

Conflict of Faith

Constitution Allows Each Parent to Expose Child to His or Her Own Practices During Custody Time

Can a father during his partial physical custody time take the child to his own religious services if different from that of the mother? What if they previously agreed to raise the child in mother's faith? What if mother's faith and father's are opposed theologically? What if they have shared legal custody and therefore have to agree on major parenting decisions?

In Pennsylvania, legal custody means the right to make major parenting decisions. Those generally are education; major after-school and vacation activities; and non-emergency and non-routine medical needs.

Pennsylvania favors shared legal custody, which means the parties have to agree, or a court will intervene and decide. In Pennsylvania, the spiritual well-being of the child is one factor, but not a determinative one, in custody disputes. It is appropriate for a court to consider the religious practices of each parent.

However, on a constitutional basis, it is the general rule here that each party may expose the child to his or her own religious practices during that party's physical custody time. This has been upheld even with testimony from a religious leader or mental health professional that attending churches of two different faiths could lead to confusion.

In Pennsylvania, courts assume a neutral stance toward religion in custody cases. Hence, even if the parties had previously been raising the child in one religion before separation, they may each take the child to a different church after separation.

There are times when a problem may arise such as the mandatory need for a child to attend regularly to prepare for an upcoming religious event. In that case a court may order one parent to handle,



during his time, transportation to and/or from the church of the other parent, with equivalent make-up time for the hours missed.

Not even a prior agreement to raise the child in one faith, made in a pre-nuptial agreement or before separation, while living as an intact family, is binding on a court after separation. Nor is the position of one faith that the child's attendance at another church presents theological difficulties, with a firm rule against it, binding upon a court.

Courts do not make a value judgment regarding a parent's religion. The idea is one of freedom of religion, exposing the child to multiple choices so that the child is free to make his or her own decision as to what to practice as the child matures. Rather, the court's role is to assure that the child's best interests are not detrimentally affected by the religious belief or practices. For instance, a court might prohibit participation in a cult, or street solicitation, if the court believes the child's present or future mental or physical health was in danger.

Therefore, counsel who wish to

oppose the other parent's religious practices by the child have a high burden of proof, usually through the testimony of a mental health professional, to show such a danger. Any such restriction imposed by a court must be the least intrusive means adequate to prevent the specified harm.

In short, it is unconstitutional in Pennsylvania to decide a custody dispute, in whole or in part, on the basis of each parent's religious devoutness; prefer stability in religious education or observance to a perceived instability by exposure to two faiths; and protect a child from attempts by either parent to instill his or her religious beliefs before emancipation, absent a showing of substantial physical or emotional harm.

Where there is compromise, tolerance and explanation, the child's adjustment is usually best. ■

David I. Grunfeld (dgrunfeld@astorweiss.com) is of counsel to Astor Weiss Kaplan & Mandel, LLP and a member of the Editorial Board of The Philadelphia Lawyer.