The Modern American Family: REPRESENTING NON-TRADITIONAL FAMILIES

North Carolina Advocates for Justice

RELIGIOUS BELIEFS AND CUSTODY

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Introduction

North Carolina General Statutes § 50-13.1(a) provides that "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided." Within the context of Chapter 50 and associated case law, issues relating to religion and minor children often arise. This can be within the context of a parent asserting his or her day to day control over a minor child and facing issues such as whether a child is vaccinated, attends a certain type of school, or is subjected to psychological assessment. It can involve issues relating to religion subject to a separation and divorce when biological parents fight over the custody or visitation of their children. It may even involve issues relating to third parties such as grandparents or state agencies that are at odds with the wishes of a natural parent.

North Carolina has only a limited amount of case law specifically interpreting these issues relating to religion and child custody. This manuscript will attempt to cover those cases and provide direction as to what should be considered in evaluating those issues.

1. General Welfare of the Child

The welfare of the child is the paramount consideration in custody matters. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977). The **best interest and welfare** of the child are the paramount considerations in determining the right to custody, as well as in determining the right to visitation, and neither the right to custody nor the right to visitation should ever be permitted to jeopardize the best interest and welfare of the child. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971). The welfare of the child is the "polar star" by which the discretion of the court is to be guided. Green v Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

In determining the best interest and welfare of a child, the North Carolina Supreme Court has said, that with regard to custody decisions, the trial judge is entrusted with the delicate and difficult task of choosing an environment which will best encourage full development of the child's (a) **physical**, (b) **mental**, (c) **emotional**, (d) **moral** and (e) **spiritual faculties**. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974). The emphasis of this

article will relate to "spiritual faculties" which may have a bearing on religious issues in custody cases.

2. Spiritual Welfare of a Child

A parent has a fundamental constitutional right to religious freedom under the First Amendment of the United States Constitution, yet, "Judges may consider the spiritual welfare of a child, as evidenced by the attendance of church or participation in religious activities, in reaching their decision on custody." Phelps v. Phelps, 337 N.C. 344, 353, 446 S.E.2d 17, 22 (1994). This would be consistent with the ruling set forth in Blackley, *supra*, in which it was stated by the North Carolina Supreme Court that with regard to custody decisions, the trial judge is entrusted with the delicate and difficult task of choosing an environment which will, in his/her judgment, best encourage full development of the child's (a) physical, (b) mental, (c) emotional, (d) moral and (e) **spiritual faculties**.

By way of example, the North Carolina Court of Appeals, in the case of Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977), the Plaintiff-father filed a motion in the cause seeking a change in custody for his five-year-old son. Prior to said motion being filed, custody of the child had been awarded to the Defendant-mother. Plaintiff filed a motion seeking a change in custody based upon a change in circumstances. He alleged, *inter alia*, that the Defendant had two illegitimate children following her divorce from him and he presented evidence that the Defendant was not a fit and proper person to have custody. Plaintiff was awarded custody and the Defendant appealed.

Defendant contended that the court erred by finding and concluding that her failure to take the minor child to church and Sunday school was jeopardizing the child's spiritual values. The Court of Appeals found that contention to be without merit, and it stated: "Defendant's argument that finding violates the constitutional provisions concerning the separation of church and state is also without support. Certainly, the trial court cannot base its findings on the preferability of any particular faith or religious instruction." Id. at 483, 232 S.E.2d 471. Based upon the decision in Blakley, the court stated: "[w]e think the spiritual welfare of a child is a factor that may be considered by the trial court in making a custody determination." Id. at 484, 232 S.E.2d 472.

The Court of Appeals, in the unpublished decision of Holcomb v. Holcomb, 149 N.C. App. 488, 562 S.E.2d 471 (2002) discussed the wide discretionary power that a judge is vested with in any custody proceeding, particularly with regard to the spiritual issues that may arise in a custody case. Here, Defendant-father appealed the Court's grant of primary physical custody to the Plaintiff-mother. He contended that the Court erred in permitting questioning and testimony concerning the religious beliefs and practices of the parents. The court disagreed.

The court, citing Phelps, see *supra*, reaffirmed that spiritual welfare is a factor that may be considered by the court. The trial court had made, *inter alia*, the following findings of fact which related to religion:

- While the Defendant has accused the Plaintiff and the members of the church which she currently attends, the Fuquay-Varina Church of Christ, of participating in alienating the children by pointing out biblical passages, quoting Scripture to the children, or praying for him all of which the defendant perceive[d] as condemnatory of him, the[c]ourt finds that after the separation the Defendant has attempted to distance himself from some of the beliefs and principles of the Church he embraced prior to the separation. The [c]ourt finds that neither the Plaintiff, nor members of the church she attends, by the exercise of their religious beliefs and principles have attempted to or in fact have alienated any of the children from the Defendant.

- Both parties are members of the Church of Christ although neither party continues to worship at the church attended by the family prior to the separation. The mother and children attend the Church of Christ in Fuquay Varina. The Defendant use[ ] to attend service at the Church of Christ in Fuquay Varina but did not become a member and attends elsewhere. The parties' exercise of their religious beliefs,

> while having had an impact on the children during the marriage and after the separation, is not a factor in the court's determination of the appropriate custodial arrangement. The court has no preference for either parties' choice or manner of exercising his or her religious beliefs. The [c]ourt finds that there is no causal relationship between the religious practices of either party and any actual or probable harm to any of the children.
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> - This Court has held that " 'a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child.' " *In re Huff*, 140 N.C. App. 288, 295, 536 S.E.2d 838, 843 (2000) (quoting *Peterson v. Rogers*, 111 N.C. App. 712, 719, 433 S.E.2d 770, 775, rev'd on other grounds, 337 N.C. 397, 445 S.E.2d 901 (1994)), disc. review denied, 353 N.C. 374, 547 S.E.2d 9 (2001). (Emphasis added).

The court concluded that the trial court's inquiry into the Defendant's religion in this case was "not so extreme as to abridge his religious freedom and was tailored to assess its impact on the children's spiritual welfare. It also concluded that substantial evidence unrelated to the religion of the parents supported the trial court's conclusion that it was in the best interest of the children that the Plaintiff be awarded their primary care and custody. Thus, if there was error, the court deemed it harmless.

3. Joint Legal Custody Issues

North Carolina General Statutes § 50-13.2(a) states:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person,

> agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either party.

"Legal Custody" is not defined in the North Carolina General Statutes. Yet, case law employs that term to "refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." Diehl v. Diehl, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006).

Legal custody includes "the rights and obligations associated with making major decisions affecting the child's life". (3 Suzanne Reynolds, *Lee's North Carolina Family Law*, §13.2b, at 13-16 (5th ed. 2002).

The "trial court has "discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." Diehl, 177 N.C. App. at 647, 630 S.E.2d at 28.

In Diehl, the trial court granted joint legal custody to both parties but went on to award" "primary decision-making authority" to Ms. Diehl unless "a particular decision will have a substantial financial effect on [Mr. Diehl]…" In the event of a substantial financial effect, however, the order still does not provide Mr. Diehl with any decision-making authority, but rather states that the parties may "petition the Court to make the decision…" Id. at 646, 630 S.E.2d at 28.

The trial court in Diehl found that the parties were unable to effectively communicate regarding the needs of the minor children and made findings that:

> Ms. Diehl has occasionally found it difficult to enroll the children in activities or obtain services for the children when Mr. Diehl's consent was required, as his consent is sometimes difficult to obtain; and when John's school recommended he be evaluated to determine whether he suffered from any learning disabilities, Mr. Diehl refused to consent to the evaluation unless it would be completely covered by insurance. Id.

The Court of Appeals reversed and remanded the trial court's decision, holding that "findings related to failure to communicate and obtain consent when required are insufficient to abrogate a parent's decision-making authority when granting joint legal custody. Id. at 648, 630 S.E.2d at 29.

In Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901 (2008), the Court of Appeals similarly heard an appeal from a trial court's decision to limit legal custody to a parent. In that case, Defendant argued that the trial court erred in dividing decision-making responsibilities between the parties after awarding joint legal custody. The trial court granted joint legal custody to both parties. However, the Plaintiff was to "have decision-making authority regarding all issues affecting the minor children except for issues regarding sports and extracurricular activities. Where the parties could not agree on issues related to sports and extracurricular activities, a parent coordinator would have decision-making authority on these issues." Id at 533-34, 655 S.E.2d at 906.

The Court in Hall referred to the holding of Diehl and noted that its ultimate holding was "[t]hat upon an order granting joint legal custody, the trial court may only deviate from "pure" legal custody after making specific findings of fact. The extent of the deviation is immaterial, so while the order in Diehl is distinguishable from the one in the instant case in terms of the authority granted to the respective defendants, that is not the relevant inquiry. Accordingly, this Court must determine whether, based on the findings of fact below, the trial

court made specific findings of fact to warrant a division of joint legal authority." Id. at 535, 655 S.E.2d at 906.

In Hall the trial court concluded that the Defendant was a fit and proper person for joint legal custody. It made no findings that a split in decision-making was warranted. Instead the court made several findings regarding the tumultuous relationship that the parties had, which, it found, as in Diehl, merely supported the trial court's conclusion to award primary physical custody to Plaintiff.

The trial court was reversed with regard to its ruling on decision-making and the case was remanded for further proceedings regarding the issue of joint legal custody. The court held that "[o]n remand, the trial court may allocate decision-making authority between the parties again; however, were the court to do so, it must set out specific findings as to why deviation from "pure" joint legal custody is necessary. Those findings must detail why a deviation from "pure" joint legal custody is in the best interest of the children. As an example, past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient, but mere findings that the parties have a tumultuous relationship would not." Id. at 535-36, 655 S.E.2d at 907.

North Carolina General Statute § 50-13.2(a) indicates that there is no presumption in favor of joint custody. It must, however, be considered by the trial court upon the request of either parent. The court has the authority to grant legal custody to one party, joint custody to both, or if proper findings are made, joint legal custody with a split in decision-making authority. Hall at 536, 655 S.E.2d at 907, fn. 3.

The North Carolina Court of Appeals, in Holcomb, *see supra*, again addressed legal custody issues where one party was granted superior rights to another. The trial court stated in its order that the Plaintiff and Defendant shall share joint legal custody of the minor children, however, it also ordered that "each party will have day to day decision-making authority with regard to routine matters when the children are with the respective party, where the parties are unable to agree on education, medical, dental, school activities, sports and counseling, plaintiff will have the right to make the final decision." The trial court's order was upheld.

In sum, a trial court may find that joint legal custody is appropriate yet give one parent superior decision-making authority. In order for such a decision to withstand appeal, however, specific findings of fact must be made evidencing why such a deviation from pure joint legal custody is in the best interest of the children.

A conflict between a Jewish father and a Methodist mother arose in the case of MacLagan v. Klein, 123 N.C. App. 557, 473 S.E.2d 778 (1996). In that case, the Plaintiff-mother and Defendant-father initially entered into a consent order which provided that both parents were fit and proper persons to have custody of their minor child, but that it was in the minor child's best interest for the Plaintiff to have custody. The plaintiff was ordered to consult with the Defendant with respect to all major decisions involving the child's education and health reasonably in advance of such decisions and if the parties could not reach an agreement they were to seek the advice of a specific therapist who would attempt to facilitate an agreement. The Defendant had a set visitation schedule, *inter alia*, of approximately 5 days every two weeks, periods during the summer and during the Jewish holidays. Significantly, the court found that the parties had agreed prior to their child's birth that the child would be reared in the Jewish faith. Id. at 560, 473 S.E.2d 781.

Plaintiff moved with the minor child from Chapel Hill, North Carolina, to Edenton, North Carolina without the Defendant's consent. While there, the minor child occasionally attended a Methodist church with her grandmother and sometimes with her mother. Her participation in church activities increased and included regular attendance at Sunday school, a weekly fellowship/choir program, and Vacation Bible School. Id. at 561, 473 S.E.2d 782.

Defendant filed a motion in the cause alleging a substantial change in circumstances and seeking modification of the Court's prior custody award.

At trial, the trial court found that the minor child was suffering from increased anxiety, confusion and stress due to travel between the two households and her parents inability to communicate with each other. This also arose from having to operate in two unrelated worlds and communities. The minor child had increased stress, headaches and stomach aches and the court found that the Plaintiff's incorporation of the child into church activities was "creating

confusion as to Ashley's self-concept and self-identity. The minor child had talked about worries of pleasing both parents "each of whom wanted her to be of their own religious faith, and that Ashley expressed a need to be loyal to both and be Jewish when she was with her father and Christian when she was with her mother." There was additionally testimony that the Plaintiff had a pattern of obstructing the minor child's relationship with the Defendant, and that the Plaintiff was undermining the child's training and Judaism.

The trial court entered an order concluding that there had been a substantial change in circumstances. The court based its conclusions on findings of fact including, in pertinent part:

- The minor child complained of stomach aches for which no physiological cause was identified and which her physician described as "possibly stress related due to the transition between parents who are not on good terms with each other;"
- The parties agreed to rear the minor child in the Jewish faith;
- The minor child has had substantial involvement with the Judea Reform congregation Synagogue in Durham and the Durham-Chapel Hill Jewish community since birth and that the self-concept she derives from this association is vital to her mental well-being;
- That the minor child is experiencing stress and anxiety due to her exposure to two conflicting religions, and this is having a detrimental effect on her emotional well-being and her relationship with the Jewish religious community in Chapel Hill;
- That there is evidence that one or more children in Edenton have made remarks to Ashley about her Jewishness, causing Ashley to experience anxiety and stress;
- That Ashley has had a positive sense of identity as a Jew since she was three years of age and interference with her worship as a Jew and fellowship with other Jews will adversely impact her emotional well-being;

- Ashley's circumstances have so changed that her welfare has been and will be adversely affected unless custody is modified.

Id at 564-65, 473 S.E.2d 784.

The trial court awarded the parties joint physical custody and ordered that the "Plaintiff be in charge of the minor child's social activities such as swim, dance and/or gymnastic lessons, but that no such activities shall be scheduled on days when Defendant and Ashley are in Chapel Hill, unless Defendant agrees; that Defendant be in charge of Ashley's religious training and practice, and that Plaintiff cooperate in and abide by Defendants' directives regarding religious training and practice; and that Ashley continue in therapy… [u]ntil otherwise ordered by the court." Id at 564-65, 473 S.E.2d 784.

The Court of Appeals upheld the Trial Court's order granting the Defendant decision-making authority over the minor child's religious training and practice. It noted that "Trial Courts are permitted to consider an array of factors in order to determine what is in the best interest of the child [and that these] may include the consideration of constitutionally protected choices or activities of parents." Id. at 568, 473 S.E.2d 786. (Citations omitted).

"Specifically as to the consideration of religion in child custody cases, this Court has previously stated that "although a court may consider a child's spiritual welfare as part of the best interests determination, a court may not base its findings on its preference for any religion or particular faith." Peterson v. Rogers, 111 N.C. App. 712, 718, 433 S.E.2d 770, 774 (1993), rev'd on other grounds, 337 N.C. 397, 445 S.E.2d 901 (1994). The general rule is that a "limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact of such practices may have upon the child." Id. at 568, 473 S.E.2d 786.

Since the minor child was raised Jewish by agreement of the parties, and as she has had a positive sense of identity as a Jew since the age of three, and as she has had substantial involvement with her synagogue in Durham, and since her introduction to her mother's Methodist church she has experienced stress and anxiety which have caused a detrimental effect on her emotional well-being, the Court of Appeals found that the trial court's findings were

supported by evidence and demonstrated affirmatively a causal connection between the conflicting religious beliefs and a detrimental effect on the child's general welfare. Id. at 569, 473 S.E.2d 787.

The Court of Appeals found that there was no impermissible expression of preference for one religion over another by the trial court. It was clear that the order giving the Defendant decision-making on the child's religious training was not based on a preference for Judaism, but "rather arises from the fact that the child has had a positive Jewish self-identity since she was three years of age, and the fact that the parties had an undisputed agreement "to raise [the child] in accordance with the tenants of Defendant's Jewish faith and heritage." We also reject plaintiff's claim that the order infringes upon her "constitutional right to the free expression of her religious beliefs." The trial court's order contains nothing which would prohibit plaintiff from following and/or engaging in the beliefs and practices of her chosen religion. The court properly limited its inquiry, and its order, to the detrimental impact of conflicting religions on the health and welfare of the child. Id.

4. Peterson v. Rodgers – To What Extent Can the Court Consider Religion?

Peterson v. Rogers, 111 N.C. App. 712, 433 S.E.2d 770 (1993), rev'd on other grounds, 337 N.C. 397, 445 S.E.2d 901 (1994), was the first North Carolina appellate case to address a situation involving an extensive religious inquiry in a child custody proceeding. In that case, the trial court allowed an extensive inquiry into the religion of the Plaintiffs, a couple that had attempted to adopt, and subsequently sought custody of the Defendant (mother's) child.

Defendant became pregnant with Paul, and while pregnant became friends with a member of a religious organization known as "The Way International." Defendant contemplated giving up the child for adoption. Plaintiffs heard about the possible adoption through their membership in The Way and arrange for the Defendant to move to North Carolina to live with a fellow member of The Way. After birth, Defendant signed a release form and Paul was given to the Plaintiffs. Soon after returning to her home in Michigan, Defendant revoked her consent to the adoption and after litigation, the North Carolina Supreme Court vacated the adoption proceeding. (See, In the Matter of the Adoption of P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

The North Carolina Supreme Court remanded the case to the trial court to determine whether custody should remain with the Plaintiff's or be transferred to Paul's biological parents. Id.

Pursuant to the remanded hearing, the trial court denied the Plaintiff's request for custody and ordered the minor child to be transferred immediately to his biological parents. Plaintiffs appealed, alleging, among other things, constitutional violations arising from the extensive inquiry into the practices and beliefs of their religion at trial and they allege that the court impermissibly considered their religious beliefs in reaching its decision to return custody of the child to his biological parents. Peterson, 111 N.C. App. at 714, 433 S.E.2d at 772.

The trial court allowed two witnesses to testify about The Way, and the testimony comprised 147 pages of the transcript and involved an in-depth examination of the general beliefs, tenants and practices of members of The Way. Id. at 715, 433 S.E.2d at 773. The judge ordered testimony from the Plaintiffs, themselves, as to their particularized beliefs, and at trial the Defendants presented evidence about The Way through the testimony of the Executive Director of the Cult Awareness Network in Chicago. The plaintiffs then presented testimony of a Way minister. Id.

The Executive Director of the Cult Awareness Network testified that The Way did not follow traditional Christian beliefs because its members do not believe that Jesus Christ is divine. She explained that The Way's concept of the trinity is "heresy" and described their practice of speaking in tongues as "classic hypnosis." Id. She further testified that in her "expert opinion" The Way International is a "destructive cult," because of its "unethical" and "deceptive" method of recruiting. Id.

In its order, the trial court made findings of fact regarding the religious practices of both the Plaintiffs and the biological parents. It found that the Plaintiffs "are members of The Way International, describing this as a "Pentecostal, Biblically oriented Christian sect which encourages its members to lead an affirmative lifestyle and… To reflect religiosity by overtly speaking in tongues." The court found that the biological parents, by contrast, "were baptized and once were professing Catholics," and that Defendant believes that The Way "is a network that isolated her and alienated her from her family and friends and influenced her under duress

and undue prejudice causing her to make an adoption decision she almost immediately regretted." Peterson, 111 N.C. App. at 716, 433 S.E.2d at 773.

The court concluded that both the Plaintiffs and the biological parents are fit and proper persons to have custody. That the minor child was not eligible for adoption and that the biological parents' rights had not been terminated. Due to "serious religious differences," "lengthy and strident court proceedings," and geographical distance, the court decided joint custody was not possible and that Paul's best interests require that he live with his biological parents with no visitation from the Plaintiffs unless consented to and approved by the parents. Id. at 716-17, 433 S.E.2d at 774.

On appeal, the North Carolina Court of Appeals noted that:

> "When considering a child's spiritual welfare… A court must be careful not to infringe upon the religious freedom of the parties involved, a fundamental right guaranteed by our State and Federal constitutions. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" US Const. amdnd. I. similarly, the North Carolina Constitution provides that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatsoever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13. Although the trial judge has wide discretion in controlling child custody cases, we believe this discretion could be abused by a religious inquiry so extensive that it would violate the most basic of our fundamental rights and thus become an inquisition.
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> Id.

The Court Of Appeals had previously held in Dean, see *supra*, that although a court may consider a child's spiritual welfare as part of the best interests determination, "a court may not base its findings on its preference for any religion or particular faith." Peterson, 718, 433 S.E.2d at 718 (citing, Dean at 483, 232 S.E.2d at 471). After reviewing the trial court transcript, the Court of Appeals found that many questions asked about The Way had no relevance to the minor child's best interests, but rather focused on the theological beliefs held by members of The Way. Peterson at 719, 433 S.E.2d 775.

The Court of Appeals refused to set down "exactly what may or may not be asked" but stated that "we will provide some examples from the transcript of questions which are clearly unacceptable in a court proceeding to determine custody of a child." Id.

Examples of ***inappropriate*** questions follow (summarized):

- Exchange between Attorney for Defendant and Cynthia Kisser, Executive Director of the Cult Awareness Network:

    - Q: I believe I asked you… What religion encompassed or was involved with The Way International, whether or not it was a Christian religion…

    - A: The Way International, the founder of it, published a book called *Jesus Christ Is Not God* which articulates a main position of that religion. That Jesus Christ was a human being and not a divine being. He is called the son of God. He is referred to in terms that are Lord and things like that, but the bottom line of the belief system is that he is a man and he is not divine or co-equal with God.

- Exchange between guardian ad litem and Ms. Kisser:
    - Q: You have stated and others have stated that the members of The Way does [sic] not believe that Jesus Christ was God, the son of God.

- A: Right

- Q: Now, don't the people in The Way believe, however, that God was in Jesus?

- A: Now you are getting into the semantics in the sense that they do not believe that - they believe that we all have a spark of divinity in us as individuals so that spark that was in Jesus could be in you or I if we are a believer too. But that would not make you or I God-equal to God in the trinity, any more than it would make Jesus that way. For him having that divinity in him, that spark of divinity, he is no more or no less than you or I in God's eyes in that sense.

- Q: And is it true that even though The Way may not particularly espouse like mainstream religions that the Trinity is personified by three individuals, for lack of a better word, don't they believe and profess that their ability to speak in tongues is a result of the Spirit of the Holy Spirit descending upon them?

- A: But it still is not a persona. Like it is still - It is still a spiritual gift which is delivered onto you because of your level of believing.

- The trial court permitted counsel to question the accuracy of The Way materials and beliefs.

    - Q: From the literature that you've reviewed in your work have you found a consistent point that there are some inaccuracies in an what Dr. Wierville [founder of The Way] has written concerning- and things that can be disproved that he has written concerning, for example, the language in which the Bible was written?

- A: Yes… There is ample literature that has been written… that is of a scholarly nature that does dispute the actual accuracy, technically, of some of the claims.

- The trial court permitted questions to Reverend Greene:

  - Q:… Do you know if The Way International is recognized as a religious denomination in the United States?

  - Q: So it wouldn't surprise you then that in the Handbook of Denominations, The Way International is not listed?

Id. at 720-21, 433 S.E.2d 776.

The Court of Appeals noted that the quoted passages "do not in any way relate to Paul or the effect on Paul of the Petersons' involvement in The Way. Id. at 722, 433 S.E.2d 776. Although Ms. Kisser expressed concern over some of the practices of The Way, she had never met the plaintiffs or the minor child and therefore, none of her testimony could have related to the present or possible future effect of the Plaintiff's religious practices on the minor child. Id. at 722, 433 S.E.2d at 776-77.

The Court of Appeals held that "[q]uestions about Jesus Christ, evil spirits, speaking in tongues, tithing, and the Handbook of Denominations had no relevance in determining custody in the child's best interests. The court noted that other Christian sects practice speaking in tongues and believe in evil spirits. Unless evidence of such practices could be put in the context of this particular family, it was irrelevant." Id. "Absent any evidence that the minor child was adversely affected or would be adversely affected in the future by the religious practices, the Court's acquiescence in the extensive inquiry was impermissible. To allow Ms. Kisser to speculate that the general practices and beliefs of members might be detrimental to children is to condemn the entire membership of The Way as unsuitable parents. Id at 723, 433 S.E.2d at 777.

Although the trial judge had attempted to explain her inquiry by stating that it was incumbent upon the judge to understand what The Way "is all about… [and the judge] wanted to know specifically what [Mrs. Peterson] thought, what she believes, and what she was doing… [the judge wanted] to know what it is. The judge stated "I know nothing about these people…" In their brief, the biological parents explained that the Court's inquiry was limited to the general teachings and practices of The Way, and did not involve the practices and beliefs of the Petersons themselves." The Court of Appeals, however, stated that "[t]his inquiry directly contradicts the rule that such examination must be limited to the religious practices of the parties involved and the effect of those practices upon the child in question." Id.

The court did give examples of questions that were asked during trial that would be deemed appropriate in this type of case:

- Q: Is there anything about your practice of your Christian, religious beliefs which requires you in any way to subject Paul to unusual discipline of any kind?

- Q: Is there anything about the - your membership within the Ministry of The Way International that in any way controls your own personal actions toward Paul or toward your husband…?

- Q: And in you're talking about first aid, second aid and third aid, I believe your statement was that all of these aids could come concurrently or contemporaneously with seeking medical treatment at the same time?

- Q: Is there anything in your religious beliefs that would be equivalent to the Jehovah's Witnesses where they won't transfuse blood… where they would not allow surgery with the Christian Scientists?

- Q: So medical treatment really is not a big deal with you all?

- Q: And, is there anything in your religion that you would teach your son that would denigrate or derogate in any way the life-style of these people who are his natural, biological parents?

Id at 723, 433 S.E.2d 777.

In conclusion, the Court of Appeals held that the Plaintiff's should not have been subjected to the inquisition of their religion at trial. "The unfamiliarity of a religion to the trial judge or other parties to a case should not serve as an excuse to delve so deeply into such private matters. In the absence of evidence of present or future physical or mental harm to the child in question, parties to a child custody dispute should not be placed in a position requiring them to explain or defend their religious beliefs." Id at 725, 433 S.E.2d 778. The case was reversed and remanded.

The North Carolina Supreme Court reversed the Court of Appeals decision in Peterson, on grounds unrelated to the analysis above and, therefore, the analysis as to the type of questions which are appropriate and/or inappropriate with regard to religion in custody cases seems to remain authoritative. The Court found that the natural parents had a constitutionally protected paramount right to the custody, care and control of their child, including control over his associations and that this outweighed the Plaintiff's interests including their right to freedom of religion. It found, therefore, that the inquiry into the Plaintiff's religious beliefs, if error, was harmless. Id. at 400, 445 S.E.2d 901.

Subsequently, the North Carolina Court of Appeals again addressed the types of questions that would be appropriate in a custody case in which the issue of religion was involved. In the Matter of X. Huff, 140 N.C. App. 288, 536 S.E.2d 838 (2000), was a termination of parental rights case in which the parents were Wicken. The guardian ad litem questioned the father about his religious beliefs and this line of questioning only comprised approximately 6 pages of the transcript (in contrast to the line of questioning in Peterson, *supra,* which included approximately 147 pages of testimony on the subject of religion). Huff at 294, 536 S.E.2d 838.

The line of questioning included, in pertinent part, the following:

- Whether his wife is a "witch" and what that term means.

- Whether his wife can cast a spell.
- Whether his wife had once stated that the reason one of her children slept well on a particular night while in the hospital was because she had cast a spell.
- Whether the father prayed that he would get a job.

Id.

The court noted the general rule that "a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child." Id. at 295, 536 S.E.2d 843, citing Peterson at 719, 433 S.E.2d at 775. The Court noted the difference in inquiry into the practices of a religion versus the inquiry into the beliefs of a religion and agreed that "the limited inquiry may touch upon the religious practices of the parties as they relate to the health and safety of the child, but such inquiry may not focus on the general beliefs and doctrines of a religion. Id.

In distinguishing the present case from Peterson, the court noted that:

1. The inquiry here only consisted of a few brief remarks by three witnesses and only included six pages of the transcript. "The inquiry can hardly be described as an inquisition."

2. "It would be unrealistic to expect a trial court to be able to make a determination about whether the religious practices of the parents "may adversely affect the physical or mental health or safety of the child without first allowing some brief inquiry into the religious practices of the parents. In other words, a trial court must have some preliminary information regarding the religious practices of the parents in order to determine whether the limited inquiry permitted by Peterson is appropriate. The inquiry that transpired in this case was appropriately brief, and a far cry from the type of inquisition prohibited by Peterson." (Citations and quotes omitted."

3. The questions to the father in this case addressed the ways in which the parents' religious beliefs might impact their behavior in specific ways. "For example, the father was asked whether he was aware that the mother believes that casting spells can affect the behavior of their children. He was also asked whether he believes that a spell can impact his ability to get a job. We believe these sorts of questions are the kinds of questions that are permissible under *Peterson*."

Id. at 296, 536 S.E.2d 844.

Because of the limited nature of the religious inquiry which was primarily directed at the father with regard to the parents' religious practices, the Court found that it was inherently relevant to the present or possible future impact of the parents' religious practices on the child. The court perceived that there was a significant difference between questioning a father about the religious practices of the family, and, on the other hand, questioning an expert witness and a minister about the general tenants of the religion. Id at 298, 140 N.C. App. 844.

5. Grandparents

The unpublished opinion of Slawek v. Slawek, 206 N.C. App. 596, 698 S.E.2d 768 (2010) does not create any new analysis for cases involving religion, however, it does provide another example of a case in which religious issues may be considered by the court in determining custody of minor children.

Based upon a grandmother's motion to intervene, an order was entered granting father sole custody of his children and the maternal grandmother visitation rights. The grandmother filed numerous motions seeking to have father held in contempt for allegedly refusing to allow visitation as ordered and asked that the court award her sole custody of the children. Father filed motions to limit the grandmother's visitation as well as a motion seeking to terminate her visitation rights.

The trial court made findings, *inter alia*, that:

- The children… have found comfort and solace in the Roman Catholic faith, a faith to which father nominally adheres.

- The children attend Immaculata Parochial School where worship is a part of the curriculum and they attend Mass regularly.

- Grandmother is a firmly committed member of the Church of God of Abrahamic Faith.

- Grandmother regularly takes the children to her church when she has them on the Sabbath and insists upon catechizing them in the doctrines of her faith.

- Grandmother attempts to convert them to her way of thinking as being the correct way of thinking.

- Grandmother has suggested the children be re-baptized in her church.

- This religious dissonance causes the children ongoing, profound distress and directly erodes the sense of security they have found in their Catholic faith.

- These particular children especially do not need, and have expressed to their therapist that they do not want, to be subjected to a contest for their hearts and minds fraught with competing religious doctrines.

- One child especially testified that he resents his grandmother's imposing upon the children a doctrine "kind of opposite of the Catholic faith" to which he adheres.

- This also directly subverts Father's paramount parental role in establishing the terms of his family's worship.

The trial court confirmed the father as sole legal and physical custodian and dissolved and revoked absolutely the visitation rights of the grandmother. The Court of Appeals held that there was a substantial change in circumstances wholly supporting the legal conclusions that the Grandmother was unfit and must be removed from the children's lives in order for them to have "normal lives."

6. Parent's Rights to Decide If a Child is Subjected to Mental Health Evaluation

The Court of Appeals in, In the Matter of Tommy Browning and Robert Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996) discussed a parent's right to decide whether or not a child should undergo a mental health evaluation in connection with a Department of Social Services' abuse investigation. Here, DSS was investigating a report of abuse concerning a minor child. The social worker requested that the respondent sign consent forms for his sons to undergo a Child Mental Health Evaluation which would be conducted by a psychologist and would generally involve eight sessions. The respondent stated that he would consent for his sons to participate in one session, but would not consent to the complete evaluation. Id. at 191, 476 S.E.2d at 466.

The social worker then filed a petition to prohibit the respondent from interfering with the child protective services investigation. The respondent testified that his objection to the investigation was based upon his religious beliefs and that, in particular, that he did not believe in psychologists and would prefer that his children undergo counseling through their minister. Id. at 192, 476 S.E.2d at 466.

The trial court found that the respondent had interfered with the investigation and that he had no lawful excuse for refusing to allow the evaluation. The trial court ordered that the respondent be prohibited from interfering with the DSS investigation and the respondent appealed arguing, *inter alia*, that the trial court's conclusions that his religious beliefs are not a

lawful excuse for his refusal to consent to the child mental health evaluation was inappropriate. Id.

The Court of Appeals disagreed and found that a liberty secured by the First Amendment to the United States Constitution and by Article I § 26 of the Constitution of North Carolina are basic and fundamental. "However, the freedom to exercise one's religious beliefs is not absolute." Id. at 193, 476 S.E.2d 467.

> "The constitutional provisions regarding freedom of religion do not provide immunity for every act, nor do they shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one's religion, or lack of it, which is protected, not one's sense of ethics. One may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a "compelling state interest in the regulation of a subject within the State's Constitutional power to regulate."
>
> The intent of the statutes requiring the Department of Social Services to screen and investigate complaints of child abuse is the protection of neglected and abused children, G.S. § 7A-542, which is undeniably a compelling state interest. Respondent's rights as custodian of the children are secondary and must give way to the protection of his children. Accordingly, his refusal to permit the evaluation based upon his beliefs is not constitutionally protected conduct and cannot afford him a lawful excuse for his interference with the Department of Social Services investigation.
>
> Id. at 193-4, 476 S.E.2d, 467. (Citations and punctuation omitted).

7. Parent's Right to Select Schooling

The Court of Appeals in the case of, In the Matter of Shelby Jane McMillan and Abe McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976) is a case in which a trial court found

that children were being neglected pursuant to G.S. § 7A-278(4) on account of the "willful failure and refusal of their parents to send said children to school." Id. at 236, 226 S.E.2d 694.

The court considered the issue as to whether children whose parents willfully refuse to allow them to attend school may be considered neglected. The parents contended that the proceeding relating to neglect was brought to compel compliance with the compulsory school attendance law as set out in G.S. § 115-166. That statute provided that "No person shall encourage, entice or counsel any such child (between the ages of seven and sixteen) to be unlawfully absent from school." Id.

The Court noted that in the case of Tucker v. Tucker, 288 N.C. 81, 216 S.E.2d 1 (1975), "[t]hat the natural and legal right of parents to the custody, companionship, control and bringing up of their children is not absolute. It may be interfered with or denied for substantial and sufficient reason, and it is subject to judicial control when the interest and welfare of the children require it." Id. at 238, 226 S.E.2d 695.

Here, the parents contended that they had a deep rooted conviction for Indian heritage and that because the schools did not teach Indian heritage and culture, that they should be on an equal constitutional plane with religious beliefs such that their position is protected by the First Amendment. Id.

The parents willfully refused to permit the children to attend public school because those schools did not teach the particular heritage and culture that the parents deemed appropriate. They did not, however, provide any alternative education or training for their children. The Court of Appeals held that the trial court exercised its control to interfere with the natural rights of the parents and the best interest and welfare of the children and affirmed the trial court's order. Id.

8. Vaccinations

The Court of Appeals in the case of, In the Matter of Spencer Stratton, 153 N.C. App. 428, 571 S.E.2d 234 (2002) addressed whether or not children who are placed in the care of the Department of Social Services could have children immunized over the objection of a parent. Here, the parents appealed from a trial court order requiring that their children be immunized.

They argued that such immunization would be in contravention of their bona fide religious beliefs and that the order violated their constitutional rights and exceeded the trial court's authority. Id. at 429, 571 S.E.2d 235.

Department of Social Services had taken custody of the children and they were adjudicated neglected and dependent. The children were placed in foster care and DSS learned that none of the children had been immunized. As part of an overall provision of health care services by DSS, the children were prepared for immunization. The parents informed DSS that they objected to the children being vaccinated without parental consent and the parents sent a letter setting forth their medical and religious objections. Id. at 430, 571 S.E.2d 235.

North Carolina General Statutes § 130A-152 mandates that "every parent, guardian, person in loco parentis and person or agency, whether governmental or private, with legal custody of the child shall have the responsibility to insure that the child has received the required immunization at the age required." Id. at 430, 571 S.E.2d 236. N.C.G.S. § 130A-157 does have a religious exemption with regard to compliance but the court found that the agency with legal custody of the children and mandated by statute to have the children immunized, had not requested the exemption on behalf of the children. Id.

N.C.G.S. § 130A-157 states:

> If the bona fide religious beliefs of an adult or the parent, guardian or person in loco parentis of a child are contrary to the immunization requirements contained in this Chapter, the adult or the child shall be exempt from the requirements. Upon submission of a written statement of the bona fide religious beliefs and opposition to the immunization requirements, the person may attend the college, university, school or facility without presenting a certificate of immunization.

The parents argued that DSS had not terminated their parents' parental rights, and that immunization of their children while in the temporary custody of DSS would violate their constitutionally protected religious beliefs. The Court of Appeals disagreed, holding that North

Carolina has a strong public policy encouraging the immunization of all children. Stratton at 432, 571 S.E.2d 236. It noted that "Our courts do not have a history of routinely ordering the performance of medical procedures on children without parental consent. However, when parents refuse to provide necessary medical care, their inaction can extinguish custody and support a finding of neglect. Id. at 433, 571 S.E.2d 237.

The Court cited the case of In Re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982). In which a child had severe speech and hearing defects which were treatable. In that case the Court ordered treatment for the child over the mother's objection since the child had been adjudicated neglected. The Huber case allowed a judge to override a parent's objection to medical treatment when the reason for the adjudication of neglect was the lack of medical treatment itself.

The State may interfere with the usual parental prerogatives as to their children when the parents' actions towards a child are contrary to the child's best interest or against the public interest. Stratton at 433, 571 S.E.2d 237. "When a parent neglects the welfare and interest of his child, he waives his usual right of custody. The Supreme Court of North Carolina has held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail. Once it has been determined that a parent is unfit or has neglected his child, the parent loses his decision-making ability as of right. Id. at 433-4, 571 S.E.2d 237. (Citations omitted). In pertinent part, the Court of Appeals held that:

> "Once unfitness, neglect or other action inconsistent with the parent's constitutionally protected interest has been found, a court should revert to the basic determination of what action is in the best interests of the child. Here, the trial court found that immunization was in the best interest of the Stratton children." Id. at 434, 571 S.E.2d 238. The religious exemption outlined in North Carolina General Statutes § 130-157 "is a parental right to be exercised by a parent with a bona fide religious belief contrary to the immunization requirement. Appellants have presented

> evidence of a religious objection to immunization, and we do not consider the bona fide nature of that objection. However, when the principles of Peterson and Price are applied to the case at bar, it is clear that appellants no longer have authority to object to the immunization of the children. Here the children have been adjudicated dependent and neglected by their parents, appellants, and their legal custody now resides with DSS... By their failure to provide basic necessities for their children, appellants have acted in a manner inconsistent with their constitutionally protected parental relationship. Here, the trial court correctly focused on the best interest of the children... Because appellants have surrendered the companionship, custody, care and control of their children by neglecting their welfare, DSS is now the only party that may legitimately make health decisions for the Stratton children."
>
> Id. at 434-5, 571 S.E.2d 234. (Citations omitted).

9. Can a Provision in a Custody Order with Respect to Religion Affect the Substantial Rights of a Party so as to Permit an Appeal While Other Claims Are Still Pending?

As a general proposition, an interlocutory appeal is impermissible unless it affects a substantial right. N.C.G.S. 7A-27(d)(1). The statute has been construed to require that a substantial right be affected, not by the judgment itself, but rather by the delay which would result if the order could not be appealed until entry of a final judgment resolving all claims against all parties.

"Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff *if not corrected before an appeal from final judgment*." Goldstein v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (emphasis added). "In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the

substantial right affected by the order sought to be appealed." Blackwelder v. State Dep't of Human Res., 60 N.C. App. 331, 335, 299 S.E.2d 777, 789-81 (1983).

In Frost v. Mazda Motor of Am., Inc., 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000), the North Carolina Supreme Court stated:

> "The [substantial right] test is more easily stated than applied: 'It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered."' (Quoting, Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)).

Assume your client is ordered to allow or not allow the child to attend 8th grade communion class at church. Who will determine whether the child "takes communion" with his or her peers. Is it a right of a party that is being affected? Is it more aptly described as a right of a child?

In the usual custody case, a party would be appealing the award of greater time to one party and hence suffer a loss of time that a parent will never get back. If the "loss of time" was considered to be a substantial right, then custody issues would essentially always be appealable as soon as custody was decided, even if other issues in the case remain open. The Court of Appeals in custody cases in determining whether a substantial right is affected has states: "[O]ur courts have recently taken a restricted view of the "substantial right" exception to the general rule prohibiting immediate appeals from interlocutory orders." Blackwelder, 60 N.C. App. at 334, 299 S.E.2d at 780.

Courts have in fact been reluctant to hold that a claim for custody inherently affects a substantial right. Given the paramount right of a parent to his or her child, and the protection found in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment, it is a seemingly curious result. "The general rule which has been stated by this Court is that temporary custody orders are interlocutory and the temporary custody granted by the order does not affect any substantial right of plaintiff which cannot be protected by timely appeal from the trial court's ultimate disposition

of the entire controversy of the merits." File v. File, 195 N.C. App. 562, 673 S.E.2d 405, 410 (2009), quoting Dunlap v. Dunlap, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).

One custody case was held to result in an interlocutory appeal when there appeared to be an unusual threat to the child's welfare. See McConnell v. McConnell, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002) ("there is a direct threat that the child is subject to sexual molestation"). But McConnell is a fact-specific exception to the general rule. "McConnell does not support the proposition that all orders for child custody are immediately appealable. Evans v. Evans, 158 N.C. App. 533, 536, 581 S.E.2d 464, 466 (2003). File appears to be an example of how "special" the McConnell fact pattern was found to be. As in File the "mere allegation" that a child was endangered by a parent's driving was rejected by the trial court based upon expert testimony from parent's physicians. This did not constitute a sufficient threat to the welfare of the child to justify immediate review.

Some practitioners have relayed that in certain parts of the State, judges have been increasingly making choices for the parents, rather than choosing the parent who will make a particular choice. Whether you agree or disagree with the judge's role as a social engineer, the decisions of whether a child will engage in certain religious practices can have a lifetime effect on the child, and the ship may have already "sailed" by the time all of the claims have been resolved--- i.e. there is no generally accepted method to unbaptize someone. The "blasting" case discussed at page 37, *infra*, of the manuscript involves the trial court in McGee making a temporary order that neither parent expose the children to the religious practice of blasting. Query as to the analysis of whether or not the original order of the trial court would have been immediately appealable.

If a court were to issue an order which would effectively "decide" a significant issue regarding a child's religious identity or affiliation, the Court of Appeals could certainly find a substantial right under the Blackwelder test. Again, there are religious decisions that cannot be "undone." The question of whether or not to circumcise comes to mind. The language in the Court of Appeals decision in Petersen appeared to pave the way for a possibility that a court could make a religious inquiry as intensive as to violate "the most basic of our fundamental

rights." This language was negated by the North Carolina Supreme Court's Peterson opinion *in dicta* to the extent the court concluded "inquiry into Plaintiffs' religious beliefs, if error, was harmless."

Can a parent pursue an interlocutory appeal on behalf of the child, contending that it is the child who is being deprived of a fundamental right? The process of the inquisition was reprehensible to the Court of Appeals in Petersen, such that the outcome of the underlying decision had to be reversed. The North Carolina Supreme Court then held the process to be harmless. However, the court in McConnell was obviously more concerned with the outcome. Regardless, "substantial right" sounds much like "fundamental right" and it appears logical that any right that is "fundamental" should be "substantial"—while the converse might not always be true. Restated, if a right is truly fundamental, how could the violation of the fundamental right NOT justify immediate appellant review? And yet, this is not the test followed in North Carolina regarding interlocutory custody appeals.

10. Can the Constitutional Rights of a Parent with Respect to Freedom of Religion Be Infringed Upon by Specific Custody Provisions?

What exactly is the right and where does it come from?

Freedom of religion is a constitutionally guaranteed right provided in the religion clauses of the First Amendment. The First Amendment prohibits the federal government from making a law "respecting an establishment of religion or prohibiting the free exercise thereof." This provision was later expanded to state and local governments through the incorporation of the Fourteenth Amendment. So, we have a restriction applicable to state and local governments which forbids law making with respect to an establishment of religion or prohibiting the free exercise thereof. Law makers cannot prohibit the free exercise of religious practices. However, the prohibition it is not absolute. While laws cannot interfere with religious beliefs and opinions, laws can interfere with practices to some degree.

A good illustration of this involves a case wherein "alcoholic" defendants had been ordered to attend Alcoholics Anonymous or face imprisonment. In 1999, a federal appeals court ruled that an order to attend AA was unconstitutional because the AA program relies upon

submission to a higher power. See Warner v. Orange County Department of Probation, 827 F.Supp. 261 U.S.D.C. (S.D.N.Y. July 29, 1993); Warner v. Orange County Department of Prosecution, (2nd Cir., Docket No. 95-7055) (1999). In a custody case, what do you do in North Carolina if your client is ordered to continue AA as a condition of visitation?

A. North Carolina Cases

First Amendment issues related to custody cases in North Carolina are discussed in Sections 2, 4, 6 & 7, *supra.*

B. A Few Illustrative Cases from Other States

i. "The [father] shall not take the children to church…the [father] shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or themselves."

In Kendall v. Kendall, 426 Mass. 238, 687 N.E.2d 1228 (1997), restrictions upon the religious exposure of the children was upheld where the children who had been raised in the Jewish faith were not permitted to share certain aspects of father's beliefs in that father had become a fundamentalist Christian. Father believed that those who did not accept his fundamentalist faith were "damned to go to hell." The Court determined that the order was a necessary and minimal burden on the defendant's right to practice religion by requiring only that he limit certain aspects of his belief with his children.

ii. The "chudakarana."

In Sagar v. Sagar, 57 Mass. App. Ct. 71, 781 N.E.2d 54 (2003), rev. denied, 439 Mass. 1103, 786 N.E.2d 395 (2003) and cert. denied, 124 S. Ct. 228, 158 L.Ed.2d. 136 (U.S. 2003), the trial court held that the religious ceremony known as chudakarana should not be performed on the child until she was of sufficient age to make that determination herself, absent a written agreement between the parties. The parties were both devout Hindus, and had engaged in Hindu ceremonies. The ceremony involves a priest removing hair from the child's head, and then offering benedictions. The Court of Appeals held the provision did not violate the father's

right to the free exercise of religion as the mother opposed the ceremony and the order was compatible with the child's health and well being. The evidence as to the impact of performing or not performing the ceremony was insufficient either way—the evidence did not establish the child would undergo harm by having or not having the ceremony. Absent proof either way, the order is a "narrowly tailored accommodation that intrudes least on the religious inclinations of either parent and is compatible with the health of the child." Id. at 12, citing Felton v. Felton, 383 Mass. At 235, 418 N.E.2d 606. The order respects the child's ability to eventually control her own religious destiny…Id. at 12, citing Wisconsin v. Yoder, 406 U.S. at 243, 92 S.Ct. 1526. (Douglas, J. dissenting).

iii. Prohibition regarding exposing child to religious upbringing or teaching…that can be considered homophobic."

In In Re E.L.M.C., 100 P.3d 546 (Col. Ct. App. 204), the trial court issued an order prohibiting the adoptive mother of the child from exposing the child to homophobic religious teachings. The Court of Appeals held the order lacked sufficient findings for determination as to whether the limitation on the child's religious upbringing impermissibly invaded the adoptive mother's state and federal constitutional right to the free exercise of religion. The Court noted that when parental responsibilities have been determined, the Colorado statute allows the person with decision-making responsibility to determine religious training unless the child's health would be endangered or emotional development significantly impaired. The Court also noted that other statutes recognized that harm to the child must be shown before custodial parent's constitutional right to determine the child's religious upbringing can be restricted in resolving a custody suit.

11. Can a Practitioner Request the Judge Recuse Himself or Herself Based upon the Judge Having Expressed Strong Religious Beliefs with Respect to Religion That Dramatically Conflict with the Beliefs of Your Client?

Most would concede that conflicting religious beliefs are a potential hot button. In the scenario wherein, for example, you have a judge who is Protestant and who has a very strong belief that those who do not share the same belief system will ultimately end up in hell,

how is that likely to affect a custody case between Protestant Sunday School teaching mother and Agnostic father? Will Agnostic father feel like he is on equal footing in a custody contest?

North Carolina Code of Judicial Conduct 3(C)(1) provides that "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The code is identical to 28 U.S.C. § 455(A). In Re Beard is a hallmark case interpreting the language of 28 U.S.C. § 455(a) and explaining the analysis when the judge's ability to be impartial is questioned. In In Re Beard, 811 F.2d 818 (4th Cir. 1987), a group of product liability claims sought a writ of mandamus ordering Judge Robert Merhige to disqualify himself from presiding over defendant corporation's Chapter 11 bankruptcy proceedings. The petitioners had originally filed an affidavit requesting the judge's recusal which request had been denied by the judge. Id. at 826. The Court of Appeals applied 28 U.S.C. § 455A and gleaned from its own precedent that disqualification is required if a reasonable factual basis exists for doubting the judge's impartiality. Id. at 927, quoting Brice v. McKenzie, 581 F.2d 1114, 1116 (4th Cir. 1978). The claimants did not have to establish actual partiality, but only that a reasonable person would have a reasonable basis for questioning the judge's impartiality. Furthermore, the bias must be personal and "derived from an extrajudicial source" to warrant disqualification. Id. 28 U.S.C. § 455(A) requires that a judge disqualify himself in "any proceeding in which his impartiality might reasonably be questioned." A judge must also disqualify himself when he has a personal bias or prejudice concerning a party or knowledge of disputed evidentiary facts concerning the proceeding. 28 U.S.C. § 455(B)(1).

A. Should the Court Raise the Issue?

How do you tactfully ask a Jewish judge, for example, whether he or she will be more aligned with the Jewish parent than the non-Jewish parent in a custody dispute? As a matter of unscientific polling, I asked a Jewish judge as I was writing this article the extent to which the judge disclosed the fact that the judge was Jewish in cases where religion was a hot issue. "Never" was the answer. The judge figured that most of the lawyers appearing before the judge know the judge is Jewish, moreover, the judge likened it to "some people have cats, some people have dogs"—if I am a dog person, I don't disclose to the litigants that I have a dog in a case where there is dog person versus cat person.

Aetna Casualty & Surety v. Berry, 669 So.2d 56 (Miss. 1996) is an interesting out of state recusal case as it is a fact pattern that is probably not that unusual. In Berry, you have a judge that was formerly in an attorney client relationship with one of the lawyers appearing before him, and had been supported by the lawyer in his election campaign. Specifically, the lawyer representing a party in domestic case had also represented a judge in his own personal domestic case 10 years earlier. In addition, the lawyer had been heavily involved in the judge's re-election campaign. Recusal was resisted on the grounds that the motion to recuse was not filed until after an adverse verdict. The court rejected the argument that moving counsel knew or should have known the circumstances, stating "presumably the fact that Harrell represented [the judge] in his 1985 divorce action is contained in the public records; however, that is not the type of knowledge that we can agree to hold a lawyer to have constructively possessed. To do so would have required lawyers in every action to sift through the public records to discover any possible evidence of a judge's impropriety. . . . It must be remembered, however, that it is the judge must come forth and recuse himself so as to avoid any appearance of impropriety." The judge went on to hold that "the objective observer would harbor doubts in this situation about [the judge's] impartiality."

There are certainly judges who do have strong enough feelings about religion that those feelings should be disclosed. There are certainly judges who, while affiliated with one religious group, aren't going to have any issues with impartiality as to a parent with very different views and beliefs. If the facts in a particular case are such that the objective observer would harbor doubts…why not have another judge determine the case. These authors respectfully submit that custody cases are hard enough without one of the parties having the sense that he or she did not start out on an even playing field.

B. Having "Strong Feelings," Coupled With Firsthand Experience Regarding the Subject Matter is Not Enough To Form the Basis of a Request for Recusal

Judges certainly have a great deal of discretion as to whether or not to recuse himself or herself. A recently retired judge in Forsyth County was somewhat famous for being willing to step down if either party raised a serious good faith issue as to whether there was a

basis for recusal. He granted many requests for recusal not because he had to, but because he wanted both of the parties to have no doubt about the impartiality of the court making the decision. Case law would certainly indicate that what a layperson may think of as a basis for his recusal is not a basis for recusal under North Carolina law.

In State v. Kennedy, 110 N.C.App. 302 (1993), the trial judge had certain alleged opinions regarding the crime of a DUI as a result of his wife's serious injury in an automobile accident caused by an impaired driver. The prosecution in the DUI case moved for the trial judge to recuse himself, and the motion was accompanied by an affidavit from an attorney which alleged the trial judge was especially requested to preside over this session of court because of his feelings toward DUI offenders, and he believed that this had an adverse impact upon any person convicted of driving while impaired. The trial judge denied the motion to have another Superior Court Judge hear the motion to recuse and denied the motion to recuse. The jury verdict was guilty.

The Court of Appeals held as follows:

> The defendant's motion and the supporting affidavit do not allege that the trial judge has any strong feelings about defendant herself. Rather, they suggest that the trial judge, for personal reasons, has strong feelings about the crime of driving while impaired. Such feelings, assuming arguendo that they do exist, are directed to the subject matter of the case and not to defendant herself. As such, they are not indicative of any bias against defendant nor are they sufficient to give a reasonable person grounds to believe that the judge could not act impartially in the matter. Therefore, there was no error in the trial judge's failure to recuse himself. Having established that there were no facts presented to cause a reasonable person to doubt the trial judge's impartiality, there is also no error in the trial judge's failure to refer the motion to recuse to another judge.
>
> See State v. Crabtree, 66 N.C. App. 662, 665-666, 312 S.E.2d 219, 221 (1984).

Given State v. Kennedy, one would have to show strong feelings by the trial judge about the particular Agnostic Father. Kennedy may be distinguishable on the basis that there

were no facts regarding statements made by the court, and the allegations in the affidavit supporting the motion appear somewhat conclusory. However, the application of the facts to the law in Kennedy provide a great deal of ammunition to a party resisting recusal.

12. What Rights Does a Child Have in Choosing His or Her Own Religion?

Do children have rights that would allow him or her to refuse to follow provisions in a custody order? For example, if the custody order provided that mother was to take child to church every Sunday and child did not believe in the principals articulated by the church and refuse to go, what is mother's obligation to bring the child to church?

In McGee v. McGee, 178 N.C. App. 742 (N.C. App. 2006) (unpublished), the trial court had initially entered an order between mother and father which found that the "blasting prayers" at the church that the parents attended had an adverse effect on the children and that neither parent shall allow the children to engage in blasting or loud prayers. At a motion to show cause, plaintiff father alleged that defendant mother was in contempt of the blasting provisions and that he be allowed to have custody; defendant mother in turn moved to modify the order such that the children be allowed to participate fully in blasting in their religious practices and worship.

The trial court declined to hear any change of circumstances other than the age and maturity of the children in deciding whether they could engage in blasting prayer. The court decided that the older two children had reached sufficient age and maturity to decide whether or not to engage in blasting prayer but the younger child had not. The trial court modified the order solely with respect to the older girls and declined to modify the custody order regarding the younger son. The Court of Appeals reversed and remanded the case as to the son because the court did not consider any of the evidence in determining whether a substantial change of circumstances existed, prior to ruling on the modification of the custody decisions. The decision was remanded with a directive to the court to consider all relevant evidence of changed circumstance prior to making its ruling. The court went on to note an inconsistency: the judge hearing the second round of motions felt bound by the first judge's decision that the blasting

prayer had an adverse effect on the children, but went on to allow the older children to engage in the activity based upon their wishes. As the court stated *in dicta*:

> The expressed wish of a child of discretion is…never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference" citing Bost v. Van Nortwicj, 117 N.C. App. 1 22, 449 S.E.2d 911, 923 (1994)(citations omitted).

As such, the child's wishes, while they should be considered, are not controlling on the court. However, the fact that the wishes are not controlling should and must be taken in the context that religion is an "individual experience," and children are also guaranteed a freedom of religion, Sagar at 12, citing Wisconsin v. Yoder, 406 U.S. at 243, 93 S.Ct. 1526 (Douglas, J. dissenting).

13. How far in the future should religious decisions be made?

Consider a case where father is Jewish, mother is not, and the judge orders that while the five year old child can participate in all religious activities with the father, including Hebrew school, and celebrate all Jewish holidays with father, and that the parties had equal decision making in religion but for the ultimate bar/bat mitzvah decision, the court orders that the child could not have a bar mitzvah unless mother consented. [Also assume mother dislikes father to the extent that she had even run over his foot according to one of the findings of fact in the order, and that the order further had provisions that barred husband and mother from being in small groups due to what was perceived as their inability to communicate civilly in a small group setting].

Given these limitations, what is the likelihood that mother would agree to a bar mitzvah in the future, regardless of the children's wishes and best interests? In the case, mother did not have a competing religion. The judge (as opposed to the children) viewed the mother's communing with nature as being a religion. Can the court reach into the future, based on a crystal ball—five years or more—and dictate a decision so important to a child?

A judge's role is to demarcate the imminent decision making, not to make the decision. Has the trial court overstepped in the hypothetical? In a custody case involving a five year old who had not begun taking dance lessons, a trial court would not make a decision as to whether the child was going to be able to compete in an "all state" dance competition when she was 13. Rather, the court would allow one party decision making over activities. Both parties would be able to move to modify the order as the circumstances unfold. Provisions of custody orders that try to reach too far into the future and anticipate and decide controversies that are not currently before the court, based upon the evidence before the court at the time of the decision, should not be valid. The controversy should actually be before the court, and be ripe. In looking at cases that would stand for this proposition, the case of McRoy v. Hodges, 161 N.C. App. 381 (2003) stands out. In McRoy, the court awarded custody to a father who had never before had custody of the minor child, making in effect a four month transition period wherein custody would be transferred to father from grandparent. The court of appeals reversed the order of the trial court, holding that the custody order was premature, speculative and unsupported by the evidence. Id. at 388. Based upon this same logic, a decision about whether a child should or should not engage in a major religious activity that is not imminently before the court, such as communion, baptism, bat mitzvah, should not be decided by the judge before there is a controversy.