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Religion, Child Custody, and Visitation

By MARGARET F. BRINIG

In January of 2017, Robert Bear was sentenced to incarceration for seven to twenty-three months for desecrating a church in Pennsylvania by gluing thirty-seven posters to its outside walls and sidewalks and disturbing the church service going on inside despite police orders that he stop. At the time, he was eighty-seven years old. The dispute dated back to 1972, when Bear was excommunicated from the Reformed Mennonite Church for questioning church doctrine about giving communion to a woman accused of adultery. The excommunication resulted in his shunning, including by his then-wife and his six children, and, eventually, in her divorcing him, continued estrangement

from the children, and a lengthy series of legal actions as he unsuccessfully sought reunion (or even contact) with his family or withdrawal of church actions against him.

The Family that Prays Together May Not Stay Together

Folk wisdom has it that the family that prays together stays together. Empirical studies bear this out—couples who share an intensity of religious faith, even though not necessarily of the same faith tradition, do tend to marry in the first place rather than cohabit, have more stable marriages, have children, stay together longer even in troubled relationships, and be



more likely to wait for divorce until any children are adults.

Despite this rosy picture, some religious couples do divorce, and these breakups are more fault-driven and acrimonious, even with no-fault divorce available, than those of their nonreligious peers (though admittedly few rise to the level of rancor in the Bears' case). That is, religious couples are more likely to use fault grounds in the states where they are available, to make more motions, to litigate rather than settle disputes, and to continue their acrimony with post-order motions. And the vast majority of the conflicts involve minor children, and specifically parenting time (custody and visitation). Of course, post-divorce conflict centered on children and seemingly oblivious to their needs is not a new phenomenon; it has been the subject of novels (and later, films) at least since the nineteenth century. While psychologists and counselors are united in their disfavor of parental conflict in front of or involving children, anyone in family practice has seen seemingly sane and thoughtful people engage in exactly this kind of destructive behavior post-breakup.

Religious Provisions: Enforceable?

The American Law Institute placed religious considerations, along with sexual orientation, wealth, and race, in its "should

not be considered" list, and case law also suggests that religion (or lack of it) should not be grounds for preferring one fit parent over another. Still, since most couples resolve their marital issues through settlement and some states require consideration of religion in parenting plans, there is no First Amendment barrier to parents who, without state intervention, take religion into consideration. Enforcement of such agreements, even if sincere and whether initiated by parents or grandparents, is a different matter.

Religious Issues in Post-Divorce Litigation

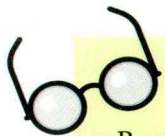
There are actually three types of cases in which religious issues may play a role in post-divorce litigation. One type involves legitimate concerns over the child's religious upbringing given the parents' living apart. A second involves less sincere attempts to harass the other parent post-divorce under the guise of religious concerns. Finally, there are extreme cases in which the state itself takes a *parens patriae* role post-divorce in the face of a parent's religious convictions.

Parents may have religious conflicts that did not surface during the marriage under a variety of circumstances. While many Americans still marry in religious ceremonies, 2017 wedding planning data suggests that church weddings made



up less than a quarter of all U.S. ceremonies. To enable couples to marry in churches, temples, or mosques, there may be pressure to sign an agreement, not legally enforceable, to bring children up in a particular tradition or to attend religious instruction prior to marriage. Sometimes this pressure may come not from the couple themselves but, rather, from one of their parents. “Mixed” marriage itself is increasing; only sixty percent of couples marrying after 2010 shared their religious faith at the time of marriage, according to a Pew survey. Further, more than forty percent of Americans, most of them Christians, switch religious affiliation during their lives. When conversion follows a divorce or the marriages were mixed to begin with or the divorce itself makes a parent less inclined to be involved in religious practices, the desire to present children with a uniform life-view may disappear.

As previously noted, there are parents who will use religion



Useful Sources

- *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975).
- *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008), *aff’d sub nom. In re Tex. Dep’t of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008).
- *O’Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986)
- *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., concurring and dissenting)
- *Baker v. Baker*, 1997 WL 731939 (Tenn. App. 1997)
- *Quiner v. Quiner*, 59 Cal. Rptr. 503 (Cal. App. 1967)
- *Lynch v. Uhlenhopp*, 78 N.W.2d 491 (Iowa 1956)
- *Grayman v. Hession*, 446 N.Y.S.2d 505 (N.Y. App. Div. 1982)
- *Brown v. Szakal*, 514 A.2d 81 (N.J. Super. Ch. Div. 1986)
- *United States v. Nagarwala*, 1018 WL 405122 (E.D. Mich. 2018)
- PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 (Am. Law Inst. 2002).
- Margaret F. Brinig, *Religion and Child Custody*, 2016 ILL. L. REV. 1369
- Margaret F. Brinig, *Children’s Beliefs and Family Law*, 58 EMORY L.J. 55 (2008)
- Emily S. Buss, *What Does Frieda Yoder Believe?* 2 U. PA. J. CONST. L. 53 (1999)
- Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J. L. REFORM 879 (1992).

as a vehicle for continuing marital conflict. Such conflict may lead to post-divorce litigation, despite litigation’s negative effect on children. In some ways, it may be easier for a parent—or the court—to understand this kind of conflict than the conflict arising out of the other parent’s religious conversion (or reversion).

A change of custody request requires a showing of changed circumstances and parents do sometimes go to court to seek adjustments in visitation/parenting arrangements or restrictions on them. If they do, alleging unfounded abuse, especially sexual abuse or “parental alienation” dramatically escalates the conflict, and the tactic may backfire. If they wish to question the other parent’s choice of recreational activities, they are likely to be unsuccessful in overcoming the autonomy typically given to parents. Alleging interference with the religious freedom of the parents, however, may be both more palatable and more successful.

Success comes both because of First Amendment religious freedom guarantees and the reluctance of courts to question any religion’s doctrine because of the Establishment Clause (as ultimately occurred for the shunning requirements of the Reformed Mennonite Church in the *Bear* case). There are therefore quite a large number of cases involving questions relating to such matters from nearly all jurisdictions, including, for example: whether the noncustodial non-Jewish parent must keep kosher when the primary custodian is Orthodox-Jewish; whether fasting occurs when religious traditions require it; whether the noncustodial parent must take the children to religious services or religious school during his or her weekends with the child or even (in a nonreported case) whether an LDS father should always be the one to accompany his children to services even though he was not the primary custodial parent because of the importance of the father taking the lead role in religious matters in that faith; and whether a noncustodial atheist father could bring an action challenging “under God” in the Pledge of Allegiance. These are difficult cases that courts do not want to decide (and sometimes cannot decide). During an ongoing marriage, courts will never intervene in such matters in deference to a series of Supreme Court and state court cases, and they are not likely to become involved when parents bring up such matters post-divorce.

The state does get involved, of course, in cases in which the child’s life and well-being is at stake. While this is unlikely where the allegation is that the child may feel ostracized or be isolated because a religious sect’s views are well outside the mainstream, if the child is actually in danger, the state may either change legal custody over to the other parent (typically in medical treatment cases) or actually change the parent with whom the child lives. Thus, actions precipitated by the other parent’s concern may be successful if the custodial parent refuses a blood transfusion or other lifesaving medical care for a minor child; when a cult allegedly involves brainwashing-like tactics that threaten to alienate the child from the more mainstream parent; when a

For Clients: A List of Questions about Religion

Given the above observations, what should the family practitioner do? As with most matters involving custody and visitation, the best approach is to deal with important issues at the planning stage, before problems arise. While your client may be angry and upset, he or she will probably at least say that the children's welfare and happiness is the most important consideration. Here are some questions, or lines of questions, that you might consider, in addition to the routine questions about children's ages, interests, gender, health, living arrangements, friends, education, and parenting until now.

- How important is religion to you? To your spouse?
- During your relationship with the other parent, how were you handling religion or religious training?
- Have you already reached agreement as to what should happen now?
- What would it look like if you were to design a plan for religious upbringing independently of the other parent?
- What do you imagine the other parent will want?

- Do you believe this (or this combination) is achievable or practical?
- Can you be objective about what might work but still hold true to your own beliefs?
- Do you have a sense of what your older child would want?

A different set of questions might help illuminate religious interests if your client wishes to revisit religious questions after a judge issues an order. The state will probably require some change from the initial order. Other questions might be:

- Why do you or your ex want to make this change?
- How do you know?
- What has he/she told you?
- How do you imagine this change might affect the children?
- If they are old enough to state thoughtful preferences, what have the children told you about what they want?

custodial parent refuses vaccination in a time of an epidemic (when even intact families' religious traditions may be thwarted); or where a dangerous practice such as venomous snake-handling at services is involved. In some of these cases, a change of physical custody action may be successful, whereas, if the parents were united in their practice, a maltreatment action might remove custody from both. In slightly less egregious cases, there have been successful alienation of affections actions where these are still viable torts or suits for intentional infliction of emotional distress.

In addition to dealing with religious conflicts as they arise, some states have legislated solutions to prevent, or at least minimize, resort to the courts. One such solution is to give religious upbringing choices to whoever has primary custody. Another is to allocate religious upbringing decisions to whoever has legal custody over that range of decisions (even if that person does not have primary physical custody). Some states allow whichever parent currently has parenting time to expose the child to his or her religious tradition. One other solution, particularly in states requiring parenting plans, is to have the parents decide who will have time with the children on religious holidays and which, if any, religious tradition will be observed. The texts of the resulting agreements often make clear in the parenting-time provisions that the other parent's religion, or lack thereof, shall not be questioned or mocked in the child's hearing or otherwise.

The Child's Independent Interests

Finally, no discussion involving religion and children is complete without considering the child's independent interests,

despite the usual presumption that parents are acting in the child's best interests. The law gives adolescents independent religious-related rights, especially as these concern abortion (for mature minors, with judicial bypass proceedings), contraception, and marriage, and the Supreme Court has increasingly recognized these in religious belief cases, beginning with Justice Douglas's concurrence and dissent in the *Yoder* Amish education case and including Justice Stevens's majority opinion in *Oak Grove Unified School District v. Newdow*, the Pledge of Allegiance case. These considerations may be particularly important in the religious and cultural contexts for some Muslim immigrant families, where, for example, there is current federal court litigation involving the legislation criminalizing prepubescent female circumcision. It may also be relevant for families belonging to sects such as the Fundamentalist Church of Jesus Christ of the Latter Day Saints, which has been involved in many legal actions involving underage marriage and polygamy. **FA**



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