MEMO

To: Geoff Blackwell; Amanda Knief
From: Amanda Scott
Subject: Atheists' Rights in Child Custody Disputes

Issues

It is well established Supreme Court jurisprudence that the Establishment Clause of the First Amendment prohibits the government from favoring one religion over another or religion over nonreligion.[1] Yet atheists, agnostics, and other nonreligious parents and guardians have raised concerns that judges have discriminated against them in child custody cases because of their lack of religion. The question before us, then, is (a) whether a judge can permissibly consider religion as a factor in a child custody case and (b) whether a judge can favor religious parents over nonreligious parents in custody decisions under the "best interest of the child" standard.

Questions

I. Can a judge consider religion in a child custody case?

II. Can a judge favor religious parents over nonreligious parents in custody decisions?

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[1] *See generally Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion") (internal citations omitted); *Everson v. Board of Education,* 330 U.S. 1, 15 (1947) ("Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another")

Answer

The answer to these questions is not clear cut. The laws involved vary by jurisdiction and depend largely on the judge's discretionary power in determining the "best interest of the child" in child custody decisions. At least seven state statutes direct judges to factor religion by considering (a) the spiritual welfare or wellbeing of the child, (b) the moral fitness of the parent or the guardian, (c) the preservation of the child's religious or church ties, and (d) the continuation of the child's religious upbringing, if any.[2] Several courts have used these grounds to award custody to religious parents over nonreligious parents even when both parents were otherwise determined to be fit to have custody.[3] Yet other courts have prohibited the favoring of religious parents over nonreligious parents under the Establishment Clause of the First Amendment which mandates government neutrality toward religion.[4]

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[2] Okla. Stat. Ann. tit. 10A § 1-1-102(B) (spiritual and moral welfare of the child); Ga. Code Ann. § 15-11-1 (moral welfare of the child); Mich. Comp. Laws § 722.23 (moral fitness of the parents); N.D. Cent. Code § 14-09-06.2(1) (moral fitness of the parents); S.D. Codified Laws § 26-7A-56 (moral fitness of the parents); Mich. Comp. Laws § 722.23 (ability to continue religious education of child); Ga. Code Ann. § 15-11-26(10)-(20) (religious or church ties of child); Ill. Comp. Stat. § 405/1-3(4.05) (religious ties of the child)

[3] *See, e.g.*, *Tweedel v. Tweedel*, 484 So. 2d 260, 262 (La. Ct. App. 1986) (noting that "The child attends church regularly with the mother and receives religious instruction. The father testified that he has not brought the child to church because the child did not want to go and that he would not force the child to go to church"); *In re Marriage of Storlein*, 386 N.W.2d 812, 813 (Minn. Ct. App. 1986) (upholding grant of custody to mother, where lower court cited as one factor in her favor that mother "is a religious person who attends church on a regular basis" and who "would probably provide more constant attention to the children's religious education and training than would [father]," while father "was not a member of any organized religion and did not attend church services"); *Staggs v. Staggs*, No. 2004- CA-00443-COA, 2005 WL 1384525, at *6 (Miss. Ct. App. May 24, 2005) (noting that "while [father] is an agnostic and testified that religion is not important to him, [mother] testified that religion is very important to her"); *Gancas v. Schultz*, 683 A.2d 1207, 1213-14 (Pa. Super. Ct. 1996) (reversing lower court's transfer of custody from mother to father, based partly on lower court's "failure to consider 'all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being,'" and in particular that while "mother … takes [daughter] to church whenever [daughter] is with her," "father, an admitted agnostic, does not attend church"); *Pountain v. Pountain*, 503 S.E.2d 757, 761 (S.C. Ct. App. 1998) (upholding denial of custody to father whom court described as "agnostic," and stating that "although the religious beliefs of parents are not dispositive in a child custody dispute, they are a factor relevant to determining the best interest of a child")

[4] *See, e.g., Bonjour v. Bonjour*, 592 P.2d 1233, 1242-1243 (Alaska 1979) ("According a preference in child custody proceedings to parents who are members of an 'organized religious community' violates that strict

A Review of Best-Interest-of-the-Child Statutes

All 50 states and the District of Columbia require judges to use the "best interest of the child" standard when making decisions in child custody disputes.[5] Although there is no uniform definition of "best interest of the child" standard, state statutes look at a number of factors evaluating the parent or guardian's ability to meet the physical, mental, emotional, and social needs of the child. Some statues consider "spiritual" and "moral" welfare as a factor in determining the best interest of the child.[6] Others consider the "moral fitness" of the parents or guardians.[7]

Oklahoma provides that "each child shall be assured the care, guidance, and supervision in a permanent home or foster home that will serve the best interests of the child," which includes "the development of the *moral*, emotional, *spiritual*, mental, social, educational, and physical well-being of the child." Okla. Stat. Ann. § 10A-1-1-102(B) (emphasis added). Georgia looks to "secure [the] *moral*, emotional, mental, and physical welfare as well as the safety of both the child and community." Ga. Code Ann. § 15-11-1 (emphasis added) (alteration in original).

Michigan, North Dakota, and South Dakota consider the "moral fitness" or "moral condition" of the child's parents or guardian.[8] Michigan considers the ability of the parent or guardian to help "continue the education and raising of the child in his or her religion or

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neutrality which the branches of government, including the judiciary, must assume in considering religious factors"); *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134, 136-38 (1964); *Gould v. Gould*, 342 N.W.2d 426, 432 (Wisconsin 1984), *Zucco v. Garrett*, 150 Ill. App. 3d 146, 501 N.E.2d 875, 881 (1986); *Zummo v. Zummo*, 574 A.2d 1130, 73 (Pa. Super. Ct. 1990)

[5] Child Welfare Information Gateway. (2016). *Determining the best interests of the child.* Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

[6] Okla. Stat. Ann. tit. 10A § 1-1-102(B); Ga. Code Ann. § 15-11-1

[7] Mich. Comp. Laws § 722.23; N.D. Cent. Code § 14-09-06.2(1); S.D. Codified Laws § 26-7A-56

[8] Id.

creed, if any."[9] Georgia and Illinois factor the child's "background and community ties," including the child's church or religious ties.[10]

Overview of State Court Jurisprudence

I. Permissible Accommodations of Children's Religious Needs

The Free Exercise Clause of the First Amendment permits the government to accommodate the free exercise of religion.[11] Courts can factor religion in child custody cases solely as it relates to serving the best interests of the child. For example, courts can consider a child's religious needs and award custody to the parent or guardian that is best able to meet those needs.[12] However, the child's religious needs must be *actual* and not merely presumed by the court.[13] The court must not make the assumption that a religious upbringing is in the best interest of the child when the child has not demonstrated actual religious needs.

When determining the actual religious needs of a child, the judge should consider "the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it."[14] Judges "exercise broad discretion on a case-by-case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity."[15] Courts have stated children 12 or older are generally considered "mature

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[9] Mich. Comp. Laws § 722.23
[10] Ga. Code Ann. § 15-11-26(10)-(20); Ill. Comp. Stat. § 405/1-3(4.05)
[11] For background on the accommodation doctrine, see Gordon, Sarah Barringer and Adams, Arlin M., "The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses" (1988). *Faculty Scholarship*. Paper 1033.
[12] *Bonjour v. Bonjour*, 592 P.2d 1233, 1239 (Alaska 1979)
[13] *Bonjour*, 593 P.2d at 1240
[14] *Id.*
[15] *Zummo v. Zummo*, 574 A.2d 1130, 67 (Pa. Super. Ct. 1990)

enough to assert a religious identity," while those eight and under are not.[16] The child's expressed preferences must be voluntary and not coerced by a custody-seeking parent or guardian.

In *Bonjour v. Bonjour*, the Supreme Court of Alaska reversed a lower court's decision because the court impermissibly awarded custody on the basis that the father and his new wife participated in an "organized religious community."[17] The Court held that considering the child's religious needs was not *per se* unconstitutional, but was applied unconstitutionally because the lower court did not make a legitimate finding that the child had *actual* religious needs.[18] The Court reasoned that "a presumption that a child 'needs religion' converts the secular legislative purpose [of accommodating a child's *actual* religious needs] into a judicial preference for religion" in violation of the Establishment Clause because it "exhibits a preference for the religious over the less religious."[19]

II. Impermissible Favor of Religion over Nonreligion: Cases in Favor of Atheists

As a general principle, the Establishment Clause of the First Amendment prohibits the government from favoring one religion over another religion and religion over nonreligion.[20] In the context of child custody cases, state courts have interpreted this command to prohibit favoring the religion of one parent or guardian over another in

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[16] *Zummo*, 574 A.2d at 68
[17] *Bonjour*, 592 P.2d at 1241
[18] *Id.* at 1239
[19] *Id.* at 1242 (emphasis added) (alteration in original)
[20] *See generally Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion") (internal citations omitted); *Everson v. Board of Education,* 330 U. S. 1, 15 (1947) ("Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another")

awarding custody when both are otherwise fit to have custody.[21] Some parents have challenged custody decisions alleging that awarding custody to a religious parent constituted favorable treatment toward religion in violation of the Constitution.[22]

In *Welker v. Welker*, the Supreme Court of Wisconsin reversed a trial court's decision to deny custody to the mother because she professed to be an agnostic.[23] The Court held that it was "legally untenable to equate [the mother's] skepticism with a lack of morals" and "improper for the trial court to give any weight in his decision to the matter of religion."[24] In *Zucco v. Garrett,* an Illinois appellate court reversed a trial court's decision to award custody to a parent because the parent was a "regular churchgoer" that "attend[ed] services on Sundays and participate[d] in church-sponsored activities."[25] The Court held that awarding custody to the church-going parent on these grounds was to conclude "a religious environment is *per se* beneficial to a child" and that such a conclusion regarding "the intrinsic benefits, if any, of an 'upbringing in religion' are beyond the power of a civil court to comprehend."[26] The Court concluded:

"The principle [sic] or primary effects of giving preference to parents who are active adherents of organized religion will be (1) to punish parents who do not believe in God or going to church by making it less likely that they will gain custody of their children . . . (2) to encourage nonreligious, antireligious, or simply disinterested parents to engage in religious practices even if their beliefs are not sincere, and (3) to increase the number of children raised in religious households. This goes beyond accommodation and benevolent neutrality towards religion, while not advancing any values protected by the free exercise

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[21] *See, e.g., Bonjour v. Bonjour*, 592 P.2d 1233, 1242-1243 (Alaska 1979) ("According a preference in child custody proceedings to parents who are members of an 'organized religious community' violates that strict neutrality which the branches of government, including the judiciary, must assume in considering religious factors"); *Welker v. Welker*, 24 Wis. 2d 570, 129 N.W.2d 134, 136-38 (1964); *Gould v. Gould*, 342 N.W.2d 426, 432 (Wisconsin 1984), *Zucco v. Garrett*, 150 Ill. App. 3d 146, 501 N.E.2d 875, 881 (1986); *Zummo v. Zummo*, 574 A.2d 1130, 73 (Pa. Super. Ct. 1990)

[22] *Id.*

[23] *Welker v. Welker*, 24 Wis. 2d 570 (1964)

[24] *Id.*

[25] *Zucco v. Garrett*, 150 Ill. App. 3d 146, 501 N.E.2d 875 (1986)

[26] *Id.* at 155

clause. . . It places the authority, influence, support and power of the government on the side of organized religion, a nonsecular result that the establishment clause is designed to prevent."[27]

In another case involving adoption proceedings rather than a child custody dispute, *In Re "E"*, the Supreme Court of New Jersey reversed a trial court's decision denying an adoption petition to a couple who were nonreligious.[28] The Court reasoned that the lower court "burdening the opportunity to adopt with religious requirements" violated the Establishment and the Free Exercise clauses of the First Amendment.[29]

III. Impermissible Favor of Religion over Nonreligion: Cases Against Atheists

Although several state supreme court and appellate court decisions have explicitly prohibited the favoring of religious parents over nonreligious parents in child custody decisions, there are courts that have done so using the discretion of the "best interest of the child" standard. The courts that awarded custody to a religious parent over a nonreligious parent, when both were fit, was based on the assumption that a religious upbringing better serves the spiritual and moral development of the child than no religious upbringing.[30] In

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[27] *Id.*

[28] *In re Adoption of E*, 59 N.J. 36 (1971)

[29] *Id.*

[30] *See, e.g.*, *Tweedel v. Tweedel*, 484 So. 2d 260, 262 (La. Ct. App. 1986) (noting that "The child attends church regularly with the mother and receives religious instruction. The father testified that he has not brought the child to church because the child did not want to go and that he would not force the child to go to church"); *In re Marriage of Storlein*, 386 N.W.2d 812, 813 (Minn. Ct. App. 1986) (upholding grant of custody to mother, where lower court cited as one factor in her favor that mother "is a religious person who attends church on a regular basis" and who "would probably provide more constant attention to the children's religious education and training than would [father]," while father "was not a member of any organized religion and did not attend church services"); *Staggs v. Staggs*, No. 2004- CA-00443-COA, 2005 WL 1384525, at *6 (Miss. Ct. App. May 24, 2005) (noting that "while [father] is an agnostic and testified that religion is not important to him, [mother] testified that religion is very important to her"); *Gancas v. Schultz*, 683 A.2d 1207, 1213-14 (Pa. Super. Ct. 1996) (reversing lower court's transfer of custody from mother to father, based partly on lower court's "failure to consider 'all factors which legitimately have an effect upon the child's physical, intellectual, moral and spiritual well-being,'" and in particular that while "mother … takes [daughter] to church whenever [daughter] is with her," "father, an admitted agnostic, does not attend church"); *Pountain v. Pountain*, 503

these cases, religion is equated with morality and a religious upbringing is linked to instilling better morals in children.[31] The judges often looked at which parent took the children to church, sent them to Sunday school, or read the bible with them in making custody determinations.[32]

S.E.2d 757, 761 (S.C. Ct. App. 1998) (upholding denial of custody to father whom court described as "agnostic," and stating that "although the religious beliefs of parents are not dispositive in a child custody dispute, they are a factor relevant to determining the best interest of a child")

[31] *Id.*

[32] *Id.*