Custody and Religion: Are Church and State Separate in New Jersey Family Court?

By Heather C. Keith

> … 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 & State.
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> Thomas Jefferson, letter to the Danbury (Conn.) Baptist Association, January 1,1802.

As the United States Supreme Court has repeatedly articulated, "the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[1] But is this "neutrality" so strong in our family courts? New Jersey courts will not address the merits of religion directly. However, they will deal with the secular effects of religion with respect to the welfare of children. For example, the courts will not intervene in the issue of married persons seeking a Jewish "get" (religious divorce). However, the courts will intervene where a mother's relocation to Utah affects the welfare of her Jewish children.

This article will first discuss briefly a fairly well-developed area of family law involving religion, that of obtaining a "get" (a Jewish religious divorce).[2] Next, it explores the body of law the New Jersey courts have developed to balance their reluctance to intervene in matters of religion with their duty to protect the welfare of children and the rights of the parents of those children. Finally, this article will set forth that the courts' neutrality with respect to religion does not extend to the secondary effects of religion, namely, the secular consequences of religion on the welfare of children in custody disputes.

Separation of Church and State: The Constitutional Basis

As noted above, the United States Constitution provides fundamental protection from government intervention in matters of religion:

> Congress shall make no law respecting an establishment of religion[3] or prohibiting the free exercise thereof … .[4]

These protections apply to the states through the Fourteenth Amendment.[5] Moreover, "[n]ot only does the First Amendment bar a state's legislature from making a law which prohibits the free exercise of religion, but it likewise inhibits a state's judiciary."[6] When religion enters the arena of family court In the face of such prohibition against interfering with matters of religion, the courts treat matrimonial and child custody matters very differently.

The Get Cases: "Get" Off My Docket

In Aflalo v. Aflalo, the court addressed an issue involving Orthodox Jews, namely, a husband's refusal to provide a get.[7] The husband took action with The Union of Orthodox Rabbis of the United States and Canada in New York City (the "Beth Din"[8]) to request a hearing on the issue of reconciliation.[9] The wife urged the court to order the husband instead to provide her with a get.

The Aflalo court observed that the Free Exercise Clause of the Constitution "prohibits government from interfering or becoming entangled in the practice of religion by its citizens."[10] The court stated that "[t]he First Amendment was designed to protect both institutions against ... unwarranted, unwanted and unlawful steps over the 'wall of separation between Church and State.'"[11] The court further noted that "[a]s Justice Frankfurter said, '[i]f nowhere else, in the relation between Church and State, 'good fences make good neighbors.'"[12] The court found that it had no authority to compel

either party to appear before a religious tribunal of Beth Din to discuss reconciliation or to obtain a get.[13]

The Aflalo court also noted an Establishment Clause issue when it quoted the dissent in Avitzur v. Avitzur, a New York case dealing with the issue of obtaining a get.[14] The Aflalo court stated that the majority's enforcement of a Jewish religious prenuptial agreement in Avitzur "required 'inquiry into and resolution of questions of Jewish religious law and tradition' and thus inappropriately entangled the civil court in the wife's attempts to obtain a religious divorce."[15]

New Jersey family courts, therefore, will not involve themselves in Jewish religious divorce because the government is not equipped, nor constitutionally empowered, to address the issue. Through Aflalo we can see that on the issue of Jewish religious divorce, separation of church and state is alive and well in New Jersey. But is this true in child custody cases?

Steering the Course: The Secular Solution

As discussed above, New Jersey courts have generally been most reluctant to intervene in religious matters.[16] In particular, consistent with the court's stance in the get cases noted above, New Jersey courts will not intervene in the religious training and education of the child.[17] Instead, the courts seek to "establish secular rules to minimize conflicting pressures placed on children and permit them to steer a course between conflicting views of their parents."[18] In the spirit of developing secular solutions to the problem of parents' conflicting religious views in the context of custody cases, the courts have developed some relatively strong guiding principles. These rules include a general deference to the wishes of the custodial parent, fostering of strong ties between

children and their parents, and serving the child's welfare comprehensively. Each of these solutions will be discussed in the sections that follow.

Courts Generally Defer to the Custodial Parent

Perhaps the most familiar principle, and certainly the easiest to apply, is that with respect to children, religion usually follows custody.[19] Once custody is granted, courts are loathe to interfere with religious training sanctioned by the custodial parent. In Feldman v. Feldman, the Appellate Division stated that "[t]he policy behind this judicial reluctance to interfere with the religious training of the children is that it is in the best interest and welfare of the children that the custodial parent be the one to control their religious upbringing."[20] Put differently, "[u]ntil the children acquire the maturity personally to make known their own choice which the court may consider, … the happiness and welfare of the children will be served by not intervening with respect to the religious training selected by the [custodial parent].[21]

New Jersey family courts have articulated the premise that the primary caretaker has the right to determine the religious upbringing of the children in his or her charge, and it is true that the courts generally defer to decisions of the custodial parent regarding religious upbringing of the children.[22] As we will see, courts do not always defer to the wishes of the custodial parent if those wishes conflict with one or more of the other guiding secular principles.

The Ties that Bind (Children to their Parents)

The second guiding principle in the courts' secular treatment of the problem of religion in the family courts is that of preserving and fostering the unique and beneficial relationship between children and both their parents after a divorce or separation. In

later decisions, religion takes less of a role compared to the importance of the ties between children and their parents, which began to come to the forefront of New Jersey courts' analysis in contested custody cases. For example, in 1979 the Appellate Division boldly stated that "[v]isitation with the children's father is more important than the children's religious upbringing."[23] In that case, the mother was awarded custody of the parties' two daughters, with parenting time to occur on alternating weekends from Friday to Sunday when the father would drive 52 miles to the mother's house. The mother enrolled the children in Hebrew school, which convened until 12:30pm each Saturday. The father appealed the trial court's order that parenting time would commence after Hebrew school. The Wagner court reversed and remanded for a hearing to determine whether alternate arrangements could accommodate the children's need for both their father's visitation and their attendance at Hebrew school.

Strengthening that trend, the Appellate Division noted in a 1994 decision that "[t]he wife is divorced from the husband, *not the child from its parents – either of them*."[24] In McCown, the court found that the custodial mother's request to compel the children's enrollment in Yeshiva would sever ties with the Catholic father and, therefore, would not be in the children's best interest. In so ruling, the McCown court found that the children's ties to both parents is more important that the children's religious training.

The Polestar: The Child's Comprehensive Welfare

The third guiding principle aiding the courts in their navigation of the problem of religion in family courts is the child's best interest. As early as 1978, in Asch v. Asch, the Appellate Division observed that "it is axiomatic that the court should seek to advance the best interests of the child where her parents are unable to agree on the

course to be followed."[25] In Asch, the father sought to prevent the mother from enrolling their Jewish daughter in parochial school. The Asch court remanded the matter for further proceedings to determine whether such a placing would have a detrimental effect on the daughter's overall well-being. In so ruling, the Asch court noted that "[t]he courts cannot choose between religions; they cannot prevent exposure to competing and pulling religious ideas and rituals. But the courts should seek to minimize, if possible, conflicting pressures placed upon a child."[26]

Not long after Asch was decided, our Supreme Court in Beck v. Beck set forth a definition of "serving the child's welfare comprehensively."[27] Specifically, children should have equal access to both parents, severing ties to either parent is contrary to the child's best interest, and the child should be able to recognize both parents as sources of security and love and should wish to continue both relationships. Our Supreme Court thus codified what the lower courts had been signaling through the previous decades: The child's best interest should be the paramount concern.

Even the reasonable expectation of the parents takes a back seat to the child's best interest. For example, the Asch court observed that "[c]ourts should give effect to the reasonable agreement and expectations of parents concerning the child's religious upbringing before their marital relationship foundered, *subject to the predominant objective of serving the child's welfare comprehensively*."[28] If the courts are to give effect to the reasonable expectations of the parents before the marriage foundered, what constitutes evidence of such an expectation, and how much weight does this expectation receive in New Jersey family courts?

In a 1968 case, T. v. H., a Jewish divorced parties' separation agreement provided that the parties' children were to be brought up in Jewish faith.[29] The father was awarded custody of the eight and ten-year-old children in northern New Jersey in which synagogues, Hebrew schools, and extra-religious facilities were plentiful, and custody was denied to the mother who married a Gentile in Western Idaho 80 miles from nearest synagogues and 300 miles from only other synagogue in the state. The court reasoned that because the wife had married a Gentile and had left the Jewish community, statistics indicate that she may not remain a practicing Jew and the children would not be raised Jewish. Although the court used the parties' agreement as a starting point, the court's consideration of the religious issue centered on "what is best for the happiness and welfare of the children."[30]

In McCown, the parties' Property Settlement Agreement ("PSA") provided that the children would attend a particular non-sectarian private school.[31] The parties' PSA provided the framework for the parents' underlying dispute, as the custodial mother wished for the children to attend Yeshiva instead. However, the McCown court found that alienating the children from their Catholic father would be contrary to the children's best interest and denied the mother's request. Therefore, the McCown court gave effect to the PSA incidentally by denying the custodial mother's request to compel the children to attend Yeshiva. The Appellate Division's decision seems to signal that a PSA is not determinative, but simply sets forth a "status quo" to be overcome only by the absence of potential harm to the children.

In Asch v. Asch, the parties' PSA provided only that the divorced parents would share "joint custody."[32] Rather than make any determination on the merits of Jewish or

Catholic religious training, the Asch court remanded the case for further proceedings with respect to the child's best interest in placing a Jewish child in parochial school.

As we have seen, where sending children to Hebrew Day School *would sever ties with their Catholic father*, the custodial mother's application to compel the children's enrollment in Hebrew Day School was denied.[33] Where the children *were being raised Jewish*, and where mother married a Gentile and moved to Utah, custody was awarded to father who lived in Northern New Jersey near Jewish institutions.[34] Where there was not enough information, the court remanded to determine whether there is sufficient justification for or detriment in placing Jewish child in a parochial school where the prevalence of a different religious allegiance and customs will be a constant force upon her and where she would be conspicuously set apart from other students by not participating in religious classes and, possibly, in other religious activities of the school's community.[35]

Religion as a Factor: The Red Herring

But doesn't the fact that New Jersey family courts address issues of religion lower the wall between church and state? Not so fast. New Jersey family courts must address the secular results of religious choices as they relate to the welfare of children, as religion is such a pervasive and integral force in our culture and daily life. As we have seen, the courts will not address the merits of religion, as doing so would violate the Establishment and Free Exercise clauses of the Constitution. Indeed, New Jersey courts have consistently held that religious faith and education is not controlling in determining child custody.[36]

In the early part of the last century, New Jersey family courts were not so reluctant to discuss religion in the child custody context. As one trial court stated in 1929, "[t]he question of religious faith and education is, of course, one to be taken into consideration in custody cases."[37] In Ex parte De Bois, custody was nonetheless granted to the father where St. Michael's Aid Society's refusal to surrender his child to him was expressly based on the fact that the child was of the Roman Catholic faith – the institution being likewise of that denomination – and the petitioner and his wife were attendants of a different church. As we have seen in the cases above, the question of religion is always viewed through the secular prism of the child's best interest. Thus, even in this early case, the court determined that the father was no less fit to parent the child simply because he did not share the child's Roman Catholic faith.

In the 1971 case of In re Adoption of E, our Supreme Court held that "[r]eligion, when coupled with other considerations, may be a factor to be weighed by the court in determining the advisability of granting an adoption of a child."[38] In this case, prospective adoptive parents filed an application for adoption of a baby they had been fostering. The county court denied their application solely because the parents did not believe in a Supreme Being. The Supreme Court certified the case on its own motion from the Appellate Division and held that absent special circumstances, adoption cannot be denied solely on ground that prospective adoptive parents lack belief in a Supreme Being or lack church affiliation.[39] The Court also held that ethics and beliefs of applicants, including religion, may be considered as bearing on issue of moral fitness.[40]

As recently as 1969, the trial court stated that in the determination of custody, the religious education and religious environment of the children are important, though not

controlling, factors. The court in T. v. H. noted that its finding "clearly carries our law beyond the proposition that religious education is never more than an element of consideration. Religious education, considered in the best interest of children, may become an important factor in deciding custody."[41] As previously noted, the court awarded custody to the father who lived in northern New Jersey where the mother moved to Utah with her Gentile spouse where only two Jewish institutions existed in the entire state to provide religious support for her children, who were being raised in the Jewish faith.

In an interesting confluence of deference to the custodial parent, the child's best interest, and the non-custodial parent's right to free exercise of his religion, the trial court in Brown v. Szakal made a strong pro-separation of church and state ruling.[42] The Brown court held that "[I]n the absence of evidence that non-observance of Jewish law during visits with the father would endanger the children's *physical, temporal or religious welfare*, this court may not impose upon the father the affirmative obligation of observing the laws of his children's religion when he visits with the children."[43] Importantly, the court suggested that the father "would do well to be sensitive to their views so as not to have them see him as a contradiction in their lives but rather to enhance and strengthen his relationship with them and their respect and love for him."[44]

Conclusion

In matrimonial cases, New Jersey family courts will not deal with the issue of religion. In child custody cases, the courts do not reach the merits of religious faith and training. Instead, New Jersey family courts developed a wholly secular solution,

adjudicating conflicts involving religion based on the second order (i.e. secular) positive and negative effects on a child's welfare comprehensively.

The United States Supreme Court in McCreary County, Ky., *supra*, noted the particular absence of a "bright line" rule with respect to separation of church and state:

> The First Amendment has not one but two clauses tied to "religion," [the first forbidding any "establishment of religion," and] the second forbidding any prohibition on "the free exercise thereof," and sometimes, the two clauses compete: … tradeoffs are inevitable, and *an elegant interpretative rule to draw the line in all the multifarious situations is not to be had*.[45]

Few other areas of law invoke more "multifarious situations" than family law, and particularly child custody cases. As practitioners, therefore, we must be highly aware of the secular effects on a child's welfare *in each case* to guide our clients effectively through custody disputes involving religion.

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[1] *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15-16 (1947); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985)).
[2] *See* Cary B. Cheifetz & Brian Roffman, *How to "Get" on With Your Life*, 29 N.J. FAM. LAW. 86 (January 2009)
[3] U.S. CONST. amend. I (the "Establishment Clause")
[4] U.S. CONST. amend. I (the "Free Exercise Clause")
[5] *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 301 (2000) (citing *Wallace*, 472 U.S. at 49-50).
[6] *In re Adoption of E.*, 59 N.J. 36, 51 (1971).
[7] *Aflalo v. Aflalo*, 295 N.J. Super. 527 (Ch. Div. 1996)
[8] "The 'Beth Din' is a rabbinical tribunal having authority to advise and pass upon matters of traditional Jewish law." *Id.* at 530, fn. 2.
[9] *Aflalo*, 295 N.J. Super. at 530.
[10] *Id.* at 537.
[11] *Id.* at 543.
[12] *Id.* (quoting *McCollum v. Board of Education*, 333 U.S. 203, 232 (1948) (dissenting opinion)).
[13] *Id.* at 544.

[14] *Avitzur v. Avitzur*, 446 N.E.2d 136 (1983).
[15] *Aflalo*, 295 N.J. Super. at 541 (quoting *Avitzur*, 446 N.E.2d at 141-142).
[16] *Donahue v. Donahue*, 142 N.J. Eq. 701 (1948); *Scanlon v. Scanlon*, 29 N.J. Super. 317, 326 (App. Div. 1954).
[17] *In re Adoption of E*, 59 N.J. 36 (1971); *T. v. H.*, 102 N.J. Super. 38, 40 (Ch. Div.1968), *aff'd on other grounds* 110 N.J.Super. 8 (App. Div.1969); *Boerger v. Boerger*, 26 N.J. Super. 90, 95 (Ch. Div. 1953); *Donahue v. Donahue*, 142 N.J. Eq. 701 (1948).
[18] *McCown v. McCown*, 277 N.J. Super. 213 (App. Div. 1994)
[19] *T. v. H.,* 102 N.J. Super. at 40.
[20] *Feldman v. Feldman*, 378 N.J. Super. 83, 92 (App. Div. 2005) (citing *Wojnarowicz v. Wojnarowicz*, 48 N.J.Super. 349, 354 (Ch. Div. 1958)).
[21] *Wojnarowicz*, 48 N.J.Super. at 354.
[22] *See, e.g., Feldman v. Feldman*, 378 N.J. Super. 83 (App. Div. 2005); *Esposito v. Esposito*, 41 N.J. 143 (1963); *Boerger v. Boerger*, 26 N.J. Super. 90 (Ch. Div. 1953); *Donahue v. Donahue*, 142 N.J. Eq. 701 (1948).
[23] *Wagner v. Wagner*, 165 N.J. Super. 553 (App. Div. 1979).
[24] *McCown v. McCown*, 277 N.J. Super. 213, 218 (App. Div. 1994) (emphasis added).
[25] *Asch v. Asch*, 164 N.J. Super. 499, 505 (App. Div. 1978).
[26] *Id.*
[27] *Beck v. Beck*, 86 N.J. 480 (1981)
[28] *Asch*, 164 N.J. Super. at 505 (emphasis added).
[29] *T. v. H.,* 102 N.J. Super. 38 (Ch. Div. 1968), *affirmed* 110 N.J. Super. 8 (App. Div. 1969).
[30] *Id.* at 40.
[31] *McCown v. McCown*, 277 N.J. Super. 213 (App. Div. 1994).
[32] *Asch v. Asch*, 164 N.J. Super. 499 (App. Div. 1978).
[33] *McCown v. McCown*, 277 N.J. Super. 213 (App. Div. 1994).
[34] *T. v. H.*, 102 N.J. Super. 38 (Ch. Div. 1968).
[35] *Asch v. Asch*, 164 N.J. Super. 499 (App. Div. 1978).
[36] *See, e.g., In re Adoption of E*, 59 N.J. at 50; *Ex parte De Bois*, 7 N.J. Misc. 1029, 1033 (Ch. Div. 1929); *T. v. H.*, 102 N.J. Super. at 42; *Boerger v. Boerger*, 26 N.J. Super. 90 (Ch. Div. 1953).
[37] *Ex parte De Bois*, 7 N.J. Misc. at 1033.
[38] *In re Adoption of E*, 59 N.J. 36 (1971).
[39] *Id.* at 50.
[40] *Id.* at 57.
[41] *T. v. H.*, 102 N.J. Super. at 42.
[42] *Brown v. Szakal*, 212 N.J. Super. 136 (Ch. Div. 1986).
[43] *Id.* at 144 (emphasis added).
[44] *Id.*
[45] *McCreary County, Ky.*, 545 U.S. at 875.