

FAMILY

Religious wars

Divorce lawyers say they're escalating in custody disputes



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By Dick Dahl
Staff writer

Custodial disputes involving religious issues are apparently escalating throughout the country, according to matrimonial lawyers.

The assessment is anecdotal, but these attorneys say that the increasing incidence of mixed-religion marriages, along with an apparent rise in evangelicalism and conservative religions, seem to be resulting in more religious clashes in child custody cases — disputes that are often highly contentious.

"Religious wars are definitely breaking out in family courts over custody issues," said Joanne Ross Wilder, a partner in the five-lawyer Pittsburgh matrimonial law firm Wilder & Mahood.

"There's been a breakdown of the lines in society, including religious lines," said Ronald W. Nelson, a Lenexa, Kan. family law practitioner who chairs the custody committee of the American Bar Association's family law section. "More and more people are getting away from their belief systems and exploring new ones. And the result has been increasing conflict over religious issues."

When one partner makes that move, it can spell trouble for the marriage. And if children are involved, it could signal a nasty fight ahead.

Major ruling in Oregon

One recent battle involves an Oregon couple, James H. and Lia Boldt, and their son, now 12, whom the father wants to have circumcised in accordance with the Jewish faith, which the father converted to after the dissolution of the marriage in 1999.

The mother is a member of the Russian Orthodox Church, and while the couple was married, their son was raised in that faith. But about the time of the divorce, Mr. Lendt began studying Judaism and ultimately converted under the United Synagogue of Conservative Judaism.

The mother was initially awarded custody of the child. But since then there have been three additional proceedings, part of a continuing fight that has gone all the way to the Oregon Supreme Court.

The third battle began in 2004, when the father had custody and told the mother that the boy wanted to convert — but that circumcision was a prerequisite. She fought back, and earlier this year the state's top court ordered that the case be remanded to the trial court,

which had denied the mother's request to change custody. (*In re Marriage of Boldt*, 176 P.3d 388) (See "Forced circumcision may warrant custody change," Lawyers USA, Feb. 11, 2008. Search words for Lawyers USA website: Boldt and circumcision.)

The court said that the trial court erred in not determining the boy's wishes and that the answer to that question was a "necessary predicate" to deciding whether a change in custody was warranted.

Clayton C. Patrick of Clatskanie, Ore., who represented the mother before the supreme court, told Lawyers USA he couldn't

make any judgments on religion itself.

Wilder has also noticed another trend for courts dealing with custody cases involving religion

"They're moving away from the argument that it's confusing for children to be exposed to more than one religion," she said. "There are a fair number of cases now in which judges have said it's not so bad for children to be exposed to the different religious beliefs of their parents. It's increasingly being seen as a broadening experience for the child, as opposed to being harmful."

But Marshall S. Zolla, a matrimonial lawyer in Los Angeles, contends that it's difficult to get a solid reading on where courts stand on religion in custody cases.

"The decisions from the various states are not always consistent," he said.

He also noted that the U.S. Supreme Court has declined to weigh in on the issue.

In 2006, the Pennsylvania Supreme Court ruled in *Shepp v. Shepp*, 906 A.2d 1165, that an excommunicated Mormon who belonged to a fundamentalist sect that practices polygamy could not be barred from teaching his daughter about the practice. This reversed a trial court decision concluding that it was harmful to teach criminal conduct to a child. In April 2007, the U.S. Supreme Court rejected a petition for certiorari.

Zolla argues that judges are yielding too readily to parents' arguments that their First Amendment rights are threatened.

"Many courts will say, 'We don't want to get involved in this issue because there's a separation between church and state,'" he said. "But I don't really subscribe to that because the courts are the last places we have to decide these things if the parents can't mediate their differences."

Gerald L. Nissenbaum, a Boston divorce lawyer, said that judges are well aware that they can't rule directly on religion itself.

"Probate and family court judges can only get involved [in ruling on religion] where there's strong evidence to show that a particular religious choice being made by one or each of the parents is harmful, and that therefore the judge has to step in to protect the child," he said.

Still, experienced divorce lawyers say, they always try to ascertain a judge's potential religious bias.

"Every judge has an underlying bias whether he realizes it or not," Nelson said. "There are some judges who are aware of their biases and some who don't have a clue."

Resist clients' 'dysfunction'

Clients may not recognize what is driving their behavior when religious beliefs enter into a custody proceeding. These beliefs can be deeply felt and very emotional, or they can be something else altogether, Nelson said.

"A lot of times, people are trying to find things they can grasp onto," he said, "and so they become very fervent in their religious views."

But some parents "find" religion when their marriage is spiraling downward as a device to be used during the custody battle.

Whether the religious conviction is genuine or not, lawyers need to be cautious of their clients' emotional states, Nelson said and not "buy into their dysfunction."

He said that it's important for matrimonial lawyers to remind clients to try to think rationally.

"I tell them judges aren't necessarily deciders of truth; they're deciders of the dispute. A judge might say, 'Neither of you is a good parent'. They might get it wrong. And sometimes judges make decisions neither party wants."

Wilder takes a similar tack.

"I tell [clients], 'You have to give deference and tolerate the fact that the child's other parent may do things that you think are inappropriate and don't like, but unless it jeopardizes the child's safety and physical health, it's better to keep your hands off,'" she said.

Zolla believes a detailed prenuptial agreement can preempt much of much of the strife that can arise around a child's religious upbringing. But he's also found that enforcement of these agreements around the country has been spotty at best.

He notes that a Los Angeles Superior Court program that seeks to resolve child custody issues via mediation has been successful, and suggests similar efforts around the country might yield positive results.

But Wilder questions whether mediation is any good at all when religion is involved.

"If people are really in an adversarial mode, they're not going anywhere with mediation," she said. "And these are usually people in a very adversarial mode."

Questions or comments can be directed to the writer at: dick.dahl@lawyersusaonline.com

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comment because the case is ongoing. The father, who is a lawyer, represented himself pro se.

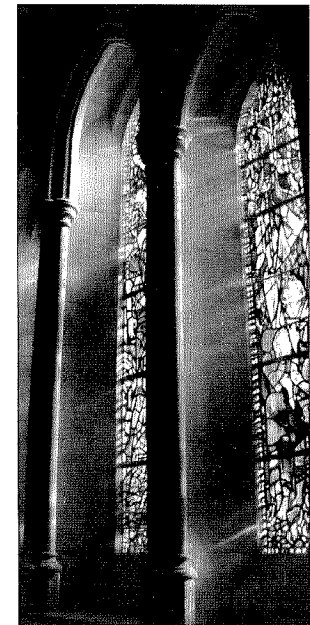
First Amendment v. child's best interest

The Oregon case illustrates the classic elements of a custody case involving religion.

On one side is the father's argument that he is protected by the First Amendment's freedom of religion clause, which he contends gives him the right to circumcise his son. On the other is the mother's position, that surgically altering her son's body runs afoul of the "best interest of the child" precept that is a cornerstone of custodial decision-making.

"Courts are caught in a dilemma," said Wilder, who is currently working on an article on religious issues in custody cases for the *Journal of the American Academy of Matrimonial Lawyers*.

She sees a trend of courts finding ways to resolve these disputes that avoid answering the question of which religion is better for the child — and the Oregon Supreme Court ruling would seem to be an example of that. Despite the fact that it ruled on a dispute involving religion, the court did not



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