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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 (1991)

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A Tale of Two Religions: A Contractual Approach to Religion As a Factor in Child Custody and Visitation Disputes

Rebecca Korzec*

> And when they had brought a sword before the king, he said, "Divide the living child in two and give half to the one, and half to the other." But the woman whose child was alive said to the king, "I beseech thee, my Lord, give her the child alive and do not kill it." But the other said, "Let it be neither mine nor thine, but divide it."
>
> I *Kings* 3:24-26

I. INTRODUCTION

Mr. Simms was Jewish; his wife-to-be was Catholic. They married in a Jewish religious ceremony and raised their children as Jews. Following their separation, Mrs. Simms resumed the practice of Catholicism, taking the children to church with her. Mr. Simms objected. In 1987, a Colorado district court granted physical custody of the Simms children to their Catholic mother, while granting "spiritual custody"[1] "for the purposes of determining religious training" to their Jewish father.[2]

The problem of religious differences between divorced parents is increasing. Cases such as *Simms* require courts to make Solomonic judgments. What role should the religious beliefs and needs of parents and children play in child custody and visitation decisions? Should courts even consider religious preferences or should they remain "neutral" by refusing to consider religious questions under any circumstances?

Ultimately, the right to decide child custody and visitation disputes between parents rests in the power of the state acting as parens patriae: society as the ultimate parent. Without question, child custody and visitation decisions limit parental control in child-rearing. Private con-

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1. Johnson, *Struggle for Custody of Children's Faith Becomes Nightmare*, N.Y. Times, Dec. 11, 1988, at 1, col. 1.

2. Gersovitz v. Siegner, 238 Mont. 506, 509-10, 779 P.2d 883, 885 (1989) (quoting the appellant citing *In re* Marriage of Simms (unpublished decision)).

cerns are transformed into state-regulated public rights. Decisions concerning the role of religion in custody and visitation cases have failed to resolve the difficult constitutional, ethical and moral issues involved.[3]

However, resolution of these questions is crucial. With more than fifty percent of marriages ending in divorce, an alarming number of children find their lives disrupted.[4] When the original family's stability is shattered, children become particularly vulnerable to parental conflict in all areas.[5] Religious differences, affecting the most sensitive, personal concerns of the individual, are likely to create conflicts. Consequently, courts often are required to make difficult custody decisions—decisions which usually are couched in terms of the best interests of the child.[6] Are religious concerns valid factors within the "best interests" formula?[7] And, if so, should the prior express and implied agreements of the parents be validated?

This article focuses on the role of religious conflict between parents in determining child custody and visitation disputes. It suggests a framework for reconciling parental control over religious observance and training with the state's duty to protect the child's best interests. First, it examines the history of English and American child custody law and analyzes modern custody cases in which religion is a factor. Next, it addresses the alarming recent attempt by courts to resolve religious disputes with a shared custody approach, awarding "spiritual custody" to one parent and "physical custody" to the other.

Finally, this article proposes a contractual approach to the question of religion in parental child custody and visitation disputes. Since reli-

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3. However, there are significant scholarly contributions which address these questions. *See, e.g.*, Beschle, *God Bless The Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989); Mangrum, *Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981). *See also* Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984). The potential conflict between the constitutional rights of parent and child is discussed in Note, *Developments in the Law - The Constitution and the Family*, 93 HARV. L. REV. 1156, 1377-83 (1980).

4. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 85 (1989).

5. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 108-20 (1980). Interestingly, children in the midst of parental divorce often perceived their parents to be "unhappy." Yet the overwhelming majority preferred the unhappy marriage to the divorce. *Id.* at 10.

6. *See generally* S. KRAM & N. FRANK, THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW 3 (1982); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

7. 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 (1986). *See also* Foster & Freed, *Life with Father*, 11 FAM. L.Q. 321 (1978).

gion is a legitimate issue to be considered in fashioning child custody decisions, courts should be required to consider the religious needs of the child, as a component of the child's educational and psychological well-being. However, constitutional issues need not be reached. Indeed, it is likely that courts can avoid most troublesome constitutional issues by enforcing the express and implied contracts created by the parties before their divorce. Ultimately, the approach suggested here most effectively protects the actual religious needs of parents and children by enforcing the express and implied contracts created in the intact, pre-divorce family.

II. Brief History of Child Custody Law

A. *English Common Law Concepts*

Modern child custody law has evolved from the historical Roman rule of *patria potesta*[8] to the current standard of best interests of the child.[9] Historically, the father possessed absolute authority over his legitimate child.[10] As the legal, religious, and moral head of the family, the father controlled the education, religious training, person and property of the child. Blackstone described the supremacy of these paternal rights at common law as follows:

> The power of a parent by our English laws is . . . still sufficient to keep the child in order and obedience. . . . The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect,) the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, . . . when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.[11]

Nonetheless, this absolute parental power was qualified by Lord Mansfield in the cases of *Rex v. Delaval*[12] and *Blissets Case*.[13] In *Delaval*, the father apprenticed his daughter to a music teacher, who in turn assigned the indenture to Delaval, ostensibly for music training, but in

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8. According to this doctrine of exclusive paternal ownership of the child, the father even had the right to terminate the child's life. *See, e.g.*, The King v. Greenhill, 111 Eng. Rep. 926 (1836).

9. *See* Foster & Freed, *supra* note 7, at 325-29.

10. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. Rev. 205 (1971).

11. W. Blackstone, Commentaries on the Laws of England 452-53 (17th ed. 1830).

12. 97 Eng. Rep. 913 (K.B. 1763).

13. 98 Eng. Rep. 899 (K.B. 1773). See also Foster & Freed, *supra* note 7, at 325-26 for a general discussion of the significance of these cases in the development of child custody law.

fact to be kept as a mistress.[14] Mansfield granted a writ of habeas corpus setting the child free. As a result, the father was deprived of a significant property right to the 'services of his child' as the 'transaction' was "grossly against public decency and good manners."[15]

Similarly, *Blissets Case* represented a further encroachment on the common law rule of paternal control over children. In that custody case, the wife left her abusive husband, taking their six-year old daughter with her. In denying the writ of habeas corpus filed by the father to obtain his child, Lord Mansfield concluded that the natural right of the father would be limited as follows:

> [T]he paternal authority as to its civil force was founded in nature, and the care presumed which he would take for the education of the child; but if he would not provide for its support, he abandoned his right to the custody of the child's person, or if he would educate it in a manner forbidden by the laws of the State, the public right of the community to superintend the education of its members, and disallow what for its own security and welfare it should see good to disallow, went beyond the right and authority of the father.[16]

Taken together, these cases foreshadowed developments which would eventually emerge as the "best interests" test.[17] For the first time, the interests of the child, rather than the father, dominated.

As previously discussed, the father's common law right to control his legitimate child included the child's religious training. The common law doctrine of *religion sequitur patrem*[18] defined the rule of paternal preference in religious matters concerning his child, provided the father actually professed religious beliefs. The rigidity of this doctrine controlled the chancery decision in *Hawksworth v. Hawksworth*.[19] There, a Roman Catholic father died leaving a Protestant widow and a six month old daughter. The mother raised the child as a Protestant for eight years before the paternal relatives instituted an action demanding that the child be raised as a Catholic. The Lord Justice acknowledged that ordering the child to be raised as a Catholic would not promote her welfare. Nevertheless, he concluded as follows:

> Were I at liberty to follow my own opinion, I should have no hesitation in acceding to (the mother's) argument. For to direct that this ward should be brought up in the Roman Catholic faith will be to create a

14. *Delaval*, 97 Eng. Rep. at 915. The charge was conspiracy to assign a female apprentice "for the purpose of prostitution." *Id.*

15. *Id.*

16. *Blissets*, 98 Eng. Rep. at 900.

17. Foster & Freed, *supra* note 7, at 326.

18. One of the most famous early cases involved the poet Percy Bysshe Shelley, an atheist. Shelley was denied custody of his two young children following the suicide of their mother, in part, because he professed no religious belief. Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817).

19. 6 L.R.-Ch. 539 (1871).

> barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union that ought to be as close, as warm, and as absolute as any known to man; and lastly, to inflict severe pain on both mother and child. But it is clear that no argument which would recognize any right in the widowed mother to bring up her child in a religion different from the father's can be allowed to weigh with me at all. According to the law of this Court the mother has no such right . . . . [T]he child must be brought up in her father's faith.[20]

This decision, supporting the paternal right to control the child's religion even after the father's death, was affirmed on appeal, expressly permitting, "the religion of the father . . . to prevail over the religion of the mother" and even "the interests of the child. . . ."[21]

Gradually, the rigidity of the common law rule upholding paternal control over religious matters was softened by equitable principles, which gave preference to the child's welfare over mindless adherence to common law precepts. Ultimately, this preference for the child's welfare was codified by a series of nineteenth and twentieth century statutes. For example, amendments to the Custody of Infants Act of 1839[22] permitted chancery courts to award custody of children under the age of seven to the mother. Eventually, the welfare of the child emerged as the "first and paramount consideration"[23] in custody decisions. As a result, parental rights have been given increasingly less significance.[24]

B. *The American Approach*

In the United States, courts refused to apply the rule of paternal preference as rigorously as it had been applied in England. Competing with the rule of paternal preference was the emerging tender years doctrine,[25] which gave the mother preference in custody disputes involving young children. Subsequently, the developing best interests doctrine[26] displaced this maternal preference and subordinated the interests of both parents to the child's welfare.

In *Commentaries on Equity Jurisprudence*,[27] Justice Story relied heavily

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20. *Id.* at 540-41 n.1.

21. *Id.* at 545.

22. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., ch. 54, § 1.

23. Guardianship of Minors Act, 1971, 19 & 20 Eliz. 2, ch. 3.

24. Hall, *The Waning of Parental Rights*, 31 CAMBRIDGE L.J. 248 (1972).

25. See Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976) for a discussion of the tender years doctrine.

26. *See generally* S. KRAM & N. FRANK, *supra* note 6.

27. 3 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1742-84 (14th ed. 1918).

on English authority in defining the parameters of American child custody law. Justice Story's primary objective was to establish that the state, under its police power, could intervene against the natural rights of the father to custody and control of the child. Although his analysis of the law of parent and child commenced with the acknowledgment of the indisputable right of the father to have the custody of his children,[28] Justice Story ultimately recognized the state's power to limit paternal rights. For example, in *United States v. Bainbridge*,[29] a father filed a writ of habeas corpus to obtain custody of his minor son who had enlisted in the Navy without paternal consent. Story denied the writ on the basis of the State's superior authority, subject to constitutional limits, to restrict parental rights as required by the public interest:

> Be the right of parents, in relation to the custody and services of their children, whatever they may, they are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition.[30]

Today, most states provide a decisional standard for custody disputes other than judicial discretion. At least twelve states simply provide the "best interests" of the child or the "general welfare" of the child[31] as the standard. Other jurisdictions identify a few general factors that are deemed to be in the child's best interest.[32] Some states have have adopted the Uniform Marriage and Divorce Act, which is essentially a "best interests" test with factors identified.[33] Other jurisdictions have modified the Uniform Act to include other factors.[34] Finally, some jurisdictions provide an extensive list "of factors to be [relied upon] in determining the best interests of the child."[35] Although these statutes sometimes mention the wishes or interests of the parents as a factor in custody cases, the main thrust is the interest of the child, not parental rights.[36]

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28. *Id.* § 1760.

29. 24 F. Cas. 946 (C.C.D. Mass. 1816).

30. *Id.* at 949.

31. Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 YALE L. & POLICY REV. 267, 268 n.3 (1987) (citing ARIZ. REV. STAT. ANN. § 25-326 (1986); CAL. CIV. CODE § 4608 (West 1983 & 1987 Supp.); FLA. STAT. ANN. § 61.13 (West 1984); IND. CODE ANN. § 31-1-11.5-21 (Burns 1986); KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1984); MD. FAM. LAW CODE ANN. § 5-203 (1984 & 1986 Supp.); MICH. STAT. ANN. § 25.312(3) (Callaghan 1984); MO. ANN. STAT. § 452.375 (Vernon 1986); N.J. STAT. ANN. § 9:2-4 (West 1976); TENN. CODE ANN. § 36-6-101 (1986); TEX. FAM. CODE ANN. § 14.07 (Vernon 1986); WIS. STAT. ANN. § 767.24 (West 1981)).

32. *Id.* at 268.

33. *See* UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

34. *See* Note, *Child Custody Modification Under The Uniform Marriage and Divorce Act: A Statute To End The Tug-of-War?*, 67 WASH. U.L.Q. 923, 926 n.22 (1989).

35. *See* Charlow, *supra* note 31, at 268.

36. See generally Chambers, *Rethinking the Substantive Rules for Custody Disputes in*

Clearly, in the law of child custody the "best interests" of the child has replaced the almost absolute preference for paternal rights. Notwithstanding this evolution, the apparent clarity of the "best interests" standard vanishes when child custody cases raise constitutional issues which the courts feel compelled to consider. In the end, courts may be forced to balance constitutional rights with the "best interests" standard.

III. Constitutional Issues and Child Custody

Both the Free Exercise and Establishment Clauses of the first amendment may affect religious disputes between divorced parents.[37] Any discussion of constitutional issues in the context of family law must begin with *Meyer v. Nebraska*[38] and *Pierce v. Society of Sisters*.[39] First, in *Meyer*, a teacher at a "parochial school maintained by Zion Evangelical Lutheran Congregation" was convicted of violating a statute proscribing the teaching of any modern language other than English in the first eight grades.[40] In reversing this conviction, the Court held the statute to be violative of the due process provisions of the fourteenth amendment.[41] The Court held that certain governmental deprivations of liberty are unconstitutional regardless of the adequacies of procedures followed in enforcing the restrictions. Among the various aspects of liberty guaranteed by the fourteenth amendment, the Court included the following:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[42]

Further, in *Pierce*, the Supreme Court invalidated an Oregon compulsory public school education law on the basis of substantive due process and parental right. The Court held that the right of the parent

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Divorce, 83 MICH. L. REV. 477, 487-99 (1984) for an examination of the principles used in deciding what is the best interest of the child. *Cf.* Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11-28 (1987).

37. The first amendment provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The first amendment is made applicable to the states through the fourteenth amendment. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).

38. 262 U.S. 390 (1923).

39. 268 U.S. 510 (1925).

40. *Meyer*, 262 U.S. at 397.

41. *Id.*

42. *Id.* at 399.

to control the education of the child could not be overridden by the state's interest in standardizing the education of children concluding that:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[43]

Since the decisions in *Meyer* and *Pierce*, family rights have received increasing protection under various constitutional doctrines. In *Griswold v. Connecticut*[44] and *Roe v. Wade*,[45] the Supreme Court expanded the constitutional limitations on the state's regulation of private, personal family matters. In *Griswold*, a majority of the Justices recognized that the Due Process Clause furnishes the basis for the right to marital privacy.[46] Similarly, in *Roe*, the majority recognized a woman's right to choose abortion is based in the Due Process Clause.[47] The Court has continued to rely on the Due Process Clause in other family law cases.[48]

Equal protection arguments have also been successful in overturning state intervention in family issues. In *Orr v. Orr*,[49] for example, an Alabama statute permitting alimony awards only to women was rejected on Equal Protection grounds.[50] Similarly, in *Stanley v. Illinois*,[51] the Court relied upon both the Due Process and Equal Protection Clauses to invalidate a statute that deprived unwed fathers of custody rights.[52] Similarly, numerous state courts have invalidated, on equal protection grounds, statutes granting maternal preference in custody disputes.[53]

Both the Free Exercise and Establishment Clauses have been employed successfully in defense of family rights against state intervention. The principle case favoring family autonomy in religious educational decisions is *Wisconsin v. Yoder*.[54] There, the Supreme Court invalidated the state compulsory high school education statute as violative of the fundamental rights of Amish parents to educate their chil-

43. *Pierce*, 268 U.S. at 535.
44. 381 U.S. 479 (1965).
45. 410 U.S. 113 (1973).
46. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring), 499 (Harlan, J., concurring), 502 (White, J., concurring).
47. *Roe*, 410 U.S. at 153.
48. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 394-95 (1978); Moore v. City of E. Cleveland, 431 U.S. 494, 496 (1977).
49. 440 U.S. 268 (1979).
50. *Id.* at 282-83.
51. 405 U.S. 645 (1972).
52. *Id.* at 646, 650.
53. *See generally* Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).
54. 406 U.S. 205 (1972).

dren in a religious atmosphere.[55] Unlike *Meyer* and *Pierce*, the *Yoder* Court specifically considered both the state's police power[56] and parens patriae power,[57] holding that neither could displace the parental right to control minor children with respect to religious education. The Amish parents had refused to send their children to public or private schools following completion of the eighth grade, arguing that their religion would be contravened by sending their children to high schools.[58] The Court stated that, in order to uphold the state regulation in question, Wisconsin would have to establish a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[59]

It can be argued that the family rights cases, taken as a whole, demonstrate that the Supreme Court will demand the greatest deference to family autonomy. The right of the parent to direct the religious education of children has been deemed by the Court to be "fundamental,"[60] and "cardinal."[61] Intrusion on such significant areas of privacy and autonomy will be justified only by the showing of substantial state interest.

Examination of the constitutional limitations on the use of religion as a factor in child custody and visitation decisions must consider *Lemon v. Kurtzman*.[62] There, the Supreme Court articulated a three-prong test for determining whether state action violates the Establishment Clause. Under the *Lemon* test, constitutionally prohibited activities are those which (1) lack a secular purpose; (2) have a primary effect of advancing or inhibiting religion; and (3) constitute excessive government entanglement with religion.[63]

The Supreme Court has concluded that the Establishment Clause of the first amendment prohibits courts from resolving "controversies over religious doctrine and practice."[64] Hence, civil courts which resolve ecclesiastical questions violate the required separation between church and state.[65] Nevertheless, the Supreme Court has recognized certain "neutral principles of law, developed for use in all [church]

55. *Id.* at 234.
56. *Id.* at 220.
57. *Id.* at 229.
58. *Id.* at 207-09.
59. *Id.* at 214.
60. *Id.* at 232.
61. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Court also noted that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968).
62. 403 U.S. 602 (1971).
63. *Id.* at 612-13.
64. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).
65. *Id.* at 449-50.

property disputes, which can be applied without 'establishing' churches to which property is awarded."[66]

Significantly, in *Jones v. Wolf*,[67] a property dispute between local church factions, the Court clearly adopted this "neutral principles of law"[68] theory, which first had been suggested in earlier church property dispute cases. The *Jones* Court acknowledged that the "neutral principles" approach could require a civil court to review religious documents concerning property ownership. However, the Court explained that "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application."[69]

IV. Neutral Principles and the Custody Problem

The New York Court of Appeals applied "neutral principles" to a family religious dispute in *Avitzur v. Avitzur*.[70] The Avitzurs married in a traditional Jewish ceremony. As part of the ceremony, the parties signed a *ketubah* (marriage contract), which provided that marital difficulties could be resolved by a *Bet Din* (religious court) if either party so desired. The husband obtained a civil divorce, but refused to grant his wife a religious divorce (*get*). Under Jewish law only the husband can obtain the *get*; if he refuses, the wife can never remarry.[71] Mrs. Avitzur brought suit for specific performance to force her recalcitrant husband to appear before the religious court to obtain the *get*. The New York Court of Appeals concluded that the *ketubah* (marriage contract) constituted a private agreement between the Avitzurs which is enforceable under "neutral principles". Consequently, enforcement of this private marriage contract would not offend first amendment safeguards.

Ultimately, the *Avitzur* court permitted judicial enforcement of a religious contract because such enforcement could be effectuated on secular terms, employing neutral principles. As a result, *Avitzur* comports with the Supreme Court's approach in *Jones v. Wolf* by insisting that "a civil court must take special care to scrutinize the document in purely secular terms . . . ."[72] Since contract enforcement constitutes a secular purpose—the protection of reasonable contractual expectations—it neither advances nor inhibits religion. As a result, courts do not violate the *Lemon* test by effectuating the voluntary, private agree-

66. *Id.* at 449.
67. 443 U.S. 595 (1979).
68. *Id.* at 602-03.
69. *Id.* at 604.
70. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983).
71. 6 Encyclopedia Judaica 122, 130 (1971). The wife who cannot obtain a *get* is an *agunah*, a woman who cannot remarry according to Orthodox and Conservative Judaism.
72. 443 U.S. 595, 604 (1979).

ments of husband and wife, even if such contracts originate from religious sources.

Arguably, the *Avitzur* principles can be applied to custody disputes by developing a purely contractual approach which honors the express and implied agreements concerning religion formulated by the pre-divorce family. Significantly, this contractual approach would not offend constitutional safeguards. In fact, first amendment issues need not be reached.[73]

Moreover, the proposed contractual approach is a substantial improvement over the current patchwork of inconsistent case law, which is largely unworkable and unpredictable. A survey of the case law reveals several discernible approaches to the religion issue, which conflict with the goal of achieving stability for children following parental divorce. Because only a few states dictate the factors to be weighed in determining the child's best interests, courts have wide discretion in considering religious differences between parents.[74]

Notwithstanding such judicial freedom, several trends emerge. First, courts are not permitted to rule on the comparative merits of different religions.[75] In fact, preferring the parent who professes religious beliefs to one who chooses nontheism may violate the first amendment.[76] This approach requires that courts exhibit judicial "neutrality" regarding the relative merits of parental religious beliefs. Second, courts are permitted to consider "moral" issues, as well as the child's "spiritual" welfare.[77] Nevertheless, courts place limits on the religion inquiry. For example, religion may not be the primary factor in custody decisions.[78] Other courts refuse to consider religion unless the particular circumstances present clear evidence of physical, emotional, or social benefit *or* detriment to the child.[79] Finally, some courts distinguish between children with "actual religious needs"[80] and those families without demonstrated needs.

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73. There is a basic judicial duty of self-restraint, which instructs judges to avoid deciding questionable constitutional issues when possible. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 93 (2d ed. 1983).

74. *See, e.g.*, Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960) (listing factors to be considered).

75. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (establishment clause prevents governmental preference of one denomination or sect). *See, e.g.*, Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445 (1966).

76. Jimmy Swaggert Ministeries v. Board of Equalization, 110 S. Ct. 688, 697-98 (1990) (collecting cases and authorities).

77. *See, e.g.*, Burnham v. Burnham, 208 Neb. 498, 502, 304 N.W.2d 58, 61 (1981).

78. *See, e.g.*, Frank v. Frank, 26 Ill. App. 2d 16, 20, 167 N.E.2d 577, 580 (1960); Anhalt v. Fessler, 6 Kan. App. 2d 921, 923, 636 P.2d 224, 226 (1981).

79. Cases are collected at Annotation, *Religion As Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 (1983).

80. *Id.*

V. Joint Custody Considerations

Some courts apply a joint or shared custody approach to the religion question. As previously noted, in *In re Marriage of Simms*,[81] the Colorado district court granted physical custody to the Catholic mother and "spiritual" custody to the Jewish father. This approach is inimical to the needs of parents and children. By 1988, more than thirty states had enacted legislation permitting, encouraging, or even compelling joint custody arrangements in which both divorced parents decide major issues concerning the child.[82] In some instances, the child even divides time equally between both parental homes. Initially, joint custody promised an ideal form of parenting by divorced parties, encouraging them to remain involved, interested parents.[83]

However, the initial enthusiasm for compulsory or imposed joint custody has waned.[84] Divorced parties cannot be *forced* to parent together in a productive, loving manner; they must parent voluntarily. In fact, forced joint custody may work against the child's interests by fostering parental hostility.

Divorce involving intermarried partners may be particularly vulnerable to such hostility. Research demonstrates that ". . . intermarriages are more likely to end in divorce than in-group marriages."[85] Moreover, individuals experiencing the trauma and disorientation of divorce often seek solace in their ethnic and religious roots. Joint custody is simply inappropriate under these circumstances.[86]

VI. Beyond The Best Interests Of The Child

Recent scholarship criticizes the "best interests" test as arbitrary, unpredictable and gender-based.[87] In *Beyond the Best Interests of the Child*,[88] Goldstein, Freud and Solnit suggest a gender-neutral standard

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81. *See supra* notes 1-2 and accompanying text.

82. J. Folberg, Joint Custody and Shared Parenting 7 (1984).

83. Canacakos, *Joint Custody As A Fundamental Right*, 23 Ariz. L. Rev. 785 (1981) (arguing parent has a constitutional right to joint custody).

84. *See, e.g.*, Singer & Reynolds, *A Dissent on Joint Custody*, 47 Md. L. Rev. 497 (1988); Holmes, *Imposed Joint Legal Custody: Children's Interests or Parental Rights?*, 45 U. Toronto Fac. L. Rev. 2 (1987); Wallerstein, *Children of Divorce: An Overview*, 4 Behav. Sci. & L. 105 (1986); Scott & Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455 (1984); Comment, *The Unfulfilled Promise of Joint Custody in Montana*, 48 Mont. L. Rev. 135 (1987).

85. Schneider, Intermarriage: The Challenge of Living with Differences Between Christians and Jews 119 (1989).

86. Coysh, *Parental Postdivorce Adjustment In Joint and Sole/Physical Custody Families*, 10 J. Fam. Issues 52 (1989).

87. *See, e.g.*, Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727 (1988); Ester, *Maryland Custody Law — Fully Committed to the Child's Best Interests?*, 41 Md. L. Rev. 225 (1982).

88. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 31-64 (1973).

which promotes the child's stability after parental divorce. This viewpoint creates a strong presumption favoring custody in the child's "psychological" parent, the parent with whom the child has forged the primary emotional bond. The strength of this "psychological" parent test lies in its emphasis on stability as an essential antidote to domestic unrest.[89] As a matter of fairness, the "psychological" parent is usually the one who has devoted more time and energy to the child in the pre-divorce family. Often such demonstrated commitment to the child has been at the expense of the parent's professional, economic, or other personal goals.[90]

VII. Actual Religious Needs and The Pre-Divorce Family

Research concerning the relationship between religion and emotional health offers mixed conclusions.[91] Some studies suggest that self-esteem and ego-strength are associated with religious belief.[92] A survey of the literature in the early 1980s provides "marginal support for a positive effect of religion."[93] However, more recent findings have concluded that ". . . the capacity to find purpose and meaning beyond one's self and the immediate and to relate positively to God" correlates in a positive manner with self-esteem, social skills, and purpose in life.[94]

Perhaps the mixed conclusions suggested by empirical research result from the cultural and legal definition of religion. Studies reveal that traditional theism is not the only method of achieving "transcendence"—the ability to find meaning and purpose beyond one's self. Transcendence is the trait generally identified with feelings of emotional health.[95]

Nevertheless, the Supreme Court originally defined religion in terms of conventional theism. In *Davis v. Beason*,[96] the Court concluded that, "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his

89. *See generally* Allison & Furstenberg, *How Marital Dissolution Affects Children*, 25 Dev'l Psychology 540 (1989).

90. *See, e.g.*, Beck, The Gender Factory (1985); Liefland, *Career Patterns of Male and Female Lawyers*, 35 Buffalo L. Rev. 601 (1986) (women lawyers act as primary childcare providers within family); Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1785-87 (1986).

91. Roof, *Concepts and Indicators of Religious Commitment: A Critical Review*, in The Religious Dimension: New Directions in Quantitative Research 17 (1979).

92. Bergin, *Religiosity and Mental Health: A Critical Reevaluation and Meta-Analysis*, 14 Prof. Psychology Res. & Proc. 170 (1983).

93. *Id.* at 176.

94. Ellison, *Spiritual Well-Being: Conceptualization and Measurement*, 11 J. Psychology & Theol. 330, 338 (1983).

95. *Id.*

96. 133 U.S. 333 (1890).

being and character, and of obedience to his will."[97] In other words, religion is theistic and resembles conventional Christianity. In 1961, however, the Supreme Court acknowledged that there could be religions "which do not teach what would generally be considered a belief in the existence of God."[98] During the Vietnam War period, the Supreme Court recognized a broader definition of religion based on "religious training and belief."[99] Most significantly, the Court held that "religion" encompassed any system recognizing "duties superior to those arising from any human relation, . . ."[100]

If "religion" is broadly defined, it can be viewed as having a secular purpose as defined in *Lemon*. To the extent that "religion," defined in both theistic and non-theistic terms, helps the child achieve emotional well-being, it should be considered in determining custody.

A recent Pennsylvania case, *Zummo v. Zummo*,[101] exemplifies much that is unworkable in the current judicial approach to religion in custody disputes. Paula and David Zummo were married in 1978 and divorced in 1988. Three children were born of the marriage, Adam, Rachael, and Daniel. Paula was raised as a Jew and "actively practiced her faith since childhood."[102] The trial court concluded that the parties had discussed their religious differences prior to their marriage and had agreed orally that any children would be raised in the Jewish faith.[103] Moreover, "[d]uring the marriage, the Zummo family participated fully in the life of the Jewish faith and community. . . . All three of the children were formally given Hebrew names. Before the parties separated, the children attended no religious services outside the Jewish faith."[104]

Following the separation, the Zummos agreed to share legal custody. Under this agreement, the mother had primary physical custody, subject to the father's partial physical custody on alternating weekends, and certain holidays and vacation periods.[105] However, Mr. Zummo refused to have the children attend Jewish Sunday School during his visitation. He preferred to take them to Roman Catholic services instead.[106] The trial court held that Mr. Zummo was obliged to arrange

97. *Id.* at 342.

98. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (Maryland's requirement that public officers declare belief in God held unconstitutional).

99. Military Selective Service Act, ch. 625, 62 Stat. 604 (1948) (codified as amended at 50 U.S.C. § 456 (j) (1982)).

100. Welsh v. United States, 398 U.S. 333, 346 (1970) (Harlan, J., concurring) (citation omitted).

101. 394 Pa. Super. 30, 574 A.2d 1130 (1990).

102. *Id.* at 51, 574 A.2d at 1141. Under traditional Jewish law, children born of a Jewish mother are considered Jewish.

103. *Id.*

104. *Id.* at 52, 574 A.2d at 1141.

105. *Id.*

106. *Id.*

for the children's attendance at Jewish Sunday School, and that he would *not* be permitted to take the children to religious services contrary to the Jewish faith.[107]

The Pennsylvania Superior Court reversed, concluding that "it is constitutionally impermissible to decide a custody or visitation dispute, in whole or in part, on the basis of a determination of or consideration of the parent's relative devoutness."[108] The court specifically vacated that portion of the trial court's order which prevented Mr. Zummo from taking his children to religious services "contrary to the Jewish faith"[109] because the facts failed to demonstrate "a substantial threat of present or future physical or emotional harm" to the children.[110]

Zummo exemplifies the shortcoming of the current judicial approach, in that it fails to promote post-divorce family stability by ignoring the legitimate and reasonable religious contracts formed by the pre-divorce family. Simply stated, the Zummo pre-divorce contract reflected the parties' intent to be a Jewish family. As recognized by both the trial court and the *Zummo* majority, the parents agreed to raise the children as Jews and performed that agreement during the entire marriage.[111] Even Mr. Zummo admitted that his desire to have the children attend church constituted a break from prior practice. In fact, Mr. Zummo testified at trial that his children are Jewish.[112] He further testified that he did not want the children to suffer identity problems with religion.[113] However, the *Zummo* result nearly guarantees that the children will have identity problems, causing needless post-divorce instability and trauma.

Numerous studies have demonstrated that children cannot be raised as both Christians and Jews without sustaining psychological loss.[114] Raising a child simultaneously in both religions "is something of an oxymoron—to be a Christian, you must believe that Jesus Christ, as the son of God, came to earth to die for the sins of humanity. Jews do not believe in the divinity of Jesus, or in many other central tenets of Christianity."[115]

Because the Zummos wished to avoid such instability and confusion, they chose to raise their children in one religion, rather than two. Their agreement, affecting both the parents and the children, should

107. *Id.* at 53, 574 A.2d at 1142 (emphasis added).
108. *Id.* at 73, 574 A.2d at 1152.
109. *Id.* at 85, 574 A.2d at 1158.
110. *Id.* at 83, 574 A.2d at 1157.
111. *Id.* at 88, 574 A.2d at 1159-60 (Johnson, J., dissenting).
112. *Id.* at 88, 574 A.2d at 1159 (Johnson, J., dissenting).
113. *Id.* at 88, 574 A.2d at 1159-60 (Johnson, J., dissenting).
114. Goldman, *In Dual-Faith Families Children Struggle for a Spiritual Home*, N.Y. Times, Aug. 18, 1988, at C1, col. 2. *See generally* SCHNEIDER, *supra* note 85; Erstenoff, *Forcing Rites on Children*, 1 AM. FAM. 13 (1987).
115. SCHNEIDER, *supra* note 85, at 157.

not have been breached merely because the parents divorced. What the *Zummo* majority refused to consider is that the religious agreement affected not only the parents, but also the children. Although the court recognized parental authority over the religious upbringing of children within the family setting, it created other rules for post-divorce families.[116] Instead of enforcing the Zummo family pre-divorce contract concerning religion, the court adopted a shared custody approach, permitting each parent to "pursue whatever course of religious indoctrination which that parent sees fit . . . during periods of lawful custody or visitation."[117] The tragedy of *Zummo* is that it completely frustrates reasonable family expectations and stability at precisely the moment they are most critical.

VIII. The Contract Approach

The contract approach to religious disputes between divorcing or divorced parents avoids the pitfalls of the current case law, especially disasters such as *Zummo* and *Simms*. Courts would enforce family pre-divorce contracts in the post-divorce context. Inquiry would focus on whether the parents had entered into an express or implied in fact contract agreement regarding the children's religion. If such an express or implied in fact agreement exists, the courts would enforce it, absent a clear showing of actual physical harm to the children.

The parents' express written agreement[118] could be secular (such as a premarital or separation agreement) or religious (such as a *Ketubah*). If the agreement is merely oral (such as the agreement in *Zummo*) it will be enforced upon a showing of actual performance during the marriage. For example, raising the children in a specific religion by tacit agreement would be evidence of actual performance. The actions in *Zummo*, which demonstrated that the children were raised as Jews, would meet this contractual test. In the same vein, performing the same acts without any agreement, would constitute a valid implied in fact contract, deserving of post-divorce enforcement.

This contractual method would meet the *Lemon* test of secular purpose. Indeed, like *Avitzur*, the suggested approach would employ neutral principles of contract enforcement to satisfy constitutional safeguards. Most significantly, enforcing pre-divorce religious contracts increases the possibility for stability and certainty for both parents and children.

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116. *Zummo*, 394 Pa. Super. at 46, 574 A.2d at 1138.

117. *Id.* at 49-50, 574 A.2d at 1140.

118. Some jurisdictions, most notably New York, enforce express written contracts concerning religion. *See, e.g.*, Lebovich v. Wilson, 155 A.D.2d 291, 547 N.Y.S.2d 54 (1989); Stevenot v. Stevenot, 133 A.D.2d 820, 520 N.Y.S.2d 197 (1987).