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The Right to Determine Religious Upbringing Following Divorce

While it would be inappropriate for The Rutherford Institute to provide you with specific legal advice under these circumstances, we are pleased to provide the following information regarding your area of concern.

I. INTRODUCTION

The issue of "religious custody" increasingly has become a contested matter upon the dissolution of a marriage. "Religious custody" concerns the question of who will control the religious upbringing of any children of the marriage. Commentators have attributed the increasing incidence of contests over religious custody to various factors, such as the rise in "fundamentalism,"[1] the increasing divorce rate,[2] and the breakdown in traditional religious barriers to inter-faith marriages.[3] Other factors, unrelated to divorce, complicate the matter.[4]

Whatever the causes and complicating factors, in such disputes the court must consider this central question: "Who has the right to determine the religious upbringing of the children?"[5] Generally, that right belongs to the custodial parent.[6] As this article will show, however, that right is not absolute, and is limited in several respects. In particular, the right of the custodial parent to determine religious upbringing is limited by provision for reasonable visitation,[7] and for protection against harm to the children.[8]

This article also argues that the noncustodial parent has a limited right to determine or contribute to the religious upbringing of the children. That right, of course, is much more restricted than that enjoyed by the custodial parent. In general, it is limited by the circumstances created by the award of custody to the other parent. In particular, it is limited by provision for protection against harm to the children[9] and for protection against creation of a religious conflict in the mind of the children.[10] Beyond these limitations, either parent is entitled to reasonable accommodation, in the best interests of the children, of their right to determine or contribute to the religious upbringing of the children.[11]

II. PARENTAL RIGHTS

Two related propositions warrant some attention before making an examination of the parental right to determine religious upbringing. First, the state[12] has no authority to determine the religious upbringing of children -- it is a **parental** right. Second, in

principle, parental rights may be limited or surrendered by contract or agreement of the parties.[13] However, the enforceability of such agreements may be limited by the constitutional constraints imposed upon the courts.

A. State Authority to Determine Religious Upbringing

The First Amendment to the Constitution prohibits a state from making any law respecting an establishment of religion or prohibiting the free exercise of religion.[14] These prohibitions encompass any attempt to determine the religious upbringing of children, including actions taken by legislative bodies or administrative agencies, as well as by the court. Thus, a court may not limit the selection of foster homes to those of a particular religious faith[15] or choose the religious training of a child where the parents do not agree.[16]

In short, a court may interfere in the determination of religious upbringing only upon an assertion of the rights or interests of the custodial parent, the non-custodial parent, or the children. The court may not act upon the mere desires or disapproval of one parent regarding the religious beliefs or practices of the other[17] or upon its own initiative.[18] Rather, the court must examine the scope of the parental right to determine or contribute to the religious upbringing of the children, which is the focus of this article.[19]

Even then, "the intervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark."[20] Despite reliance on the best interests of the child, a custody order directed to or based on the child's religious upbringing may run afoul of the First Amendment.[21] If an order prefers a religious parent over a non-religious parent or prefers one religion over another, it may violate the Establishment Clause.[22] If an order imposes restrictions or obligations regarding religious beliefs or practices on a parent, the order may violate the Free Exercise Clause.[23] Some orders violate both clauses.[24]

Ordered supervisory visitation based on the fact that a noncustodial father continued to teach his religion to his children during visitation has been upheld based on state family law as well as constitutionally upheld as not violating the Free Exercise Clause.[25] Religious teaching that is contrary to the wishes of the custodial parent may interfere with the custodial parent's right under state family laws to control the religious upbringing of the children.[26] In addition, it has been held that such ordered supervisory visitation is a reasonable restriction in order to protect against such infringement.[27] The Free Exercise Clause has been held not to be violated by such an order if such a restriction only prohibits the noncustodial parent's religious discussionwith his children to the
extent that it causes the children to reject the custodial parents choice of religion.[28]

B. Effect of Agreement Regarding Religious Upbringing

Generally, courts will enforce agreements regarding the religious upbringing of the children.[29] Some statutes specifically provide for agreements regarding religious upbringing.[30] In several cases, courts have noted the absence of an agreement,[31] signifying the importance of such agreements in the minds of some judges. However, some agreements are by their nature unenforceable.[32] Additionally, courts should recognize that religious beliefs may change over time. Changed conditions may render an agreement unenforceable where enforcement would require the court to restrict newly adopted religious beliefs or practices.

III. STATE INTRUSION FOLLOWING DIVORCE

Parents have broad authority to determine a child's religious upbringing.[33] State intrusion into a child's religious upbringing is limited to those instances where serious harm to the child is threatened.[34] The application of these principles in no way differs where a single parent is involved.[35] Basically, the parental right is not dependent on the marital status of the parent. The same constitutionally protected parental right to determine religious upbringing that exists before divorce continues with regard to the religious upbringing of the child after divorce. Upon divorce, the marital bond between the parents is severed. In principle, the parent-child bonds remain intact. In fact, however, the court is confronted by two parents with equal rights but differing interests. The practical effects of the parents' physical separation and irreconcilable disagreements require the court to award custody to one of the parents.[36] The award of custody in turn severely impacts upon the relationship of the child with the non-custodial parent effectively limiting its significance to times of visitation. In the eyes of the law, however, the non-custodial parent continues to have recognizable interest absent termination of parental rights.

The flip side of these individual rights presents a perspective of the limitations of the state. During the marriage, as noted above, state intrusion into family religious matters is limited to situations involving the threat of serious harm to the child. During the divorce proceedings, the court, of necessity, must intrude upon the sanctity of the now disintegrated family.[37] Once new relationships have been established, however, those policies that support respect for family privacy during the marriage have new application to matters of family privacy after marriage.[38]

IV. THE CUSTODIAN'S RIGHT TO DETERMINE RELIGIOUS UPBRINGING

The custodial parent has the strongest interest in determining the religious upbringing of the children. Some statutes specifically provide that the custodial parent has the right to determine religious training.[39] Other statutes have been construed to recognize this right.[40] More immediately,

however, the right is rooted in the First Amendment, and is recognized as a fundamental right.[41]

This right is not absolute, but is limited in several respects. To the extent the following limitations do not apply, the custodian is entitled to reasonable accommodation of his or her rights if such accommodation is in the best interests of the children.

A. Reasonable Visitation

The right of the custodial parent to determine the religious upbringing of the children is limited by the right of the non-custodial parent to reasonable, unrestricted visitation. Statutes often state that the non-custodial parent "is entitled to reasonable visitation rights unless the court finds that visitation would endanger seriously the child's physical, mental, moral, or emotional health."[42] The right is also grounded in the premise that "visitation is the essence of parental rights for the non-custodial parent."[43]

The statutory construction problem presented by most custody statutes centers on the absence of any provision giving preeminence to either the custodian's right to determine religious upbringing or the non-custodian's right to visitation. The problem arises where a custodial parent seeks an order restricting the visitation rights of the non-custodial parent. The claim will be based on the assertion that the present visitation scheme denies the custodian the right to determine the religious training of the child.

For example, suppose the visitation order arranges for the child to visit the non-custodial father's home every weekend. Further, suppose that the father is non-religious. If the only opportunities for formal religious instruction in the religion of the custodial mother occur on the weekends, then the child may be precluded from receiving any formal religious instruction. The custodial mother may assert that such a scheme denies her the right to determine the religious upbringing of the child.

The comments to the Uniform Marriage and Divorce Act (UMDA)[44] shed some light on this problem. The comment to section 408, which gives the custodial parent the right to determine religious upbringing, states that the section is "designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the non-custodial parent."[45] The purpose of section 408 appears to be that of a shield, and not that of a sword.

The comment to section 407, on the other hand, states that "visitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or non-custodial parent."[46] It would appear that reasonable visitation is determined in the best interests of the child without regard to the interest of the custodial parent in determining religious upbringing. In addition, visitation may not be

restricted or eliminated unless the court finds that the "visitation would endanger seriously the child's physical, mental, moral, and emotional
health,"[47] without regard to the interest of the custodial parent in determining religious upbringing.

Therefore, under the UMDA, the custodian's right to determine religious upbringing (1) prevents intrusion upon his or her prerogatives at the request of the non-custodial parent and (2) entitles the custodian to a visitation scheme which accommodates his or her prerogatives to the extent that accommodation does not restrict or eliminate reasonable visitation.[48] Stated negatively, the custodian's right to determine religious upbringing does not entitle the custodian to an order eliminating or unreasonably restricting visitation.[49]

In the previous example, if allowing the custodial mother to retain custody two Sundays out of every month would not unreasonably restrict visitation, then the court should seek to fashion an order accommodating the conflicting interests. The case of In re Marriage of Heriford[50] involves such an order. However, the custodial mother in that case, dissatisfied with two Sundays per month, sought to expand her time of custody to include three Sundays per month. She based her claim on Missouri's version of UMDA section 408.[51]

In denying her motion to modify custody, the court found that the Missouri Legislature did not intend the statute to give the custodial parent an absolute right to determine all aspects of the children's religious training.[52] Rather, the Legislature intended to provide a guideline lodging the initial decision on such matters with the custodial parent and the burden of challenging such decisions with the non-custodial parent.[53] In light of the Missouri version of UMDA section 407, which recognizes the non-custodial parent's right to reasonable visitation, the court found neither right superior to the other.[54] Accordingly, the accommodation reached by the trial court was upheld.

B. Harm to the Child

The custodian's right to determine the religious upbringing of the children ends where harm to the children begins. Some statutes explicitly recognize this limitation on the custodian's right to determine religious upbringing.[55] Even in the absence of a statutory limitation, harm to the child creates a compelling state interest upon which the state may restrict involvement of the child in religious practices or activities.[56]

The non-custodial parent bears the burden of proof on the question of harm.[57] Generally, the non-custodial parent must show that the child's physical health will be endangered or that the child's emotional development will be impaired by the unrestricted religious practices of the custodial parent.[58] Variations on this theme may require the non-custodial parent to show "serious" or "substantial" harm,[59] "actual" or "immediate" harm,[60] or harm by "clear and affirmative" evidence.[61]

For example, in Stapley v. Stapley,[62] the custodial mother allowed the children to be taken door-to-
door distributing religious publications, generated animosity toward the father through religious teachings, refused to notify the father to allow blood transfusions in the event of an accident, and disregarded court orders generally.[63] The court found a serious danger to the lives or health of the children as a result of the religious views of the custodial mother.[64]

Upon a finding of harm to the child, the court must fashion an order which is least restrictive of the custodian's rights and yet alleviates the threat of harm to the child.[65] Normally, this can be accomplished by prohibiting the custodian from involving the child in the "harmful" religious beliefs or practices.[66] In some instances, however, the harm remains as a result of the custodian's continued involvement in his or her religious beliefs or practices. In such situations, it may be more appropriate for the court to award custody to the other parent than to prohibit the preferred parent from herself following or engaging in her religious beliefs or practices.[67] For example, the court in Stapley simply awarded custody to the father rather than exercise contempt power against the custodial mother.[68]

Changing custody to the other parent may be more appropriate than restricting the custodian's own religious activities for a number of reasons. First, it may be the least restrictive way of alleviating the harm to the child.[69] Second, it allows the preferred parent to agree to limit his or her involvement voluntarily.[70] Third, it avoids the unseemly situation in which the state removes children out of the home or exercises its contempt power because the custodial parent engaged in or followed his or her religious beliefs.[71]

V. THE NON-CUSTODIAN'S RIGHTS REGARDING RELIGIOUS UPBRINGING

The non-custodial parent has a limited right to contribute to the religious upbringing of the children. This right is rooted in the concept of parental rights,[72] in the guarantee of freedom of religion,[73] and in the prohibition against state interference in religious matters.[74] The right may be limited upon a showing of harm to the children,[75] and is effectively limited to periods of visitation.

Two lines of authority have developed regarding the non-custodial parent's right to contribute to the religious upbringing of the children.[76] One line of authority holds that the custodial parent has virtually exclusive authority to determine religious upbringing.[77] In some instances, that authority is based on a statutory declaration.[78] Therefore, the custodian may be entitled to an order requiring the non-custodial parent to accommodate the religious instruction selected by the custodian or to refrain from exposing the children to any religious teachings inconsistent with that selected by the custodian.[79]

The second line of authority holds that the state may not interfere with the non-custodial parent's religious training of the children absent a showing of harm to the children.[80] Thus, the non-custodial parent is free, during visitation to involve the children in his or her religious beliefs or practices. In the absence of a termination of parental rights, it appears that those rights are applicable during
periods of visitation.

At the point of division in the authority, one finds the debate over the effect of divorce on family privacy.[81] During the marriage, the parents have the right to direct the religious upbringing of the children,[82] so long as the religious beliefs or practices do not pose a serious threat of harm to the children's well-being.[83] When divorce ends the marriage, however, a parent not awarded custody necessarily loses control over the upbringing of the children to a large degree.

Admittedly, the shield against state intervention in matters of family privacy is weakened during the divorce proceedings.[84] However, once visitation rights have been determined in the best interests of the children, the rationale that supports respect for family privacy during the marriage has new application to matters of family privacy during visitation.[85] The focus is not so much on the extent of the rights of the non-custodial parent as it is on the authority of the state to intervene.

The authority of the state to intervene in religious matters is, of course, severely limited by the First Amendment to the Constitution.[86] Intervention in religious matters requires substantial justification.[87] Thus, the state may not interfere with the right of the custodial parent to determine the religious upbringing of the children absent a substantial justification.[88] So also, the state may not interfere with the right of the non-custodial parent to contribute to the religious upbringing of the children absent a substantial justification.

A. Harm to the Child

Harm to the child provides a substantial justification for limiting the right of the non-custodial parent to contribute to the religious upbringing of the children. The harm to the children may result from the non-custodial parent's religious beliefs or practices, or from exposure to conflicting religious beliefs. Where the harm to the children is the result of the non-custodial parents' religious beliefs, the problem is addressed in the same manner as harm to the child as a result of the custodial parent's religious beliefs or practices.[89]

Where the harm to the children results from exposure to conflicting religious beliefs, then the harm may be alleviated only by reducing the exposure of the children to one of the religions. At this point, a presumption that favors the right of the custodial parent to direct the religious upbringing of the children is appropriate. Otherwise, the court necessarily

would have to choose one religion over the other, risking an Establishment Clause violation. The result could very well undermine the award of custody to the custodial parent. Instead, reducing the exposure of the children to the religious beliefs of the non-custodial parent avoids these problems and is least restrictive of religious practice on the whole.

B. Proof of Harm to the Children as a Result of Exposure to Conflicting Religious Beliefs

Most jurisdictions which recognize the non-custodial parent's right to contribute to the child's religious upbringing will restrain that right only where "there is a clear and affirmative showing that the conflicting beliefs affect the general welfare of the child."[90] In Massachusetts, the question is "whether, in particular circumstances, such exposures are disturbing a child to [his or her] substantial injury, physical or emotional, and will have a harmful tendency for the future."[91] The Missouri courts have fashioned a different test, which presumes harm to the child when it appears that a parent "has created or fostered a basic religious conflict in the mind of [the] child, instilled in him a disrespect for or disbelief in the religion of [the custodial parent], or erected religious barriers" between the custodial parent and the child.[92]

Generally, courts hold that duality of religious belief does not, per se, create a conflict in the mind of the child.[93] Rather, harm from exposure to conflicting religious belies cannot be assumed or surmised, but must be demonstrated in detail.[94] Thus, factual evidence of harm rather than mere conclusions and speculation is required.[95] Therefore, a custodial parent's general testimony that the child is upset or confused is insufficient to demonstrate harm.[96]

Although a court may deny that expert testimony is necessary in order to establish harm to the child as a result of exposure to conflicting religious beliefs,[97] few reported cases in fact find harm to the child without expert testimony to that effect.[98] The tests set forth above require testimony concerning adverse emotional or physical effects upon the children as a result of conflicts in specific religious practices, teachings or doctrines. Expert medical, psychiatric or theological testimony is a practical necessity in most cases.

Upon a finding of harm to the child, the court must fashion an order which is least restrictive of the non-custodial parent's rights and yet alleviates the threat of harm to the child.[99] The New Mexico courts have set out a three-step inquiry which reflects these concerns.[100] Normally, the harm may be alleviated by prohibiting the non-custodial parent from involving the child in the formal practices, instruction, activities, and training of the religion.[101] Special constitutional concerns arise where the order places a direct restriction or obligation on the religious practices of the non-custodial parent.

Those orders which prohibit the non-custodial parent even from discussing religious matters with his or her children raise these constitutional concerns.[102] Such orders create

an ironic situation in which the parent is free to discuss religion with all the world except his or her own children. Apart from the difficulty of enforcing such orders, enforcement would lead to the unseemly state action of restricting or eliminating visitation or of exercising the contempt power because the non-custodial parent discussed his or her religious beliefs with the children.

Another type of order which raises constitutional concerns includes those orders which require the non-custodial parent to observe the religious practices of the custodial parent and the children. For example, in Brown v. Szakal[103] the non-custodial father was required, as a condition during visitation, to observe Jewish Sabbath and dietary restrictions. Again, apart from the difficulty of enforcing such orders, enforcement would lead to the unseemly state action of restricting or eliminating visitation or of exercising the contempt power because the non-custodial parent refused to observe the practices of another person's religion. Such an order would seem to run afoul of the non-custodial parent's free exercise rights.

At some point it seems, the restriction of personal liberties becomes so onerous, the entanglement of the state becomes so excessive, and the quality of visitation becomes so eroded that denial of visitation is the least restrictive or intrusive alternative. If a parent who seeks visitation consents to the imposition of a religious restriction or obligation, another case is presented.[104]

VI. THE RIGHT OF ACCOMMODATION

In essence, the right to determine or contribute to the religious upbringing of one's children is a right to an accommodation. That is, to the extent the rights of the other parent are not infringed upon, each parent is entitled to an accommodation of his or her concerns regarding the religious upbringing of the children. Most often this accommodation may be made through visitation scheduling.[105]

For example, suppose a religious custodial parent sets apart every Sunday morning for religious observances, and desires that the children participate in those observances. The non-custodial parent is non-religious, but is entitled to reasonable visitation.[106] The court may (1) schedule visitation around so many of the religious observances as will preserve reasonable visitation;[107] or (2) require the non-custodial parent to make the children available to the custodial parent for, or transport the children to, so many of their religious observances as will preserve reasonable visitation.[108]

If, on the other hand, the non-custodial parent is religious while the custodial parent is non-religious, the non-custodial parent may be entitled to the same types of accommodation. The court may (1) schedule visitation to include the religious observances of the non-

custodial parent; or (2) require the custodial parent to make the children available to the non-custodial parent for participation in religious observances.[109]

A final variation on this theme arises when both parents are religious and both desire the children to participate in their respective religious observances. Absent a showing of harm to the children from exposure to conflicting religious beliefs, the court must fashion a visitation order which provides for reasonable visitation with the non-custodial parent and does not prefer one religion over another. Thus, if both parents participate in religious observances every weekend, an order awarding visitation every other weekend may be appropriate.[110]

VII. CONCLUSION

The custodial parent has the primary right to determine the religious upbringing of the children. That right is limited, however, by provision for reasonable visitation and protection against harm to the children. Upon finding a threat of harm to the children from the religious practices of a parent, the court may fashion an order which will alleviate the threat in the least restrictive way.

The non-custodial parent has the right to contribute to the religious upbringing of the children. That right is limited, however, by provision for protection against harm to the children. Harm may emanate not only from religious practices, but also from exposure of the children to conflicting religious beliefs. Where harm results from exposure of the children to conflicting religious beliefs, the court may abate the harm by reducing the exposure of the children to the religious beliefs of the non-custodial parent. The court must fashion an order which will alleviate the harm in the least restrictive way.

In the absence of harm, each parent may be entitled to accommodation of his or her desire that the children participate in religious observances. The accommodation, however, may not intrude upon reasonable visitation or directly burden the other parent with religious obligations or restrictions. Accommodation may also not favor one religious over another.

The court must be ever conscious of the limitations placed on its discretion by the Establishment and Free Exercise Clauses. Those limitations remain effective, notwithstanding it is a custody or visitation dispute before the court. Arguably, in no other sphere should the court be more reluctant to intrude as that of family religious observance.

NOTES

1. See, e.g., Debra Cassons Moss, Religion vs. Custody, 74 A.B.A.J. 38 (Oct. 1988); C. Michael Housman, Religious Issues in Custody and Visitation: A Court's Dilemma, 1 Amer. J. of Fam. L. 325 (1987). "Fundamentalism" is defined as "a militantly conservative movement...in opposition to modernist tendencies and emphasizing as fundamental to Christianity the literal interpretation and absolute inerrancy of the Scriptures, the imminent and physical second coming of Jesus Christ, the virgin birth, physical resurrection, and substitutionary atonement." Webster's Third New International Dictionary 921 (1966). The term increasingly has been used more broadly to refer to various religious groups without regard to the five or six fundamental Christian doctrines listed above.
2. See, e.g., C. Michael Housman, supra note 1.
3. See, e.g., Schwarzman v. Schwarzman, 88 Misc. 2d 866, 871, 388 N.Y.S.2d 993, 997 (Sup. Ct. 1976).
4. See, e.g., C. Michael Housman, supra note 1 (two wage-earner families, mobility, etc.)
5. This article does not address control over education decisions as they relate to religion. See Griffin v. Griffin, 699 P.2d 407 (Colo. 1985); Sullivan v. Sullivan, 141 Conn. 235, 104 A.2d 898 (1954); Vasquez v. Vasquez, 443 So. 2d 313 (Ct. App. 1983), review den., 451 So. 2d 851 (Fla. 1984); Wilhelm v. Wilhelm, 504 S.W.2d 699 (Ky. Ct. App. 1973); Kincaide v. Kincaide, 444 So. 2d 651 (La. Ct. App. 1983); Haasken v. Haasken, 296 N.W.2d 253 (Minn. Ct. App. 1986); Romano v. Romano, 54 Misc. 2d 969, 283 N.Y.S.2d 813 (1967).
6. See, e.g., C. Michael Housman, supra note 1, at 331; 2 Arnold H. Rutkin, Family Law & Practice sec. 32.07[3][h] (1983). See also infra notes 29-37.
7. See infra text accompanying notes 39-54.
8. See infra text accompanying notes 55-71.
9. See infra text accompanying notes 72-88.
10. See infra text accompanying notes 89-104.
11. See infra text accompanying notes 105-110. This article does not address the scope or effect of the child=s Free Exercise interests. Several judicial opinions reflect concern on this issue. See, e.g., Funk v. Ossman, 150 Ariz. 578, 582, 724 P.2d 1247, 1251 (Ct. App. 1986); Osborne v. Osborne, 512 So. 2d 645, 653 (La. Ct. App. 1987); Van Koevering v. Van Koevering, 144 Mich. App. 404 ,407, 375 N.W.2d 759, 760 (1985); Wajnarowicz v. Wajnarowicz, 48 N.J. Super. 349, 354-55, 137 A.2d 618, 621 (Ch. Div. 1958); Spring v. Glawon, 89 A.D.2d 980, 981, 454 N.Y.S.2d 140, 142 (1982). Regarding intact families, Professor Clark observes that "[a]side from the abortion cases, which are hardly apposite here, the courts have not recognized constitutional rights in children to make decisions in opposition to their parents." Homer C. Clark, Jr., The Law of Domestic Relations in the United States, 2d. Student Edition, sec. 9.2 (1988). The question is whether the same approach is appropriate where a child asserts some constitutional claim in opposition to the parents where the parents are divorced.
12. "State" shall refer to any political unit of sovereign government unless the context requires otherwise.
13. See, infra text accompanying notes 29-38.
14. See U.S. Const. amend. I.
15. See, Scanlon v. Scanlon, 29 N.J. Super. 317, 325-26, 102 A.2d 656, 661-62 (App. Div. 1954).
16. See, e.g., Griffin v. Griffin, 699 P.2d 407, 410-11 (Colo. 1985); Siegal v. Siegal, 122 Misc. 2d

932, 472 N.Y.S.2d 272 (1984) (separation agreement requiring court to choose religious training for children in absence of agreement is unenforceable; decision is that of custodial parent).

17. Cf., Osborne v. Osborne, 512 So. 2d 645, 653 (La. Ct. App. 1987) (in the absence of request to attend particular church during visitation, court will not require non-custodial father to take child to that particular church); Wajnarowicz v. Wajnarowicz, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (Ch. Div. 1958) (no evidence to justify judicial interference with the religious training sanctioned by the custodian other than non-custodial father's disapproval); Bond v. Bond, 144 W. Va. 478, 494-95, 109 S.E.2d 16, 25 (1959) (same).

18. See, e.g., Chapman v. Chapman, 352 N.W.2d 437, 441 (Minn. Ct. App. 1984) (abuse of discretion for court to eliminate, upon its own initiative and without findings, requirement established by agreement that non-custodial father take the children to Mass).

19. This article does not address joint custody on the assumption that joint custody is inappropriate where a conflict between the parents exists concerning the religious upbringing of the children. Where a joint custody statute allows a court to grant to one parent ultimate responsibility over religious upbringing in light of the best interest of the child, the court essentially determines which parent's proposed religious upbringing is in the best interests of the child. This is a constitutionally impermissible inquiry. See, Griffin, supra note 16 (in absence of agreement on religious upbringing, joint custody is inappropriate and custodial mother may determine religious upbringing; court may not determine religious upbringing). See also, Kincaide v. Kincaide, 444 So. 2d 651 (La. Ct. App. 1983); Fisher v. Fisher, 118 Mich. App. 227, 324 N.W.2d 582 (1982); Andros v. Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986); Sanborn v. Sanborn, 123 N.H. 740, 465 A.2d 888 (1983). But see, Vasquez v. Vasquez, 443 So. 2d 313 (Ct. App. 1983), review den., 451 So. 2d 851 (Fla. 1984); Esposito v. Esposito, 41 N.J. 143, 195 A.2d 295 (1963).

20. Wajnarowicz, supra note 11, 354, 137 A.2d at 621.

21. See, Holly L. Robinson, Joint Custody: Constitutional Imperatives, 54 Cin. L. Rev. 27 (1985) (the best interests of the child may not provide a compelling state interest upon which the state may restrict free exercise).

22. See Fisher, supra note 19, 234, 324 N.W.2d at 585; Sanborn, supra note 19, 747-48, 465 A.2d at 893-94.

23. See Ex parte Hilley, 405 So.2d 708, on remand, 405 So. 2d 711 (Ala. 1981); Griffin, supra note 16, 411; Rogers v. Rogers, 490 So.2d 1017 (Fla. Ct. App. 1986); Osier v. Osier, 410 A.2d 1027 (Me. 1980); Brown v. Szakal, 212 N.J. Super. 136, 514 A.2d 81 (Ch. Div. 1986); Kadin v. Kadin 131 A.D.2d 437, 515 N.Y.S.2d 868 (1987); Bond, supra note 17, 490-97, 109 S.E.2d at 23-26.

24. See, e.g., Watts v. Watts, 563 S.W.2d 314 (Tex. Civ. Ct. App. 1978).

25. See In re the marriage of Robert P. Lange v. Elizabeth Lange, 175 Wis.2d 373, 502 N.W.2d 143 (1993).

26. Id. at 380.

27. Id. at 381.

28. Id. at 383.

29. See, e.g., In re Marriage of Grandinetti, 342 N.W.2d 876 (Iowa Ct. App. 1983); Sina v. Sina, 402 N.W.2d 437 (Minn. Ct. App. 1984); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 89, 432 N.E.2d 765 (1982); Romano v. Romano, 54 Misc. 2d 969, 283 N.Y.S.2d 813

(1967); Rinehimer v. Rinehimer, 336 Pa. Super. 446, 485 A.2d 1166 (1984).

30. See, e.g., Unif. Mar. & Div. Act ' 408, 9A U.L.A. 627 (1998). See also Ariz. Rev. Stat. ' 25-410 (2001); Colo. Rev. Stat. ' 14-10-130 (2001); 750 Il.C.S. 5/608 (2001); Ky. Rev. Stat. ' 403.330 (2000); Minn. Stat. ' 518.176 (2000); Mo. Ann. Stat. ' 452.405 (Vernon 1986); Mont. Code Ann. ' 40-4-218 (2000); Wash. Rev. Code Ann. ' 26.09.184 (2001).

31. See, e.g., Appelbaum v. Hames, 159 Ga. App. 552, 553, 284 S.E.2d 58, 59 (1981); Wilhelm v. Wilhelm, 504 S.W.2d 699, 700 (Ky. Ct. App. 1973); Kincaide, supra note 19, 652; Haasken v. Haasken, 396 N.W.2d 253 (Minn. Ct. App. 1986); Schwarzman v. Schwarzman, 88 Misc. 2d 866, 388 N.Y.S.2d 993 (Sup. Ct. 1976).

32. See, e.g., Griffin, supra note 16, 409-10 (agreement to agree on religious upbringing unenforceable); In re Marriage of Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1970) (antenuptial agreement); Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (Ch. Div. 1953) (antenuptial agreement); Siegal, supra note 16, 933, 472 N.Y.S.2d at 273. See also, Annotation, Religion as a Factor in Child Custody and Visitation Cases, 22 A.L.R.4th 971, 1028-34 (1983 & Supp. 1988).

33. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

34. Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

35. See, e.g., Stanley v. Illinois, 405 U.S. 645 (1971).

36. See supra note 19.

37. See Morris v. Morris, 271 Pa. Super. 19, 27-28, 412 A.2d 139, 143 (1979).

38. In re Marriage of Mentry, 142 Cal. App. 3d 260, 267, 190 Cal. Rptr. 843, 848 (1983). The court explains that "a family relationship, even a disharmonious one, continues between the former spouses in connection with the rearing of their minor children." The court set out two purposes for respecting parental authority following dissolution. One purpose is "to diminish the uncertainties and discontinuities that can afflict the parent-child relationship whenever third parties episodically intrude through an ill-equipped adversarial process in which decisions are subject to reconsideration and eventual appellate review." Another purpose, among others, is to advance the public policy of [the] state to assure minor children of frequent and continuing contact with divorced or separated parents and "to encourage [such] parents to share the rights and responsibilities of child rearing in order to effect this policy." Id. at 268, 190 Cal. Rptr. at 849 (citing Cal. Civ. Code ' 4600(a)).

39. See, e.g., Ind. Code § 31-1-11.5-21(b) (1986); sources cited supra note 30.

40. See, e.g., Pardue v. Pardue, 385 So. 2d 552, 554-55 (La. Ct. App. 1973).

41. See Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). See also Housman, supra note 1, at 328.

42. Unif. Mar. & Div. Act § 407(a), 9A U.L.A. 612 (1998). See also Colo. Rev. Stat. § 14-10-129(1) (2000); 750 Il.C.S. 5/607(a), (c) (2001); Ky. Rev. Stat. § 403.320(1) (2000); Minn. Stat. Ann. § 518.175(1), (5) (2000); Mo. Ann. Stat. §452.400(1) (2000); Wash. Rev. Code Ann. § 26.09.240 (2001).

43. Housman, supra note 1, at 329.

44. 9A U.L.A. 147 (1998). The following states have adopted the relevant provisions of the UMDA: Colorado, Illinois, Kentucky, Minnesota, Missouri, and Washington. See, supra notes 30 and 42.

45. UMDA § 408 comment, 9A U.L.A. 627 (1998).

46. UMDA § 407 comment, 9A U.L.A. 612 (1998).

47. UMDA § 407(a) & (b), 9A U.L.A. 612 (1998).

48. See In re Marriage of Tisckos, 161 Ill. App. 3d 302, 310-311, 112 Ill. Dec. 860, 514 N.E.2d 523, 528-29 (1987).

49. See, e.g., In re Marriage of Roberts, 151 Ill. App. 3d 65, 67, 104 Ill. Dec. 406, 503 N.E.2d 363, 364 (1986); Van Koevering v. Van Koevering, 144 Mich. App. 404, 407-08, 375 N.W.2d 759, 760-61 (1981); Cissell v. Cissell, 573 S.W.2d 722, 724 (Mo. Ct. App. 1978); Wagner v. Wagner, 165 N.J. Super. 553, 557-58, 398 A.2d 918, 920-21 (App. Div. 1979); Housman v. Housman, 285 A.D. 1012, 139 N.Y.S.2d 24, reh. and app. den., 285 A.D. 1116, 141 N.Y.S.2d 515 (1955); Angel v. Angel, 2 Ohio Ops. 2d 136, 74 Ohio L. Abs. 531, 140 N.E.2d 86 (C.C. 1956); Matthews v. Matthews, 273 S.C. 130, 133, 254 S.E.2d 801, 803 (1979); Neely v. Neely, 737 S.W.2d 539 (Tenn. Ct. App. 1987).

50. 586 S.W.2d 769 (Mo. Ct. App. 1979).

51. 586 S.W.2d at 771 (citing Mo. Ann. Stat. §452.405).

52. 586 S.W.2d at 771.

53. Id.

54. 586 S.W.2d at 772 (citing Mo. Ann. Stat. §452.400).

55. See UMDA § 408, 9A U.L.A. 627 (1998). See supra note 30.

56. See Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944); Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); Osier v. Osier, 410 A.2d 1027, 1030-31 (Me. 1980); Levitsky v. Levitsky, 231 Md. 388, 396-98, 190 A.2d 621, 626-27 (1963); Fisher v. Fisher, 118 Mich. App. 227, 232-34, 324 N.W.2d 582, 584-85 (1982); Battaglia v. Battaglia, 9 Misc. 2d 1067, 1068, 172 N.Y.S.2d 361, 362 (1958); In re Marriage of Hadeen, 27 Wash. App. 566, 575-79, 619 P.2d 374, 380-82 (1980). See also Funk v. Ossman, 150 Ariz. 578, 581, 724 P.2d 1247, 1250 (Ct. App. 1986); Quiner v. Quiner, 59 Cal. Rptr. 503, 511-13 (Ct. App. 1967); Overman v. Overman, 497 N.E.2d 618, 619 (Ind. Ct. App. 1986); Wilhelm v. Wilhelm, 504 S.W.2d 699, 700-01 (Ky. Ct. App. 1978); Haasken v. Haasken, 396 N.W.2d 253, 258 (Minn. Ct. App. 1973); Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977); Goodman v. Goodman, 180 Neb. 83, 88, 141 N.W.2d 445, 448 (1966); Sanborn v. Sanborn, 123 N.H. 740, 749, 465 A.2d 888, 894 (1983); Weiss v. Weiss, 53 Misc. 2d 262, 264, 278 N.Y.S.2d 61, 63 (1967) (court will not interfere in custodian's determination of religious training absent a showing of harm to the child).

57. See, e.g., Funk, supra note 56, 581, 724 P.2d at 1250; In re Marriage of Tisckos, 161 Ill. App. 3d 302, 309-10, 112 Ill. Dec. 860, 514 N.E.2d 523, 528 (1987); In re Heriford, 586 S.W.2d 769, 771 (Mo. Ct. App. 1979).

58. See, e.g., Haasken, supra note 56, 258.

59. See, e.g., UMDA § 408, 9A U.L.A. 627 (1987); Levitsky, supra note 56, 398, 190 A. 2d at 626; Overman, supra note 56, 619; Goodman, supra note 56, 88, 141 N.W.2d at 448.

60. See, e.g., Quiner, supra note 56, 511; Osier, supra note 56, 1030; Sanborn, supra note 56, 749, 465 A.2d at 894.

61. See, e.g., Funk, supra note 56, 581, 724 P.2d at 1250; Munoz v. Munoz, 72 Wash. 2d 810, 813, 489 P.2d 1133, 1135 (1971).

62. 15 Ariz. App. 64, 485 P.2d 1181 (1971).

63. Id. at 69, 485 P.2d at 1186.

64. Id. at 71, 485 P.2d at 1187.

65. See, e.g., Rogers v. Rogers, 490 So. 2d 1017, 1018-19 (Fla. Ct. Ap. 1986); Osier, supra note 56, 1030-31; Felton v. Felton, 383 Mass. 232, 235, 418 N.E.2d 606, 608 (1981); Fisher, supra note 56, 231-32, 324 N.W.2d at 584; Harris, supra note 56; Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715, 721 (Ct. App.), cert. denied, 107 N.M. 16, 751 P.2d 700 (1988); Kadin v. Kadin, 131 A.D.2d 437, 439-40, 515 N.Y.S.2d 868, 870-71 (1982). Apart from constitutional analysis, some courts state that failure to fashion an order least restrictive of freedom of religion is tantamount to a manifest abuse of discretion. See, Ex parte Hilley, 405 So. 2d 708, 711 (Ala. 1981); Watts v. Watts, 563 SW.2d 314, 317 (Tex. Civ. Ct. App.), writ ref. n.r.e. (disapproved on other grounds sub nom Jones v. Cable, 626 S.W.2d 734 (Tex. 1981)); Munoz, supra note 61, 812, 489 P.2d at 1135.

66. See, e.g., Levitsky, supra note 56, 396-98, 190 A.2d at 626-27; Haasken, supra note 56, 258; Harris, supra note 56; Battaglia, supra note 56.

67. See, e.g., Hilley, supra note 65, 711; Mendez v. Mendez, 527 So. 2d 820 (Fla. Ct. App. 1987), cert. denied, 108 S.Ct. 1122, reh'g denied, 108 S.Ct. 1587 (1988); Rogers v. Rogers, 490 So. 2d 1017 (Fla. Ct. App. 1986).

68. Stapley, 15 Ariz. App. 64, 70-71, 485 P.2d 1181, 1187-88 (Az. Ct. App. 1971).

69. See sources cited, supra note 65.

70. See Hilley, supra note 65, 711 ("This case does not present, nor do we decide, a situation where a parent who seeks custody consents to restrict his or her involvement in religious activities, the pursuit of which might be detrimental to the children.").

71. See, e.g., Stapley, supra note 68; Hilley, supra note 65, 711.

72. See, e.g., In re Mentry, 142 Cal. App. 3d 226, 268, 190 Cal. Rptr. 843, 848 (1983); Felton v. Felton, 383 Mass. 232, 233, 418 N.E.2d 606, 607 (1981); Boerger v. Boerger, 26 N.J. Super. 90, 96, 97 A.2d 419, 422 (Ch. Div. 1953); Angel v. Angel, 2 Ohio Ops. 2d 136, 137, 74 Ohio L. Abs. 531, 533-34, 140 N.E.2d 86, 88 (C.C. 1956); Morris v. Morris, 271 Pa. Super. 19, 25-26, 412 A.2d 139, 142 (1979); Neely v. Neely, 737 S.W.2d 539, 542 (Tenn. Ct. App. 1987).

73. See, e.g., Felton, supra note 72, 233, 418 N.E.2d at 607; Morris, supra note 72, 25-26, 412 A.2d at 142; Neely, supra note 72, 543.

74. See, e.g., sources cited supra notes 29-34.

75. See infra text accompanying notes 85-100.

76. See Housman, supra note 1, at 331.

77. See, e.g., Mendez v. Mendez, 527 So.2d 820, 823 (Fla. Ct. App. 1987), cert. denied, 108 S.Ct. 1122, reh'g denied, 108 S.Ct. 1587 (1988) (Baskin, J., dissenting on denial of motion for rehearing en banc and motion to certify question, setting out the order entered by the trial court and upheld on appeal); In re Marriage of Tisckos, 161 Ill. App. 3d 302, 309-10, 112 Ill. Dec. 860, 514 N.E.2d 523, 528-29 (1987); Overman v. Overman, 497 N.E.2d 618, 618 (Ind. Ct. App. 1986); Pardue v. Pardue, 285 So.2d 552, 554-55 (La. Ct. App. 1973); Andros v. Andros, 396 N.E.2d 917, 924 (Minn. Ct. App. 1986); Siegal V. Siegal, 122 Misc. 2d 932, 934, 472 N.Y.S.2d 272, 273 (1984).

78. See, e.g., Tisckos, supra note 77, 309, 514 N.E.2d at 528 (citing Ill. Rev. Stat. ch. 40, para. 608(a) (1985)); Overman, supra note 77, 614 (citing Ind. Code ' 31-1-11.5-21(b)); Andros, supra note 77, 724 (citing Minn. Stat. § 518.008(3)(a) (1984)). The statutes are based on Unif. Mar. & Div. Act § 408, 9A U.L.A. 627 (1987). For other interpretations of this provision, see infra note 80.

79. See, e.g., sources cited supra note 73.

80. See, e.g., Funk v. Ossman, 150 Ariz. 578, 581, 724 P.2d 1247, 1250 (Ct. App. 1986); Compton v. Gilmore, 98 Idaho 190, 192, 560 P.2d 861, 863 (1977); Felton v. Felton, 383 Mass. 232,

233-34, 418 N.E.2d 606, 607 (1981); Fisher v. Fisher, 118 Mich. App. 227, 234, 324 N.W.2d 582, 585 (1982); Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715, 720 (Ct. App.), cert. denied, 107 N.M. 16, 751 P.2d 700 (1988);Bentley v. Bentley, 86 A.D.2d 926, 927, 448 N.Y.S. 2d 559, 560 (1982); Hanson v. Hanson, 404 N.W.2d 460, 463-64 (N.D. 1987); Morris v. Morris, 271 Pa. Super. 19, 29, 412 A.2d 139, 144 (1979); Munoz v. Munoz, 79 Wash. 2d 180, 813, 489 P.2d 1133, 1135 (1971) (en banc). All but the New York case cite to the standard set out in Munoz, the Washington case. See also Harris v. Harris, 343 So.2d 762, 764 (Miss. 1977) (dicta); Goodman v. Goodman, 180 Neb. 83, 89, 141 N.W.2d 445, 449 (1966) (dicta).

81. See, e.g., In re Mentry, 142 Cal. App. 3d 260, 267-69, 190 Cal. Rptr. 843, 848-49 (1983); Felton, supra note 80, 234-35, 418 N.E.2d at 607-08; Morris, supra note 80, 27-28, 412 A.2d at 143; Neely v. Neely, 737 S.W.2d 539, 542-43 (Tenn. Ct. App. 1987).

82. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 553 (1925).

83. See Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944).

84. Morris, supra note 80, 27, 412 A.2d at 143.

85. Mentry, supra note 81, 267, 190 Cal. Rptr. at 848. The court explains that "a family relationship, even a disharmonious one, continues between the former spouses in connection with the rearing of their minor children." The court set out two purposes for respecting parental authority following dissolution. One purpose is "to diminish the uncertainties and discontinuities that can afflict the parent-child relationship whenever third parties episodically intrude through an ill-equipped adversarial process in which decisions are subject to reconsideration and eventual appellate review." Another purpose, among others, is to advance the public policy of [the] state to assure minor children of frequent and continuing contact with divorced or separated parents and "to encourage [such] parents to share the rights and responsibilities of child rearing in order to effect this policy." 142 Cal. App. 3d at 268, 190 Cal. Rptr. at 849 (citing Cal. Civ. Code § 4600(a)).

86. See U.S. Const. amend. I.

87. See, e.g., Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 716-18 (1981); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

88. See supra text accompanying notes 29-64.

89. See supra text accompanying notes 55-71.

90. Munoz, supra note 80, 813, 489 P.2d at 1135. See Funk, supra note 80, 581, 724 P.2d at 1250; Compton, supra note 80, 192, 560 P.2d at 863; Khalsa, supra note 80, 751 P.2d at 720; Hanson, supra note 80, 463; Morris, supra note 80, 29, 412 A.2d at 144.

91. Felton, supra note 80, 235, 418 N.E.2d at 608.

92. Pope v. Pope, 267 S.W.2d 340, 343 (Mo. Ct. App. 1954). See In re Heriford, 586 S.W.2d 769, 772 (Mo. Ct. App. 1979).

93. See, e.g., Felton, supra note 80, 240, 418 N.E.2d at 610; Hanson, supra note 80, 464; Munoz, supra note 76, 815, 489 P.2d at 1136.

94. See, e.g., Compton, supra note 80, 192, 560 P.2d at 863; Felton, supra note 80, 233-34, 418 N.E.2d at 607; Hanson, supra note 80, 464; Munoz, supra note 80, 813, 489 P.2d at 1135-36.

95. See, e.g., Felton, supra note 80, 240, 418 N.E.2d at 610; Khalsa, supra note 80, 751 P.2d at 720; Robertson v. Robertson, 19 Wash. App. 425, 427-28, 575 P.2d 1092, 1093 (1978).

96. See, e.g., Compton, supra note 80, 191-92, 560 P.2d 863-64; Felton, supra note 80, 239, 418 N.E.2d at 610; Goodman, supra note 80, 88-89, 141 N.W.2d at 448-49; Khalsa, supra note 80, 751 P.2d at 720; Hanson, supra note 80, 465 n.2; Munoz, supra note 80, 814, 489 P.2d at 1135-36.

97. See Hanson, supra note 80, 465 n.2.

98. Id. See also sources cited supra note 76.

99. See sources cited supra note 76.

100. See Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715, 721 (Ct. App.), cert. denied, 107 N.M. 16, 751 P.2d 700 (1988) ("[I]n determining whether a parent involved in a child custody dispute should be restricted from practicing or encouraging the child in a religious belief or practice, the trial court must consider the following:

1. Whether there exists detailed factual evidence demonstrating that the conflicting beliefs or practices of the parents pose substantial physical or emotional harm to the child;
2. Whether restricting the religious interaction between the parent and child will necessarily alleviate this harm; and
3. Whether such restrictions are narrowly tailored so as to minimize interference with the parent's religious freedom.")

101. See, e.g., Funk, supra note 80, 580, 724 P.2d at 1249, 1251; Miller v. Hedrick, 158 Cal. App. 2d 281, 282-83, 322 P.2d 231, 232-33 (1958); Swartzel v. Swartzel, 492 N.E.2d 71, 72 (Ind. Ct. App. 1986) (dicta);

102. See, e.g., Lewis v. Lewis, 260 Ark. 691, 543 SW.2d 222 (1976); Mentry, 142 Cal. App. 3d at 261-62, 268, 190 Cal. Rptr. at 844, 848-49; In re Murga, 103 Cal. App. 3d 492, 504-05, 163 Cal. Rptr. 79, 81-82 (1980); Swartzel, 492 N.E.2d at 72 (dicta); Felton v. Felton, 383 Mass. 232, 418 N.E.2d 606 (1981); Robertson, supra note 91, 427-28, 575 P.2d at 1093.

103. 212 N.J. Super. 136, 514 A.2d 81 (Ch. Div. 1986).

104. See supra note 70.

105. See, e.g., Pardue v. Pardue, 285 So. 2d 552, 555 (La. Ct. App. 1973); Williamson v. Williamson, 479 S.W.2d 163 (Mo. Ct. App. 1972); Lee v. Gebhardt, 173 Mont. 305, 308-09, 567 P.2d 466, 468 (1977); Application of Seltzer, 11 A.D.2d 805, 205 N.Y.S.2d 218 (1960); Weiss v. Weiss, 53 Misc. 2d 262, 264, 278 N.Y.S.2d 61, 63 (1967); Rinehimer v. Rinehimer, 336 Pa. Super. 446, 450-53, 485 A.2d 1166, 1168-69 (1984).

106. See supra text accompanying notes 39-54.

107. See supra note 105.

108. See, e.g., Tisckos, 161 Ill. App. 3d 302, 112 Ill. Dec. 860, 514 N.E.2d 523; Overman v. Overman, 497 N.E.2d 618 (Ind. Ct. App. 1986); Pardue, supra note 101, 555; Chapman v. Chapman, 352 N.W.2d 437, 441 (Minn. Ct. App. 1984); Hodge v. Hodge, 186 So. 2d 748, sugg. of error overr., 188 So. 2d 240 (Miss. 1966); Chasan v. Mintz, 119 N.H. 865, 409 A.2d 787 (1979). Cf., Osborne v. Osborne, 512 So. 2d 645, 563 (La. Ct. App. 1987). An order imposing an obligation to transport a child to church may raise constitutional concerns. See, Neely v. Neely, 737 S.W.2d 539, 542-44 (Tenn. At. App. 1987); Watts v. Watts, 563 S.W.2d 314, 317 (Tex. Civ. Ct. App. 1978).

109. See, e.g., Dunlop v. Dunlop, 475 N.E.2d 723 (Ind. Ct. App. 1985); Seltzer, 11 A.D.2d at 805, 205 N.Y.S.2d at 219-20; Robert O. v. Judy E., 90 Misc. 2d 439, 395 N.Y.S.2d 351 (Fam. Ct. 1977); Weiss, supra note 105, 264, 278 N.Y.S.2d at 63.

110. See, e.g., In re Heriford, 586 S.W.2d 769 (Mo. Ct. App. 1979); Angel v. Angel, 2 Ohio Ops. 2d 136, 74 Ohio L. Abs. 531, 140 N.E.2d 86 (C.C. 1956).