RELIGIOUS ISSUES IN CHILD CUSTODY LITIGATION

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I. Constitutional Underpinnings – First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. US Supreme Court Religion Cases

A. Watson vs. Jones, 13 Wall. 678, 80 US 679, 20 L.Ed. 666 (1872)

Dispute over national Presbyterian Church in the United States of America and local church over national body's resolution requiring members to renounce slavery. Local church rebelled and elected pro-slavery officers. Anti-slavery members raised issues in federal court over which faction was entitled to the local church property. The Supreme Court ruled:

1. To the extent that courts can apply "neutral principles of the law" to court property disputes, they must.[1]
2. To the extent that courts are faced issues of doctrine, discipline, faith, or ecclesiastical rule, the legal courts must leave those issues to the highest church authorities.[2]

> "In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. . . . All who unite themselves to such a body do so with an implied consent to [its] government, and are bound to submit to it."[3]

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[4]

B. Reynolds v. United States, 98 U.S. 145 (1878)

Reynolds appealed his conviction of violating the federal bigamy prohibition claiming that the Free Exercise Clause to the First Amendment protected his practice as a sincere exercise of his Mormon faith entitling him to exemption. The Court held, however, that devout belief cannot exempt anyone from criminal laws if that belief carries though into conduct deemed by society to be illegal or immoral:

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1 80 U.S. at 723.
2 80 U.S. at 727.
3 80 U.S. at 728-729, fn 5
4 80 U.S. at 730.

> "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . . . Can a man excuse his practices to the contrary because of his religious belief?
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> "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[5]

C. Cantwell v. Connecticut, 310 U.S. 296 (1940)[6]

Jehovah's Witnesses challenged a solicitation ordinance that required a state license for anyone soliciting funds. The state claimed the ordinance "require[s] the officer to issue a certificate unless the cause in question is clearly not a religious one, and that, if he violates his duty, his action will be corrected by a court."

> The Court struck down the ordinance, holding for the first time that the religion clauses to the First Amendment are fundamental rights applied to the states by the Fourteenth Amendment:
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> "[A] grant of power which rests [upon] a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."[7]

D. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

Jehovah's Witnesses challenged West Virginia statutes requiring that children salute the Flag at school. The Supreme Court held that First Amendment rights are susceptible to regulation

> "only to prevent grave and immediate danger to interests which the State may lawfully protect."[8]

E. Everson v. Board of Education, 330 U.S. 1 (1947)

A taxpayer challenged a state's reimbursement of bus fares paid for transporting children to schools other than just public schools. The Supreme Court upheld the law as facially neutral, but stated that:

> "The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. . . .Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of

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5 98 U.S. at 167.

6 See also *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 US 150 (2002)

7 310 U.S. at 307.

8 319 U.S. at 639.

separation between church and State," ... [and] that wall must be kept high and impregnable."[9]

F. Zorach v. Clauson, 343 U.S. 306 (1952)

Public school parents challenged a school-sponsored released time program that allowed student release to attend religious classes off campus during instructional time. The Supreme Court upheld the law emphasizing its "content-neutral" precedent, which is the standard used today:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each group flourish according to the zeal of its adherents and the appeal of its dogma. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government showed a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."[10]

G. Kendroff v. Nicholas Cathedral, 344 US 94 (1952)

New York Legislature enacted a statute recognizing the administrative autonomy of Russian Orthodox churches in North America. The Supreme Court found the statute unconstitutional by "intrud[ing] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment."[11] The Supreme Court emphasized the Constitutional basis for the *Watson v. Jones* decision:

> "Watson v. Jones ... radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.[12]

H. Fowler v. Rhode Island, 345 U.S. 67 (1953)

Finding unconstitutional an ordinance prohibiting political or religious "addresses" to meetings in any public park, the Supreme Court declared that

> "[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove,

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9 330 U.S. at 15-16.

10 343 US at 313-314

11 344 US at 119.

12 344 US at 116.

classify, regulate, or in any manner control sermons delivered at religious meetings." [13]

I. Torcaso v. Watkins, 367 U.S. 488 (1961)

The Court struck down a provision of the Maryland constitution requiring all office holders to declare a belief in the existence of God:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[14]

J. Abington School District v. Schempp, 374 U.S. 203 (1963)

Parents of public high school students challenged a Pennsylvania law requiring the reading of "at least ten Bible verses without comment at the opening of each school day." The law permitted a student to be excused from this reading upon parental request. The Court determined, however, that:

> "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."[15]

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

Seventh-day Adventist challenged denial of unemployment compensation because she refused to work on her Sabbath. The Court ruled that denial infringed the free exercise of religion because she was required to forego the exercise of her faith to obtain a government benefit to which she was otherwise entitled:

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right,' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[16]

L. Lemon v. Kurtzman, 403 U.S. 602 (1971)

The Court reviewed statutes from Pennsylvania and Rhode Island that provided state aid to church-related schools by subsidizing teacher pay and financial aids for textbooks. Finding the

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13 345 US at 70.

14 367 US at 495.

15 374 U.S. at 226.

16 374 U.S. at 404.

statutes to violate First Amendment's prohibitions, the Court first stated three criteria with which "[e]very analysis in this area must begin":

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."[17]

> "Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn."[18]

M. Thomas v. Review Bd of the Indiana Emplmnt Security,

Denied unemployment compensation because his personal religious beliefs, not shared by all in his religion, forbade him from participation in producing armaments, Thomas won Supreme Court approval of the principle that:

> "The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[19]

N. Frazee v. Illinois Dept of Emplmnt Security, 489 U.S. 829 (1989)

Denied unemployment compensation because of his refusal to work "on the Lord's Day" since he was not a member of an organized church, Franzee won Supreme Court approval of the principle that:

> "There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause[.]' Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held.

> "Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection."[20]

O. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

Members of the Santeria religion challenged a Florida city ordinance that banned the "ritual slaughter" of animals but exempted virtually all forms of animal slaughter, including

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17 403 U.S. at 612-613.

18 403 U.S. at 625.

19 450 U.S. at 713.

20 489 U.S. at 834.

those for kosher purposes. Finding the ordinance unconstitutional, the Court emphasized the extent that public authorities must reach in acting neutral when religion is involved:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs'. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[21]

III. Rights of Parenthood

A. Meyer v. Nebraska, 262 U.S. 390 (1923)

Although brought up as a challenge to a Nebraska law prohibiting the teaching of foreign languages to school children before high school, the Supreme Court stated the basis for later decisions about the rights of parenthood:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. 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."[22]

B. Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Finding that an Oregon law that required every parent to send their young child "to a public school for the period of time a public school shall be held," the court expanded its previous declarations on parental rights:

> "Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. 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."[23]

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21 508 US at 546.

22 262 U.S. at 399.

23 268 U.S. at 534-535.

C. Prince v. Massachusetts, 321 U.S. 158 (1944)

In ruling against a Jehovah's Witness woman for violating child labor laws by having her young ward sell religious literature in the streets of Boston, the Supreme Court limited absolute parental powers:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.
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> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae*, may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[24]

D. Stanley v. Illinois, 405 U.S. 645 (1972)

Finding that the rights of parenthood are not exclusive to those within marriage, the Supreme Court rule:

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."[25]

E. Moore v. City of East Cleveland, 431 U.S. 494 (1977)

Finding that city ordinances that limit the number of family members that may live in a house was unconstitutional, the Supreme Court refined its previous statements on family relations:

> "Of course, the family is not beyond regulation. . .But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[26]
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> "To be sure, [previous] cases did not expressly consider the family relationship presented here. . .But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."[27]

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[24] 321 U.S. at 167.

[25] 405 U.S. at 652.

[26] 431 U.S. 500-501.

[27] 431 U.S. 501.

F. Smith v. Organization of Foster Families, 431 U.S. 816 (1977)

Distinguishing between natural families and foster families, the Court emphasized that the state has much broader powers over "state created" bonds than it does with "natural families."

> "But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual's freedom to marry and reproduce is 'older than the Bill of Rights'. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' "[28]

G. Quilloin v. Walcott, 434 U.S. 246 (1978)

Finding a statute constitutionally could require an unmarried father to make some effort towards supporting his child in order to prevent adoption by the mother's husband, the Supreme Court made clear that parental rights cannot be compromised merely on a determination that it would be "in the children's best interests":

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' "[29]

H. Santosky v. Kramer, 455 U.S. 745 (1982)

Finding that where parental rights are at issue, the standard of proof applied must consider those fundamental rights, the Court emphasized that parental rights cannot be discarded merely because the children are not cared for in the way general society deems "best":

> "The fundamental liberty interest of natural parents in the care custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[30]

I. Troxel v. Granville, 455 U.S. 745 (1982)

Finding that where parental rights are at issue, the standard of proof applied must consider those fundamental rights, the Court emphasized that parental rights cannot be discarded merely because the children are not cared for in the way general society deems "best":

> "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject

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[28] 431 U.S. at 845.

[29] 434 U.S. at 255.

[30] 455 U.S. at 753.

to judicial review, the court must accord at least some special weight to the parent's own determination."

IV. Considering Religion and Child Custody

Despite the strong views expressed by the US Supreme Court, State courts applied varied rules when faced with parental disputes about religious indoctrination and exposure.

A. Ex Parte Snider, 929 So.2d 447 (Ala. 2005)

Although "religious beliefs alone shall not constitute the sole determinant in child custody awards" and even though the record revealed that the majority, if not all, of the mother's actions adhered to their religious beliefs "does not necessarily preclude exploration into those beliefs. In this State, as in other jurisdictions, the ultimate consideration in determining the proper custody of the child is what is in his best interests. . . ." The Court held that when reasonably related to the determination of whether the prospective custodian's convictions might result in physical or mental harm to the child, are proper considerations for the trial court in a child custody proceeding and that the trial court's findings that the mother's action "resulted in a significant and detrimental change in the personality and behavior of the child" was appropriate.

B. Sagar v. Sagar, 57 Mass.App. 71, 781 N.E.2d 54 (2003)

In the course of a contentious divorce between two devout Hindus, the husband requested permission to perform a Hindu relgious ritual, Chudakarana. The Appellate court determined that there was no compelling state interest to intervene in the dispute.

C. Marriage of McSoud, 131 P.3d 1208 (Colo. 2006)

A court may not properly inquire into or make judgments regarding the abstract wisdom of a particular religious value or belief in allocating parental responsibilities. Therefore, evidence of religious beliefs or practices is admissible only as reasonably related to potential mental or physical harm to the child. the course of a contentious divorce between two devout Hindus, the husband requested permission to perform a Hindu relgious ritual, Chudakarana. The Appellate court determined that there was no compelling state interest to intervene in the dispute.

IV. Standards Used in Assessing Religion within Child Custody

Based on the intersection between the detailed and complex interrelationship between these rights and the courts' need to resolve disputes about children between parents' opposing views about how to raise, educate, and protect their children, States have arrived at three basic ways in which to address the issue:

A. Actual or Substantial Harm

Most courts use "actual or substantial harm" standard in determining whether to restrict a parent's First Amendment and parenting rights. Typically, restrictions occur only if the parent's religious practices cause the child. But these courts have difficulty defining what constitutes "substantial harm."

See Khalsa v. Khalsa, 107 N.M. 31, 36 (Ct. App. 1988) (general testimony regarding parents' divergent religious beliefs causing child to be upset or confused insufficient to justify restriction of exposure to noncustodial parent's religion); Munoz v. Munoz, 79 Wash. 2d 810, 815 (1971) (duality of religious beliefs does not per se create conflict in child's mind); Robertson v. Robertson, 19 Wash, App. 425, 427 (1978) (child's alarm at religious beliefs insufficient);Zummo v. Zummo, 394 Pa. Super. 30, 74--76 & n.39 (1990) (rejecting speculation by parents and experts as to potential future emotional harm to child based on assumption that exposure is generally harmful); In re Marriage of Weiss, 42 Cal. App. 4th 106, 116--117, cert. denied sub nom. Weiss v. Weiss,519 U.S. 1007 (1996) (rejected notion that contradictory messages caused harm, no evidence child had discipinary problems, nor bruises); In re Marriage of Mentry, 142 Cal. App. 3d 260, 266 (1983) (held that evidence of child's social adjustment problems in school and periodic stomach aches were not attributable to conflict over religion); Kirchner v. Caughey, 326 Md. 567, 577, 579 (1992) (child psychiatrist determined that child suffered from anxiety was not conclusive where problems could just as easily have been attributed to parental conflicts); Levirsky v. Levitsky, 231 Md. 388, 398 (1963) (requiring serious danger to life or health of child before determining protection necessary from exposure to parent's religious beliefs).

Munoz v. Munoz, 79 Wash.2d 810, 489 P.2d 1133 (1971)

Exposing children to two different religions (Mormon and Catholic) is not harmful in and of itself and does not justify restricting a parent's religious activities.

Pater v. Pater, 63 Ohio St. 3d 393, 588 N.E. 2d 794 (1992)

Religious customs (Jehovah's Witness) restricting a child's social activities (requiring separation non-practicing peers and aberrance from community standards) are not enough to justify court intervention unless the practices harm the child’s mental or physical health.

Kendall vs. Kendall, 426 Mass. 238 (1997)

In a divorce action, the judge's findings, based on a report of a guardian ad litem, that there was demonstrable evidence of substantial harm to the children ages three, five and seven, supported her order restricting the father's freedom to educate the children in the tenets of his religion.

B. Risk of Harm.

The courts that use this standard restrict a parent's First Amendment and parenting rights if the parent’s religious practices “might harm” the child in the future. Courts have varied widely in their defining criteria for the boundaries of this standard.

In re Snider, 929 So.2d 447 (2005)

Although “religious beliefs alone shall not constitute the sole determinant in child custody awards” and even though the record revealed that the majority, if not all, of the mother’s actions adhered to their religious beliefs “does not necessarily preclude exploration into those beliefs. In this State, as in other jurisdictions, the ultimate consideration in determining the proper custody of the child is what is in his best interests. . . .” The Court held that when reasonably related to the determination of whether the prospective custodian's convictions might result in physical or mental harm to the child, are proper considerations for the trial court in a child custody proceeding and that the trial court’s findings that the mother’s

action “resulted in a significant and detrimental change in the personality and behavior of the child” was appropriate.

C. “Custodial Parent” Rule.

Some courts resolve the tension between First Amendment rights and those of parentage by deeming exclusive the “custodial parent’s right to influence the children's religious upbringing. Under this standard, if the custodial parent objects to the other parent's religious activities, then the court defers to the custodial parent’s position.

Johns v. Johns, 53 Ark. App. 90, 918 S.W. 2d 728 (1996)

Father complained to the mother that she was preventing him from visiting his children. Mother responded that he didn't take the kids to church and Sunday school. The Arkansas Supreme Court upheld trial court order that Father take his children to church because the mother’s desire that the children attend church each week was paramount.

D. “Joint Custody Best Interests” Rule.

A variation of the “custodial parent” rule, the “joint custody” rule attempts to defer issues related to basic parenting disputes to the parents themselves by refusing to “choose sides.” Instead, these courts emphasize that while they have the right and ability to determine a child’s best interests, both parents have the right to raise and educate their child and that the parents may both engage their child in activities when their child is in that parent’s physical care without interference from the other parent.

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

Because the parents shared joint custody, the Pennsylvania Superior Court resolved a divorcing couple's dispute about the religious upbringing by allowing them both to instill their own religious beliefs in their children – mother could take the children to her synagogue and father could take the children to his Catholic services.