
Martin Weiss

Robert Abramoff

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ARTICLES

THE ENFORCEABILITY OF RELIGIOUS UPBRINGING AGREEMENTS

MARTIN WEISS* & ROBERT ABRAMOFF**

INTRODUCTION

This article addresses religion in custody disputes. Specifically it analyzes whether an antenuptial agreement on the religious upbringing of children, entered into by the child's parents, is enforceable over the objection of one of the parents.

In light of the high rate of interfaith marriages, and the high rate of divorce, the enforceability of agreements on religious upbringing demands the courts' attention. There are over 750,000 children in this country of Jewish-Christian intermarriages alone.1 This figure does not include children of "broken faith marriages," marriages in which one parent changes religion after the marriage commences or terminates. This change may occur when a partner, who converted to the spouse's religion, later disassociates with that religion. Alternatively, this change in religion may arise when one partner converts to another religion as a result of proselytization or self-searching. This paper focuses on the sequelae of such broken faith marriages, where one partner acted in reliance on the other's commitment, as opposed to a mere interfaith marriage, where there was no such firm commitment. Religious conflict in divorce is not limited to Jewish-Christian marriages. Such disputes take place in Protestant-Catholic marriages, and other interfaith marriages as well. The number of children affected in such situations is no doubt great.

Conventional wisdom holds that antenuptial agreements on the religious upbringing of children are not enforceable.2 Parties op-

* Martin Weiss received a B.S. from Wayne State University in Psychology and an M.D. from Wayne State University Medical School.

** Robert Abramoff received a B.A. from Boston University in English and a J.D. from the University of Southern California.


2. For reviews on the enforceability of antenuptial religious upbringing agreements see Note, Enforceability of Antenuptial Contracts in Mixed Marriages, 50 YALE L. J. 1286 (1941); Comment, Parent's Right to Prescribe Religious Education of Children, 3 DEPAUL L. REV. 83 (1953); Leo Pfeffer, Religion
pose enforcement of such agreements, arguing objections based on interpretations of contract law and First Amendment rights. Closer scrutiny, however, reveals that these objections are of scant substance. And, contrary to conventional wisdom, a review of the case law demonstrates that the question is far from settled.

Courts that refuse to enforce religious upbringing agreements often consign a child to being raised in two religions simultaneously. This article argues that such a result is neither in the best interests of the child, nor demanded by law. This article begins with a brief review of contract law and the First Amendment, as applied to this issue. It then provides an overview of the case law as well as examines the best interests of the children in the context of parental religious conflict. Next, this article comments on other reviews of this issue and the courts' relationship to religion. Finally, this article concludes that courts should enforce religious upbringing agreements when the best interests of the child are served.

I. CONTRACT LAW

This article does not question that marriage itself is a contract. Black’s Law Dictionary succinctly defines marriage as, “[a] contract, according to the form prescribed by law, by which a man and a woman capable of entering into such contract, mutually engage with each other to live their whole lives [or until divorced] together in a state of union which ought to exist between a husband and wife.”

Rather, the question here is whether an antenuptial agreement on the religious upbringing of children, when central and essential to a marriage contract, is subject to the principles of contract law.

The philosophical basis for contract law derives from three principles. The first principle lies in the sanctity of the promise. Both Canon lawyers and Talmudic scholars believed reneging on a


commitment made in free will was an offense against God. The second principle revolves around the theory of private autonomy. This element holds: "[r]ecognizing the desirability of allowing individuals to regulate, to a large extent, their own affairs, the State has conferred upon them the power to bind themselves by expression of their intention to be bound, provided, always, that they operate within the limits of their delegated powers." Finally, the third principle is based on the reliance theory of contracts. This principle holds that the "foundation of contract law is not in the will of the promisor to be bound but in the expectations engendered by, and the promisee's consequent reliance upon, the promise." When antenuptial religious upbringing agreements are made in free will, involve voluntary binding and result in reliance by the other party, basic principles of contract law clearly apply. Moreover, religious upbringing agreements meet the criteria required for valid contracts. Those criteria are the presence of consideration, lack of duress and capability of the parties.

Three elements must exist for a promise to be supported by consideration: (1) the promisee must suffer legal detriment, that is, do or promise to do what he or she is not legally obligated to do, or refrain from doing what he or she is legally privileged to do; (2) the detriment must induce the promise; and (3) the promise must induce the detriment. When a person offers to agree to marriage, in exchange for his future spouse's promise to raise their children in a specific faith, the criteria for consideration have been met. A significant legal detriment is placed on the promisee (the marital status), and one promise has induced another.

Second, neither party may be under duress at the time they enter into the contract. However, unless the prospective wife is already pregnant, or the religious upbringing agreement is unexpectedly demanded immediately before the wedding ceremony, duress is not present.

Finally, the parties must be capable of entering into the contract. Partners who are capable of entering into marriage are presumed to be capable of entering into an antenuptial agreement. Thus, antenuptial religious upbringing agreements meet both the principles and criteria for valid contracts. Nonetheless, some courts hold these agreements invalid. Objections to antenuptial religious upbringing agreements center on either a presumed lack of mutual assent (indefiniteness), or on a presumed conflict with the First Amendment.

5. Id. at 8.
6. Id. at 7.
7. Id. at 9.
Courts may find a contract void for indefiniteness. Calamari explains indefiniteness as follows:

The traditional rule is that if the agreement is not reasonably certain (citation omitted) as to its material terms there is a fatal indefiniteness with the result that the agreement is void. (citation omitted). The rule does not apply a precise standard. Vagueness and indefiniteness are matters of degree. (citation omitted). If the agreement is reasonably certain, it is enforced even though all of the terms are not set forth with "optimal specificity." (citation omitted). It is enough that the agreement is sufficiently explicit so that the court can perceive what are the respective obligations of the parties. (citation omitted). In other words, the requirements of definiteness cannot be pushed to extreme limits.8 (emphasis added)

In several instances, however, courts that cite indefiniteness as a basis for voiding antenuptial religious upbringing agreements push the requirement for definiteness to those extreme limits. For example, in Lynch v. Unlenhopp9 a rather straightforward dispute developed as to whether a child was to be raised as a Roman Catholic, as had been previously agreed, or as a Protestant. The court opined:

It is provided [by the agreement] that the said child shall be reared in the Roman Catholic Religion. Is this language so clear, specific and unequivocal that it can be readily understood? .... What constitutes "rearing" a child in the religion? .... Must he be taken to church once a week, or once in two weeks, or Sunday? If mid-week services are held, must he be taken to them? Is it required that he attend catechism class? Must he attend a parochial school if the particular denomination in question maintains such schools? What fast days must be observed, what Lenten observances followed?10

The Lynch court erred because the issue was which of two faiths the child was to be raised in, not the degree. Moreover, how would the concept of indefiniteness apply in an antenuptial agreement to raise children in the Jewish faith, and specifically not the Christian faith? Even if the court held the affirmative portion of the agreement indefinite, the prohibitive portion of the contract is still clear cut, the parents agreed not to raise their children in the worship of Christ.

The extreme limits to which the court in Lynch pushed the concept of indefiniteness becomes apparent if one subjects the marriage contract to the same test. For instance, what will constitute sex in the marriage? Will intercourse be once a week, or once in two weeks, or three times a week? Who will do the housework? Will the housework be shared, and if so, in what proportions? Will both parties work outside the home to generate income, or just one?

8. Id. at 54.
10. Id. at 496-97.
By the *Lynch* court's reasoning, the contract of marriage fails to be valid for "indefiniteness." Clearly, this reasoning is faulty. What defines the marriage contract is its exclusivity, its monogamous nature. What defined the religious upbringing agreement was also its exclusivity, the child was to be raised in the Roman Catholic faith, and no other.

Definiteness is a prerequisite for the validity of contracts under only one theory of contract law. Most courts follow the objective theory of contract law, which holds that the presence of assent is:

[Determined solely from objective manifestations of intent - namely what a party says and does rather than what he subjectively intends or believes or assumes. (citation omitted). Thus under the objective theory the mental assent and intent of the parties is irrelevant ... (citation omitted).]

For at least a century the objective theory of contracts has been dominant.

[The objective theory of contract law holds that the] objective manifestations of intent of the party should be viewed from the vantage point of a reasonable man in the position of the other party ... (citation omitted). In other words, a party's intention will be held to what a reasonable man in the position of the other party would conclude his manifestations to mean.

The objective theory clearly encompasses marriage expectations. For example, a detached, objective observer to a Jewish marriage ceremony would be reasonable in assuming that the partners' plan was to raise their children in the Jewish, and not the Islamic faith. As these examples demonstrate, attacks on antenuptial religious upbringing agreements based on contract law collapse.

II. THE FIRST AMENDMENT

The First Amendment to the Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Amendment, as written, limits only Congress. Through the Due Process Clause of the Fourteenth Amendment, the First Amendment applies to the states. In addition, the Fourteenth Amendment makes the First Amendment applicable to state judicial action as well as legislative action. The First Amendment does not, however, apply to dealings between individuals. In applying the First Amendment to avoid consideration of religious upbringing disputes in custody decisions, courts quote the Establishment Clause of the First Amend-

11. CALAMARI & PERILLO, supra note 4, at 26.
12. Id.
ment, as well as the Free Exercise Clause. While initially these arguments appear potent, closer scrutiny reveals that they are, surprisingly, without basis.

A. The Establishment Clause

The Establishment Clause reads "Congress shall make no law respecting an establishment of religion." The founding fathers' original intent for the Establishment Clause was merely to preclude the federal government from establishing a church that favored one Christian denomination over others. Although a number of the states supported state-established churches until well after the Revolution, the Establishment Clause prevented the federal government from aiding one denomination over another. The Establishment Clause does not bar the courts from considering antenuptial religious upbringing agreements because the court is not establishing the religious identity of the children. The parents, as a couple, establish their children's religious identity in the antenuptial agreement. The court's role in this aspect of the divorce proceeding is only to ascertain the validity of that contract. Thus, the court neither establishes nor sanctions any religion.

The following analogy illustrates the nature of the court's role in considering antenuptial religious upbringing agreements. A small church takes out an insurance policy to protect itself from fire and theft losses. Unfortunately, a fire occurs, destroying the church building. However, on rather dubious grounds, the insurance company refuses to honor the policy it issued; it refuses to honor the contract. Would the courts, without considering the merits of the case, declare the insurance policy void and unenforceable on the ground that supporting the congregants would result in the court advancing the establishment of religion? Clearly, the court would not take such a position. The court would view the issue as a question of law, not theology. The same principle holds for antenuptial religious upbringing agreements. On neither a historical, nor a legal basis, can consideration of antenuptial religious upbringing agreements conflict with the Establishment Clause.

B. Neutrality: The Tripartite Test

Courts that deny the validity and enforceability of antenuptial religious upbringing contracts have yet to critically analyze the constitutional basis for their position. They simply assume that judicial resolution of these disputes violates both the Establishment Clause

17. U.S. CONST. amend. I.
and the Free Exercise Clause of the First Amendment, and, therefore, they claim the court must take a position of "neutrality." As a measure of such "neutrality," some courts employ the tripartite test articulated by the Supreme Court in Lemon v. Kurtzman.19 The lower courts' dependence on this test, however, is misplaced.20 The Supreme Court created the Lemon criteria to evaluate whether statutes enacted by government favor religion over non-religion. These criteria, established to evaluate legislative programs, are not appropriate in custody disputes.

Even though the tripartite test is of dubious value in assessing antenuptial religious upbringing agreements, these agreements can meet this test. The test requires, first, that the statute have a secular legislative purpose.21 The family is the foundation of this nation, and religion is the bedrock of many families. With divorce, the family is broken, but it is not destroyed. A single mother or a single father raising children still constitutes a family. When the courts allow further shredding of that family by permitting the children to be indoctrinated into a second, alien religion, they create an additional trauma that may further upset an already traumatized family.

Second, the test requires that the principal effect of the statute neither advance nor inhibit religion.22 The enforcement of antenuptial agreements on religious upbringing meet this element as long as the courts do not prefer any specific religion, but rather, enforce the antenuptial agreements on a case by case basis, utilizing contract principles and not religious dogma. For instance, if the antenuptial agreement ordered the parents to raise the children as atheists, and one of the divorcing parents became a born-again Christian, the agreement would continue to be enforceable. Consequently, with this approach, the court would not accord preference for one religion over another, or for religion over non-religion. Nor would any individual case advance religion to even a minimal degree. If, in a single case, a court orders that a child be raised in the Jewish faith, then the number of Jews in this country is increased by 1/6,000,000. This advance is not statistically significant. Moreover, the advance will no doubt be counter-balanced by other decisions in which the court orders that a child is to be raised in the Christian faith.

The third prong of the test requires that the state not foster an

20. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979) ("In order to uphold constitutionality of the religious needs provision . . . we must further examine the statute in accord with those tests [Lemon].").
22. Id.
excessive government entanglement with religion.\textsuperscript{23} Antenuptial agreements concern the religious identity, not the religious intensity, of a child’s upbringing. If courts enforce these agreements, based on contract law, rather than religious doctrine, government is not excessively entangled with religion.

C. The Free Exercise Clause

Parties in religiously motivated custody disputes frequently argue that the Free Exercise Clause of the First Amendment precludes the court from denying custody on the basis of religious belief.\textsuperscript{24} Parents with atypical religious habits or faiths are especially likely to advance a Free Exercise Clause argument. While the courts’ protection of unpopular or atypical beliefs is admirable, slavish adherence to the Free Exercise Clause hardly serves the best interests of children in custody disputes. Courts should not adhere to the Free Exercise Clause when the custodial parent’s religious beliefs threaten the health and well-being of their children.\textsuperscript{25}

Clearly, the Constitution prohibits government from restricting religious belief. However, while freedom to believe is absolute, freedom to act on that belief is not.\textsuperscript{26} Courts often uphold government restrictions on the free exercise of religion. For example, courts have upheld the prohibition of polygamy,\textsuperscript{27} which is practiced not only by some 6,000,000 adherents of the Mormon religion, but also by the Muslim religion, which has several million adherents in this country. Courts have also recently prohibited the Peyote Indians from using hallucinogenic drugs in their religious ceremonies.\textsuperscript{28} Moreover, courts have ruled that the state’s concern for the health and safety of children supersedes the religious beliefs of the parent in cases involving blood transfusions for the children of Jehovah’s Witnesses.\textsuperscript{29} Clearly, then, free expression of religious ideas is not an unqualified right. That right is limited, particularly when the health and welfare of another may be adversely affected.

\textsuperscript{23} Id. at 613.
\textsuperscript{24} See, e.g., Quiner v. Quiner, 59 Cal. Rptr. 503, 517 (Cal. Ct. App. 1967) (“First Amendment in conjunction with the Fourteenth solves the problem; it legally prohibits such religious evaluations.”).
\textsuperscript{25} See Beebe v. Chavez, 602 P.2d 1279, 1291 (Kan. 1979) (citing the Guyana Massacre in the Jim Jones Cult as an example where a parent’s religious beliefs threatened the health and well-being of the children).
\textsuperscript{26} Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
\textsuperscript{29} E.g., Stapley v. Stapley, 485 P.2d 1181 (Ariz. Ct. App. 1971) (custody changed due to mother’s failure to follow court order, which included her refusal to notify father if child needed blood transfusion in order to obtain his permission).
This limitation on the free expression of religion can be significant in custody disputes. Where young children may be harmed by exposure to conflicting religious beliefs, courts have enjoined non-custodial parents from engaging in religious activities with these children. However, the threshold at which courts recognize potential harm to the child is a matter of dispute.

We have established, at this point, that the free exercise of religion is not an unqualified right, and that courts may impose reasonable limitations on the free exercise of religion. Moreover, in addition to the limitations that courts may impose on the free exercise of religion to protect a child, the parties themselves voluntarily impose limitations on their own free exercise of religion by entering into an antenuptial agreement.

Some courts, however, reject antenuptial agreements on the ground that religious freedom is an inalienable right, and therefore cannot be "bargained away." However, Black's Law Dictionary defines inalienable rights as, "rights, which are not capable of being surrendered or transferred without the consent of the one possessing such rights." Accordingly, as long as parties enter into an antenuptial agreement voluntarily, enforcement of these agreements does not violate the principle of inalienability of the right of religious freedom.

Once again, an analogy may be helpful. The First Amendment is not limited to religion. It includes freedom of speech as well. There is no unqualified inalienable right to freedom of speech. For example, in settling a lawsuit, "A" may agree to give a monetary settlement to "B," with the proviso that "B" not disclose the amount of the settlement. Should "B" disclose the figure, he will forfeit the award. In this instance, "B" has voluntarily imposed upon himself a limitation on his right to freedom of speech. There

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32. Zummo, 574 A.2d at 1148.
33. BLACK'S LAW DICTIONARY 683 (5th ed. 1979) (emphasis added).
34. Curiously, courts that note the inalienability of religious freedom, e.g. Zummo, are confused as to which party has the inalienable right. When one party agrees, in consideration of marriage, that the other party will raise future children in his or her faith, the first party voluntarily consented to transfer his or her right to determine the religious upbringing of the children. That right now belongs to the second party. When the court refuses to enforce the agreement, it is depriving the second party of his or her right to decide the religious upbringing of the children; this is the parent who possesses the inalienable rights of both parties. The court takes the right away without the second party's consent.
are myriad examples of such enforceable voluntary limitations on speech. For example, when Ross Perot obtained a "divorce" from the Board of General Motors, he agreed that if he made any negative comments about General Motors' management, he would forfeit a significant portion of the settlement.35

Voluntarily imposed restrictions on the free expression of speech are valid and enforceable by the courts. Similarly, voluntarily imposed restrictions on the free expression of religion are also valid and, in numerous cases, courts have enforced such restrictions.36 It would appear, then, that a court may impose limitations

35. Doren H. Levin, For H. Ross Perot, Use of "Free" Speech Could Cost Millions, WALL ST. J., Dec. 2, 1986, at A3 ("Under terms of agreement with GM, both parties are forbidden from publicly criticizing each other. Any disputes over just what constitutes criticism would be decided by a panel of three arbitrators, who could levy penalties of as much as $7.5 million.").

A more recent example is Rust v. Sullivan, 111 S. Ct. 1759 (1991) in which the United States Supreme Court ruled that the administration could prohibit physicians, who practice in clinics which are federally supported, from discussing abortion with their patients. The court reasoned that the government has a right to condition the money it spends, and clinic physicians voluntarily impose on themselves such conditions. If the physicians are uncomfortable with those conditions, they are free to practice elsewhere.

on the religious upbringing of a child, when there is a potential for harm to the child and when an antenuptial agreement has been violated.

In considering the relationship between the Free Exercise Clause and the enforcement of antenuptial religious upbringing agreements, the issue is not the religious belief of the parent. The parent is free to believe in any faith he or she chooses. Rather, the issue is the unilateral breach of a commitment made by both parties, as a couple, to raise a child in a specific faith.

D. Separation of Church and State

There is one additional argument against enforcement of antenuptial religious upbringing agreements. That argument is premised on the phrase "separation of church and state." However, if

37. The phrase "separation of church and state" derives from an address Thomas Jefferson made in Danbury, Connecticut on January 1, 1802, to a group of Baptists. The Danbury Baptists wrote to President Jefferson fearful that a rival Protestant denomination was about to be recognized as the state church of the United States (much as the Anglican Church is the state church of England). Jefferson reassured his audience, stating, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Reynolds v. United States, 98 U.S. 125 (1878). From the context in which Jefferson delivered his speech, "Wall of Separation" clearly meant that the federal government would not establish a state religion.

Jefferson’s phrase was first quoted in court by the Mormon Church in 1878, when that church claimed that the “free exercise of religion,” as found in the First Amendment, and the “separation of church and state,” as pronounced by Jefferson, precluded the federal government from interfering with their religion’s polygamy. (The court did not accept these arguments, and outlawed polygamy). Reynolds, 98 U.S. at 165.

The phrase was not presented again in court until 1947, in Everson v. Board of Educ., 330 U.S. 1 (1947). Contrary to conventional wisdom, “separation of church and state” is found nowhere in the Constitution. The widespread use of the phrase dates from Everson. In Everson, the court declared “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.” Id. at 18. The Everson court implied that Jefferson’s Danbury speech indicated the intent of the First Amendment framers. It is unclear on what basis the Court made this assumption. Even if the context of the speech is cast aside, Jefferson delivered his Danbury speech some thirteen years after Congress passed the First Amendment. Moreover, Jefferson was neither a member of Congress in 1789, when the First Amendment was framed, nor a delegate to the earlier 1787 Constitutional Convention. Nor was he a member of any state legislature, or ratifying convention, relevant to the passage of the First Amendment. During this time, Jefferson was in France, serving as the United States Ambassador. DAVID BARTON, THE MYTH OF SEPARATION 42 (1989).

The Court further implied that Jefferson’s Danbury speech reflected his antipathy, if not outright aversion, to religion in governmental or public affairs. This is a questionable position for the Court to take. It is true that Jefferson (as opposed to Washington and Adams) refused to issue Thanksgiving proclamations. Lee v. Weisman, 112 S. Ct. 2649 (1992). However, while President Jefferson chaired the school board for the District of Columbia, he authored its plan
enforcement of these agreements violates neither the Establishment nor the Free Exercise Clause of the First Amendment, and if enforcement of these agreements also passes the "neutrality" test set forth in *Lemon*, it is unclear how the "separation of church and state" issue would be relevant. Moreover, as Chief Justice William Rehnquist has stated, "[t]he wall of separation between church and state is a metaphor based on bad history. It should be frankly and explicitly abandoned." In fact, in matters of neutral contract principles, there is no such separation.

III. CASE LAW

Probably no judicial hearing is as difficult as a contested custody hearing. When the court must also resolve a religious upbringing conflict, the difficulties magnify significantly. Few areas in either constitutional or natural law overlap in such a volatile way. It is understandable, then, that some courts attempt to "wash their hands" of the matter by adopting a judicial philosophy that the religious upbringing portion of the dispute is essentially beyond the court's jurisdiction, unless there is "clear and convincing demonstrable evidence of harm" to the child.

A full annotation of religion as a factor in child custody and of education using the Bible and Watt's Hymnal as reading texts. Moreover, in 1803, a year after his Danbury speech, Jefferson recommended to Congress passage of a treaty providing funds to support Catholic missionaries to the Kaskaskia Indians, which they did. Congress enacted similar treaties during Jefferson's administration, with the Wyandotte Indians in 1806, and with the Cherokees in 1807. BARTON, supra at 175.

Jefferson was not only a great statesman, but also a great politician. Perhaps the seeming contradiction between Jefferson's Danbury speech and his support for religion merely reflects political expediency. However, there is little to suggest that Jefferson envisioned the rigid secular philosophy now attributed to him. The First Amendment founders' goal was a secular government, not a secular society.


39. An item culled from a local community newspaper demonstrates this point. The California State Attorney General's Office filed a complaint against David Levi, doing business as Bazar Meats and Poultry, in Los Angeles, for selling non-kosher poultry as kosher. The complaint alleged that the document Levi displayed in his shop, certifying his products to be kosher, carried an expired date. Only the Rabbinate issues such documents for a fee. The State of California sought a minimum of $17,500 in penalties. Yale Butler, *State Charges Fairfax Avenue Market with Trafe*, B'NAI B'RITH MESSENGER, Sept. 28, 1990, at 1.

There is an implied contract between the consumer of kosher products and the seller, that those products are, in fact, kosher. Thus, it is most curious that the State of California will bring to bear its full police powers to enforce an implied contract on the religious identity of a dead chicken, yet refuse to consider an explicit agreement on the religious identity and upbringing of a young child.

40. See infra notes 190 through 252 and accompanying text for cases applying the clear and convincing demonstration of harm standard.
visitation cases can be found elsewhere. The scope of this article is limited to cases in which the dispute concerns which religion the child is to be raised in, and how many religions the child is to be raised in. This article does not address disputes over harm or potential harm to the child from beliefs or practices of particular religions or cults.

To clarify the issues involved, this article examines the case law in two sections. The first section reviews cases addressing the general question of the enforceability of religious upbringing agreements. The second section reviews cases in which the courts have applied the “best interests of the child” principle to religious upbringing disputes. Both sections review religious upbringing agreements in contemplation of divorce, as well as those in contemplation of marriage. Both sections also review disputes in the context of visitation as well as custody because common principles and issues underlie these disputes.

A. Are Religious Upbringing Agreements Enforceable by the Courts?

Conventional wisdom holds that courts will not enforce religious upbringing agreements. In fact, however, courts frequently have enforced such agreements. In fifteen cases a court enforced a religious upbringing agreement, while in sixteen cases a court declined to enforce such an agreement. As the cases examined below demonstrate, parties seeking enforcement of religious upbringing agreements uniformly base their claim on the commitment that the other parent has broken. The arguments against enforcement, depending on one's point of view, are numerous and scattered.

1. Cases Favoring Enforcement

Three of the fifteen cases in which a court enforced a religious upbringing agreement involved antenuptial agreements. In *Ramon v. Ramon*, a New York trial court enforced a written antenuptial agreement calling for the children to be raised in the Catholic faith. The wife, a Protestant married to a Catholic, separated from her husband and began taking her child to a Protestant church and Sunday School. The court found that the antenuptial religious upbringing agreement was supported by valid consideration because the wife's promise to raise the children as Catholics induced the husband to change his marital status. The court therefore took no-

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42. *See supra* note 2 for a discussion of articles on the enforceability of religious upbringing agreements.
tice of the religious and moral obligations of the parties. In enforcing the agreement, the court, quoting Williston on Contracts, noted that, "[a]greements between parents relating to the religious training of their children are generally upheld." In an earlier New York case, the court also upheld a parental agreement on the religious upbringing of children as an enforceable contract. Similarly, in Shearer v. Shearer, a New York court held that an antenuptial religious upbringing agreement was an inducing cause of the marriage and an enforceable contract.

The other cases in which courts enforced religious upbringing agreements involved separation agreements, divorce decrees, or custody agreements. In Gluckstern v. Gluckstern, the New York Supreme Court enforced a separation agreement which gave the father full authority over the religious education of the children, allowing the father to raise a child in the Jewish faith. The court found that the mother, who had remarried and converted to the Church of Christian Scientist, had "greatly influenced the child's thinking," causing the child to wish to become a Christian Scientist. The court found the mother in contempt of court and fined her. In Butler v. Butler, a Florida court enforced a religious upbringing agreement which was part of a divorce decree. In Gottlieb v. Gottlieb, the Appellate Court of Illinois upheld an agreement incorporated in a divorce decree requiring that the children be raised in the Jewish faith. The mother, a Catholic, ignored the agreement and enrolled the children in Catholic schools. Similarly, in Stern v. Stern, an Illinois court upheld a religious upbringing agreement that was part of a divorce decree.

In T. v. H., a provision in a separation agreement that the children were to be brought up in the Jewish faith was an important factor in a New Jersey court's award of custody to the father. After the divorce, the mother married a Gentile and moved to western Idaho where there were few Jews and few facilities necessary to cultivate the Jewish faith in the children. The Maryland Supreme

44. Id. at 111.
45. Weinberger v. Van Hessen, 183 N.E. 429 (N.Y. 1932) (father ordered to comply with support agreement which he entered in order to obtain exclusive control over child's religious upbringing).
46. Shearer v. Shearer, 73 N.Y.S.2d 337 (N.Y. App. Div. 1947) (children were to be raised in religion of father, Roman Catholic, as wife agreed in prenuptial agreement).
48. Id. at 624.
Court in *Wagshal v. Wagshal*\(^{53}\) also enforced a religious upbringing agreement, finding that a chancellor erred in striking from a proposed divorce decree a provision, which the parties had agreed upon, that the child was to be raised in the Jewish faith. The court stated that religious upbringing agreements are desirable and should be encouraged.

In *Perlstein v. Perlstein*\(^{54}\) the New York Supreme Court, Appellate Division, vacated a declaration of custody, reinstated a father's custody petition, and ordered a new trial on the issue of custody, because the mother failed to comply with a provision in the separation agreement that required her to raise the child in a home observant of Jewish dietary law. The separation agreement stated, "[t]he wife agrees to strictly limit the food served at home according to Jewish dietary laws. Her continuous violation of this paragraph shall immediately revert the custody of the child to the father."\(^{55}\) The trial court dismissed the father's petition and declared the mother "sole custodian" of the child. However, the appellate division reinstated the father's petition stating:

> Nor is the finding that the child had adjusted well to the non-orthodox lifestyle his mother fostered dispositive. When neither party has a special claim or right to custody, the well-being of the child is the sole denominator of his best interests. But, when, as here, the parties have agreed upon an appropriate standard of religious upbringing, both interests, the child's and the parents' as regards his moral and religious training, must be weighed and, where possible, reconciled. Thus, in the circumstances of this case, the principle adopted by Trial Term that a change in custody is justified only if conditions are so bad as seriously to affect health or morals (citations omitted) is not controlling.\(^{56}\)

Despite finding the mother to be a fit parent, the appellate division found as a matter of law that, "the mother was obligated to show that the observance of the religious guidelines specified in the separation agreement was detrimental to the child, since it was the father who sought to uphold the terms of the separation agreement."\(^{57}\) The court found that the child's mother failed to show that adherence to the religious guidelines had been or would be detrimental to the child.

[The father] has met his burden of proving that the custody provisions of the agreement were violated, and [the mother] has failed to show that the rights of both parents concerning custody should not be governed by the separation agreement. Therefore, it is the obligation of

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\(^{55}\) Id. at 898.

\(^{56}\) Id. at 900.

\(^{57}\) Id. at 901.
the court to enforce the agreement in accordance with its terms.58

In Spring v. Glawon,59 a Catholic custodial mother enrolled her child in a Catholic elementary school, over the objections of the child's Jewish noncustodial father, and in violation of a divorce decree that stated, "this child shall have no religious upbringing without the express written permission of both parties."60 The New York Supreme Court, Appellate Division, ordered the mother to remove the child from the parochial school, and to enroll the child in a public or non-sectarian private school.61 The trial court decision, affirmed by the appellate court, stated:

The court should not substitute its judgment as to what is in the best interest of the child, when it is contrary to the parental agreement, unless the party seeking modification can clearly demonstrate to the court's satisfaction that enforcement would not be in the best interest of the child. This is so regardless of when the agreement was made.

Defendant must therefore prove that it would be in the infant child's best interest to modify the agreement so as to permit his continued enrollment in the parochial school without his father's approval . . . .

The defendant mother, as custodial parent, has contracted away a valuable right; the right to determine the religious upbringing of her child without restriction. The court will not rewrite that contract . . . .62

The Spring trial court also noted, "[o]ccasionally, the courts have sought to distinguish between ante-nuptial agreements requiring the religious upbringing of children and agreements made in contemplation of a divorce, holding the former not binding (citation omitted) although this court can see no substantive difference between the two."63

In Gruber v. Gruber,64 the New York Appellate Court ordered a custodial father to enroll his children in a yeshiva (an orthodox Jewish religious day school), as provided in the separation agreement. The court stated, "no reason appears why the provisions of the contract should be ignored."65 The Gruber court further noted, that "the party in breach of the agreement should bear the burden of demonstrating that adherence to the agreement would be detrimental to the interests of the child."66

60. Id. at 141.
61. Id.
63. Id. at 2283.
65. Id. at 122.
66. Id. at 120.
In *Sina v. Sina*, a divorce decree provided that the children would be raised in the Lutheran faith of the mother, but could be exposed to the Catholic faith of the father. The father, however, subsequently joined another denomination. The mother objected to submitting the children to yet a third religion, and the Minnesota trial court concurred, stating that "exposure ... to a third religion will result in confusion and dilution of their basic religious training ..." The Minnesota Appellate Court affirmed the decision.

In *S. E. L. v. J. W. W.*, a Jehovah's Witness father agreed in the stipulated settlement, incorporated into the divorce decree, that the mother was to have absolute custody and exclusive supervision, control, and care of their daughter. He was, therefore, restricted by a New York trial court in the extent to which he could expose the child to his religion. The court noted that when he surrendered "exclusive supervision, control and care" to his wife, he "waived his right to the 'free exercise' of his religion" when his daughter visited him. "He assumed the onus of demonstrating that allowing him to expose Natalie [his daughter] to his religion would not be harmful to her."

In *Smith v. Smith*, a New York trial court ordered a custodial mother to honor a clause in her decree-incorporated custody agreement that provided for her children to be brought up in the Roman Catholic faith. The court ordered her to refrain from raising her children in her new religion, the Church of God Eternal. The court noted that because the mother had clearly agreed that the children would be raised as Catholics, she could not interfere with their religious upbringing. The trial court stated:

> [B]ecause the mother unequivocally agreed that the children were to be raised as Catholics she cannot do anything to hinder their religious upbringing. [B]y requiring the children to observe her Sabbath (Friday evening through Saturday evening) and attend Sabbath services in her home, she has effectively forced them to practice a religion other than Catholicism.

In several cases the courts, in allowing the custodial parent to determine the religious upbringing of the children, implied that had there been an agreement, a different decision might have been reached. In the foregoing cases, courts upheld several kinds of

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68. *Id.* at 576.
69. *Id.* at 577.
71. *Id.* at 679.
72. *Id.*
74. *Id.*
religious upbringing agreements. These courts based their decisions upon contract principles. However, each court considered the child's well-being as a potentially dispositive factor and allowed the parties to show that the enforceability or non-enforceability of the agreement could harm the child.

2. Case Law Against Enforcement

Courts which have found antenuptial religious upbringing agreements unenforceable have set forth several different arguments. The most potent of these is that in a particular case, enforcement conflicts with the best interests of the child. This reasoning cannot be faulted. As the following cases demonstrate, however, arguments which deny enforcement of religious upbringing agreements on grounds of general principle, rather than on a case by case basis, lack credible reasoning. Courts have developed no clearly discernable pattern in these decisions. Therefore, the cases are grouped on the basis of the primary argument underlying the decision. Although such a grouping results in considerable overlap, this approach provides a more focused overview of the arguments courts employ to deny enforcement of religious upbringing contracts.

a. Arguments Based on Constitutional Grounds

In Brewer v. Cary, the Missouri Court of Appeals refused to enforce an antenuptial agreement on the religious upbringing of an infant, because enforcement would require the court to choose between religions. As the Brewer court stated:

Nor can we, in determining what is for the welfare of the infant, determine that on considerations of religion. That would involve our determination between religions — and we are not permitted to do that. To do so would be a determination by the courts as to differences in religious belief, which is incompatible with religious freedom.

In contending that enforcement of the religious upbringing agreement would compel the court to prefer one religion over another, the Brewer court exaggerated its role. The court's only task was to acknowledge the existence of a contract freely entered into by two consenting adults. The court was not required to discuss theology or religious differences, nor to determine the superiority, value, correctness, or spirituality of any religion relative to another.

Mester v. Mester, 296 N.Y.S.2d 193 (N.Y. App. Div. 1969) (without an agreement between the parties as to children's religious training, custodial parent controls); Ackerman v. Ackerman, 205 A.2d 49 (Pa. Super. Ct. 1964) (absent contractual agreement between parents as to child's religion, court presumes that religious training follows the custodial parent).

77. Id. at 692.
In *McLaughlin v. McLaughlin*, the Connecticut Superior Court refused to enforce an antenuptial contract that provided for the children to be raised in their father's faith. The *McLaughlin* court also refused to support the father's petition to enforce the children's religious upbringing by granting him custody of the children. The court argued that, "[a] court will not take a child's religious education into its own hands short of circumstances amounting to unfitness of the custodian, and in a dispute relating to custody, religious views afford no ground for removing children from the custody of a parent otherwise qualified." The *McLaughlin* court argued that no person should be compelled to join or be associated with any particular church or religious association. The court also asserted that the law is absolutely impartial on matters of religion.

On the surface, the issues in *McLaughlin* were clear cut. While a court can order a custodial parent to raise a child in the religion of the other parent, by requiring the custodial parent to enroll the child in the noncustodial parent's church education program and requiring that parent to transport or otherwise make the child available for church services, there are tensions inherent in such a scheme. Consequently, few courts look on such a plan with much enthusiasm. A specific religious upbringing can also be effected by a change of custody, but a court would be particularly hesitant to remove a child from a custodial parent on religious grounds, when the custodial parent's religious views were traditional and "mainstream." Also, once a court vests custody in a parent, it is far more difficult to reverse that decision and grant custody to the other parent.

Upon closer scrutiny, however, several inconsistencies appear in the *McLaughlin* court's reasoning. The *McLaughlin* court stated that the court should not compel a person to join or to be associated with any particular church. However, the custodial parent in *McLaughlin* was not being so compelled. It was the child who was to attend the church school and go to the church services, not the mother. The court stated in *McLaughlin* that religious views afford no ground for changing custody. However, the religious views of the custodial parent were not at issue. The custodial parent was free to believe in whatever religion she desired. Rather, her religious actions were at issue. Raising the child in her religion instead of the father's religion violated her commitment in the antenuptial agreement. The *McLaughlin* court stated that it would not take a child's religious education "into its own hands," short of unfitness.

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79. *Id.* at 422.
of the custodian. However, under the antenuptial agreement, the custodial parent had already placed the direction of the child's religious upbringing into the hands of the noncustodial parent. Therefore, the court was not being asked to take the child's religious education "into its own hands." Instead, the noncustodial parent asked the court to recognize the existence of a contract on the child's religious upbringing. The net effect of the *McLaughlin* court's refusal to act is no less potent than affirming the contract would have been.

Although the *McLaughlin* court declared the law to be "absolutely impartial" on religious matters, many courts do not act impartially. Were these courts impartial on matters of religion, they would analyze antenuptial religious upbringing agreements on neutral contract principles, as they would any other contract, and they would enforce religious upbringing contracts subject only to the best interests of the child. "Impartial" (or "neutral") is, therefore, an inaccurate description of the courts' attitude toward religion. "Indifferent" is a far more accurate characterization. In being indifferent to antenuptial religious upbringing agreements, the courts consign these contracts to illegality. The suggestion that deliberate and selective withholding of the rule of law from religious upbringing disputes represents impartiality toward religion is specious. The above objections to the court's reasoning notwithstanding, if the children's interests were best served by allowing their mother to retain custody, (and there is nothing in the opinion to suggest that this was not the case), the *McLaughlin* court came to the correct decision.

In *Hackett v. Hackett*, the Court of Appeals of Ohio found unenforceable, portions of a separation agreement that had been adopted by a court decree. The separation agreement provided that the parties' daughter would be reared in the Roman Catholic faith exclusively, that she would take her first communion, be confirmed, and attend all services as prescribed by the church. The agreement also stated that the daughter would attend a particular Catholic elementary school, or one of the same order. Despite the agreement, however, the mother, a Protestant, removed the child

80. *Id.*
81. *Id.*
82. Black's Law Dictionary defines impartial as "favoring neither; disinterested; treating all alike; unbiased; equitable, fair, and just." BLACK'S LAW DICTIONARY 677 (5th ed. 1979). All courts, in all cases, are presumed to be impartial.

Indifferent has several distinct meanings and, in the context taken here, means "not mattering one way or the other; of no great importance; having no particular interest or concern; apathetic." AMERICAN HERITAGE DICTIONARY 655 (2d ed. 1982).
from the Catholic school and enrolled her in a public school. The court refused to enforce the agreement, stating that “religious doctrine [is] a matter of personal choice uncontrolled by law or decree of a court. Nor can the free choice of religious practices be circumscribed or controlled by contract.”\textsuperscript{84} The \textit{Hackett} court also stated, citing \textit{Boerger v. Boerger},\textsuperscript{85} that the custodial parent must be the one to determine the child’s religious upbringing.

Like the \textit{McLaughlin} court, the court in \textit{Hackett} offers a specious argument when it states that, “religious doctrine [is] a matter of personal choice uncontrolled by law or [court] decree.”\textsuperscript{86} Again, the issue is not the religious doctrine of the custodial parent. That parent is free to believe in any religious belief he or she sees fit. On the contrary, the issue is the religious \textit{indoctrination} of the child. This is hardly a matter of “personal choice” for a seven year old child, who is incapable of such a choice. Nor is it by “law or [court] decree” that the child’s religious identity and direction are set, but instead by a solemn commitment made by the parent now seeking to break that commitment. Neither “law [n]or [court] decree” has ever created the religion of a child \textit{de novo}. The only “controlling” factors should be the best interests of the child and the reliance which the other parent had placed on the religious upbringing commitment. The \textit{Hackett} court also stated, “[n]or can the free choice of religious practices be circumscribed or controlled by contract.”\textsuperscript{87} However, a contract can circumscribe or control the right to proselytize. For instance, a parochial school may bar proselytizing by a teacher of another faith, who was hired to teach a secular subject. Also, as the court stated in \textit{S. E. L. v. J. W. W.},\textsuperscript{88} “rights of constitutional dimension can be freely waived.”

In \textit{Brown v. Szakal},\textsuperscript{89} a mother born and reared as a Catholic, converted to Judaism prior to marrying a Catholic. The parties married in a Catholic ceremony and their children were baptized and attended Catholic mass. When she subsequently divorced her husband, the settlement agreement provided that the mother would have custody of the children and “primary responsibility for their religious upbringing.”\textsuperscript{90} The father temporarily left the country to work in Saudi Arabia. On his return, he found that his former wife had married an orthodox Jew, had taken up that faith, and was raising his children, now ages six and three, as orthodox Jews. The mother refused to allow the father to visit the children on the Jew-

\textsuperscript{84. Id. at 433.}
\textsuperscript{86. Hackett, 150 N.E.2d at 433.}
\textsuperscript{87. Id.}
\textsuperscript{90. Id. at 82.}
ish Sabbath, chastised the children for eating non-kosher food while visiting with their father, and berated the father for giving them non-kosher food.

Initially, the Superior Court of New Jersey required the father to comply with the mother's demands that he not transgress Jewish dietary laws or Sabbath laws during his visitation. The father sought to have the court's order vacated, arguing that "to require him to obey all Jewish Sabbath and dietary laws while visiting with his children would violate his constitutional rights in that the court as a state entity would be doing an affirmative act in support of an organized religion." The court agreed, noting that "the mother has by contract with defendant sole authority to choose the religion of their children. But she cannot, through this court as a state agency, constitutionally impose the practice of her beliefs and those of the children upon her former husband."

The court, with some understatement, also noted that:

Plaintiff created a personal pluralism by leaving the religion of her parents and choosing her present faith. She is twice married - giving her children a natural father and a stepfather. In spite of the foregoing voluntarily obtained dichotomies, the mother would have the children encapsulated and shielded from all alien influences even if those influences are those of the children's natural father . . . . It is suggested that . . . she opts for self interest which here must yield to the welfare of . . . the father and the children, particularly.

The Brown court's decision was correct. Had the court acceded to the mother's demands, the Catholic father, despite his marriage to the mother in a Catholic ceremony and despite his children's baptism in the Catholic faith, would have been required to practice the tenets of orthodox Judaism.

b. Arguments Based on the Best Interests of the Child

In several cases, courts refused to enforce religious upbringing agreements because enforcement was inimical to the best interests of the child. In Boerger v. Boerger, the court refused to enforce an antenuptial agreement that the children would be raised in the Catholic faith of their noncustodial father. In permitting the mother to raise the children as Lutherans, the New Jersey Superior Court noted that the children's training in the Catholic faith had ended when they were four to six years old. The Boerger court found that a religious change at these ages did not have a harmful effect on the children. The Boerger court also noted that "[It would

91. Id.
92. Id. at 83.
93. Id. at 84-85.
be] psychologically [un]desirable for the child[ren] to be exposed to
the conflicting desires of [their] parents . . . [as to their religious]
training,"95 as they were when the father took the children to Cath-
olic services each Sunday, after the children had already attended
Lutheran services with their mother.

In Martin v. Martin,96 the New York Appellate Court modified
and refused to enforce an antenuptial agreement between a noncus-
todial Catholic father and a custodial Christian Scientist mother,
requiring that the child be raised Catholic. Because the boy had
reached the age of twelve, the court held that he "had a mind of his
own and because failure to amend the decree would strip him of his
independent judgment in matters of this kind."97

In Stanton v. Stanton,98 a Georgia court refused to enforce an
antenuptial contract that the children be raised in the faith of their
father even if custody were granted to the mother, holding that the
childrens' best interests outweighed the antenuptial agreement.
The father conceded that the mother was a good parent. The court
noted that "parents cannot by contract relating to the religious
training of their children restrict the discretion of the court in
awarding custody, and the court may disregard entirely any such
contract."99 The court also noted that "[generally], the welfare of
the child is the controlling fact in determining the right to its cus-
tody, and . . . contracts between the parents concerning the religious
training of their children will not be enforced, and the parent to
whom custody is awarded is not bound by a previous contract [relat-
ing to religious training]."100 Stanton thus argues that custody
should be determined according to the best interests of a child,
rather than by an antenuptial contract of any nature, religious or
otherwise. Furthermore, once sole custody has been determined, it
is impractical to require the custodial parent of one religion to raise
the children in another religion.

In Hehman v. Hehman,101 the New York Appellate Court re-
fused to enforce an antenuptial agreement which required that one
child be raised in a faith different from the faith of the child's sib-
lings residing in the same household. The antenuptial agreement
and divorce decrees permitted a noncustodial father to continue to
raise his son in the Lutheran faith, providing for visitation on Sun-
days. The boy's custodial mother was a Catholic and she was raising

95. Id. at 426.
97. Id.
99. Id. at 293.
100. Id. at 292.
his brother and sister as Catholics. The mother began taking the boy to a Catholic church and planned to enroll him in a Catholic school. The father protested and sought to enforce the antenuptial agreement. The New York Appellate Court considered the welfare of the child noting that “arbitrarily to assign different religious upbringing to children of the same household is certainly not leaving them unmolested.”102 Thus, the court would not enforce the agreement.

In Miles v. Liebolt,103 the New York Appellate Court refused to enforce an antenuptial agreement on the religious upbringing of two children, ages five and seven. In Miles, the custodial mother remarried into another religion and was raising her children in the faith of her new husband and his children. The Miles court stated that:

"[T]he paramount consideration at this time is the continuance of the happy family life now enjoyed by the children . . . [which would be disrupted by the exercise of a compulsion that the children be distinguished from the others with whom they reside in the manner of their religious upbringing]. This is not to minimize the importance of the agreement made between the parties. Were the circumstances not such that enforcement would wreck injury upon the children, a direction to carry it out would be proper."104

In O'Neil v. O'Neil,105 the New York Appellate Court refused to enforce an antenuptial agreement which would require changing the religion of a seven year old child. In O'Neil, the Jewish custodial mother was raising her child as a Jew, despite an antenuptial agreement that any children of the marriage would be raised in the Catholic faith. The father sought to have the child enrolled in a Roman Catholic school. Noting the psychological harm that would result in changing the child's religion, the O'Neil court stated that, "the problem [is] not determined by consideration of the law of contracts. Rather, the determinative consideration must be the welfare of the child."106

c. Arguments Based on the Custodial Parent's Right to Determine the Religious Upbringing of the Child

In addition to looking at the child's best interests, one court, in refusing to uphold an antenuptial religious upbringing agreement, looked to which parent had custody and found that that parent held the right to determine the religious upbringing of the child, notwithstanding any agreements which the parties entered into. In

102. Id. at 330.
104. Id. at 344.
106. Id. at 778.
Wolfert v. Wolfert,\textsuperscript{107} the Colorado Appellate Court refused to require a custodial parent to honor an antenuptial agreement which provided the children would be raised in the religion of the noncustodial parent. The Wolfert court observed that state law gives the custodial parent the right to determine the religious training of children. The court also found that the parties presented no evidence to show that raising the children in the custodial parent’s religion had significantly impaired the children’s physical health or emotional development.

The Wolfert court’s approach is valid, provided that the court considered the religious upbringing dispute when it determined custody. However, if the court had not considered religious upbringing when it awarded custody, the court would have abrogated the rights of the noncustodial parent, who lost his or her right to raise the children in his or her religion. As such, this would constitute a change of circumstances warranting a reassessment (but not necessarily a change) of custody.

d. Argument Based on Religious Law

Religious law played a pivotal role in the New York Appellate Court’s decision not to enforce an antenuptial religious agreement in Schwarzman v. Schwarzman.\textsuperscript{108} In Schwarzman, a Jewish father sought to enjoin his former wife from changing the religion of their children. Prior to marriage, the wife converted from Catholicism to Judaism, but following their divorce she returned to Catholicism and raised their children as Catholics. When the couple married, the wife was in an early stage of pregnancy and she converted to the Jewish faith as a precondition to the marriage. The conversion instruction and the conversion took place within the Reform branch of Judaism. The father claimed that his four daughters were Jewish, first, as a result of his oral antenuptial agreement with their mother, and second, because of the daughters’ ritual induction into the Jewish faith (apparently in a naming ceremony).

The New York Appellate Court felt the father’s contention obligated the court to determine whether the children were actually Jewish, in order to ascertain “the validity of the children’s rights, if any, to be brought up within their own religious identity.”\textsuperscript{109} In reaching this determination, the court relied on Halacha, orthodox Jewish law. The court noted that in her conversion by the Reform rabbi, the mother did not undergo an immersion in a Mikvah (a Jewish ritual bath). Despite the fact that Reform Judaism does not require such an immersion to effect conversion, the court stated

\begin{footnotesize}
\begin{enumerate}
\item[109.] Id. at 996.
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\end{footnotesize}
that, "[u]nder strict Halachic interpretation, she never attained the status of a Jewish woman which would entitle her progeny to claim a Jewish heritage by birth."\textsuperscript{110}

In further evaluating whether the children were Jewish, the court also noted the sworn testimony of the mother who stated:

\textit{[T]hat she never intended a true conscientious conversion from the faith of her birth, that she acceded to the pressure imposed upon her by the plaintiff at a time \ldots \textit{of} great anxiety, in the early stages of pregnancy and unmarried, that she never truly adopted Judaism as her faith, and that upon the termination of this marriage, she returned eagerly and wholeheartedly to her original Roman Catholic Church.} \textsuperscript{111}

The court then stated, "[t]here is Rabbinical authority, both Orthodox and Reform for the proposition that a convert who denies the intention to have become a true convert and renounces the Jewish faith \ldots annuls the conversion by that fact alone \textit{ab initio}, as having been made in bad faith."\textsuperscript{112} On the basis of Jewish law, the court concluded that "for whatever it is worth, the children of this mother cannot claim a Jewish birthright nor can the father claim it for them as a matter of religious law."\textsuperscript{113}

The decision in \textit{Schwarzman} shows confusion in several respects. In negating the validity of a conversion in Reform Judaism, because it did not meet Orthodox Judaism's standards, the \textit{Schwarzman} court negated the validity of Reform Judaism. This is constitutionally impermissible. Likewise, the court erred in questioning whether the children were actually Jews under Halachic law. Notwithstanding the father's statement that the children were Jews, the issue before the court was whether there was an agreement that the children \textit{were to be raised as Jews}.

The opinion in \textit{Schwarzman} does not state whether the rabbinical law annulling conversions made in bad faith \textit{ab initio} represents a minority position or a consensus of rabbinical opinion. Regardless, it is unclear why a promise made in bad faith should automatically release the promisor. Moreover, it was the father who relied on the "promise" represented by his prospective wife's conversion, not the rabbinate. Finally, the actual promise was the wife's agreement to raise the children in the Jewish faith; her conversion to Judaism merely provided supporting evidence of that promise. As the \textit{Schwarzman} court itself noted, "[i]t is not denied by the mother that in contemplation of the marriage \ldots she agreed with the plaintiff that the children of the marriage would be reared as Jews."\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 998.
\end{itemize}
On neutral contract principles, the defendant wife might have argued that the antenuptial religious upbringing agreement was not a binding contract because she made the agreement under duress, due to her pregnancy. However, the Schwarzman court did not mention this argument.

The Schwarzman court was further disingenuous in concluding that the mother was not engaged in "changing the religion of the children." As the court expressed it, "[s]he and her second husband apparently attend church regularly and have begun to bring the children or some of them to church and instructing their children in the Catholic religious practices and dogma." The court also held that the religious upbringing agreement was not controlling because the parties had not made the agreement in contemplation of divorce. Such reasoning is examined below in the discussion of Stevenot v. Stevenot. Despite such muddled thinking, however, the Schwarzman court came to the correct decision. The parties in Schwarzman did not contest the award of custody to the mother. Since the mother was to retain custody of the children, it would have been impractical and divisive for the court to require

115.  Id. at 999-1000.
116.  Id. at 995.

The father has urged that the court interview the oldest child or the oldest two children (10 and 8) to determine their religious preference, in order to assist the court to come to a conclusion in this case. This court carefully observed the attitudes of mother and father during the course of the hearing. It is clear that the father utilizes his visitation time to proselytize with the children, admonishing them that they are Jews, that their mother is doing a sinful thing by taking them to her Church and that they will suffer the fires of hell if they accede to their mother's religious indoctrination. The foolishness of the father's attitude will become more evident as these children grow in this divisive and destructive atmosphere .... The tragedy of these children being torn apart by a vindictive and insensitive father are the consequences of his own acts and he cannot redeem himself on earth or in heaven by inflicting his religious views .... upon these hapless infants. If he continues this campaign of terror against his own children, it is not difficult to foresee that their lives and their personalities will be irreparably damaged in this world. Accordingly, this court will decline to interview the children of such tender years since we are of the view that they are not capable, competent or free enough to make such a choice at this time.

Schwarzman, 388 N.Y.S. 2d at 998-99. It is unfortunate this court elected not to interview the two older children because, without benefit of the trial court transcripts, the mother's allegations against the father appear suspect. Judaism does not believe in Hell nor do Jews generally use such verbiage as "suffer the fires of hell." PAUL SILVERMAN, JUDAISM AND CHRISTIANITY 197 (1968). A central tenet of Judaism is that God judges people for their actions, not for their religions. Therefore, Jewish principles have never held that anyone would "suffer the fires of hell" because they were Christian. Moreover, the father was from the liberal Reform branch of Judaism. Consequently, either this father was remarkably ignorant of his faith's tenets, or the court was ignorant of the events which actually transpired in the family.
the custodial parent of one faith to raise the children in another faith.

e. Arguments Based on the Failure to Contemplate Divorce and the Statute of Frauds

In *Stevenot v. Stevenot*, the New York Supreme Court, Appellate Division, denied a husband's attempt to enforce an oral antenuptial agreement requiring his former wife to raise their two children in the faith of the Congregational Church. The *Stevenot* court held that the oral agreement on the children's religious upbringing, which the parties had made prior to their marriage and reiterated during their marriage, was not binding because it had not been reduced to a writing and because it did not contemplate a post-divorce status.

Even if the antenuptial agreement had been in writing, the *Stevenot* court would not have enforced the contract because it did not contemplate a post-divorce status. There are difficulties with this reasoning. The agreement to raise the children in the Congregational faith was made in consideration of marriage. Thus, the husband performed his part of the bargain by marrying his wife. The *Stevenot* court's position that the wife was released from her commitment when the court dissolved the marriage is unfounded. Such reasoning assumes that the husband was at fault in the failure of the marriage and that he was the party who breached this "contract." However, if the marriage had failed solely as a result of the wife's actions, would the *Stevenot* court still have released the wife from her contractual commitment on the religious upbringing of the children? How would the *Stevenot* reasoning apply under "no fault" divorce provisions?

The *Stevenot* court's reasoning misinterprets contract law. Under *Stevenot*, a wife who promises to raise the children in the faith of the father, as part of the bargain for marriage, can later renege on that solemn promise by breaking up the marriage. She can then claim she no longer has any obligation to raise the children in their father's faith. Instead, she can raise the children in the religion of her choosing, because the breakup of the marriage constitutes the father's "withdrawal" of his "consideration."

Such reasoning raises many problems. Obligations incurred before and during marriage do not abruptly and arbitrarily cease with the dissolution of the marriage. For example, a husband pays "spousal support" for many years because his financial obligations to his wife do not cease with termination of the marriage. Yet, unlike the religious upbringing obligation, post-divorce spousal sup-
port is not usually an issue raised prior to a marriage, nor is it likely
an obligation on which the parties relied at the time the marriage
was agreed to.

The *Stevenot* court also found the agreement unenforceable as
violating the statute of frauds. Although *Stevenot* is one of only two
cases in which a court invoked the statute of frauds, it is likely one
of the stronger arguments against enforcement of antenuptial reli-
gious upbringing agreements. Therefore, the statute of frauds war-
rants closer analysis.

The other case in which a court used the statute of frauds to
render an oral antenuptial agreement unenforceable is *Kellner v.
Kellner*.119 In *Kellner*, two people of different faiths agreed prior to
marriage that they would marry in the husband's faith, adhere to
that faith and raise their children in that faith. For a time, the wife
raised the children in the husband’s faith, but then began raising
the children in her own faith. The father brought an action to en-
force the agreement after the parties had been separated for five
years. At this time, the children were in the mother's custody. The
mother argued that the court should dismiss the complaint because,
"it seeks to compel performance of an asserted promise made orally
in consideration of marriage which the law says is enforceable only
when committed to writing."120 The New York Supreme Court dis-
missed the father's complaint noting, "that the Legislature provided
that an agreement such as this should be void unless in writing and
subscribed by those sought to be bound thereto. Whatever the mo-
tivation, the prohibition is a proper exercise of the Legislative func-
tion in the field of public policy."121

The statute of frauds, which was adopted in England in 1676,
requires that certain agreements be reduced to writing to be en-
forceable.122 Under the statute of frauds, any agreement made in
consideration of marriage must be reduced to a writing. An oral
agreement under the statute is not invalid, but it is
unenforceable.123

Apparently, in *Kellner*, the wife did not formally convert to her
husband's religion. However, the statute of frauds may be a less

120. *Id.* at 744 (citing New York personal property law as support for her
argument).
121. *Id.* at 745.
122. The statute of frauds, however, did not apply to religious upbringing
disputes, as the operating doctrine at that time and until the 1880's was "reli-
gion sequitur patrem." The father held the right to determine the religious
upbringing and education of the child. *Lee M. Friedman, The Parental Right to
Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 495 nn.37-38
(1916).
123. *Samuel Williston & George J. Thompson, Williston on Contracts*
§ 527 (rev. ed. 1938).
significant bar to the enforcement of religious upbringing agreements in marriages in which one spouse has formally converted to the faith of the other. In such marriages, there is usually a writing signifying the spouse's religious conversion. If that writing includes a commitment to raise the parties' future children in that particular faith, the writing serves to validate the oral religious upbringing agreement, making it enforceable. It is well established that a properly signed writing can render an oral antenuptial agreement enforceable, even when the writing was executed subsequent to the oral agreement and subsequent to the marriage. Moreover, even if the writing fails to make express reference to the prior oral agreement, the writing removes the oral agreement from the statute of frauds. As Williston has stated, "[i]t is even said that the only effect of the statute is to require certain evidence in order to prove the bargain." Such protection will likely not be present, however, in a marriage of parties who initially shared the same faith and married in that same faith, if one of the parties subsequently abandons that faith. There is no "paper trail" in such marriages because religious identity of the family was already assumed. Nor should such a "paper trail" have been necessary. It would be as unnatural for the religious character of the marriage to be set to paper as it would be for the sexual character of the marriage to be set to paper. On such essentials of a marriage, there is a presumed and express agreement as regards religion that the parties ratify when they are married in a ceremony of their common faith. Application of the statute of frauds in such an instance effectively prevents a non-changing parent from maintaining the religious upbringing and identity of his or her children.

The incongruous nature of applying the statute of frauds should be fully appreciated. It is only the parent who has "played

126. WILLISTON & THOMPSON, supra note 123.
127. The statute of frauds, as regards promises in consideration of marriage, clearly was intended to apply to monetary, and not religious upbringing promises. Historical and social situations contemporaneous with the time evince this intent:

[In England,] as early as 1590 the Elizabethan government aimed at the suppression of Catholic education by enacting that only schoolmasters who repaired to the Established Church might be maintained, (citation omitted) followed four years later by a further statute which punished as a proemunire the sending abroad of a child for Catholic education. (citation omitted). From time to time further laws were passed (citations omitted) to render more effectual the suppression of Catholic education, until by
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by the rules,” by assuming the burdens and obligations of marriage before beginning a family, who finds himself or herself without any rights to maintain the children’s faith. Ironically, the law affords considerably more protection to the rights of the parties in “mere-tricius relationships,” such as unmarried and cohabiting, as in

1699 it was a crime punishable by perpetual imprisonment for any Papist to keep school or assume the education of youth. (citation omitted)

Naturally during this period, in the face of such public sentiment and of such laws there was little or no litigation in the courts of England on the part of Catholic parents to protect any parental rights in relation to their children. Indeed the temper of the courts, reflecting this prevalent spirit of religious intolerance, is well illustrated by their action in Shaftsbury v. Hannam, (citation omitted) where upon an insinuation by counsel for the plaintiff that the defendant was a Papist, although “utterly denied” by her, an order was entered that unless Lady Hannam “dispose herself to receive the Sacrament according to the rites of the Church of England, before the end of the next term, and produce a legal certificate thereof, the court would then consider to remove the infant into such hands as might secure his education in the Protestant religion.”

Friedman, supra note 122, at 485-86. (emphasis added).

Calamari describes the statute of frauds in the following manner:

In 1677 Parliament enacted an Act for the Prevention of Fraud and Perjuries. (citations omitted). This Statute contained twenty-five sections which dealt with conveyances, wills, trusts, judgment and execution in addition to contracts. (citations omitted). Only two sections, the fourth and the seventeenth are important for contract purposes. These sections read as follows:

Sec. 4. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought (1) whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Sec. 17. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

CALAMARI & PERILLO, supra note 4, at 774.

It is evident on reading the statute that the provision intends to refer only to financial agreements, such as dowries. Moreover, the only two cases applying the statute of frauds to religious upbringing agreements, cited the statute from the New York Personal Property Law. See Stevenot v. Stevenot, 520 N.Y.S.2d 197 (N.Y. App. Div. 1987); Kellner v. Kellner, 90 N.Y.S.2d 743 (N.Y. App. Div. 1949).
Marvin v. Marvin.\textsuperscript{128} Were such a couple to disagree on the religious upbringing of their children, an oral agreement, without the need for a writing, suffices to bind the parties. For, as one commentator has noted in discussing Marvin, "[t]he court in fact gave greater force to this contract than would be given to an ordinary antenuptial agreement, since it held this contract could be enforced even though oral, while an antenuptial contract would be within the statute of frauds."\textsuperscript{129}

Thus, when the courts blindly apply 17th century English common law, now largely abandoned in that country,\textsuperscript{130} incongruous consequences result; the courts provide legal protection to an unmarried, cohabiting parent while denying the same protection to a married parent. This outcome cannot be in the interest of public policy. However, courts appear reluctant to invoke the statute of frauds, even when they are unsympathetic to the party seeking to enforce the antenuptial agreement. The court in Zummo v. Zummo,\textsuperscript{131} while making passing note of the oral nature of the antenuptial religious upbringing agreement, chose instead to find the agreement void for indefiniteness.

Even if a court applied the statute of frauds to render an oral antenuptial agreement unenforceable, a party still retains an avenue for relief by arguing promissory estoppel. Professor Douglas Whaley provides the following description of the doctrine of promissory estoppel:

Section 90 of the Restatement of Contracts provides that where the promisor makes a promise, and can foresee reasonable reliance on the promise by the promisee, then to the extent necessary to avoid injustice, courts will enforce the promise, even though there is no traditional consideration given by the promisee to the promisor.

The doctrine of promissory estoppel has grown by leaps and bounds, to hold people to promises whenever there is foreseeable detrimental reliance . . . .

The doctrine can be used to get around a lack of a technical acceptance, it can be used to get around a lack of consideration . . . it can be used to get around the necessity of a writing in a statute of frauds situation."\textsuperscript{132}

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\textsuperscript{128} Marvin v. Marvin, 557 P.2d 105 (Cal. 1976).
\textsuperscript{129} CLARK, supra note 124, at 19.
\textsuperscript{130} 2 & 3 Eliz. 2, ch. 34 (1954).
\textsuperscript{132} DOUGLAS WHALEY, CONTRACTS, SUMS AND SUBSTANCE AUDIO TAPES (Herbert Legal Services).
A second avenue is also available to circumvent objections based on the statute of frauds. While promises in consideration of marriage fall under the statute of frauds, mutual promises to marry do not. When one party converts or agrees to raise children in the other party's faith, this agreement is part and parcel of a mutual agreement to marry, rather than an agreement in consideration of marriage. Therefore, even if one party argues the statute of frauds, the other party maintains arguments to enforce the religious upbringing agreement.

f. Arguments Based on Indefiniteness

In *Lynch v. Unlenhopp*, in an Iowa court voided a religious upbringing agreement on the ground that it was insufficiently definite. The dispute in *Lynch* was whether a child was to be raised in the Roman Catholic faith, as provided in the religious upbringing agreement, or as a Protestant. The *Lynch* court voided the contract for indefiniteness, stating "[i]t is provided [by the agreement] the said child shall be reared in the Roman Catholic Religion. Is this language so clear, specific and unequivocal that it can be readily understood? . . . ." What fast days must be observed, what Lenten observances followed? As suggested in the earlier discussion of *Lynch*, in Section I of this article, the *Lynch* court appears confused. The issue before the court in *Lynch* was the identity of the child's religion, not its intensity. Thus, the agreement in *Lynch* was "clear, specific and unequivocal" as to what religion the child was to be raised in.

In *Zummo v. Zummo*, the Pennsylvania Superior Court ruled that the trial court erred in enforcing an oral prenuptial agreement on the religious upbringing of children. In *Zummo*, the mother, who was Jewish, and the father, who was Catholic, had orally agreed prior to their marriage, that they would raise any children in the Jewish faith. At the time the couple divorced, they had three children, who were eight, four, and three years old. During the marriage, the children had attended Jewish religious services. Although the parties shared legal custody, they agreed the mother would have primary physical custody and the father would have partial physical custody on alternate weekends. Both parents continued to agree, after the divorce, that the children would be raised as Jews. The dispute arose, however, when the father took the children to mass and refused to take the eldest child to Bar Mitzvah

134. *Id.* at 496.
135. *Id.* at 497.
classes on the Sundays he had custody. The mother objected to these actions and obtained an order from the lower court stating:

5. Father shall be obligated during his weekend visitation to arrange for the children's attendance at their Synagogue's Sunday School . . . . This provision shall not be construed so as to prevent father from going on trips or attending special functions with his children . . . .

6. Father shall not be permitted to take the children to religious services contrary to the Jewish faith, however, this provision shall not be construed so as to prevent father from taking the children to weddings, funerals, or family gatherings and shall not be construed so as to prevent father from arranging for the presence of the children [at] events involving family traditions at Christmas and Easter.\(^{137}\)

The father appealed the order to the superior court arguing that the order violated his constitutional rights and those of his children. The superior court, in a two-to-one decision, agreed with the father. As a result, the court vacated the restrictions. They did, however, affirm the part of the order directing the father to take his children to the Jewish Sunday School. The superior court concluded that, "the trial court erred in giving the oral pre-nuptial agreement much significance." In this context, the agreement was entitled to no significance. The decision to grant it such weight was constitutionally impermissible and an abuse of discretion.\(^{138}\)

There are several difficulties with the superior court's reasoning. First, the superior court was confused with respect to the issue in the case. The mother only asked the court to recognize the parties' agreement to raise a child in a specific faith, and to consider enforcing that agreement. Thus, the court's assertion that, "as courts may not divine truth or falsity in matters of religious doctrine, custom, or belief, courts may not give weight or consideration to such factors in resolving legal disputes in civil courts"\(^{139}\) was irrelevant to the court's determination. The court was not asked to compare the truth or falsity of any faith, nor to compare the validity and value of one faith over another. The court's task was merely to assess issues of contract law, not religious doctrine.

Second, the superior court was confused about the concept of indefiniteness. The court characterized the couple's religious upbringing agreement as "vague," giving weight to the father's claim that though he understood that their agreement called for their children to "receive [a] formal Jewish education, he did not understand it to preclude him from exposing the children to Catholic mass . . . ." The mother, on the other hand envisioned an "exclusive Jewish . . . indoctrination."\(^{140}\) It is unclear how an agreement

\(^{137}\) Id. at 1142.

\(^{138}\) Id. at 1148.

\(^{139}\) Id. at 1135.

\(^{140}\) Id. at 1145.
to raise children as Jewish could be considered so vague as to include a Catholic mass. The superior court noted that under the lower court's order, the father was prohibited from taking his children to religious services contrary to the Jewish faith. The superior court then asked "[w]hat constitutes a 'religious service?' Which are 'contrary' to the Jewish faith? What for that matter is the 'Jewish' faith? Orthodox, Conservative, Reform, Reconstructionist, Messianic... might differ widely on this point."1

This statement is astonishing. "Messianic Jews" are people of Jewish descent who have accepted Jesus as Lord. These people are unequivocally of the Christian faith. If the superior court could not distinguish between ethnic background and faith, it is not surprising that it would find an agreement to raise children as Jewish unenforceable due to "indefiniteness."

Third, the superior court noted that "[t]he indefiniteness of the instant oral agreement precludes enforcement on ordinary contract principles as it demonstrates no meeting of minds on the critical issues of the exclusivity and intensity of the Jewish education envisioned by the parties..."142 This argument demonstrates a misunderstanding of the differences between Judaism and Catholicism. The Jewish and Catholic faiths, while related and held in mutual respect, are also mutually exclusive. A Jew's rejection of the divinity of Jesus effectively excludes him from the Catholic faith. Conversely, the beliefs of a Catholic regarding Jesus preclude that person from being of the Jewish faith. Judaism and Catholicism are exclusive from each other not only in faith, but also in practice. Jews do not make a regular habit of going to mass. Catholics tend not to enroll their children in Jewish parochial schools. A dispassionate observer, on learning that children were to be raised as Jews, would hardly be unwarranted in assuming these children would not be attending mass on a regular basis. However, because the Zummo religious upbringing agreement did not specifically state that the children would not be raised in or exposed to the Catholic faith as well as the Jewish faith, the superior court deemed the oral contract indefinite. If there had been such an understanding, would the court have enforced the agreement?

Finally, the superior court mistook religious intensity as a central issue in the dispute. The court argued that there was "no meeting of minds on the... intensity of the Jewish education envisioned by the parties"143 and contended that this made for "indefiniteness." However, the sole "intensity" issue before the court was the mother's plea that the child continue with his Bar Mitzvah lessons.

141. Zummo, 574 A.2d at 1146.
142. Id. at 1145.
143. Id.
Since a dispassionate observer would reasonably expect a boy being raised in the Jewish faith to have Bar Mitzvah lessons, it is unclear why the superior court found "intensity" to be a "critical issue" of such "indefiniteness" as to "preclude ordinary contract principles."

In addition to the arguments discussed above, the superior court in Zummo further posited that all religious upbringing agreements "must remain as legally unenforceable in civil courts as the wedding vows the parties even more solemnly exchanged...[as]... (wedding vows express a mere future expectation)."\(^{144}\) This too is a poor argument. If, by the term "wedding vows" the court is referring to the rhetorical language, "love, honor and obey," it should be noted that commitments to raise children in a specific religion are not made in exchange for such statements. On the contrary, the religious upbringing commitment is given in exchange for the actual marital state. If, on the other hand, the court used the term "wedding vows" to refer to the actual marital state, that state is hardly a "mere expectation" without obligations. On the contrary, the marital state is a contract which imposes significant obligations.

As noted, and demonstrated above, courts enforce religious upbringing agreements as often as not.\(^{145}\) Considering the hostile "separation of church and state" atmosphere in which courts rendered these decisions, these results can be interpreted as a testament to the potency of the argument for enforcement. Moreover, contrary to conventional wisdom that courts have never enforced antenuptial religious upbringing agreements over the objections of one of the parents, there are, in fact, three such decisions.\(^{146}\) Nonetheless, courts are more likely to enforce religious upbringing agreements which are part of an agreement in contemplation of divorce, than they are to enforce an antenuptial religious upbringing agreement. Yet, as the court stated in Spring v. Glawon,\(^{147}\) there is "little substantive difference between the [two]."\(^{148}\)

\(^{144}\) \textit{Id.} at 1147.

\(^{145}\) A large number of these decisions came down in the New York courts. New York enforced these agreements in nine cases, and did not enforce them in seven. In jurisdictions outside New York, courts enforced these agreements in six cases and declined to enforce them in nine.

New York's high number of cases reflects perhaps the greater religious diversity in that state, and in particular, its large Jewish population. Conflicts between a Christian and a Jewish parent on the religious upbringing of their children are likely to be of greater intensity than disputes between two parents of differing Christian denominations. Therefore, these conflicts are more likely to be brought before the courts.


\(^{148}\) \textit{Id.} at 142.
B. The Best Interests of the Child as Applied to Religious Upbringing Disputes

Clearly, there is an inherent tension between the best interests of the children on the one hand, and the First Amendment rights of one of the parents on the other. The courts take one of two approaches in weighing the significance of these two interests. Some courts given primacy to the interests of the children, holding that a "reasonable likelihood of future harm" will trigger a decree. Other courts, however, give primacy to the rights of the parent, requiring a "clear, convincing, demonstration of present harm" before they will enforce a religious upbringing agreement. As will be shown below, the choice a court makes between these two standards likely determines their decisions.

1. Cases Decided on a "Reasonable Likelihood" Standard

In every case in which a court adopted the "reasonable likelihood of future harm" threshold, the court imposed some sort of restriction on religious upbringing by one of the parents. In Miller v. Hedrick, the California Appellate Court upheld a lower court's order restraining a noncustodial divorced father from exposing his child to the father's religion, unless he obtained the custodial mother's approval. In Miller, the couple was married in 1951 and divorced in 1953. The court heard this religious upbringing dispute in 1958, when the child was five and a half years old. The father was a Jehovah's Witness, the mother a Catholic. The mother curtailed the father's weekend visitation when she discovered that he was taking their son to religious meetings and having him sell Jehovah's Witness literature door to door. The mother, who was raising her child in the Catholic faith, believed it would be "antagonistic to have a child taught a belief contrary to those he is regularly taught." The trial court noted that "as between parents the parent having legal custody was entitled to determine the child's religion." Basing its decision on the welfare of the child, the trial court restrained the father from involving his child in any religious activities unless the child's mother permitted those activities.

The father appealed the restraining order, claiming that "the court erred in holding that as between parents the parent having legal custody is entitled to determine the child's religious training; that the court abused its discretion in reducing plaintiff's visitation

150. Id. at 232.
151. Id. (citing BARBARA N. ARMSTRONG, CALIFORNIA FAMILY LAW 554 (1953); Burge v. San Francisco, 262 P.2d 6, 12 (Cal. 1953); Lerner v. Superior Ct of San Mateo County, 242 P.2d 321 (Cal. 1952)).
rights because of this plaintiff's religious opinion.\(^{152}\) The father cited opinions which held, in effect, that the court has no authority over the child's religious training and discipline and in a custody dispute, religious views afford no ground for depriving a parent of custody, if the parent is otherwise qualified. The appellate court, however, upheld the restraining order. Quoting *Lerner v. Superior Court*,\(^ {153}\) the appellate court stated that "[t]he essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and *religion*."\(^ {154}\) The appellate court also emphasized that the welfare of the child is the paramount consideration, observing that under the doctrine of *parens patriae*, the court "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare and which may be detrimental to the mind of the child."\(^ {155}\)

Similarly, in *Morris v. Morris*,\(^ {156}\) the Superior Court of Pennsylvania held that the best interests of the child outweighed the First Amendment rights of the noncustodial parent. John and Jean Morris were married in a Roman Catholic ceremony in 1974, although the husband was not a Catholic. Their child, Lisa, was born eight months later. Both husband and wife agreed to raise any children from their marriage as Roman Catholics. However, the husband subsequently became a Jehovah's Witness. In 1977, when the couple divorced, the court awarded the mother custody with visitation rights for the father. The relationship was amicable until the following year, when the mother learned that the father was taking Lisa on door to door solicitations for the Jehovah's Witnesses as well as to Sunday meetings. Although the mother objected, the father continued these activities with the child. Finally, the mother refused the father all visitation privileges.

The father then brought a habeas corpus action. The court granted him visitation rights every other weekend, but prohibited him from engaging in door to door religious solicitations with his daughter. The father appealed, claiming the order infringed upon his right to the free exercise of religion, and his right to privacy. However, the Superior Court of Pennsylvania upheld the order of the lower court. The superior court's comments bear repeating:

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[1.] It would be an egregious error by our courts in a custody dispute to scrutinize the ability of the parents to foster the child's emotional development, their capacity to provide adequate shelter and sustenance, and their relative income, yet not review their respective religious beliefs.\textsuperscript{157}

[2.] In the best interests concept [in a child custody dispute] is the stability and consistency of the child's spiritual inculcation.\textsuperscript{158}

[3.] The paramount consideration is the best interests and welfare of the child . . . . (citations omitted). Although best interests is necessarily a nebular term, rendering itself amenable to neither simple definition nor application, it embraces the child's physical, intellectual, moral and spiritual well being.\textsuperscript{159}

[4.] It is legitimate for a court [in a child custody dispute] to examine the impact of the parents' beliefs on the child.\textsuperscript{160}

[5.] While the adoption of a belief is absolutely protected, there exists only a qualified right to act on that belief.\textsuperscript{161}

[6.] While religious beliefs must not constitute the sole determinant in a child custody award, the court may consider those beliefs in rendering a decree.\textsuperscript{162}

[7.] Considerations given to religious beliefs in custody matters apply with equal force to matters involving visitation, or partial custody.\textsuperscript{163}

[8.] A court considering religious beliefs in rendering a challenged custody award neither intend to, nor are capable of, rendering a value judgment on the intrinsic truth of the varied religious beliefs, but confine [its] investigation solely to any detrimental effect their practice [of those beliefs] may have on the development of the child.\textsuperscript{164}

[9.] We cannot accept an argument that the absence of present harm constrains the court's power to act. Were this the case, we would have to allow psychological harm to Lisa to progress to a mentally crippling point before action could be taken. With that damage a \textit{fait accompli}, however, any remedial action would be marginally effective. For our purposes it may be unfortunate, but the state of the art in psychiatry is such that absolute certainty is not possible . . . .

[I]nconsistent teachings would probably result in some mental disorientation to Lisa. We believe that this is sufficient to override any right appellant may have in draping the whole of his religious beliefs upon the child.\textsuperscript{165}

In several recent decisions, courts have ruled that limiting religious upbringing to instruction in a single religion serves the best

\textsuperscript{157} Id. at 142.
\textsuperscript{158} Id. at 141-42.
\textsuperscript{159} Id. at 141.
\textsuperscript{160} Id. at 142.
\textsuperscript{161} Morris, 412 A.2d at 142.
\textsuperscript{162} Id. at 143.
\textsuperscript{163} Id. at 144.
\textsuperscript{164} Id.
\textsuperscript{165} Id. at 146-47.
interests of the child. In *Andros v. Andros*, the Court of Appeals of Minnesota modified a joint arrangement and granted sole custody to the mother in order to resolve a dispute over the religious upbringing of the children. The *Andros* court also restricted the father's visitation rights to prevent him from taking the children to his church. When the parties were divorced in 1983, the court granted physical custody of the two children to the mother and granted joint legal custody and reasonable, liberal visitation to the father. Both parties remarried. At the time of the father's remarriage, he sought to involve the children in his activities with the Assemblies of God which led to disputes with the mother, a Lutheran. Some of their arguments took place in the presence of the children. The mother feared that her ex-husband was attempting to convert the children to his faith and to his "very fundamental beliefs. He told the children that Halloween costumes were symbols of the devil... and informed the children that there was no Santa Claus or Easter Bunny." The mother sought sole custody and a court order to restrict the father from involving the children in his religious activities. In his defense, the father argued that he supported the children's attendance at the mother's Lutheran church but also claimed that the children enjoyed their activities at his church. The wife countered that when the children returned home from visits to the father's church, they were "extremely upset and [in an] emotional state indicating that I was going to hell because I did not go to the correct church." The mother had the children examined by a psychologist, who found that "the children are equally fond of both parents, and have suffered no permanent damage as a result of the divorce." However, the psychologist further testified that in his opinion "attendance at two churches with beliefs and practices as divergent as in this case may endanger the children's emotional health." The psychologist added that "because the children are so closely bonded with both parents, they feel a need to try to please both. However, the children know that to please one parent necessarily involves displeasing the other."

The trial court recognized a threat to the children's emotional well being finding:

7. That, as this conflict is made evident to the children through the parties, either by direct conversation or by the parties through the practice of their religion, it creates a conflict in the children because of their love for each parent, their desire to please each par-

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167. *Id.* at 919.
168. *Id.*
169. *Id.* at 920.
170. *Id.*
171. *Andros*, 396 N.W.2d at 920.
ent, and that, that conflict at this age has not caused any emotional
damage but is very likely to impair the emotional development of
the children.172

8. That there is nothing in the religious practices of either party
which, if practiced singly, would be detrimental to the develop-
ment of the children's emotional health or welfare.173

9. That there has been no impairment of emotional health up to this
point, because the children have been affected only by the exter-i-
ors of the conflict because of their age and ability to perceive the
differences in beliefs and practices, but that in the immediate fu-
ture the differences, other than exterior only, will, in all likeli-
hood, endanger their emotional development.174

In his appeal, the father conceded that his visitation remained lib-
eral, but claimed that "restricting visitation so that he cannot take
the children to his church unduly restricts his relationship with
them and abridges his freedom of religion."175 The court of appeals
did not agree, "[a]ppellant's [father's] freedom to exercise his reli-
gious beliefs remains exactly the same as before. The court's order
properly gives respondent, not appellant, exclusive control of the
children's religious training. It is settled law in Minnesota that the
custodial parent of minor children has control of the children's reli-
gious upbringing."176 The court of appeals also rejected the father's
contention that the court improperly considered the relative merits
of the two religions:

The court inquired into the parties' religious beliefs for the purpose of
determining whether the conflict over the parties' religions was seri-
ous enough to affect the custody issue. Although the court found that
the conflict was serious enough to terminate joint legal custody, the
court specifically remained neutral on the merits of either religion.177

Finally, the court of appeals refused to apply the standard of
"compelling state interest"178 to the restriction placed on the fa-
ther's visitation:

The court's modification of visitation affects neither applicant's [fa-
ther's] religious beliefs, nor his right to practice his religion. The
court's ruling simply repeats the law, a legal custodian has the right to
determine the minor children's religious training.

We hold that the court's decision does not affect appellant's consti-
tutional right to freedom of religion. Although appellant's wish to in-
voke the children in his religious activities is now subject to
respondent's consent while they are minors, appellant is, and always
has been, free to practice his religious beliefs as he sees fit.179

172. Id.
173. Id. at 924.
174. Id. at 920.
175. Id. at 923.
176. Andros, 396 N.W.2d at 923-24 (citing MINN. STAT. § 518-003 (1984)).
177. Id. at 924.
178. Id.
179. Id.
In *Short v. Short*, a custody dispute involving a mother who was a Jehovah's Witness, the Colorado Supreme Court overturned a lower court ruling that the mother's religious beliefs and practices were inadmissible. The supreme court found the lower court's use of the standard of "substantial probability that the religious belief or practice will result in actual harm or endangerment to the child's welfare" to be "unduly restrictive." Instead, the supreme court found that the mother's religious beliefs and practices need only be "reasonably likely to cause present or future harm to the physical or mental development of the child," to be admissible in a custody determination.

In *LeDoux v. LeDoux*, the Nebraska Supreme Court upheld a trial court order barring a noncustodial Jehovah's Witness father from exposing his children to any beliefs or practices inconsistent with the religious teachings of the Catholic faith, the religion in which the mother was raising the children. The trial court found that exposing the children to more than one faith would be detrimental. The supreme court noted that, "[p]rohibiting a court from considering religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child." The court also noted that, "the right to practice religion freely does not include liberty to expose . . . the child to . . . ill health."

In two recent cases, courts have gone even further, ordering the noncustodial parent to cooperate with the custodial parent in the latter's religious upbringing of their children. In *Overman v. Overman*, the Indiana Court of Appeals ruled that the custodial parent, "may determine the child's upbringing, including his education, health care, and religious training," to the extent that the noncustodial parent can be required to transport the child to catechism classes on his visitation time, against the noncustodial parent's wishes. The Indiana Court of Appeals based its decision on an Indiana statute that permitted the custodial parent to "determine the child's upbringing, including his education, health care, and religious training . . . ." Similarly, in *In re Tiscos*, the court or-
ordered a noncustodial Baptist father either to take his child to Roman Catholic church services during his Sunday morning visitation periods or to leave the child with the custodial mother. In these cases, the courts, after applying a reasonable likelihood standard, limited one parent's actions affecting the religious upbringing of his or her child.

2. Cases Decided on a "Clear Demonstration" Standard

In contrast to giving primacy to the child's interests, some courts give primacy to the parents' rights and will not restrict their actions unless the other parent proves by clear and convincing evidence that the child will suffer present harm. In *Munoz v. Munoz*, the Supreme Court of Washington required "a clear and affirmative showing that conflicting religious beliefs affect the general welfare of the child" before it would interfere with a child's religious upbringing. The *Munoz* trial court had enjoined a Catholic father from exposing his children to his faith. The children were in the custody of their mother, a Mormon who had converted to the Catholic faith prior to the marriage but subsequently returned to the Mormon faith. The trial court held that the custodial parent should determine the children's religion. The trial court also believed that exposing the children to conflicting beliefs would be detrimental. The Supreme Court of Washington, applying a "clear demonstration" standard, reversed the injunction.

In *Murga v. Peterson*, the California Court of Appeals refused to enjoin a noncustodial father from discussing his religion with his child and from involving his child in his religious activities, absent a showing that the children would be harmed by such discussions or activities. At the time the parties dissolved the marriage, the court awarded the mother custody of the couple's three-year-old son. In 1978, the father asked the court to modify his visitation rights because he was moving to Florida to enroll in a Bible institute. In addition to opposing any change in the father's visitation rights, the mother asked the court to restrain the father from "(1) requiring the child to engage in any religious activities except as approved by the mother; (2) sermonizing, evangelizing, instructing, discoursing with, and/or attempting to indoctrinate the child on any religious subject without her prior approval . . . ." The trial court granted the visitation modifications and allowed the father to phone the child once a week, "on condition that he refrain from discussing

191. *Id.* at 1135.
193. *Id.* at 501.
any religious or biblical activities." The court imposed no further religious restrictions on the father.

The mother appealed, arguing that the trial court abused its discretion in refusing to grant the restraining order she had requested. In support of her contention, the mother told the court that:

When the child is visiting with his father, he is required to spend 15 or 20 minutes a day . . . reading and discussing the Bible, praying and singing. On Sundays, he is taken to church and Sunday School. He once told his mother that his father had taken him on a door-to-door crusade to save people; the father denied that any such outing ever occurred. The mother asserts that as a result of the father's imposition of his religious attitudes and practices, the child hates religion and refuses to go to church with her. She has requested the father not to discuss religion with the child, but the father has refused to accede to her requests.

The mother contended "that, as the custodial parent, she ha[d] an absolute right to direct the child's religious upbringing; that the father's imposition of his religious beliefs and practices has so alienated the child that the mother is unable to exercise this custodial right." The appellate court found no California decision where, absent evidence of harm to the child, a court enjoined a noncustodial parent from discussing or involving the child in his or her religion. The court also noted decisions from other jurisdictions favoring the noncustodial parent on this issue. On the basis of these cases, the court refused to enjoin the noncustodial parent, citing "the protected nature of religious activities and expressions of belief" and "the proscription against preferring one religion over another."

The appellate court held that "custody decisions will not be governed by the religious tenets or practices of parents absent a clear showing that the parent's religious practices would be harmful to the child." The court claimed its decision was "consistent with the only case we have discovered dealing with visitation rights and religious beliefs and practices, Miller v. Hedrick."

The opinion in Murga is most curious. The appellate court writes that it can find no California decision in which, absent evidence of harm to the child, a court enjoined a noncustodial parent
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from discussing or involving the child in the noncustodial parent’s religion. In point of fact, however, there is such a decision, Miller v. Hedrick. Even more disturbing, the appellate court claims that its decision is “consistent with the only case we have discovered dealing with visitation rights and religious beliefs and practices, Miller v. Hedrick.” First, the appellate court misplaces Miller, then it inexplicably rewrites it. The Murga court’s decision and reasoning are, in fact, quite the opposite of the Miller court’s decision and reasoning. In Miller, the court did not require a “clear showing of harm to the child” before it would intervene for the child’s protection. To read such a requirement into Miller is to turn that decision on its head.

In Felton v. Felton, the Massachusetts Supreme Court required a detailed demonstration of harm to the child to justify limiting a parent’s religious instruction of the child. In Felton, the supreme court ruled that a trial court incorrectly curtailed the non-custodial father, a Jehovah’s Witness, from instructing his children in his religious beliefs. The mother, a Congregationalist, claimed that the father was confusing and disorienting the children and alienating them from her. The trial court agreed, finding a “deleterious effect” on the children and an “undermining” of the custodial relationship with the mother. The court, in effect, forbade visitation unless the father ceased the instruction.

The supreme court, however, remanded the case for reconsideration, noting a lack of foundation for the lower court’s findings after determining the mother’s testimony was insufficient evidence. As the supreme court wrote:

The parents together have freedom of religious expression and practice which enters into their liberty to manage the familial relationships. (citations omitted). But the “best interests” of the child are to be promoted, and when the parents are at odds, the attainment of that purpose may involve some limitation of the liberties of one or other of the parents. (citations omitted). However, harm to the child from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail. (citations omitted).

If the dominating goal of the enterprise is to serve a child’s best interests . . . , then it might be thought to follow that a policy of stability or repose should be adopted by which the child would be exposed to but one religion (presumably that of the custodial parent) at whatever cost to the “liberties” of the other parent. (citations omitted). The law, however, tolerates and even encourages up to a point the child’s exposure to the religious influences of both parents although they are divided in their faiths. This, we think, is because the law sees a value

201. Miller, 322 P.2d at 231.
in “frequent and continuing contact” of the child with both its parents, (citation omitted) and thus contact with the parents’ separate religious preferences. (citation omitted). There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose later in life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child.204

Because the above passage from Felton became authority, quoted in full in Mentry v. Mentry205 and quoted in part in Khalsa v. Khalsa,206 it warrants closer scrutiny. The supreme court wrote in Felton “harm ... from conflicting religious instructions ... [to] justify ... a limitation, should not be simply assumed or surmised; it must be demonstrated in detail.”207 In taking this approach, the court assumes that any harm from conflicting religious “instruction” (indoctrination would be a more appropriate word) would present itself in a readily “demonstrable” fashion and in a close temporal relationship to that conflicting “instruction.” It is well established, however, that conflicts within children resulting from the divorce of their parents may not manifest themselves until years later.208 Furthermore, religion is more than just faith. For many people, religion defines their identity. Consequently, confusion over religion at age seven can lead to confusion over identity at age twelve. There is no basis for the supreme court’s assumption in Felton that such harm will be readily demonstrable and immediate.

The supreme court in Felton further writes, “[t]he law ... tolerates and even encourages up to a point the child’s exposure to the religious influences of both parents although they are divided in their faiths.”209 However, the noncustodial parent’s intent in Felton (and Mentry and Khalsa) was not merely to expose his children to his religion. His intent was to indoctrinate the children into his religion. The supreme court’s statement should, therefore, be rewritten, as follows: “The law ... tolerates, and even encourages, up to a point, the child’s indoctrination into the religions of both parents, although they are divided in their faiths.” In Felton, the supreme court defines “up to a point” as “harm ... demonstrated in detail.”210 Therefore, rewriting the sentence, but remaining faithful to the court’s definitions, is “the law, however, tolerates and even encourages the child’s indoctrination into the religions of both

204. Id. at 607-08.
207. Felton, 418 N.E.2d at 607.
209. Felton, 418 N.E.2d at 607.
210. Id.
parents, although they are divided in their faiths, up to harm demonstrated in detail.” Moreover, “divided” is not descriptive of the parents’ religious views in Felton. “In conflict” is a more accurate characterization. Nor is the faith of the parents the issue in Felton; the issue is the religious indoctrination of the child. The supreme court’s sentence thus becomes, “the law, however, tolerates and even encourages the child’s indoctrination into conflicting religions, up to harm demonstrated in detail.” The law, of course, says no such thing. Finally, the supreme court also erred when it wrote, “[a]nd it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child,”211 citing Smith v. Smith.212 The court in Smith made no such statement or suggestion.

In Mentry v. Mentry,213 the California Court of Appeals, in a two-to-one decision, relied primarily on Felton to overturn a lower court restraining order that prohibited a noncustodial father from involving his children in his religion during his visitation periods. Mentry involved a couple who were members of the Mormon Church. When they dissolved their marriage in 1979, the wife left the Mormon religion, and joined another church. At the time of the dissolution, their children were seven and six years old. The court granted the father visitation rights. In 1980, the mother sought an order restraining the father from involving the children in any religious activities without the mother’s approval. The trial court stated that the mother’s request would be governed by the rule presented in Murga, “a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby damaged.”214 At the hearing, the court conciliator testified that he believed that involving the children in two religions would confuse them, thus the father’s religious activities with the children would be harmful. The trial court agreed, and issued an order restraining the father from involving his children in his religious activities during his visitation.

In reviewing the trial testimony, the appellate court noted that the conciliator never actually interviewed the children. In the appellate court’s opinion, the conciliator’s opinion was essentially conjectural. The appellate court reversed the trial court relying primarily on Felton.215 The appellate court also stated that Murga “is the only California decision that defines a standard for deter-

211. Id. at 608.
214. Id. at 262 (quoting Murga v. Peterson, 103 Cal. App. 3d 498, 505 (Cal. Ct. App. 1980) (Miller, J., dissenting)).
mining whether a custodial parent may enjoin the noncustodial parent from discussing religious subjects with the child or from involving the child in the noncustodial parent's religious activities. 216

Unlike the court in Murga, which reinvented Miller, the appellate court in Mentry sidestepped Miller, stating that while, "Miller (citation omitted) addresses the question whether to restrict visitation rights due to religious differences between the parents, but rather than defining any criteria for making such a determination simply defers to the discretion of the trial court." 217 A reading of Miller, however, clearly reveals that the Miller court offers a criterion for such a determination. Specifically, Miller permits the court to restrict visitation rights in any conflict, "affecting the child's welfare and which may be detrimental to the mind of the child." 218 Obviously, the court in Mentry did not agree with the Miller standard, but to skirt precedent in this fashion is disingenuous.

Mentry noted that:

*Murga, Felton* and most of the cases they rely upon reflect a salutary judicial disinclination to interfere with family privacy without the evidentiary establishment of compelling need. (citation omitted) This attitude, . . . is predicated . . . on the recognition that a " . . . court cannot regulate by its processes the internal affairs of the home . . . . The vast majority of matters concerning the upbringing of children must be left to the conscience, patience, and self restraint of the father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children." (citing *Sisson v. Sisson*).

Raising the issue of family privacy in the context of religious upbringing disputes is questionable. The family at issue is now a former family. There is now a new family, that of the custodial parent and the children. Quite central to the privacy of the new family is the right to develop and follow religious beliefs and precepts, without court supported intrusions that will disrupt, and possibly shred, the family's religious identity and cohesion. The issue of family privacy has never been raised in these disputes. The issues are first, the best interests of the children balanced against one parent's claim of constitutional rights and, second, the enforceability of religious upbringing commitments. The cited statement from *Sisson* 220 also implies that a religious upbringing dispute does not present an issue of compelling need. However, for the parents and children involved, religious upbringing is among the most critical of

217. *Id.* at 264 n.2.
issues. Moreover, *Sisson* simply does not apply to religious upbringing disputes, particularly in the context of custody battles and divorce, which are not typically characterized by "patience and self restraint." *Sisson* was merely a dispute between a wealthy husband and wife as to whether their daughter should go to boarding school in Switzerland. *Sisson* presented no issue of divorce or custody. *Sisson* presented no issue of religion. By comparison, the issues in *Sisson* were inconsequential to the issues presented in religious upbringing disputes. Finding a common principle in *Sisson* and religious upbringing disputes is, therefore, quite remarkable.

As noted above, the Court of Appeals in *Mentry* was split two-to-one. The dissenting judge found that:

the evidence presented at the trial below and my analysis of California and sister-state case law compel an opposite conclusion to that reached by my colleagues .

The majority opinion bases its decision on the single determination that the evidence is manifestly insufficient to justify the restraining order. However, it is settled that in matters relating to child custody and visitation rights the trial court is given broad discretion . In my view the court below not only did not abuse its discretion but correctly decided how the "best interests" of the children were to be promoted.

Although not explicitly stated, the majority opinion impliedly holds that a showing of actual harm to the children must be made before infringing upon the non-custodial parent's constitutional liberties. This is not the law. *Murga* held that a non-custodial parent will not be enjoined from exposing the child to his or her religious activities "in the absence of a showing that the child will be thereby harmed." (citation omitted). The holding employs the future tense which necessarily is somewhat speculative. This policy of permitting the courts to intervene prior to a child suffering actual injury is sound; it would be meaningless to state that the court must act in the best interests of the child then restrain the court from acting until the child is demonstrably harmed.221

Until *Murga* in 1977, California case law allowed courts to take into account the likely harmful effects of religious discord on a child. Since 1977, the dissent in *Mentry* notwithstanding, California law apparently demands, for all practical purposes, the demonstration of an actual harmful effect.

In *Hadeen v. Hadeen,* the Washington Court of Appeals observed that it was "improvident" for a court to await actual harm to a child before considering the religious decisions and acts of parents. Nonetheless, the court of appeals remanded a custody dispute for reconsideration on the ground that the trial court's award of custody to the father, based on the mother's involvement with a

radical fundamentalist sect, might have violated the mother's constitutional rights.⁴⁵ The mother in *Hadeen* belonged to a sect that encouraged, as a form of discipline, “[e]nforced isolation, fasting, and zealous beatings,” and also encouraged “vile language toward, lying to, and shunning of non-believers and non-members of the sect.”⁴⁶ The trial court found that the denomination the mother belonged to “requires complete submission and fidelity to the exclusion of other reasonable relationships that usually exists.”⁴⁷ The trial court placed the minor children in the custody of the father, finding that awarding custody to the mother would cut the father off from involvement with the children. In remanding the case, the court of appeals stated:

The trial court’s finding that Mrs. Hadeen is in complete submission to the church to the exclusion of other “reasonable” relationships is a subjective conclusion which should have played no part in the trial court’s decision unless Mrs. Hadeen’s submission posed a substantial threat of endangering the children’s mental or physical welfare. There was no [such] evidence ....⁴⁸

In *Bentley v. Bentley*,⁴⁹ the New York Supreme Court, Appellate Division, upheld a lower court order prohibiting a noncustodial Jehovah’s Witness father from instructing his children in his religion. The mother was raising the children in the Catholic faith. The lower court based its order on a finding that the children were “emotionally strained and torn” because of the parents’ conflicting religious beliefs. The supreme court held that the lower court acted within its discretionary power in determining “that the best interests of these children dictates that they be reared in only one religion.”⁵⁰ Unfortunately, the *Bentley* court did not disclose the evidence or testimony on which the court based its finding that the children were “emotionally strained and torn.” *Bentley* is, therefore, not helpful in defining the “clear demonstration of harm” standard.

By contrast, in *Funk v. Ossman*,⁵¹ the Arizona Court of Appeals relied on a detailed demonstration of actual harm suffered by a child subjected to indoctrination in conflicting religions. The court of appeals in *Funk* affirmed a trial court order permitting a noncustodial Jewish father to take his child to synagogue, but enjoining the father from subjecting the child to religious instruction

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⁴⁵ Id.
⁴⁷ Id.
⁴⁸ Id.
⁵⁰ Id. at 560.
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in Judaism. The trial court found that the child, whose mother was raising him as a Lutheran, was suffering from anxiety and psychological injury as a result of the conflicts between the two religions. The parties in Funk were married in a Jewish ceremony in 1973, following the wife's conversion to Judaism. When they were divorced in 1978, they had a fifteen month old son. The court awarded custody to the mother and gave the father reasonable visitation rights. After the divorce, the mother converted to the Lutheran faith, became a lay minister, and began raising their child as a Lutheran. In 1983, the father sought a court order that their son be raised exclusively in the Jewish faith. The hearing was held in 1984, and included the testimony of three psychologists. The trial court found that:

[A]ll three psychologists believed that a child should not be simultaneously raised in, and receive religious training in both religions and that training in both religions would not be in the best interests of the child. The court further found from the testimony of the psychologists that it would be very hard on the child and against the best interest of the child if he were living with the custodial parent, a practicing Christian, but was receiving formal religious education in Judaism.230

The trial court denied the father's petition and ruled that the mother continued to hold the right to direct and control the religious upbringing of the child.

Approximately half a year later, the mother filed a petition alleging that the father was in contempt of court because he enrolled the child in a Jewish Sunday School. The trial court found that, "the teachings and doctrines of Christianity and Judaism are mutually exclusive."231 The court enjoined the father from taking the eight year old child for formal training or indoctrination in the Jewish faith but permitted the father to involve the child in his faith through the celebration of holidays and visits to the synagogue, exposure which the mother had not objected to. The father appealed, claiming the injunction was improper because "no immediate harm to the child was shown."232

The court of appeals stated:

When it is made to appear that a conflict between divorced parents as to religious instruction is affecting the welfare of their children, a court should always act in accordance with what is best for the happiness and welfare of the child. In legal contemplation, the court recognizes no difference in objectives between religious or other conflicts . . . . (citations omitted)

When do the courts interfere? We adopt the rule set forth in Munoz:

230. Id. at 1249.
231. Id.
232. Id.
the courts . . . should not . . . restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child. (citation omitted).

The facts here justify the court's interference. Rabbi Weizenbaum in whose Sunday school Hal [the child] was enrolled testified:

"[O]ne doesn't raise a child to be both a Christian and a Jew at the same time. I don't think this is a healthy approach to raising a child. I would tell anybody that, because the reasoning is the same for anybody. I would never recommend that approach."

"I don't think that it is a good policy to raise a child to be one thing, and to send him to a school which teaches him to be something else. I think that is to create conflict, which is not healthy for the child . . . ."

Dr. Burkholder, a child psychologist who had been counseling Hal, testified that because of the differences in religions it would be confusing for any child to try to consolidate in his mind two different concepts and would cause long-term confusion and a decision-making problem. She also testified that Hal is having an anxiety problem which he tries very hard not to show but that the anxiety has manifested itself in a psychosomatic problem, soiling his pants (encopresis). This problem and his tension and anxiety ceased when, . . . Hal ceased going to the Jewish Sunday school. As a result of being put in the middle of the relationship between his parents, his anxiety is manifested by the encopresis. He feels that he is a mediator and must please both parents, including pleasing them over the religious issue.233

Based on the above reasoning and evidence, the court of appeals upheld the trial court order. Thus, in Funk the child's encopresis, apparently due to anxiety over going to Hebrew school, constituted a "clear affirmative" showing of harm. Funk is the only published case in which a party provided such evidence to meet the "clear and demonstration of harm" standard set forth in Murga and Felton. The court in Bentley made a similar finding of harm, but failed to disclose the evidence on which its finding was based.

In Zummo v. Zummo,234 discussed earlier, the Pennsylvania Superior Court refused to enforce an oral agreement to raise children exclusively in the Jewish faith, basing its decision on the "indefiniteness" of the contract. However, the Zummo court also addressed the question of the "best interests of the child." The trial court in Zummo concluded that to expose the children to a competing religion after so assiduously grounding them in the tenets of Judaism would "unfairly confuse and disorient the children, and perhaps vitiate all benefits flowing from either religion."235 The trial court based its conclusion on the dictum of the Pennsylvania Superior Court in Morris, that "it is beyond dispute that a young

233. Id. at 1250-51.
235. Id. at 1142.
child reared in two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects."\textsuperscript{236}

However, on appeal the superior court in Zummo refused to apply the reasoning of Morris and reversed the court's philosophy. In Zummo, the superior court required proof of a "substantial threat," rather than "some probability" of harm to the child.\textsuperscript{237} The Zummo court argued that,

> each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional, harm to the child in absence of the proposed restriction.\textsuperscript{238}

The superior court has taken an incongruous position. Ostensibly, in custody disputes, the governing factor is the best interests of the child. The prospect of "some probability" of harm to the child would, therefore, seem to outweigh the interest of one of the parents. Moreover, the right of one parent to expose the child to an incompatible religion does not occur in a vacuum. The other parent is likely to be as distressed at seeing the child indoctrinated into an alien religion as the first parent would be if the court precluded him or her from proselytizing the child. Even if the rights of the two parents canceled each other out (a dubious proposition, if one of the parents had voluntarily, and without duress, entered into a contract on this matter), there remains "some probability" of harm to the child. What is at stake in religious upbringing disputes is usually not mere "exposure" but attempted indoctrination. Because children are highly malleable and impressionable, religious beliefs may be quickly "bonded" onto them. Just as religious beliefs may be "bonded" onto children, so may religious discord and conflict. A court reflects gerrymandered logic when it considers "some probability" of harm to the child as irrelevant, and regards the distress of the other parent as inconsequential.

In Gersovitz v. Siegner,\textsuperscript{239} the Montana Supreme Court upheld a trial court custody order granting joint custody but placing a child who had been raised as a Jew during the marriage in the custody of his non-Jewish mother during the school year. The father appealed the custody order contending that granting custody to the mother during the school year effectively prevented him from raising his child in the Jewish faith. The trial court order stated, "[n]either parent shall have the exclusive right to determine the child's reli-

\textsuperscript{237} Zummo, 574 A.2d at 1155.
\textsuperscript{238} Id. at 1154-55 (emphasis added).
\textsuperscript{239} Gersovitz v. Siegner, 779 P.2d 883 (Mont. 1989).
gious education and affiliation. This determination is consistent with the philosophy underlying joint custody and also with the reality of the child's heritage."\(^{240}\) The father argued that the custody arrangement would result in the child being raised in no religion at all.

The Montana Supreme Court found that "an award of custody for the purpose of religious education should not dominate other elements which comprise the best interests of this particular child."\(^{241}\) The supreme court did not find persuasive the holding in *in re Marriage of Simms*,\(^{242}\) a 1987 Colorado District Court case. In *Simms*, the court awarded a Jewish father custody for the purpose of determining religious training even though it granted physical custody to the mother. During the marriage, the mother had raised the children in the Jewish faith, but after the separation she returned to the Catholic church and sought to raise the children in both faiths. After hearing expert testimony, the Colorado District Court found that only one parent should determine the religious training of the children.

In *Gersovitz*, notwithstanding the award of "joint custody," the court placed the child primarily in the custody of the mother. One would, therefore, expect the mother to determine the religious upbringing of the child. However, basing its reasoning on the best interests doctrine, the *Gersovitz* court concluded that, "the child must reside primarily with one parent during the time he attends school so his education will not be interrupted by multiple custodial transfers."\(^{243}\) The *Gersovitz* court did not find that a similar consistency and stability in religious upbringing would also be in the child's best interests. On the contrary, the trial court stated that its holding that neither parent have exclusive right to determine the child's religious education was consistent "with the reality of the child's heritage."\(^{244}\)

The trial court is engaging in some minor sophistry. The issue is religion, not heritage. The two are not synonymous. The *American Heritage Dictionary*, the major college dictionary in this nation, would hardly have the word "heritage" in its title if that word had any religious connotation at all. That dictionary defines heritage as "[s]omething passed down from preceding generations, tradition."\(^{245}\) Santa Claus is heritage, Christ is religion. Multiple heri-

\(^{240}\) Id. at 884.
\(^{241}\) Id. at 885.
\(^{242}\) Id.
\(^{243}\) Id. at 884.
\(^{244}\) *Gersovitz*, 779 P.2d at 884.
\(^{245}\) *AMERICAN HERITAGE DICTIONARY* 607 (2d ed. 1982).
In *Hanson v. Hanson*, the North Dakota Supreme Court invoked the "clear demonstration of harm" standard when it overturned a trial court order restricting a noncustodial father from involving his children in his Pentecostal religion. The father had converted from Catholicism to the Pentecostal church. The trial court found that the father was "press[ing] his new faith on the children, thus causing them stress." The mother testified that the father told the children that "the Catholic church believes in cannibalism," and that "the Catholic church and Lutheran church taught false doctrine." The mother also testified that "the boys are being "pulled back and forth" because of the conflict in their parents' religious beliefs and that this "upsets" them." However, the supreme court, citing *Munoz* and *Felton*, found that "the evidence in this case falls short of the clear and affirmative showing of physical or emotional harm to the children required to justify the religious restrictions placed upon James' [the father's] visitation rights."

Similarly, in *Khalsa v. Khalsa*, the New Mexico Court of Appeals overturned a trial court order enjoining a noncustodial Sikh father from involving his children in his religion on the grounds that the mother had failed to demonstrate in detail the alleged harm to the children. The parties in *Khalsa* had been married in the Sikh faith and had raised their children in that faith during their marriage. After the divorce, the mother remarried and discouraged the children from practicing Sikhism. The father protested and sought a change of custody. The mother provided testimony from an expert witness that the children were disturbed after their visits with the father. On the basis of this evidence, the trial court restricted the father's religious activities with his children. However, the court of appeals found that the expert testimony was admitted in error because the mother failed to disclose the identity of the expert witness until the day before the trial, thereby depriving the father of any opportunity to depose the witness. In the absence of the excluded expert testimony, the appeals court found the record insufficient to support the trial court's findings. The appeals court stated that, "physical or emotional harm to the child cannot be assumed, but must be demonstrated in detail,"

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247. *Id.* at 464.
248. *Id.*
249. *Id.*
250. *Id.* at 465.
before the court can impose a religious restriction on visitation rights.\(^{252}\)

IV. **THE BEST INTERESTS DOCTRINE AND RELIGION**

In the cases reviewed in the preceding pages, the courts recurrently raise the issue of balancing the best interests of the child against the freedom of religion of one of the parents. However, such a balancing incorrectly frames the issue and skews the outcome of the dispute. In the religious upbringing disputes which are the subject of this article, one parent has broken an explicit, voluntary commitment on the religious identity and education of the children of the marriage. The other parent placed great reliance on that commitment. Thus, these cases do not present a simple issue of freedom of religion. The first parent is free to believe in any faith he or she chooses. Rather, the issue is the freedom to casually break a very profound commitment, when breaking that commitment may have a crucial impact on the identity of the child and a grievous effect on the stable parent.

Framing religious upbringing disputes solely in First Amendment terms does a disservice. The conflict is not between a restrictive court decree and the First Amendment. On the contrary, the issue is a parent's right to unilaterally alter a most intrinsic and significant aspect of a child's future balanced against the rights of that child and the rights of the other parent. An analogy may help clarify the distinction. A parochial elementary school hires a teacher of another faith for secular studies. The teacher, however, begins to "instruct" his students in his own faith. The school demands he cease these activities. He refuses to do so stating that he will not allow the school to violate his First Amendment right of freedom of religion. The teacher's claim, of course, is nonsense. The students' parents hold the First Amendment right to decide and direct the religious upbringing of those children, not the teacher. Governmental action to prevent the school from prohibiting the teacher's unwanted religious "instruction" would clearly infringe the First Amendment rights of the parents. For, unlike the parents, the teacher has no basis for claiming First Amendment rights with respect to those children.

In the same fashion, a parent who breaks an antenuptial agreement on the religious upbringing of children has no basis for claiming First Amendment rights with respect to the children. By entering into a religious upbringing agreement, the parent freely and knowingly transferred away the First Amendment right to decide and direct the religious upbringing of those children. At the

\(^{252}\text{Id. at 720.}\)
very least, the parent who entered a religious upbringing agreement did so as consideration for the marriage. The parent who depended on the other parent to honor the contract placed the greatest of reliance on that agreement. Therefore, when a court refuses to even consider a religious upbringing contract in its custody determination, the court violates the reliant parent's First Amendment right to decide and direct the religious upbringing of the children. At the same time, through the court's deliberate inaction, the party who voluntarily entered into and then broke the most solemn of commitments, reacquires a most significant right. Courts are disingenuous in claiming that their refusal to consider a religious upbringing agreement does not infringe upon the First Amendment right of the reliant parent on the ground that he or she may still expose the child to his or her religion.

Courts appear extremely sensitive to the adverse effects of even the most ethereal manifestations of religion when there is a church-state issue involved. In *Sands v. Morongo Unified School District*, for example, the court prohibited the local community minister from delivering non-denominational invocations at a public high school graduation. The *Sands* court based its decision on the possibility that such an invocation might offend agnostics, atheists or non Judeo-Christians in the audience and might suggest implied government support for religion. The religious content at issue in *Sands* was a forty-five second invocation, delivered once during four years of high school, making mention of "our Heavenly Father," not deliberately targeted to any specific individual, and heard by a seventeen year old atheist or agnostic student in the audience, who already had a defined attitude on religion. Nonetheless, because the court considered that the invocation infringed the First Amendment rights of that student and his or her parents, it mandated intervention.

Yet, courts are much less sensitive to the adverse effect of religious content in the context of religious upbringing disputes. Thus, courts purport that to subjugate one's child to a deliberate indoctrination in a religion that conflicts with or denies the reliant parent's faith does not infringe, let alone abrogate, that parent's right to direct the religious upbringing of that child. This reasoning is inconsistent. The right to direct a child's religious upbringing includes not only the right to teach the child what to believe, but also, the right to teach the child what not to believe.

It is doubtful that judicial inaction in religious upbringing disputes serves the best interests of the child. In cases where a psychologist or psychiatrist testified before the court, not once has the

expert witness stated that exposure to conflicting religions would be harmless, let alone beneficial, for the child. On the contrary, every professional expert on the well-being of children has testified that such exposure is, or is likely to be, harmful.

Because the courts purportedly accord great deference to the “best interests of the child,” the doctrine warrants closer scrutiny. The best interests of the child doctrine dictates that for all practical purposes, the custodial parent determines the child’s religion. At least for children of tender years, the custodial parent is the parent who was the primary caretaker during the marriage unless the primary caretaker is shown to be grossly unfit. The primary caretaker is virtually always the mother. Therefore, absent gross unfitness, the court awards the mother custody, and thereby, the right to dictate the religious upbringing of the child. Thus, the “best interests of the child” doctrine, at least for a child of tender years, amounts to a female equivalent of a principle long discarded and discredited in the English speaking world, “religio sequitur patrem” (religion follows the father). Religious determination based on the “best interests” principle, therefore, turns out to be considerably more arbitrary and more skewed toward mothers, than would appear on its face.

In a custody dispute involving children of tender years, the rights of a father who honored an antenuptial religious upbringing

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West Virginia law does not permit a maternal preference. But we do accord an explicit and almost absolute preference to the “primary caretaker parent,” defined as the parent who: (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends’ homes and the like; (4) provides medical attention, monitors the child’s health, and is responsible for taking the child to the doctor; and (5) interacts with the child’s friends, school authorities, and other parents engaged in activities that involve the child. This list of criteria usually, but not necessarily, spells “mother.” . . .

Our rule inevitably involves some injustice to fathers who, as a group, are usually not primary caretakers. There are instances where the primary caretaker will not be the better custodian in the long run . . . . [However] once the primary caretaker has been identified, the only question is whether that parent is a “fit parent.” In this regard, the court is not concerned with assessing the relative degrees of fitness between the two parents, but only with whether the primary caretaker achieves a passing grade on an objective test . . . . Under our system a mother’s lawyer can tell her that if she has been the primary caretaker and is a fit parent, she has absolutely no chance of losing custody . . . .

Neely, supra at 180-82.

Neely’s article immediately discloses that the sole purpose of his invention of the primary caretaker rule was to provide a mechanism to provide mothers with custody, and to preclude fathers from contesting custody. The primary caretaker principle is the subject of an article now in preparation.
agreement will have no effect unless the court weighs the rights of
the father into the custody determination before, not after, the
court ascertains the "best interests" of the child. Otherwise, the
father's rights will be washed away by the best interests/custodial
parent/primary caretaker/tender years/maternal presumption
principle.

The policy proposed here begins with a presumption that the
court will award custody of the child to the parent honoring the
religious upbringing agreement, absent a finding that this arrange-
ment conflicts with the child's best interests. Courts face two obsta-
cles which may preclude them from adopting this policy. First,
although courts ostensibly consider the rights of parents in deter-
mining custody, the courts hold the "best interests of the child" as
"controlling," "primary," and "paramount." The net result is that
parents' interests and rights take a back seat in custody determina-
tions. The priority courts accord to the best interests of the child is
exemplified by cases in which wives who engage in adulterous rela-
tionships terminating the marriage, still win custody of the children
because the courts determine that the children's best interests will
be better served with their primary caretaker, their mother. It is
unclear how the best interests of the child has taken priority over
the rights of the parents. The United States Supreme Court has
described parents' rights in controlling the rearing of children as
"cardinal," "basic in the structure of our society," and "fundamen-
tal."255 Moreover, the Supreme Court recognized parents' rights to
control the religious education of their children.256 Since these pa-
rental rights are fundamental rights, courts must strictly scrutinize
any statute or governmental act that abridges these rights. Fur-
thermore, since the policy proposed in this article is predicated on
recognition of the child's best interest, there is no logical reason
why courts should not effectuate the rights of a parent who has re-
lied to his or her detriment on a spouse who breaches a religious
upbringing agreement thereby furthering the best interest of the
children.

The second obstacle to taking this approach is the courts' re-

255. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (cited in Mangrum,
supra note 2, at 50); Ginsberg v New York, 390 U.S. 629, 639 (1968); Prince v.
Massachusetts, 321 U.S. 158 (1944).

256. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (Oregon act requir-
ing parents to send their children, ages eight through sixteen, to public schools
in their district for the entire school year, unreasonably interferes with parent's
liberty of parents to direct upbringing of children); Meyer v. Nebraska, 262 U.S.
390, 399 (1923) (statute forbidding teaching of any languages other than English
in any school evades liberty of the Fourteenth).
V. RAISING A CHILD IN TWO FAITHS

When courts either refuse to enforce religious upbringing agreements or refuse to limit noncustodial parents' religious involvement with or indoctrination of their children, children are often consigned to being raised in two religions. Some courts assert that a child can be raised in two conflicting faiths simultaneously, without a deleterious impact. However, with the exception of Zummo, courts fail to cite any evidence, data, or authority to support this assertion. Moreover, even the court in Zummo, which cited "commentaries and empirical studies" to buttress its position, totally misread those "commentaries and studies."

To demonstrate that "exposure" to contradictory religions is not harmful to children, the Zummo court relied primarily on the work of Egon Mayer, a prominent sociologist at the City University of New York. However, Professor Mayer refutes application of his work to the claims of the Zummo court, writing, "the study [is] virtually inapplicable to an understanding of the particular situation of a child who is thrust by divorce into being raised in two religions."

The Zummo court also quotes Petsonk and Remsen, authors of The Intermarriage Handbook, as suggesting that "expos-

258. See Mentry, 142 Cal. App. 3d. at 266. The Mentry court quoted the Felton court, 418 N.E.2d at 680, who suggested that such dual upbringing may sometimes be a "sound stimulant" for the child. In noting this, the Felton court cited Smith v. Smith, 367 P.2d 230 (Ariz. 1961). However, the Smith court said no such thing.
259. Zummo, 574 A.2d at 1157.
260. Id. at 1156 (citing Egon Mayer, LOVE AND CHILDREN OF TRADITION: MARRIAGE BETWEEN JEWS AND CHRISTIANS 277 (1983)).

In a letter to this author dated July 16, 1990, Dr. Mayer writes:
The study [was] based on 117 children-of-intermarried couples, ranging in age from 16-42 (i.e. children in the sense of progeny not of childhood age). All were from in-tact families to eliminate any possible effects of divorce. The principal objective of the study was to discover the relationship between being raised in an intermarriage and later ethnic-religious identification. Only secondarily, and to a very limited extent did the study attempt to evaluate any possible emotional correlates of being raised in an intermarriage.

We had no standardized measure of self-esteem or emotional well-being built into the study. Our main interest in this area was whether or not respondents showed evidence of emotional marginality, as explained in the study, vis-a-vis their parents and extended families.

These and other limitations make the study virtually inapplicable to an understanding of the particular situation of a child who is thrust by divorce into being raised in two religions.

Id. (emphasis added).
Religious Upbringing Agreements

ing a child to more than one religion in the various households to which [the child] is attached does not, by itself, cause [the child] emotional stress or identity confusion." However, inexplicably missing from the excerpt quoted in Zummo is the immediately preceding caveat that this statement is only applicable when there is no parental conflict on religious matters. Obviously, parents who seek judicial resolution of a religious upbringing agreement conflict on religious matters. A court may posit that parents who truly care for their child have a responsibility to insure that their religious conflict does not spill over onto the child. But a court is blind to reality when it presumes that a Jewish father, who takes his faith seriously, can quietly acquiesce as his son is proselytized into a "Jews for Jesus" cult. The court is wrong. Conflict over religious upbringing is not caused by parental indifference to the harm that may come to the child. On the contrary, such conflict occurs precisely because the parent does care about the harmful effect on the child.

Furthermore, it should be noted that Petsonk and Remsen are writers, rather than researchers, psychologists, or sociologists. The portion of the chapter which the court quoted in Zummo was their synopsis of the work of Egon Mayer and Karen Kaufman, a clinical psychologist in Berkeley, California. Kaufman, like Mayer, is surprised at and rejects the conclusions the Zummo court drew from her work.

The work of Mayer and Kaufman provided the sole empirical basis for the Zummo court's position. However, the Zummo court also cited numerous handbooks written either by members of the clergy or by individuals who intermarried. These sources are clearly of anecdotal value only and do not constitute empirical studies. Interestingly, however, contrary to the Zummo court's claim,

262. Zummo, 574 A.2d at 1156.
265. In a letter to the author dated August 30, 1990, Dr. Kaufman writes: All couples, as a condition of participation in the study, needed to report that they were in agreement as to the way in which they were raising their children with regard to religious instruction and affiliation. Therefore, the study does not apply to the situation of raising a child in two faiths when parents are not in agreement in this matter."
most of the handbook authors argue that children should be raised in one faith, not two. The most recent of these books, which has received considerable attention in the general press, is Mixed Blessings by Cowan.267 Cowan found that now grown children of intermarriage expressed the same opinion, "parents should choose a religious identity for their children and not leave it up to them to choose."268

268. COWAN & COWAN, supra note 267, at 247 (emphasis added). Cowan writes:

What about our children? We're adults and we can maintain our separate identities, but what about them? That question, more than any other, haunts the people who come to our workshops. Listen, as two ... interviewed give their answer:

"When I go to church or a synagogue I feel interested, but not connected to either religion. If you asked me what I am, I'd say I'm Jewish but I come from a mixed marriage and religiously I'm not Jewish at all. At times, I feel as if I have a special outlook, a window into both worlds. But sometimes I get the sense that I have a foot in each territory and I'm not a citizen of either . . . ."

"All my life I've been aware of being half and half. I feel like I'm on the fringes of things in a lot of ways. I'm half Jewish, half Christian . . . . I just feel there are a whole lot of ways I don't belong. I've wanted to know who I was ever since I was a teenager."

Whatever their age, whatever their gender or generation, most children of intermarriage sound variations of these themes. They are not talking about happiness. There is no evidence, in our interviews or in the few studies that have been done, that children of intermarriage are more or less cheerful, more or less content with their lives, more or less loving to spouses or children, more or less successful in their professions, than any other group of people. Many say that they feel unusually well equipped to move back and forth between two cultures.

Others experience a negative version of that same feeling. They say they feel like double agents, darting back and forth between enemy lines . . . .

Some people . . . [feel] that the cross and the star are at war inside [them]. Most of these people describe a lifelong sense of rootlessness, a lifelong need to resolve persistent questions about their identities.

The children of intermarriages we interviewed ranged in age from eighteen to forty-five . . . . They grew up in a time when synagogues were much more hostile to interfaith couples than they are now . . . .

When we interviewed them, they had no preconceptions of what they would say; we had no idea of what we would hear. Often, as they talked, confusions and angers that had been bottled up for years poured forth. The depths of their feelings surprised them and us. Their stories were long and complicated. Clearly the fact that one parent was Jewish and one was Christian was only one aspect of their childhood experience, one explanation for complicated attitudes about themselves, their place in the world, and the religious values.

Yet within their collective responses we found clear patterns. They described pitfalls that face any interfaith couple. They sounded warnings that we feel parents should hear.

At the end of our interviews, we asked them whether they wished their parents had done anything different about their religious upbringing. Of course, the answer varied from person to person. But both those who
However, this article does not concern interfaith marriage. In such marriages, the partners usually make no commitment on the faith of the children, and religious identity is usually not a major factor. Rather, this article concerns marriages that were entered into on a single faith basis, either because both partners were of the same faith or because one partner converted to the other's faith. As even the most "liberal" of these guidebooks, Happily Intermarried, states, "a family in which one parent converts to the religion of the other is no longer an "interreligious" family, and there should be no possibility of disputes over the religion in which the children will be raised." 269

In part, the position that raising a child in two religions is harmless, may be a consequence of language. Those who argue that a child can be raised in two religions without harm may be confusing culture with religion and ceremony with faith. Although a child probably can grow up with both Christmas trees and Hanukkah presents, these traditions are actually quite peripheral to the beliefs of Christianity and Judaism. When such traditions are observed primarily for cultural or social reasons, rather than for religious reasons, they are no more incompatible than St. Patrick's Day and Columbus Day. In many "interfaith" marriages, the degree of religiosity is not particularly intense and Christmas and Hanukkah are, in fact, cultural rather than spiritual events. Hence, in such marriages, there is no great incompatibility. Perhaps "interfaith" marriages such as these, which are secular rather than religious in their character, provide the anecdotal basis for the Zummo court's opinion. Indeed, in the social strata to which judges belong, such a "sophisticated," "low key" approach to religion is relatively fashionable.

They wanted roots in one of their parents' religions and cultures, but branches that extended to the other's. Indeed, many of the children we talked with were troubled that one parent had suppressed all traces of his or her own religious heritage and culture. In many cases, the children had felt compelled to follow the few clues they had found about this past and sought to re-create that hidden identity for themselves.

Id. at 245-48.

The last paragraph is likely the sentiment the Zummo court interpreted as being a call for raising the children of interfaith marriages in two religions. It is, however, nothing of the sort. The sentiment calls not to suppress or deny the heritage of either parent.

Proponents of raising a child in two religions also error in characterizing religious beliefs. They argue that since a child can go to temple on Saturday and then go to church on Sunday, there is no conflict. One’s faith, however, is more than a matter of scheduling. One’s faith does not begin and end with a weekly religious service. It is present throughout the week. One’s identity within, and identification with, a faith, carries through the entire week, and is not confined to a forty-five minute bolus.

Two sets of conflicting, mutually negating beliefs are unlikely to benefit a small child. At root, Christianity and Judaism are conflicting, mutually negating, beliefs. The central tenet of Christianity, that one can attain salvation and reach God only through faith in Jesus Christ, effectively negates and invalidates all other religions, including Judaism. Conversely, Judaism absolutely rejects the divinity of Christ. These two beliefs have not been reconciled in nearly two thousand years. It is unclear then, how, by court decree, the two beliefs are to be suddenly and successfully reconciled within the mind of a seven year old boy.

Those who foresee no adverse impact from raising a child in two conflicting religions argue that the child will simply be exposed to two religions and choose one of them. There are, however, three immediate problems with this argument. First, when parents conflict over religion and the child tilts toward the religion of one parent, he or she creates stress in the relationship with the other parent. A small child should not bear this burden. Second, unlike adults, children are not capable of realistically weighing what they are told. They do not have a lifetime of experience as a basis for deciding what to accept and what to reject. Thus, it is unclear on what basis courts suppose children to have the maturity and wisdom to choose between religions. It is indeed remarkable that courts hold seventeen year olds to be uniformly incapable of signing up for a four-week course of Arthur Murray dance lessons, yet cite no reason why a seven year old child can effectively choose between Judaism and Christianity. Finally, children no more “choose” a religion than adults do. We believe what we believe, to a very large extent, based on what we were indoctrinated into as children. On reaching adulthood, most people who were raised as Christians, if they remain religious, remain Christians. Most who were raised as Jews, if they remain religious, remain Jews. Of course, people do freely and frequently change the intensity of their


271. WHALEY, supra note 132 (“infants” under eighteen lack the capacity to enter into contracts; the law treats minors “as if they have the mental capacities of chimpanzees, and does not hold them to any higher standard.”).
religious involvement, but leaving one religion for another is uncommon.

Beliefs and attitudes indoctrinated during childhood can become “imprinted” and carried on into adulthood. If religious beliefs can be imprinted, it stands to reason that so can religious conflict. Such dissonance may not be “broadening.” On the contrary, it may be quite disabling. One is unlikely to find a single individual in this nation who professes to be both Episcopalian and Mormon. If no adult is able to hold two beliefs, even when the beliefs are not particularly disparate, why would a court propose that a child is capable of holding two beliefs?

In either a custody dispute or in an adoption proceeding, the court attempts to place a child in a stable environment. In such a hearing, the court might consider an individual who actively practices two religions to be unstable or disturbed. Therefore, the court should not deliberately and consciously create in a child what it is leery of in an adult. In fact, courts are conscious of this need. Both in divorce and adoption, the courts try to place the child with parents who will continue the child's religious identity. Courts recognize the trauma that may result if a child raised as a Catholic is sent into a Protestant home. Courts are well aware of the need for continuity and the need for stability in belief.

The medical profession is also well aware of the consequences that can result from a lack of continuity and stability in religious belief. The DSM-III-R, The Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association, is the standard reference, not only in this country, but worldwide, for the classification and diagnosis of mental disorders. This manual devotes considerable attention to Identity Disorder, a mental disorder which most commonly arises in late adolescence. The DSM-III-R describes Identity Disorder as a:

272. See Mangrum, supra note 2, at 60 nn.171-74 (numerous statutes cited).
273. But not all courts share this view. In Zummo, the court stated:

For children of divorce in general, and children of intermarriage and divorce especially, exposure to parents' conflicting values, lifestyles, and religious beliefs may indeed cause doubts and stress. However, stress is not always harmful, nor is it always to be avoided and protected against. The key, is not whether the child experiences stress, but whether the stress experienced is unproductively severe.

Zummo v. Zummo, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990). This is a curious statement. Courts routinely go to great lengths to protect divorced wives (and occasionally divorced husbands) from the stress of suffering a drop in their standard of living upon divorce (e.g. from upper middle class to middle class), by placing onerous support obligations on the other party. It is unclear why fully mature adults should be so eagerly shielded from “stress” by the courts, yet small children require the threshold of “unproductively severe,” to the point of fecal incontinence, as in Funk v. Ossman before the courts entertain protection.
severe subjective distress regarding inability to integrate aspects of the self into a relatively coherent and acceptable sense of self. There is uncertainty about a variety of issues relating to identity, including... religious identification, moral value systems, and group loyalties... Conflict regarding values and loyalties may include concerns about religious identification, patterns of sexual behavior, and moral issues. The person experiences these conflicts as irreconcilable aspects of his or her personality and, as a result, fails to perceive himself or herself as having a coherent identity. Frequently the disturbance is epitomized by the person's asking, "Who am I?"

Mild anxiety and depression are common and are usually related to inner preoccupations rather than external events. Self-doubt and doubt about the future are usually present, and take the form of either difficulty in making choices or impulsive experimentation. Negative or oppositional patterns are often chosen in an attempt to establish an independent identity distinct from family or other close people. Such attempts may include transient experimental phases of widely divergent behavior as the person "tries on" various roles.

Frequently there is a phase with acute onset, which either resolves over a period of time or becomes chronic. In other instances the onset is more gradual. If the disorder begins in adolescence, it is usually resolved by the mid-20s. If it becomes chronic, however, the person may be unable to make a career commitment, or may fail to form lasting emotional attachments, with resulting frequent shifts in jobs, relationships, and career directions.

The degree of impairment varies. Usually there is some interference in both occupational (including academic) and social functioning, with deterioration in friendships and family relationships. Educational achievement and work performance below that appropriate to the person's intellectual ability may result from this disorder. [However,] "[there is] no information [on prevalence]. The disorder is apparently more common now then several decades ago..."274

It would be a gross presumption to claim that all or even most children raised in two conflicting religions will suffer from Identity Disorder. Clearly, many children raised in two conflicting faiths can shrug off the conflicts and do well. Just as clearly, though, some children cannot shrug off these conflicts and will suffer.

VI. COMMENTS ON OTHER REVIEWS

Others who have reviewed the question of the enforcement of religious upbringing agreements have taken a position quite opposite the position taken in this article. This article has dealt with most of their objections. Two objections, however, remain. Leo Pfeffer, in his article, Religion in the Upbringing of Children, in the Boston University Law Review,275 offers another rationale for not enforcing religious upbringing agreements. It should be noted

275. Pfeffer, supra note 2, at 362.
that the Zummo court referred to Mr. Pfeffer as "the venerable advocate of religious liberty."276

Pfeffer writes as follows:

Why, it may well be asked, should such agreements not be enforced? Why should they not be accorded the legal sanctions enjoyed by other agreements? By statute everywhere, contracts in contemplation of marriage remain in effect and are enforceable after the marriage takes place . . . . Where the agreement is made in contemplation of a marriage which otherwise would not have been entered into, the principles of estoppel would seem to dictate its enforceability.

... There is . . . . no basis for estoppel because the promisee . . . . got exactly what he bargained for - a promise that the children would be brought up in his faith. He could not bargain for judicial enforcement of the promise because it was not the promisor's to give.277

By Pfeffer's line of reasoning, all that is required of any promisor in any contract is the mere mouthing or writing of the promise. Carrying out the promise is superfluous. An analogy will show the absurdity of this view of contractual obligation. A homeowner has a policy with an insurance company for fire protection. Year in and year out, the homeowner pays premiums. Year in and year out, the insurance company issues a policy, promising to indemnify the homeowner in event of fire. There is a fire, and the house burns down. The homeowner submits his claim, but the insurance company refuses to honor it. The company argues that all the premiums bought was a promise of insurance, not actual insurance. Obviously, this is a nonsensical view of contracts which deserves no further discussion.

In The Religious Upbringing of Children After Divorce,278 Zarowny stated:

One may be tempted to look for ulterior motives behind parents' actions in post-divorce religious upbringing cases. A custodial parent trying to graft religious training obligations onto the divorce settlement may simply want to decrease the non-custodial parent's visitation privileges to the point that they become meaningless. (citation omitted). Undoubtedly, religious training can be used as a weapon by a vengeful former spouse to carry on a battle which should have ended with the divorce. The children can become, as one judge stated, "footballs to satisfy the "I'll show you" attitudes with which estranged spouses too frequently are imbued."279

The article cites Smith v. Smith,280 as the source of this quote. However, viewed in context, the judge's remark takes on a very different appearance. The opinion offers the quoted remark as an ad-

276. Zummo, 574 A.2d at 1132.
277. Pfeffer, supra note 2, at 362-63.
278. Zarowny, supra note 2.
279. Id. at 161 (footnotes omitted).
monition warning to divorced parents to avoid such attitudes. Moreover, the divorce in Smith involved absolutely no religious upbringing dispute. Thus, Smith does not support the author’s assertion that parents who seek enforcement of religious upbringing agreements have ulterior motives.

V. THE COURTS AND RELIGION

When courts refuse to apply contract principles to religious upbringing disputes and refuse to limit religious indoctrination by noncustodial parents, they purport to be confirming their neutral attitude toward religion. This judicial neutrality with respect to religion warrants closer scrutiny. Courts are made up of individual judges who have individual religious beliefs. Clearly, there is little danger that those religious beliefs will enter into the courts’ decisions. But, while it is clearly recognized that the law proscribes the injection of the court’s personal attitude toward a specific religion, either favorable or unfavorable, it is not as clear that the law similarly proscribes the injection of the court’s personal attitude toward religion per se. Attitudes toward religion per se may color the court’s decision between parents over the religious upbringing of their children. A brief commentary on judicial attitudes toward religion is, therefore, justified.

Attitudes toward religion range across a wide span. The most hostile attitude is that of the Marxist/Freudian schools, prevalent in academic circles and such social sciences as sociology and psychology. Marx’s characterization of religions as “the opiate of the masses,” succinctly summarizes the Marxist position. Freud regarded religion as “adult oedipal complex.” It is doubtful that even a handful of judges hold such extreme views, but Marxist/Freudian attitudes toward religion may surreptitiously enter into the court’s decision through custody evaluations or expert testimony by social workers, psychologists, or psychiatrists.

Less hostile attitudes toward religion are no doubt more typical, but these attitudes too, may color a court’s decision. For instance, there is a widespread truism among the more “sophisticated” that all religions are basically the same, that all people believe in the same God, and that all people share the same moral and ethical values. Courts with this attitude would have little patience for religious upbringing disputes, particularly if one parent claimed that a child was being subjected to “incompatible” beliefs. However, the philosophy that all religions are essentially the same, is a

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281. KARL MARX, INTRODUCTION TO A CRITIQUE OF THE HEGELIAN PHILOSOPHY OF RIGHT (1844).
282. SIGMUND FREUD, FUTURE OF AN ILLUSION (1949).
gross simplification which bespeaks a misunderstanding of the nature of religion. Although many religious leaders might disagree, religions are defined not by belief in God, but by belief in men. Christianity is defined by belief in the claims of Christ, Judaism by belief in the teachings of Moses, Islam by belief in the visions of Mohammed. The teaching, values, and histories of these religions are quite distinct. Despite public posturing, there are significant tensions and conflicts between these faiths. The fact that these religions outwardly profess mutual respect and coexist side by side in the public arena does not justify the conclusion that they will coexist successfully in the mind of a child.

Courts may also hold the attitude that religion is unnecessary for a child, that the conflict over his or her religious identity is much ado about nothing, and that the child would be better off being raised in a secular framework. If a child's choice is between being raised simultaneously in two conflicting religions or being raised in the humanist tradition, the latter option is almost certainly preferable for the child. Many children who are raised without religion have happy childhoods and grow up to be successful adults.

But that is usually not the option before the court. Usually the court's choice is not between religion and the absence of religion, but between being raised in one religion or being raised in two. It is conceivable that a small child may intellectualize the conflicts between the two religions and, as a consequence, abandon both religions in favor of secular humanism. It is also quite conceivable, though, that a child will internalize the conflicts between the two religions and, as a consequence, suffer anxiety. Unless the court can predict with great assurance which course a particular child will follow, the court should avoid taking the position that religion is irrelevant to the well-being of the child.

The courts, in fact, have generally not taken the position that religion is irrelevant to a child's welfare. On the contrary, in at least 105 cases, courts have noted the need to assure the "spiritual well-being" of the child in determining custody and visitation rights.\textsuperscript{283} Thus, many courts clearly recognize that spiritual\textsuperscript{284} well-being is of great importance to the welfare of the child. Yet, courts continue to permit children to be raised in two conflicting religions despite the fact that no one has shown that being raised in two conflicting religions is conducive to the spiritual well-being of a young child.

\begin{thebibliography}{9}
\bibitem{Russ} Russ, supra note 2.
\bibitem{Black} Spiritual "relat[es] to religious. . . affairs." \textit{BLACK'S LAW DICTIONARY} 1256 (5th ed. 1979).
\end{thebibliography}
Another attitude toward religion also warrants mention. This is the view that religion is irrational, that religious upbringing disputes are, therefore, irrational, and that courts should not adjudicate these disputes. There are faults in this reasoning. A court's refusal to adjudicate an antenuptial religious upbringing contract, on the ground that it considers the religions of the parties to be irrational, would appear to violate the First Amendment and the right to due process of law. Even if religion is, in fact irrational, one cannot conclude that disputes concerning religious upbringing are irrational. Indeed, a great many significant disputes before the courts, particularly family courts, have an "irrational" basis. Thus, the issue is not whether the underlying basis for the dispute is irrational. The issue is whether the dispute is significant. Religious upbringing disputes are significant. A child raised as a Jew, may grow up to be very different from the person he or she would have become if raised as a Mormon. He or she may perceive the world differently, marry a different partner, and raise a different family. These are not unimportant disputes.

CONCLUSION

This article discussed an area of law in which custody battles and religious conflict overlap. Few areas of law involve disputes of such intensity. Few areas of law demand more difficult decisions of judges. However, the difficulties facing the court are minor in comparison to the difficulties facing the young children who find themselves thrust involuntarily into a battle between their parents, and a battle between religions. There is little stability and great turmoil for such children.

In custody determinations, the court's role is to attempt to "repair the world" for the children who are the focus of, and all too often the victims of these battles. That role may be performed less effectively by a court which maintains a studied indifference to the struggle over the religious upbringing and identity of the child.

That indifference, which some courts may euphemistically describe as "neutrality," is best exemplified by the philosophy articulated in Felton, that the law tolerates and even encourages, "[up to harm] demonstrable in detail" the indoctrination of children in conflicting religions. Courts in California, Pennsylvania, and other states have adopted the Felton standard, thereby abandoning the standard which required only a showing of "reasonable : : of harm" for the court to intervene in defense of the best interests of the child. The "demonstrable harm" standard is a misreading of the law and reckless policy.

Judicial indifference to religion is also reflected in the courts' refusal to enforce antenuptial agreements on the religious upbring-
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ing of children. For many, however, agreement on religion remains an essential element of marriage. Such individuals would never have married in the absence of either a shared religious faith, or an antenuptial religious upbringing agreement.

This article therefore reaches the following conclusions:

1. In custody disputes involving a significant religious upbringing conflict, courts should award custody to the party who seeks enforcement of an antenuptial religious upbringing agreement, provided the court finds that party to be a fit and loving parent, and absent a determination that the best interests of the child would be better served by awarding custody to the other parent.

2. Courts should not invoke the statute of frauds to render a religious upbringing agreement unenforceable if the agreement is evidenced by the background and histories of the parties, the religious ceremony in which the marriage took place, or the conversion of one of the partners.

3. Courts should favor and seek spiritual stability for children. If there is a significant religious upbringing conflict between the parents, regardless of whether custody is sole or joint, the court should order that the child be raised in a single faith. Also courts should permit some exposure to the other parent's religion, absent a finding that such exposure is reasonably likely to distress or harm the child.

The positions taken in this article are at variance with current conventional opinion. However, the approach proposed here is cogent, neutral, and consistent with the best interests of the child. It offers a considerable improvement over the indifference that currently holds sway in some courts. Neither Constitution, common law, nor common sense can justify that indifference.