matter is settled.[101] If, however, the court initially concludes that the child's welfare is best served by awarding custody to the parent with a special religious consideration, the court "must proceed along a two-stage analysis designed to protect [the parent's] rights against unwarranted infringement."[102] The analysis requires a determination of whether the child's "well-being is immediately and substantially endangered by the religious practice in question."[103] If the answer is yes, then the court will "engage in a deliberate and articulated balancing of the conflicting interests involved" attempting to make "the least possible infringement upon the parent's liberty interest consistent with the child's well-being."[104] Under the *Osier* analysis the court thoroughly analyzes the competing interests, and if there is any intrusion into religion it is only made upon a finding that nonintrusive means are lacking.[105]

V. THE NEED FOR IOWA TO FACTOR RELIGION INTO CHILD CUSTODY DISPUTES

A. *The Iowa Legislature Needs to Establish Guidelines for Considering Religion as a Factor*

Iowa must follow Maine's approach[106] by adopting a child custody statute that includes religion as a factor in the best interest of the child equation, as well as outlining a test to guide Iowa courts in applying that statute. Currently, the best interest of the child is the paramount consideration in child custody disputes in Iowa.[107] Other state statutes providing for judicial determination of custody "generally allow judges great discretion in deciding what is in the child's best interest."[108] Some statutes, however, fail to provide any guidelines for judges, and only seven states actually include religion as a

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99. Osier v. Osier, 410 A.2d 1027 (Me. 1980).
100. *Id.* at 1029.
101. *Id.*
102. *Id.* at 1030.
103. *Id.*
104. *Id.*
105. *Id.*
106. *See* discussion *supra* Part IV.C.
107. *Factoring Religion into the Best Interest Equation*, *supra* note 73, at 1702 n.1 (referencing *In re* Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa Ct. App. 1982)).
108. *Id.* at 1702.

factor to consider in awarding custody.[109] Iowa Code section 598.41 mandates consideration of the following factors in determining the custody arrangement that is in the best interest of the minor child:

> a. Whether each parent would be a suitable custodian for the child.
> b. Whether the psychological and emotional needs and development of the child will suffer due to the lack of active contact with and attention from both parents.
> c. Whether the parents can communicate with each other regarding the child's needs.
> d. Whether both parents have actively cared for the child before and since the separation.
> e. Whether each parent can support the other parent's relationship with the child.
> f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
> g. Whether one or both parents agree or are opposed to joint custody.
> h. The geographic proximity of the parents.
> i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.[110]

There is, however, no mention of religion in the list of relevant factors to consider.[111] Unlike Iowa, Alaska specifically addresses religion in Alaska Code section 25.24.150, which prescribes the powers and duties of courts in awarding custody of children pursuant to a divorce proceeding.[112] In pertinent part, Alaska Code section 25.24.150 requires the court to consider all relevant factors including: "the physical, emotional, mental, *religious*, and social needs of the child."[113]

Alaska was one of the first states to have a statute specifically allowing a court to consider the religious needs of a minor in a child custody proceeding.[114] In *Bonjour v. Bonjour*,[115] the Alaska Supreme Court noted that the majority of statutes from other jurisdictions are framed in more general

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109. *Id.*; *see supra* note 40.

110. IOWA CODE § 598.41(3) (1997).

111. This does not mean that Iowa solely considers the specific factors enumerated in the statute. In a recent Iowa Supreme Court decision, the court gave weight to the mother's strongly held cultural beliefs, a factor not included in Iowa Code section 598.41. *See In re* Marriage of Kleist, 538 N.W.2d 273, 277 (Iowa 1995).

112. ALASKA STAT. § 25.24.150(c)(1) (Michie 1995); *see* Bonjour v. Bonjour, 592 P.2d 1233, 1236 (Alaska 1979).

113. ALASKA STAT. § 25.24.150(c)(1) (Michie 1995) (emphasis added).

114. Bonjour v. Bonjour, 592 P.2d at 1238.

115. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).

terms.[116] "While these statutes do not list religious factors among those to be considered by the courts, many appellate decisions have considered the propriety of a trial court's investigation of religious factors in child custody proceedings."[117] The court further noted that "[a] court's task in a child custody case is to determine which parent will better serve the best interest of the child."[118] Myriad factors may "be considered in working toward this goal. To hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interest of the child."[119] Iowa must adopt a child custody statute similar to Alaska's statute in order to clarify the need to consider religion as a factor in child custody disputes.

B. *Iowa Must Adopt a Formal Analysis for Evaluating Religion*

Iowa cannot simply add religion to its list of relevant factors to consider in evaluating the best interest of a child. There is also a strong need for the legislative branch to establish how and when to consider religion in these disputes and the reasons behind the consideration. Trial judges may have some discretion in factoring religion into the best interest analysis because the best interest equation varies for each child. This is not to say, however, that guidelines would not be useful to avoid arbitrary decisions and to allow for some type of uniformity.[120]

In the recent Iowa decision of *In re Marriage of Anderson*,[121] the court offered no guidelines for evaluating religion in a child custody case. The Iowa Court of Appeals ruled on whether the trial court punished the petitioner, Eileen Buske Anderson, for her religious views by awarding physical care of the couple's three children to her husband, Wayne D. Anderson.[122] Both parents were "educated, articulate, and responsible, and truly concerned about their children's well being."[123] The court concluded that either party would be an excellent physical custodian of the couple's three children.[124] Mrs. Anderson, however, "contended the trial court gave improper consideration to her religious beliefs in arriving at its decision" that Mr. Anderson was the better custodian.[125] While the court of appeals found that the trial court did not conclude Mrs. Anderson's religious belief and practices were a factor that prevented her from receiving custody of the children, the court agreed with Mrs. Anderson "that she has the constitutional right to practice

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116. *Id.* at 1238.
117. *Id.*
118. *Id.*
119. *Id.*
120. *See* Beschle, *supra* note 1, at 396-97.
121. *In re* Marriage of Anderson, 509 N.W.2d 138 (Iowa Ct. App. 1993).
122. *Id.* at 141.
123. *Id.*
124. *Id.*
125. *Id.*

the religion of her choosing."[126] Furthermore, the court found nothing about Mrs. Anderson's religious practice that threatened "the physical or mental health of the children."[127] Religion, therefore, should not have been a factor in determining custody of the children.[128]

A dissenting opinion by Chief Judge Oxberger pointed out the need for the court to establish guidelines in evaluating religion in custody disputes.[129] Oxberger used the two-pronged analysis developed by the Supreme Court of Maine in *Osier v. Osier* to determine if a parent's religion should be considered in a child custody dispute.[130] Judge Oxberger was correct in noting that Iowa must adopt guidelines similar to those set out in Alaska and Maine.

VI. CONCLUSION

Guidelines are essential in order for courts to promote what is in the best interest of the child, while at the same time respecting the constitutional rights of the parent's religious beliefs. If there are no clear guidelines as to when compelling reasons exist for courts to intervene in child custody disputes involving religion, then "judicial eagerness to prevent all harms to children after divorce may lead courts to intervene where intervention is unwise and unprofitable."[131] On the other hand, courts may lean to the other extreme and refuse to consider religion at all in deciding the best interest of the child.[132] Without clear guidelines, inconsistencies will continue to plague the courtroom.

Courts need direction as to when, and in what manner, intervention is appropriate. Precision and uniformity are essential in preventing judges from using their own discretion in determining whether religion should be considered in a particular custody dispute. With the rising incidence of religiously mixed marriages and the alarming number of marriages ending in divorce, it is clear the issue of religion in child custody disputes is not going to disappear.[133] It is up to state legislatures to establish guidelines so decisions based on the best interest of each child are assured.

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 145 (Oxberger, C.J., dissenting).

130. *Id.* (noting that Mrs. Anderson acquired a "religious zeal" going from one church to another and that she "would cloister herself in her room at home to read her Bible" and refused to participate in family functions, thus spending less and less time with her children).

131. Méndez, *supra* note 4, at 346 (quoting Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 901 (1992)).

132. *See* Osteraas v. Osteraas, 859 P.2d 948, 953 (Idaho 1993).

133. Beschle, *supra* note 1, at 383-84.