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## Balancing the Welfare of Children with the Rights of Parents: *Petersen v. Rogers* and the Role of Religion in Custody Disputes

*"[I]ntervention in matters of religion is a perilous adventure upon which the judiciary should be loath to embark."*<sup>1</sup>

Since the 1970s, the "best interests of the child" standard has been the dominant test in resolving custody disputes.<sup>2</sup> This standard seeks to place a child with the parent most likely to meet his developmental needs.<sup>3</sup> With a court's use of the best interests formula, however, comes the danger that a judge may exceed her power to reach the desired goal of proper child placement by trampling on the constitutional rights of parents. One commentator, noting that the best interests standard provides rhetorical cover for advancing public interests over personal autonomy, observed that if "public interest were the exclusive standard, then an argument could be made that many, if not all children, ought to be removed from their parents who, in most cases, lack professional training in child psychology, child rearing techniques and child education."<sup>4</sup> Courts, however, have determined that "the very concept of 'best interests' would be but a hollow shibboleth were not parental rights to yield to the welfare of the child."<sup>5</sup>

The conflict between the best interests analysis and the constitutional rights of parents is most pronounced in the area of religion. Under what circumstances should a court consider the religious beliefs and practices of a parent in a custody proceeding? Although religious freedom remains a sacred ideal in the United

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1. *Kirchner v. Caughey*, 606 A.2d 257, 261 (Md. 1992) (quoting *Wojnarowicz v. Wojnarowicz*, 137 A.2d 618, 621 (N.J. Super. Ct. Ch. Div. 1958)).

2. See *infra* notes 61-63 and accompanying text.

3. The basic premise of the best interests standard is that the welfare of the child trumps the interests of any other party to the dispute. Jordan C. Paul, "You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." *The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583, 598 (1989). To determine the most beneficial placement of the child, courts consider a number of factors including the wishes of the parents, the wishes of the child, the relationships between the child and family members, the child's adjustment to home and school, and the mental and physical health of all parties. *Id.* at 600 n.85.

4. R. Collin Mangrum, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?*, 24 CREIGHTON L. REV. 445, 445 (1991).

5. E.g., *Morris v. Morris*, 412 A.2d 139, 144 (Pa. Super. Ct. 1979).

States, protection of this right may be limited when the welfare of a child is at stake.

In *Petersen v. Rogers*,<sup>6</sup> the North Carolina Court of Appeals directly confronted this complex issue.<sup>7</sup> The court held that a limited inquiry into the religious practices of parents and adoptive parents is constitutional only as this inquiry "relate[s] to the health and safety of the child."<sup>8</sup> Applying this standard, the court ruled that the trial judge erred in considering extensive evidence about the religion practiced by the adoptive parents.<sup>9</sup>

This Note begins with a discussion of the facts of *Petersen* and the opinion rendered by the North Carolina Court of Appeals.<sup>10</sup> It then traces the development of the best interests standard and its interplay with state and federal constitutional standards.<sup>11</sup> Next, the Note analyzes the case law dealing with the proper role of religion in custody proceedings,<sup>12</sup> the limitations imposed by the Establishment Clause, and the effects of those limitations on the *Petersen* decision.<sup>13</sup> Finally, this Note concludes that the *Petersen* court reached the correct outcome.<sup>14</sup>

Pamela Rogers became pregnant with her son Paul in December of 1987.<sup>15</sup> At that time, she was unmarried and living with William Rowe in Michigan.<sup>16</sup> Later that year, Rogers developed a friendship with Sheryl Piccirillo, a woman who introduced her to a religious organization known as The Way International (The Way).<sup>17</sup> As Rogers became more involved with The Way, she distanced herself

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6. 111 N.C. App. 712, 433 S.E.2d 770 (1993), *rev'd on other grounds*, 337 N.C. 397, 445 S.E.2d 901 (1994).

7. *Id.* at 714, 433 S.E.2d at 772. The court treated this case as one of first impression: "No North Carolina cases have addressed a situation involving an extensive religious inquiry in a child custody proceeding." *Id.* at 718, 433 S.E.2d at 774.

8. *Id.* at 719, 433 S.E.2d at 775.

9. *Id.* at 725, 433 S.E.2d at 778.

10. See *infra* notes 15-53 and accompanying text.

11. See *infra* notes 54-78 and accompanying text.

12. See *infra* notes 79-138 and accompanying text.

13. See *infra* notes 139-61 and accompanying text.

14. See *infra* notes 162-77 and accompanying text.

15. *In re Adoption of P.E.P.*, 329 N.C. 692, 695, 407 S.E.2d 505, 506 (1991).

16. *Id.*

17. *Id.* The Way was described by the trial court as a "Pentecostal, biblically-oriented Christian sect which encourages its members to lead an affirmative lifestyle and . . . to reflect religiosity by overtly speaking in tongues." *Petersen*, 111 N.C. App. at 716, 433 S.E.2d at 773. Followers of The Way believe "[t]hat Jesus Christ was a human being and not a divine being," and "that the Holy Spirit is not a separate persona as traditional Christianity would hold it to be." *Id.* at 720, 433 S.E.2d at 776.

from those outside the organization, including Rowe.<sup>18</sup> Rogers left Rowe and moved in with her mother.<sup>19</sup>

After the move, Rogers considered giving the baby up for adoption and discussed this possibility with Piccirillo.<sup>20</sup> Piccirillo informed a member of The Way of the possible adoption; that person contacted William and Patricia Petersen, members living in North Carolina.<sup>21</sup> The Petersens hired another member of The Way, attorney Doug Hargrave, to represent them in the adoption.<sup>22</sup> Six months into her pregnancy, Rogers arranged with the Petersens, through Hargrave, to move to North Carolina and live with a member of The Way until the baby was born.<sup>23</sup> The Petersens and Hargrave paid for the care and medical treatment Rogers received while in North Carolina.<sup>24</sup> On September 9, 1988, Paul was born in Chapel Hill.<sup>25</sup> Rogers signed a release form and gave up the child to the Petersens.<sup>26</sup>

Shortly after returning to Michigan, Rogers told Piccirillo that she wanted to have Paul back, and reserved a plane ticket to return to North Carolina.<sup>27</sup> Furthermore, Rowe recently had initiated proceedings to find the baby.<sup>28</sup> On the day Rogers was to leave for North Carolina, Piccirillo and her husband went to Rogers's apartment and called Hargrave.<sup>29</sup> The three collectively assured

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18. *P.E.P.*, 329 N.C. at 695, 407 S.E.2d at 506 ("She no longer saw her former friends and did not spend much time with her mother.").

19. *Id.*

20. *Id.* This discussion occurred while Rogers was heavily involved with The Way and after Piccirillo convinced Rogers that Rowe had been unfaithful to her. *Id.*

21. *Id.*

22. *Id.*

23. *Petersen*, 111 N.C. App. at 714, 433 S.E.2d at 772.

24. *Id.* Hargrave used his own money to pay for Rogers's housing and to provide her with additional funds. *P.E.P.*, 329 N.C. at 696, 407 S.E.2d at 507. During her stay in North Carolina,

Rogers's days were spent only with followers of the Way. She would read books from the Way given to her by Smith [the woman with whom she was staying], and Smith would play the Way's teaching tapes and music tapes every day. Smith also discussed the philosophy of the Way with Rogers.

*Id.*

25. *Id.* at 697, 407 S.E.2d at 508.

26. *Id.* A hospital caseworker testified that she "deviated from hospital procedure" by authorizing Paul's release before the birth certificate had been signed and before Rogers had the opportunity to speak with a caseworker. *Id.* at 698, 407 S.E.2d at 508. The case worker attributed this streamlined procedure to "Hargrave's special arrangements with the hospital's legal department." *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Rogers "that something would happen to [Rowe] if he continued to search for the baby."<sup>30</sup> After that conversation, Rogers decided against going to North Carolina.<sup>31</sup>

Late in 1988, Rogers and Piccirillo watched a television episode of the Geraldo Rivera Show on dangerous cults. The show portrayed The Way as a dangerous cult and stated that members of The Way were "trained to bear arms and deal in mind control."<sup>32</sup> Shortly afterwards, Rogers and Rowe filed a motion for relief from the interlocutory decree allowing the adoption of Paul; the motion alleged fraud, undue influence, and duress at the hands of The Way.<sup>33</sup> Rogers asserted that she was "brainwashed into giving up her baby by [the] religious cult."<sup>34</sup> Following "extensive litigation,"<sup>35</sup> the North Carolina Supreme Court dismissed the adoption proceeding.<sup>36</sup>

In September 1991, the Petersens filed a complaint in Orange County District Court seeking custody of Paul.<sup>37</sup> Prior to trial, the Petersens filed a motion in limine to exclude evidence regarding the "religious practices or beliefs" of The Way, arguing that any such evidence would be "irrelevant to a determination of the custodial best interests of [Paul]."<sup>38</sup> Judge Hunt denied the motion, "explaining that she didn't know anything about [The Way] and it would be unfair to Ms. Rogers to exclude such evidence" and that "it would be unfair to the Petersens 'not to understand what The Way is all about.'"<sup>39</sup> At trial, Rogers and Rowe presented the testimony of Cynthia S.

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30. *Id.*

31. *Id.*

32. *Id.* at 699, 407 S.E.2d at 509.

33. *Id.* The Petersens had filed a petition for adoption in Orange County and received an interlocutory decree granting adoption on November 17, 1988. On December 27, 1988, Rogers and Rowe petitioned the court to vacate the interlocutory decree. *In re Adoption of P.E.P.*, 100 N.C. App. 191, 194, 395 S.E.2d 133, 135 (1990), *rev'd*, 329 N.C. 692, 407 S.E.2d 505 (1991).

34. *N.C. Supreme Court Ruling Ends 3-Year Custody Battle*, CHARLOTTE OBSERVER, Sept. 6, 1991, at B5.

35. *Petersen*, 111 N.C. App. at 714, 433 S.E.2d at 772.

36. *P.E.P.*, 329 N.C. at 704, 407 S.E.2d at 511-12. The court found "statutory violations" and "numerous other irregularities" in the adoption proceeding. *Id.* The court stated that "[a]lthough Hargrave [and the Petersens] may not have purchased Rogers' unborn child, the evidence would support an inference that this was done." *Id.* at 701, 407 S.E.2d at 510.

37. *Petersen*, 111 N.C. App. at 714, 433 S.E.2d at 772.

38. Motion in Limine Regarding "The Way International" at 50, *In re P.E.P.*, No. 91J109C (Orange County Dist. Ct. Oct. 25, 1991), *cited in Petersen*, 111 N.C. App. at 715, 433 S.E.2d at 772.

39. *Petersen*, 111 N.C. App. at 715, 433 S.E.2d at 772-73. Judge Hunt seemed to base her decision in part on intellectual curiosity. *See id.*

Kisser, executive director of the Cult Awareness Network; the Petersens countered with Reverend William C. Greene, a Way minister.<sup>40</sup> The testimony elicited from Ms. Kisser and Reverend Greene constituted 147 pages of the transcript and provided an "in-depth examination of the general beliefs, tenets, and practices of members of The Way."<sup>41</sup> Judge Hunt denied the Petersens' request for custody and ordered the immediate return of the child to his biological parents.<sup>42</sup> The Petersens appealed this order, arguing that the court improperly considered their religious beliefs.<sup>43</sup>

The court of appeals reversed, finding that the trial court "violated the Petersens' constitutionally guaranteed right to religious

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40. *Id.*, 433 S.E.2d at 773.

41. *Id.* at 715, 433 S.E.2d at 773. For examples of the testimony on The Way allowed into evidence, see *infra* note 49.

42. *In re P.E.P.*, No. 91J109C, slip op. at 83, 86-88 (Orange County Dist. Ct. Nov. 15, 1991), cited in *Petersen*, 111 N.C. App. at 716, 433 S.E.2d at 773-74. The relevant findings of fact and conclusions of law are listed below:

16. Paul has lived with the Petersens since his birth to this time and has been raised in a most appropriate fashion, in a good home with great love and care and concern for his physical, his emotional and his spiritual well-being . . . [T]he Petersens are fit and proper persons to have custody of Paul.

17. Paul is an above average child intellectually and he is age-appropriate physically and emotionally.

18. The Petersens are members of a Christian sect called "The Way International." The Way International is a Pentecostal, biblically-oriented Christian sect which encourages its members to lead an affirmative lifestyle and encourages its members to reflect religiosity by overtly speaking in tongues. . . .

20. . . . It is apparent from the Grand Rapids, Michigan, Department of Human Resources' home study of William Rowe and Pamela Rogers that they are good parents, that they love their children and that they take care of them in a manner fitting their economic station in life. . . .

24. Pamela Rogers and William Rowe were baptized and once were professing Catholics. Pamela Rogers believes that "The Way" is a network that isolated her . . . and influenced her under duress and undue prejudice causing her to make an adoption decision she almost immediately regretted. Pamela Rogers is extremely concerned that her child is being raised in "The Way," which she sees as her enemy in her fight for her child. . . .

31. Because this child is not free to be adopted, a continuing custody in the family with the Petersens will require extensive visitation with Rogers and Rowe and will require extensive communication between these parties as to the education, the discipline, the religion and the spiritual life of Paul. These two families are separated a great distance geographically, intellectually and emotionally and lead totally different life styles.

*Id.* The court concluded that, while both parties were fit to have custody of Paul, it was in Paul's best interests to be with his biological parents; the Petersens were not given visitation rights. *Id.* at 88-89.

43. *Petersen*, 111 N.C. App. at 714, 433 S.E.2d at 772.

freedom.”<sup>44</sup> Writing for the court, Judge Lewis discussed the permissible level of inquiry into religion during a child custody trial.<sup>45</sup> Finding the issue to be one of first impression in North Carolina, the court analyzed decisions from other jurisdictions and found that the “general rule” is to allow inquiry into the religious practices of the parties only to the extent that those practices “adversely affect the physical or mental health or safety of the child.”<sup>46</sup>

The court rejected a restrictive approach requiring a showing of actual harm to the child and accepted a “broader rule” that allows inquiry upon a showing of potential harm:

We find that restricting the inquiry to the practices of the parties and the effect such practices have had or may in the future have upon the child in question sufficiently narrows the inquiry to avoid a chilling effect on the practice of religion yet protects the best interests of the child. We conclude that the limited inquiry may touch upon the religious practices of the parties as they relate to the health and safety of the child, but such inquiry may not focus on the general beliefs and doctrines of a religion.<sup>47</sup>

The court noted that, absent proof of harm to the child, the “parties to a child custody dispute should not be placed in a position requiring them to explain or defend their religious beliefs.”<sup>48</sup>

Analyzing the role religion played in *Petersen*, the court found that much of the trial court’s inquiry into the Petersens’ religion was “clearly unacceptable.”<sup>49</sup> The court was particularly concerned with

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44. *Id.* at 725, 433 S.E.2d at 778.

45. *Id.* at 718-19, 433 S.E.2d at 775-76.

46. *Id.*, 433 S.E.2d at 774-75; see also *supra* note 7.

47. *Petersen*, 111 N.C. App. at 719, 433 S.E.2d at 775.

48. *Id.* at 725, 433 S.E.2d at 778 (“We reverse and remand to the trial court for proceedings free from unwarranted religious inquisition into the beliefs of the parties.”).

49. *Id.* at 720, 433 S.E.2d at 775. The court listed examples from the trial transcript of improper inquiry into religion. Some examples from the direct examination of Ms. Kisser are given below:

Q Okay, I believe I asked you . . . what religion encompassed or was involved with The Way International, whether or not it was a Christian religion, and your answer was something about traditional Christianity and non-traditional. Could you explain that, please?

A Right. . . . The Way International, the founder of it, published a book called Jesus Christ is Not God which articulates a main position of that religion. That Jesus Christ was a human being and not a divine being. He is called the Son of God. He is referred to in terms that are Lord and things like that, but the bottom line of the belief system is that he is a man and he is not divine or co-equal to God. . . .

testimony of an expert on The Way who had never observed the Petersens.<sup>50</sup> Finding that the extensive inquiry into religion at trial was a violation of the Petersens' freedom of religion, the court reversed.<sup>51</sup> Rogers and Rowe appealed this decision, and on December 2, 1993, the North Carolina Supreme Court granted discretionary review.<sup>52</sup> The supreme court did not settle the religious freedom issue, but instead reversed on other grounds.<sup>53</sup>

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... And the Christian church, if you look at it as a historical existence, not in particular denominations, it is very clear on this point that such a position is heresy. ...

*Id.* at 720-21, 433 S.E.2d at 775-76. The court also gave examples of proper inquiry into religion from the direct examination of Ms. Petersen:

Q All right. Is there anything about your religious beliefs that has prohibited you or prevented you from seeking medical attention for Paul at any time?

A No.

....

Q ... Is there anything about your practice of your Christian, religious beliefs which requires you in any way to subject Paul to unusual discipline of any kind?

A No.

*Id.* at 723, 433 S.E.2d at 777.

50. *Id.* at 722, 433 S.E.2d at 776-77 ("Although [the expert on cults] expressed concern over some of the practices of The Way, she testified that she had never met the Petersens or Paul. Therefore, none of her testimony could have related to the present or possible future effect of the Petersens' religious practices on Paul.").

51. *Id.* at 725, 433 S.E.2d at 778; see also Hunter T. George II, *New Trial Is Ordered in Cult Custody Case*, CHARLOTTE OBSERVER, Sept. 8, 1993, at C2 (discussing the *Petersen* decision). The court noted the "chilling effect" that allowance of general inquiry into religion would have on litigants in future cases. *Petersen*, 111 N.C. App. at 723, 433 S.E.2d at 777.

52. *Petersen v. Rogers*, 335 N.C. 239, 439 S.E.2d 150 (1993).

53. *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). The Court ruled that any inquiry into the Petersens' religious beliefs, "if error, was harmless" because the constitutionally protected rights of the biological parents outweighed the Petersens' rights, including their right to religious freedom. *Id.* After an analysis of the United States Supreme Court decisions and the North Carolina cases emphasizing the rights of parents to raise their own children and the importance of family integrity, the Court held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905. Under this rule, the custody of Paul must be awarded to Rogers and Rowe because the trial court found them to be fit for custody and there was no evidence of neglect. *Id.* at 404, 445 S.E.2d at 905. In essence, the Court did not consider whether the trial court conducted a proper best interests analysis because it held that the trial court should not have inquired into the best interest of the child at all since the contest was between natural parents and "strangers." The Court further held that the Petersens had no right to visitation under N.C. Gen. Stat. § 50-13.1 (Supp. 1993) because the statute did not "confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers." *Id.* at 406, 445 S.E.2d at 906.



The law of child custody has evolved considerably since early English common law.<sup>54</sup> At common law, the father exerted absolute power over his children, qualified only in extreme cases by the *parens patriae* power of the state.<sup>55</sup> In contrast, the married mother enjoyed no rights to her children.<sup>56</sup> In early American history, a strong preference for the father emerged in custody disputes; this preference could be overcome only by showing the father's past or present wrongful behavior.<sup>57</sup>

This preference for paternal custody changed significantly at the turn of the twentieth century.<sup>58</sup> A strong preference for maternal custody emerged under the "tender years doctrine."<sup>59</sup> The justification for the shift was the belief that mothers were uniquely capable of providing for the needs of their young children.<sup>60</sup>

In the 1970s the tender years doctrine gave way to the best interests of the child standard now universally applied in custody decisions between biological parents.<sup>61</sup> Under this approach, the

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54. See R. Collin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25, 30-44 (1981) [hereinafter Mangrum, *Exclusive Reliance*] (providing an exhaustive review of the development of custody law); see also Mangrum, *Religious Constraints*, *supra* note 4, at 451-60 (analyzing custody law at common law and in the United States).

55. See Mangrum, *Exclusive Reliance*, *supra* note 54, at 31-32 (noting that the state's power generally was exercised only against poor parents who were financially unfit to care for their children).

56. Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 385 (1989) ("Although within a particular family a husband might give his wife power over the children, the law regarded the married woman as the equivalent of an infant.").

57. *Id.* (noting that courts frequently determined custody by finding fault with the father's behavior rather than the future environment of the child). An example of the state's exercise of its *parens patriae* power during this period involved poet Percy Bysshe Shelley. Mangrum, *Religious Constraints*, *supra* note 4, at 454. The court refused Shelley custody of his two children following the suicide of his wife because his atheistic views and immoral conduct made him an unfit parent. *Id.*

58. Beschle, *supra* note 56, at 385.

59. *Id.* at 385-86.

60. *Id.* at 386. The Court stated:

[W]hile the law held women unsuited for the professions and while women's suffrage was an issue of intense controversy, courts recognized that "[m]other love is a dominant trait in even the weakest of women, and as a general thing, surpasses the paternal affection for the common offspring, and moreover, a child needs a mother's care even more than a father's."

*Id.* (quoting *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916)) (footnote omitted).

61. See Beschle, *supra* note 56, at 387; Paul, *supra* note 3, at 598. The best interests standard, while accommodating the many custody disputes to which it is applied, is necessarily "vague and indeterminate." *Id.* at 599. Some critics of the best interests standard emphasize the importance of stability to a child and argue for a single standard,

trial court considers a number of factors and places custody of the child with the party best able to meet that child's needs. For example, Ohio's statute includes the following factors: "[t]he child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest; [t]he child's adjustment to his home, school, and community; [and t]he mental and physical health of all persons involved in the situation . . ."<sup>62</sup> Thus, under the best interests standard, "except for constitutional considerations, the interests of the children are paramount."<sup>63</sup>

Child custody law, despite its emphasis on the best interests of the child, must also conform to limitations imposed by state and federal constitutions. Such limitations may occur when the religion of the parents or other parties becomes an issue in the best interests

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as opposed to a multi-factor approach, which gives complete custody to the primary caretaker or "psychological parent." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1979). Others have advocated a return to a maternal preference. See, e.g., Ramsay L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 342-59 (1982).

The best interests of the child standard is applied in every jurisdiction when the custody dispute is between biological parents. See Beschle, *supra* note 56, at 387. When the custody dispute is between a biological parent and a third party, however, courts are split as to the applicable standard. Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1316 (1994). While many courts also apply the best interests analysis to this situation, *id.* at 1319, others apply a parental rights standard which awards custody to the biological parent unless he is shown to be unfit. *Id.* at 1318; see also *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994) (applying the parental rights standard); *supra* note 53.

62. OHIO REV. CODE ANN. § 3109.04(F)(1) (Baldwin Supp. 1994); see also *Pater v. Pater*, 588 N.E.2d 794, 797 (Ohio 1992) (quoting OHIO REV. CODE ANN. § 3109.04(F)(1) (Baldwin Supp. 1992)). Other courts have included religious needs within the best interests test. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 (Alaska 1979); *Morris v. Morris*, 412 A.2d 139, 141 (Pa. Super. Ct. 1980) ("[B]est interests . . . embrace[] the child's physical, intellectual, moral, and spiritual well-being."). The North Carolina custody statute also follows the best interests framework:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

N.C. GEN. STAT. § 50-13.2(a) (1987).

63. Mangrum, *Exclusive Reliance*, *supra* note 54, at 44 (emphasis added).

analysis.<sup>64</sup> While the welfare of the child remains a determinative factor, the court must balance the child's welfare with constitutionally protected religious freedom.<sup>65</sup> Courts run the risk of infringing on this constitutional right if they prefer one religion over another or include the religious practices of a party in the best interests analysis.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>66</sup> The religious freedom guarded by the First Amendment is contained in two clauses: the Establishment Clause<sup>67</sup> and the Free Exercise Clause.<sup>68</sup> Although both clauses are implicated when religion is a factor,<sup>69</sup> this Note focuses on the Establishment Clause to determine the proper role of religion in custody proceedings.<sup>70</sup>

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64. Other interested parties may include, for example, the adoptive parents or the child's grandparents.

65. Religious freedom has been protected vigorously by the courts. See *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

66. U.S. CONST. amend. I. The incorporation of the First Amendment into the Fourteenth Amendment expands the protection of religious freedom to prevent interference by the states. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 139-41 (1987); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."). The limitations of the religion clauses apply to judicial as well as legislative actions. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

67. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."); see also *infra* notes 72-74 and accompanying text.

68. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); see also *infra* note 70.

69. See Beschle, *supra* note 56, at 416.

70. In custody disputes the Free Exercise Clause is generally raised when grants of custody or visitation rights are conditioned upon the party either foregoing his practice of religion or providing religious training for the child. These types of conditions on custody have been referred to as "spiritual custody." For a detailed analysis of spiritual custody and its First Amendment implications, see Beschle, *supra* note 56, at 416 ("[F]ree exercise issues arise where a parent must choose between religious practices and custody or visitation of children."); Mangrum, *Religious Constraints*, *supra* note 4, at 494 (arguing that before a court may restrict the visitation rights of the noncustodial parent there must be "an affirmative showing by clear and convincing evidence that the noncustodial parent's religious influence over his or her children during visitation threatens imminent and substantial harm to their emotional or physical well-being"); Paul, *supra* note 3, at 586 ("[A]bsent a specific showing of physical or demonstrable psychological harm to a child, spiritual custody awards that infringe upon the free exercise rights of the custodial parent fail to satisfy the strict scrutiny test governing such state action."). The Free Exercise Clause also has been used by many courts to analyze the general issue of the proper role of religion in custody disputes. See, e.g., *In re Marriage of Short*, 698 P.2d 1310, 1313

The Establishment Clause requires governmental impartiality in matters of religion.<sup>71</sup> To define the parameters of this restriction on government, the Supreme Court developed a three-part test outlining the appropriateness of a governmental action.<sup>72</sup> In *Lemon v. Kurtzman*, the Court held that to survive scrutiny under the Establishment Clause, the state action must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid a governmental entanglement with religion.<sup>73</sup> The *Lemon* test became the operative standard in Establishment Clause jurisprudence.<sup>74</sup>

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(Colo. 1985).

71. See *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (explaining that government "must be neutral in matters of religious theory, doctrine and practice [and] may not be hostile to any religion or to the advocacy of non-religion"). In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court outlined the scope of the Establishment Clause:

[The Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

*Id.* at 15-16.

72. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). For a detailed analysis of the Supreme Court doctrine leading up to *Lemon*, see Christian M. Keiner, *A Critical Analysis of Continuing Establishment Clause Flux as Illustrated by Lee v. Weisman*, 112 S. Ct. 2649 (1992) and *Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality?*, 24 PAC. L.J. 401, 407-15 (1993); see also Beschle, *supra* note 56, at 390-92 (discussing the development of the *Lemon* test).

73. *Lemon*, 403 U.S. at 612-13.

74. Keiner, *supra* note 72, at 407. Although the *Lemon* test remains in force today, see, e.g., *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 n.7 (1993) (applying *Lemon* in holding that a school district would not violate the Establishment Clause by allowing a church to use school facilities to show a religious film on family values and child care and stating that "however frightening it might be to some, [*Lemon*] has not been overruled"), there is reason to doubt whether it will control future Establishment Clause jurisprudence. See Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 821-43 (1993) (arguing that the Court has abandoned *Lemon* in favor of a coercion test). But see Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 866-67 (1993) (arguing that the Court has not abandoned the *Lemon* framework). In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court declined to apply *Lemon* to a case involving school prayer at graduation ceremonies. *Id.* at 2655. The Court also refrained, however, from reversing *Lemon*. *Id.* Although *Weisman* seemed to indicate an abandonment of *Lemon*, the Court subsequently employed the three-part test in *Lamb's Chapel*, 113 S. Ct. at 2148. Justice Scalia commented on the rebirth of *Lemon*: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." *Id.* at 2149-50 (Scalia, J., concurring in the

The North Carolina Constitution provides what may appear to be a supplemental layer of protection for religious freedom. Article I, Section 13 states that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience."<sup>75</sup> The North Carolina Supreme Court, however, has held that "the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States."<sup>76</sup> In *Heritage Village Church & Missionary Fellowship, Inc. v. State*,<sup>77</sup> the court held that the North Carolina Constitution and the United States Constitution operate together to provide "a singular guarantee of freedom of religious profession and worship, 'as well as an equally firmly established principle of separation of church and state.'"<sup>78</sup>

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judgment). Justice Scalia's opinion noted that five of his fellow Justices had expressed views contrary to *Lemon*. *Id.* at 2150 (Scalia, J., concurring in the judgment) ("Over the years, . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. . ."). In *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), the Court held that the Establishment Clause does not prevent a school district from providing a sign-language interpreter for a handicapped student enrolled in a sectarian school. *Id.* at 2469. Although the court of appeals employed the *Lemon* test and was reversed, the Supreme Court neither overruled nor relied on *Lemon*. *Id.* at 2464-69. Instead, the Court analyzed the issue by comparing *Zobrest* to past decisions. *Id.* at 2466-69; see T. Jonathan Adams, Note, *Interpreting State Aid to Religious Schools Under the Establishment Clause: Zobrest v. Catalina Foothills School District*, 72 N.C. L. REV. 1039, 1057-59 (1994). Most recently, in *Board of Educ. v. Grumet*, the Court considered whether a statute that created a school district for a religious enclave of Satmar Hasidim violated the Establishment Clause. 114 S. Ct. 2481, 2484 (1994). The lower court relied on *Lemon* to overturn the statute. *Id.* at 2487. The Supreme Court affirmed the lower court's ruling, but did not overrule *Lemon*. *Id.* at 2494 (Blackmun, J., concurring). The Court focused on the neutrality requirement of the Establishment Clause, *id.*, and referred to *Lemon* only twice, and then only listing it among a number of cases supporting a proposition, *id.* at 2488. While commentators debate the current validity of *Lemon*, the Court has not accepted any other coherent doctrine to replace it. See Keiner, *supra* note 72, at 422 ("[T]he Lee Court provides the bench and bar with more questions than answers regarding the proper standard to apply when deciding or presenting an Establishment Clause question."). This Note, therefore, employs the *Lemon* test to analyze the proper role of religion in custody proceedings. See *infra* notes 142-61 and accompanying text.

75. N.C. CONST. art. I, § 13.

76. *In Re Williams*, 269 N.C. 68, 78, 152 S.E.2d 317, 325 (1967).

77. 299 N.C. 399, 263 S.E.2d 726 (1980).

78. *Id.* at 406, 263 S.E.2d at 730 (quoting *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972)). The court defined when the state would violate its constitutional restrictions:

The Legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative

Although religious freedom may be of paramount importance in the United States, the application of a best interests standard would be limited if the rights of parents were absolute.<sup>79</sup> The tension between the best interests of the child and the constitutional rights of parents has created a complex issue for courts to resolve when making custody decisions. Prior to *Petersen*, North Carolina appellate courts only incidentally addressed the extent to which a court may consider the religion of parties when making a custody determination.

Two North Carolina cases have recognized that religious practices of a particular party can be a favorable factor; that is, the religious environment provided by one parent can work to his advantage in a custody proceeding.<sup>80</sup> In *Spence v. Durham*, the court awarded custody to the children's mother upon a finding that, among other factors, she was "an active member of Trinity Methodist Church"<sup>81</sup> and "attend[ed] to . . . [the] religious education" of the children.<sup>82</sup> Similarly, in *In re King*, the court noted favorably that the mother of the child "participat[ed] in local church . . . activities."<sup>83</sup> Although these courts gave weight to the religious practices of a party, they did not confront the constitutional implications of that consideration. Likewise, the North Carolina Supreme Court on two occasions has endorsed the spiritual growth of the child as a proper consideration in determining placement, but has not offered an explanation for considering the child's spiritual upbringing.<sup>84</sup>

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procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward religion.

*Id.*

Some state courts have provided more protection for the exercise of religion under state constitutions than under the current reading of the Free Exercise Clause of the First Amendment. See Stuart G. Parsell, Note, *Revitalization of the Free Exercise of Religion under State Constitutions: A Response to Employment Division v. Smith*, 68 NOTRE DAME L. REV. 747, 754-72 (1993). See generally Kent Greenawalt, *The Concept of Religion in State Constitutions*, 8 CAMPBELL L. REV. 437 (1986) (analyzing the additional protection of religious freedom provided by state constitutions).

79. *E.g.* *Morris v. Morris*, 412 A.2d 139, 144 (Pa. Super. Ct. 1979).

80. See *Spence v. Durham*, 283 N.C. 671, 679-81, 198 S.E.2d 537, 542-43 (1973), cert. denied, 415 U.S. 918 (1974); *In re King*, 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971).

81. *Spence*, 283 N.C. at 681, 198 S.E.2d at 543.

82. *Id.* at 686, 198 S.E.2d at 546.

83. 11 N.C. App. at 419, 181 S.E.2d at 221.

84. *In re Custody of Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667-68 (1982); *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) ("[T]he trial judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties.").

Prior to *Petersen, Dean v. Dean*<sup>85</sup> was the leading North Carolina case on the issue of religion in custody disputes. In *Dean*, the father sought a change in child custody due to a material change of circumstances.<sup>86</sup> The trial court found that such a change had occurred and determined that the mother was not "a fit and proper person to have custody of" the child.<sup>87</sup> In awarding custody to the father, the trial court concluded that the mother's failure to take the child "to church and Sunday school was jeopardizing [the child's] spiritual values."<sup>88</sup> The mother claimed that the court's consideration of her religious practices violated her right to religious freedom under the North Carolina and United States Constitutions.<sup>89</sup>

The court of appeals rejected the mother's argument<sup>90</sup> and held that while "the trial court cannot base its findings on the preferability of any particular faith or religious instruction[,] . . . the spiritual welfare of a child is a factor that may be considered by the trial court in making a custody determination."<sup>91</sup> The court's conclusory holding offered no explanation for its determination that the "spiritual welfare" of the child justified consideration of religion in custody proceedings.<sup>92</sup>

With *Petersen*, North Carolina entered the nationwide debate on the proper role of religion in child custody disputes.<sup>93</sup> While most jurisdictions generally agree on some basic issues in factoring religion into custody battles,<sup>94</sup> courts part ways on the proper test to apply

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85. 32 N.C. App. 482, 232 S.E.2d 470 (1977).

86. *Id.* at 482-83, 232 S.E.2d at 471. Mr. Dean argued, and the trial court agreed, that a material change of circumstances sufficient to justify a change in custody had occurred because the mother "had given birth to two illegitimate children since the original award of custody." *Id.* at 484, 232 S.E.2d at 472.

87. *Id.* at 484, 232 S.E.2d at 472.

88. *Id.* at 483, 232 S.E.2d at 471.

89. *Id.*

90. *Id.*

91. *Id.* at 483-84, 232 S.E.2d at 471-72.

92. *Id.* Furthermore, the court did not explain the limitation that it did place on inquiry into religion—that the trial court may not hold a preference for "any particular faith or religious instruction." *Id.* at 483, 232 S.E.2d at 471. The court failed to note that to consider the "spiritual welfare" of the child, it must necessarily hold a preference for one faith or religious instruction over another. In fact, the *Dean* court based its findings on a preference for formal religion, such as "church and Sunday school," *id.*, over informal spiritual instruction such as Secular Humanism. *Id.*

93. See generally Annotation, *Religion as Factor in Child Custody and Visitation Cases*, 22 A.L.R.4TH 971, 973-1028 (1983 & Supp. 1994) (providing an exhaustive review of cases on this issue).

94. See *infra* notes 96-98 and accompanying text.

in limiting the best interests of the child inquiry.<sup>95</sup> For example, courts agree that judges may not rule on the comparative merits of religions and that courts must consider all religions impartially.<sup>96</sup> Many jurisdictions do include religious factors, generally under the rubric of "spiritual welfare" or "moral well-being," when weighing the best interests of the child.<sup>97</sup> Nonetheless, most courts agree that none of these considerations of religion may be the sole determining factor in a custody decision.<sup>98</sup>

Jurisdictions vary in their determinations of when factoring religion into a best interests inquiry becomes an invasion into the religious freedom of the parties. Although the cases on this issue "are sometimes difficult to categorize,"<sup>99</sup> three lines of cases appear to have developed. From the broadest to the narrowest view they are (1) the "temporal welfare" approach—religious practices of a party are open to inquiry whenever they reflect on the temporal well-being

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95. See *infra* notes 99-141 and accompanying text.

96. See, e.g., *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) ("Courts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths."); *Zucco v. Garrett*, 501 N.E.2d 875, 880 (Ill. App. Ct. 1986) ("The establishment clause of the first amendment . . . prohibits state and federal action 'favoring the tenets or adherents of any religion or of religion over nonreligion.'") (quoting *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring)); *Bienenfeld v. Bennett-White*, 605 A.2d 172, 180 (Md. Ct. Spec. App.), *cert. denied*, 612 A.2d 256 (Md. 1992); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978) ("Any suggestion that a state judicial officer were favoring or tending to favor one religious persuasion over another in a child custody dispute would be intolerable to our organic law . . ."); *Burrows v. Brady*, 605 A.2d 1312, 1315 (R.I. 1992); *In re Marriage of Knighton*, 723 S.W.2d 274, 278 (Tex. Ct. App. 1987) ("[I]t is beyond the power of a court, in awarding the custody of a child or children to prefer the religious views or teachings of either parent, even though the beliefs and practices of one parent might be more 'normal' or more in accord with majority religious views or practices."); *Gould v. Gould*, 342 N.W.2d 426, 432 (Wis. 1984).

97. See, e.g., *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 (Alaska 1979) (emphasizing that Alaska's custody statute includes the "religious" needs of the child among her best interests); *Short*, 698 P.2d at 1313 ("[A] court in a custody proceeding must not blind itself to evidence of religious beliefs or practices of a party seeking custody which may impair or endanger the child's welfare."); *McNamara v. McNamara*, 181 N.W.2d 206, 209 (Iowa 1970); *Dean v. Dean*, 32 N.C. App. 482, 484, 232 S.E.2d 470, 472 (1977) (holding that the court may consider the "spiritual welfare" of the child in deciding custody); *In re Custody of J.S.S.*, 444 A.2d 1251, 1253 (Pa. Super. Ct. 1982); *Morris v. Morris*, 412 A.2d 139, 141 (Pa. Super. Ct. 1980) ("[The] best interests [test] . . . embraces the child's physical, intellectual, moral, and spiritual well-being."); *Burrows*, 605 A.2d at 1315.

98. See, e.g., *Anhalt v. Fesler*, 636 P.2d 224, 226 (Kan. Ct. App. 1981) ("Religion and church attendance, although factors to be considered, are not alone sufficient to determine the best interests of minor children."); *T. v. H.*, 245 A.2d 221, 222 (N.J. Super. Ct. Ch. Div. 1968), *aff'd*, 264 A.2d 244 (N.J. Super. Ct. App. Div. 1970).

99. *Bonjour*, 592 P.2d at 1238.



of the child;<sup>100</sup> (2) the "threatened harm" approach—the religion of a party may be considered only if the religious practices have harmed or threaten to harm the physical or mental well-being of the child;<sup>101</sup> and (3) the "actual harm" approach—religion is a proper factor only upon the showing of actual physical or mental harm to the child due to the religious practices of a party.<sup>102</sup>

Under the broadest view, religion is a proper factor in the best interests analysis if it relates to the temporal welfare of the child. Courts endorsing this position allow inquiry into religion without any showing that the religious practices caused or threatened harm to the child. Instead, they require only that the practices *affect* the child's welfare generally.<sup>103</sup>

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100. See *infra* notes 103-13 and accompanying text. The term "temporal" is used to distinguish secular from spiritual matters. See WEBSTER'S NEW WORLD DICTIONARY 1377 (3d College ed. 1988) (defining "temporal" as "civil or secular rather than ecclesiastical"); see also Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interests Equation*, 82 MICH. L. REV. 1702, 1705 n.14 (1984) ("A child's 'temporal health' includes his physical, mental and moral but not spiritual well-being.").

101. See *infra* notes 114-34 and accompanying text.

102. See *infra* notes 135-38 and accompanying text.

103. See *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978). In *Waites*, the child's father and mother divorced because of the mother's beliefs as a Jehovah's Witness. *Id.* at 327. Extensive cross-examination of the mother about her religion was allowed at trial. *Id.* The court held that "[i]nquiry into religious beliefs *per se* is impermissible," but that such inquiry would be allowed when it related to the child's development. *Id.* at 333. The court ruled that the inquiry into religion in *Waites* was unrelated to the development of the child and therefore not allowed. *Id.* The court's view of when religion would be a proper factor was exceptionally broad. According to the court, very few religious practices could be excluded as not affecting the child's "development." For example, "a parent might properly be asked whether he or she would refuse to permit the child to attend a school class where evolution is taught." *Id.* This broad view is also apparent in *T. v. H.*, 245 A.2d 221 (N.J. Super. Ct. Ch. Div. 1968), *aff'd*, 264 A.2d 244 (N.J. Super. Ct. App. Div. 1970). Under a rationale considering the "general welfare of the infant," the court heavily weighed the religious education the child would receive with each parent and considered the fact that one party lived in an Idaho town where the nearest temple was 300 miles away. *Id.* at 221. *T. v. H.* also illustrates that the temporal welfare approach may be used by the court to give preference to religion over non-religion. *Id.*; accord *McNamara v. McNamara*, 181 N.W.2d 206, 209 (Iowa 1970) (holding that a child's best interests include his "moral environment," granting custody to the father, and concluding that the father "conscientiously adheres to religious teachings and would apparently rear his children in the same manner"); see also *Bienenfeld v. Bennett-White*, 605 A.2d 172, 182 (Md. Ct. Spec. App. 1992), *cert. denied*, 612 A.2d 256 (1992) (holding that religious factors may be considered if they "bear upon the physical or emotional welfare of the child" and concluding that the mother's religious views were admissible because they "posed a threat to the children's relationship with their father"); *Edwards v. Edwards*, 829 S.W.2d 91, 93 (Mo. Ct. App. 1992) (approving the trial court's finding of fact that the "[m]other's inability to explain the religious beliefs she had taken up . . . was some indication of her uncertain

An example of this broad approach is *Burnham v. Burnham*,<sup>104</sup> in which the Nebraska Supreme Court extensively considered the religious practices of the mother in its *de novo* review of the trial court's decision to place the child in the mother's care.<sup>105</sup> The mother belonged to the Tridentine Church, considered by its members to be the true Catholic Church.<sup>106</sup> Several tenets of her faith troubled the court. First, the mother considered her marriage to the child's father void because it did not take place in the Tridentine Church; for this reason, she considered the child illegitimate.<sup>107</sup> Second, the church taught and the mother affirmed "that there exists in this world, a master plot on the part of the Jews and Communists, to gain control of the world."<sup>108</sup> Finally, the court was concerned that, with the mother's agreement, her parents had ceased communication with their older son (her brother) because he did not follow the Tridentine Church.<sup>109</sup>

The court found that the mother's beliefs about the illegitimacy of her daughter, her racist views under the church's teachings, and her apparent willingness to cut off communication with her daughter if she disobeyed the church would have an adverse impact on the well-being of the child.<sup>110</sup> For this reason, the court reversed and awarded custody to the father.<sup>111</sup> Although no evidence was presented to show that these beliefs would in any way threaten the

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and unstable living environment, and that this instability affected the child's best interests"); *Provençal v. Provençal*, 451 A.2d 374, 378 (N.H. 1982) (holding that it was not improper for the guardian *ad litem* to consider religion in making his recommendation since he "refrained from evaluating the merits of differing religious beliefs" and focused on the child's "temporal welfare"), *overruled on other grounds*, *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988); *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971) (requiring "a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child").

104. 304 N.W.2d 58 (Neb. 1981). For criticism of the Court's decision in *Burnham*, see Mangrum, *Exclusive Reliance*, *supra* note 54, at 26-30.

105. *Burnham*, 304 N.W.2d at 59-60.

106. *Id.* at 60. The mother's parents encouraged her to join the church. *Id.* At the time she joined, she was still married to the father and attempted to bring him into the group, but he refused. *Id.*

107. *Id.* The mother also believed that "under pain of mortal sin" she was obliged to bring her children up in the church. *Id.*

108. *Id.*

109. *Id.* ("In fact, [the mother] returned a toy to [her brother] that he had sent as a gift to [the child].").

110. *Id.* at 61-62.

111. *Id.* at 62. The court noted that the father "will look after [the child's] moral and religious training and enroll her in a Sunday school or something equivalent." *Id.*

physical or mental welfare of the child,<sup>112</sup> the court nonetheless concluded that the mother's religion would adversely affect the child's temporal well-being.<sup>113</sup>

A more restrictive approach to admitting evidence regarding religion requires a showing that the religious practices of a party have harmed or threaten to harm the physical or mental well-being of the child.<sup>114</sup> Under this view, the party wishing to introduce evidence of religious beliefs or practices must show that these beliefs or practices have caused or threaten to cause harm to the child.<sup>115</sup> This approach is more restrictive because it eliminates the court's discretion to decide whether the religion of a party is detrimental to

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112. See Mangrum, *Exclusive Reliance*, *supra* note 54, at 29 ("[T]he speculative 'adverse impact' relied upon by the [Nebraska] supreme court as the basis for reversing seems to have been implied from the assumption that the abnormality of the mother's beliefs would necessarily be contrary to the child's best interests.").

113. *Burnham*, 304 N.W.2d at 62 ("We feel that [the mother's] religious beliefs . . . will have a deleterious effect . . . upon the well-being of the child herself.").

114. See, e.g., *Clift v. Clift*, 346 So. 2d 429, 435 (Ala. Civ. App. 1977); *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Alaska 1979) (holding that the court may consider the religion of a party only if it poses a substantial threat of harm to the child or the child has actual religious needs); *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) (holding that evidence of a party's religious beliefs is admissible only if it is shown that such beliefs "are reasonably likely to cause present or future harm to the physical or mental development of the child"); *Zucco v. Garrett*, 501 N.E.2d 875, 880 (Ill. App. Ct. 1986) (holding that to pass the *Lemon* test, the court must find "a substantial threat of . . . actual physical, emotional or mental injury" to consider the religious beliefs of a party); *Osier v. Osier*, 410 A.2d 1027, 1030 (Me. 1980) ("[W]here [the court] finds that a particular religious practice poses an immediate and substantial threat to the child's well-being . . . [it] may make an order aimed at protecting the child from that threat.") (citation omitted); *Harris v. Harris* 343 So.2d 762, 764 (Miss. 1977); *Sanborn v. Sanborn*, 465 A.2d 888, 894 (N.H. 1983) (requiring a showing "that the children's welfare was *in fact* jeopardized" before allowing consideration of the mother's religion); *Pater v. Pater*, 588 N.E.2d 794, 799 (Ohio 1992) (holding that inquiry into the religious beliefs of a parent is impermissible when those beliefs "do not pose a direct threat to the child's mental or physical welfare"); *In re Marriage of Knighton*, 723 S.W.2d 274, 278 (Tex. Ct. App. 1987) (allowing inquiry into religion "if the religious doctrines and practices of an applicant for custody do in fact seriously threaten the physical or mental well-being of the child, or would lead the custodian to neglect such a child"); see also *infra* note 134 (discussing *Osier*); *infra* notes 130-34 and accompanying text (discussing *Bonjour*).

115. See *Kirchner v. Caughey*, 606 A.2d 257, 262 (Md. 1992). In *Kirchner* the Court of Appeals of Maryland held that to inquire into religion requires more than the general testimony of a parent that the child is "confused" or "upset" by conflicting religious practices. A factual finding of a causal relationship between the religious practices and the actual or probable harm to a child is required—mere conclusions and speculations will not suffice. When the evidence is sufficient to demonstrate the need for intervention, the remedy should be that "which intrudes least on the religious inclination of either parent and is yet compatible with the health of the child."

*Id.* (quoting *Felton v. Felton*, 418 N.E.2d 606, 608 (Mass. 1981) (citations omitted)).

the child in the absence of evidence showing physical or mental harm. More importantly, under this approach the court may not give special preference to a party because of his religious practices. In other words, the court cannot use religion as a positive factor.<sup>116</sup>

*In re Marriage of Hadeen*<sup>117</sup> illustrates the threatened harm approach. In this Washington case, the trial court awarded the father custody of four of the Hadeens' five children.<sup>118</sup> Evidence presented at trial showed that the mother was involved with the First Community Churches of America, a fundamentalist Christian sect.<sup>119</sup> The church taught a strict code of discipline; on one occasion the mother spanked one of her daughters for two hours with a Ping-Pong paddle while the other children held their sister down.<sup>120</sup> The mother taught her children that there was nothing wrong with swearing at or lying to other children who had not "received the Holy Spirit."<sup>121</sup> Also, the mother severed communication with one of her daughters because she would not attend church.<sup>122</sup> The trial court found that the mother was "in complete submission to the [church]" and granted custody to the father.<sup>123</sup> The court of appeals analyzed the trial court's consideration of religion under the Free Exercise Clause of the United States Constitution and held that inquiry into religion is only appropriate upon a finding of a "reasonable and substantial likelihood of immediate or future impairment" of the child.<sup>124</sup> The court found that a determining factor for custody was the mother's religion,<sup>125</sup> but, because the trial court failed to find that the mother's religion posed a substantial threat of harm to the

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116. The court therefore could not consider, for example, whether a party would attend to the religious training of a child.

117. 619 P.2d 374 (Wash. Ct. App. 1980).

118. *Id.* at 375

119. *Id.* ("The [Church] . . . demands much of its members' time, their total loyalty, and a subservience to the teachings of the church."). The divorce of the parents was instigated by the pastor of the church when he attempted to get Mr. Hadeen to sell his home and donate the proceeds to the church. *Id.* at 376.

120. *Id.* at 375. The church also taught "enforced isolation and fasting as another means of discipline." *Id.*

121. *Id.* at 375-76.

122. *Id.* at 376.

123. *Id.* at 378.

124. *Id.* at 382. In rejecting the requirement of a showing of actual present impairment, the court held that such an approach "is improvident and could lead a trial court to ignore a child's present welfare." *Id.*

125. *Id.* The trial court also factored in the emotional bonds of the children with their parents, the care provided by the parties, and the recommendation of a psychiatrist. *Id.* at 378.

children, the court of appeals held that it was improper for the judge to consider religion in awarding custody.<sup>126</sup>

A comparison of *Hadeen* and *Burnham*<sup>127</sup> illustrates the distinction between the temporal welfare and the threatened harm approaches. The facts in *Hadeen* would appear to support a finding by the court that the mother's religion had some effect on the welfare of the children; her religion would therefore be a proper factor for consideration under the temporal welfare view.<sup>128</sup> Under the threatened harm threshold applied in *Hadeen*, however, the mother's religion was not an appropriate factor, because the trial court did not find that her religious exercise threatened substantial harm to the welfare of the children.<sup>129</sup>

In *Bonjour v. Bonjour*,<sup>130</sup> the Supreme Court of Alaska adopted a modified threatened harm approach. This approach allows inquiry into religion not only upon a showing that the religious beliefs or practices threaten injury to the child, but also upon a showing that the child has "actual religious needs."<sup>131</sup> The court defined "actual religious needs" as "the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it."<sup>132</sup> Such a classification is not without limits, however. The

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126. *Id.* at 382-83 ("There was no evidence that Mrs. Hadeen neglected her children or did not provide them with her companionship because of her membership in the church. In fact, the trial court expressly found that the children were adjusted reasonably well.").

127. *Burnham v. Burnham*, 304 N.W.2d 58 (Neb. 1981); *see also supra* notes 104-13 and accompanying text.

128. *See supra* notes 117-26 and accompanying text. Compare *Burnham*, 304 N.W.2d at 60 (describing the mother's belief of her daughter's illegitimacy) with *Hadeen*, 619 P.2d at 375 (describing the mother's paddling of the child). The severe paddling would appear to justify inquiry into religious practices more than would a belief of illegitimacy. Moreover, in *Burnham*, the court considered that the mother's parents severed communication with one of their children for religious reasons, 304 N.W.2d at 60; the court in *Hadeen*, however, did not find the fact that the mother herself had severed communication with one of her own daughters sufficient to justify inquiry into the mother's religion, 619 P.2d at 382-83.

129. *Hadeen*, 619 P.2d at 382-83. Another important distinction between the two approaches—not apparent in a comparison of *Hadeen* and *Burnham*—is that the temporal welfare approach allows inquiry into the positive effects of religion while the threatened harm approach does not.

130. 592 P.2d 1233 (Alaska 1979).

131. *Id.* at 1240; *cf.* Note, *supra* note 100, at 1727-32 (arguing that, under the constraints of the Establishment Clause, a court should only consider religion when the child has expressed a sincere religious conviction).

132. *Bonjour*, 592 P.2d at 1240. The court noted that the "maturity of a minor will, of course, vary from case to case and will not always correspond to the minor's chronological age . . . [T]he child must be of sufficient age to have developed some understanding of religion and its place in his or her life." *Id.* at 1240 n.14. The court also noted that, to

child's religious needs must be actual, not presumed, and one party must be more capable than the other of meeting those needs.<sup>133</sup> Moreover, these religious needs of the child are not absolutely dispositive; they are included in the best interests analysis as one factor in awarding custody.<sup>134</sup>

The most restrictive approach to the conflict between the best interests of the child analysis and the constitutional rights of parents requires a showing that the religious practices of a party have caused *actual* physical, psychological, or mental harm to the child before they will be factored into the best interests equation.<sup>135</sup> The California Court of Appeals explained the rationale for requiring actual harm in *Quiner v. Quiner*.<sup>136</sup>

Precisely because a court cannot *know* one way or another, with any degree of certainty, the proper or sure road to personal security and happiness or to religious salvation, which . . . to untold millions is their primary and ultimate best interest, evaluation of religious teaching and training

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satisfy the Establishment Clause, the inquiry into actual religious needs must not be limited to formal religion, but rather it must extend to the child's "profound aversion to formal religious training of any sort." *Id.* at 1240.

133. *Id.* at 1239.

134. *Id.* at 1240. The Supreme Judicial Court of Maine also offered a modified threatened harm approach in *Osier v. Osier*, 410 A.2d 1027, 1029-30 (Me. 1980). In *Osier*, a father who had remarried initiated a hearing to gain custody of his son. *Id.* at 1228. Most of the trial court's order granting custody to the father was devoted to the mother's religious beliefs that would prevent her from consenting to a blood transfusion for her son in the event that he needed one. *Id.* at 1028-29. Citing the general rule that courts should attempt to resolve cases without reaching constitutional issues, the court adopted a two-step analysis. *Id.* at 1029. First, the trial court should make an initial best interests decision without considering the religious practices of either party. *Id.* If the religion of the nonpreferred party is at issue, then the court need not consider religious factors at all. *Id.* If, however, the religion of the preferred party is at issue, then the court may consider religious practices that pose "an immediate and substantial threat to the child's well-being." *Id.* at 1030. Second, the court should attempt to fashion a custody award that has "the least possible infringement upon the parent's liberty." *Id.* The court remanded the case to the district court for a custody determination in accordance with the two-step analysis. *Id.* at 1028; *see also* Mangrum, *Exclusive Reliance*, *supra* note 54, at 71 ("The approach . . . in *Osier* most effectively accommodates the best interests of the child and the constitutional rights of the parents.").

135. *See Quiner v. Quiner*, 59 Cal. Rptr. 503, 516 (Cal. Ct. App. 1967).

136. *Id.* In *Quiner*, custody was granted to the father after a trial involving extensive inquiry into the mother's religion, the Exclusive Brethren. *Id.* at 504. The Brethren is a Christian sect with a mission to save the people of the world. *Id.* at 506 n.1. The Brethren practice strict "separation," which prevents members of the church and their children from associating in any way with people who are not members of the fellowship. *Id.* at 504. In accordance with this principle, the mother testified that if she were granted custody of her son, she would "keep him away from his father if she could." *Id.* at 505.

and its projected as distinguished from immediate effect (psychologists and psychiatrists to the contrary notwithstanding) upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations. Numerous profound thinkers have fixed convictions that *all* religion is bad, particularly so in rearing of children. If a court has the right to weigh the religious beliefs or lack of them of one parent against those of the other, for the purpose of making the precise conclusion as to which one is for the best interests of a child, we open a Pandora's box which can never be closed. By their very nature religious evaluations are subject to question, disbelief, and difference of opinion.<sup>137</sup>

This approach differs from the threatened harm position only in "degree of imminence required to justify intervention."<sup>138</sup> Because of its focus on harm to the child, the actual harm approach does not allow introduction of evidence on the positive effects that religion may have on the child.

A review of the case law on the issue of the proper role of religion in custody proceedings reveals definite constitutional parameters. First, courts should not weigh the comparative merits of religions; they should remain impartial as to different religions and as between religion and non-religion.<sup>139</sup> Second, courts should not allow religion to be the sole determinative factor in a custody award.<sup>140</sup> Third, courts should never consider religious factors unless the factors are relevant to a determination of the temporal welfare of the child.<sup>141</sup>

An examination under the *Lemon* test<sup>142</sup> of the temporal welfare, threatened harm, and actual harm approaches indicates that the more restrictive approaches are constitutionally acceptable. The first prong of the *Lemon* test requires that the government action

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137. *Id.* at 516-17. The court held that "[a]lthough the evidence indicates a probability of psychological impact" on the child due to the religious practices of the mother, no proof was offered "that the doctrine of separation had in any manner affected the child's physical, emotional or mental well-being." *Id.* at 517. Despite the probability of harm to the child, the absence of actual harm precluded consideration of the mother's religion. *Id.*

138. Mangrum, *Exclusive Reliance*, *supra* note 54, at 71.

139. *See supra* note 96 and accompanying text.

140. *See supra* note 98 and accompanying text.

141. *See supra* notes 103-13 and accompanying text. However, some courts have determined that an additional showing of actual or threatened harm to the child is required. *See supra* notes 114-38 and accompanying text.

142. *See supra* notes 72-74 and accompanying text.

have a secular purpose.<sup>143</sup> Because the best interests test focuses on the civil well-being of the child rather than spiritual development, all three approaches appear to satisfy this prong. Under the temporal welfare approach, however, two problems may develop: There is no secular purpose for the assumption that religion is an essential element of secular growth,<sup>144</sup> nor for the premise that religious parents are better equipped to raise children in a moral manner.<sup>145</sup>

The second prong of the *Lemon* test requires that the primary effect of the governmental action neither advance nor inhibit religion.<sup>146</sup> The temporal welfare approach permits inquiry into religion when religious practices benefit<sup>147</sup> or adversely affect the child; thus, this approach appears to fail the requisite standard.<sup>148</sup>

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143. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

144. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1242-43 (Alaska 1979) (“[A] presumption that a child ‘needs religion’ converts the secular legislative purpose into a judicial preference for religion[, thus] violat[ing] . . . the first amendment’s establishment clause, for it exhibits a preference for the religious over the less religious.”).

145. Some commentators conclude that any preference for religion—even under the temporal welfare approach—fails the secular purpose prong of the *Lemon* test. See Note, *supra* note 100, at 1719 (“A court preference for parental religiousness to promote the spiritual or temporal welfare of the child serves no valid secular purpose.”). This conclusion, however, depends on the reference point, as this perspective assumes that the court is giving preference to a religious party over a nonreligious party due to some notion that religion indicates a higher moral standard. *Id.* at 1709. If such a preference exists, then the court’s comparative merits of religion would not meet the constitutional standard. See *supra* note 96 and accompanying text. If the court considers the religious practices of a party only to the extent that they have a direct effect on the civil well-being of the child, however, the secular purpose of the first prong of the *Lemon* test is met. See *supra* notes 143-44 and accompanying text. This is best illustrated by an example in which the court has an unfavorable view of the religion of a party. In such a case, the court does not impose a view that religion is morally superior to non-religion; it merely looks to the effect that religious practices have on the secular development of the child.

146. *Lemon*, 403 U.S. at 612-13.

147. The secular benefits of religion are highly suspect; therefore, a judge’s own religious views are likely to prevail. Cf. Beschle, *supra* note 56, at 407-16 (analyzing social science data to determine whether a religious upbringing leads to a better life for the child and for society). Professor Beschle, citing research by Professor Allen Bergin, suggests that under a traditional definition of religion, the emotional well-being of a child is only marginally advanced by religion. *Id.* at 407 & n.155. Furthermore, he notes a study that tenuously suggests “a positive correlation between religion and racial prejudice” at least for some types of religious beliefs. *Id.* at 413; cf. *Quiner v. Quiner*, 59 Cal. Rptr. 503, 516-17 (Cal. Ct. App. 1967) (“Numerous profound thinkers have fixed convictions that all religion is bad, particularly so in the rearing of children.”).

148. *Bonjour*, 592 P.2d at 1243 (“The principal or primary effect of giving preference to parents who are members of an ‘organized religious community’ in child custody disputes will be to encourage non-religious, anti-religious, or simply disinterested parents to engage in religious practices, even if their beliefs are not sincere. . . . [This practice] puts government on the side of organized religion, a non-secular result that the



The Illinois Court of Appeals has noted three ways in which the positive consideration of religion in custody proceedings advances religion: (1) by preferring parents who follow organized religion and punishing parents who are atheists or non-practicing members of a religion; (2) by encouraging non-religious parents to take up religion; and (3) by increasing the number of children brought up in a religious environment.<sup>149</sup> Moreover, when a court considers the adverse effects of religion under the temporal welfare approach, the court's use of religion may have the primary effect of inhibiting religion by punishing its practice.

A requirement that the court find actual or threatened harm to the child before allowing inquiry into religion appears to meet the second prong of the *Lemon* test. Under these approaches, the primary effect of the inquiry would clearly not advance religion; inquiry into religion would only take place in a circumstance in which the court *inhibits* the religion. Nor would religious inquiry under these circumstances have the primary effect of inhibiting religion;<sup>150</sup> the primary effect of the inquiry would advance the best interests of the child and place the child in the home most likely to meet his secular needs.

The third prong of the *Lemon* test requires that the action avoid "entangl[ing]" government with religion.<sup>151</sup> The purpose of the entanglement prohibition is to avoid any ongoing relationship between church and state.<sup>152</sup> At first glance, it appears that little danger exists of violating the entanglement test when the only government involvement occurs during the pendency of a trial. If, however, the court uses the temporal welfare approach and extensively inquires

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establishment clause is designed to prevent.").

149. *Zucco v. Garrett*, 501 N.E.2d 875, 881 (Ill. App. Ct. 1986); see also *Osteraas v. Osteraas*, 859 P.2d 948, 953 (Idaho 1993) (holding that the use of religion as a factor in custody disputes will create the appearance that courts "favor one religion over another, or favor religion in general as against no declared religion; thus, using this factor would serve to advance such religion in contravention of the First Amendment establishment clause . . . [and thereby] violat[e] the second prong of the *Lemon* test") (footnote omitted); Note, *supra* note 100, at 1719-23 (supporting the position advanced in *Zucco*).

150. See *Bonjour*, 592 P.2d at 1239-40 (holding, after a review of Establishment Clause doctrine, that judicial inquiry into religion is allowed only when the religion substantially threatens harm to the child or the child has actual religious needs).

151. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also *Roemer v. Board of Pub. Works*, 426 U.S. 736, 766 (1976) ("There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of 'excessive entanglement,' itself makes that clear."); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) ("The [entanglement] test is inescapably one of degree.").

152. See Note, *supra* note 100, at 1723 & n.70.

into the comparative effects of religion on the child, the court may violate the third prong of *Lemon* by entangling itself in "debates" of "religious philosophy."<sup>153</sup> This prong may also be violated if the court retains a supervisory role in a grant of custody conditioned on religious practices of the party, or if the court considers religion in a subsequent change of custody proceeding.<sup>154</sup> Under the harm-based approaches, the court does not entangle itself with religion *per se*, but rather inquires into conditions affecting the welfare of the child.

Both the threatened harm and actual harm approaches appear to meet all three prongs of the *Lemon* test.<sup>155</sup> Between the two, the threatened harm approach appears to be the better position. Because the actual harm approach requires the religious practices of a party to have caused damage before allowing any inquiry into religion,<sup>156</sup> this standard can produce bizarre results.<sup>157</sup> Although the threatened harm approach may leave the door open for courts to predict the effects of religious practices on the welfare of the child,<sup>158</sup> the requirement of proof of a "substantial"<sup>159</sup> threat should avoid any judicial overreaching.

Courts should not limit the inquiry into religion to a showing of a substantial threat to the welfare of the child. Religion may also be a proper factor when the child herself professes sincere religious convictions.<sup>160</sup> The constitutional rights of the parents are not the exclusive concern of courts; the rights of children may also be violated if their religious beliefs are ignored.<sup>161</sup>

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153. *Bonjour*, 592 P.2d at 1243.

154. See Note, *supra* note 100, at 1723-27.

155. See *supra* notes 142-54 and accompanying text.

156. See *supra* notes 135-38 and accompanying text.

157. The danger of the more restrictive view is apparent from a hypothetical example of an admittedly absurd, yet illustrative, case. Assume in a custody dispute between the mother and father of an eight-year-old child that the father practices a religion requiring all fathers to lock their child in a closet for their entire ninth year. Assuming that no religious practices of the father up to the point of trial have harmed the child, under the actual harm doctrine, the court could not consider any beliefs or practices of the father's religion despite the disastrous effects they would have on the child if the father were to win custody. Under the threatened harm position, the court would consider the father's religious beliefs and would likely grant custody to the mother—a decision clearly in the best interests of the child.

158. See *supra* notes 114-34 and accompanying text.

159. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Alaska 1979).

160. *Id.*; see also Note, *supra* note 100, at 1727-38 (arguing that the Establishment Clause prohibits any inquiry into religion unless the child has actual religious needs).

161. See *supra* notes 130-34 and accompanying text.

The court of appeals in *Petersen* adopted the threatened harm approach: "In the absence of evidence of present or future physical or mental harm to the child in question, parties to a child custody dispute should not be placed in a position requiring them to explain or defend their religious beliefs."<sup>162</sup> This opinion signals an important deviation from North Carolina precedent on the issue. The positive consideration of religion in *Spence v. Durham*<sup>163</sup> and *In re King*<sup>164</sup> would likely be unacceptable under the threatened harm approach. Also, the *Dean v. Dean* opinion, which affirmed the trial court's consideration of the mother's failure to take the child "to church and Sunday school,"<sup>165</sup> could not be upheld under the threatened harm approach absent the unlikely showing that this lack of religious training threatened substantial physical or emotional harm to the child.

Having applied the threatened harm standard, the court correctly reversed the trial court's decision. Without any showing of the harm these beliefs may cause to the child, the trial court nevertheless allowed evidence about The Way, including its doctrinal understanding of "Jesus Christ, evil spirits, speaking in tongues, [and] tithing."<sup>166</sup> The court also allowed counsel for Rogers and Rowe to question experts about the accuracy of Way beliefs.<sup>167</sup> Clearly, this inquiry into the Petersens' religious beliefs in no way suggested a threat of harm to the child in the event custody was granted the Petersens. The court of appeals therefore appropriately reversed.<sup>168</sup>

The court also correctly observed places in the record where evidence of the Petersens' religion was appropriately admitted under

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162. *Petersen*, 111 N.C. App. at 725, 433 S.E.2d at 778. The court noted the influence that inquiry into religion may have on the parties' choice of religion and found a violation of the "Petersens' right to freedom of religion guaranteed by the United States Constitution and the North Carolina Constitution." *Id.*

163. 283 N.C. 671, 679-80, 198 S.E.2d 537, 542-43 (1973) (noting favorably the mother's participation in the Trinity Methodist Church and the religious education she provided to the children); see also *supra* notes 81-82 and accompanying text.

164. 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971) (favoring the mother in part because of her participation in local church activities); see also *supra* note 83 and accompanying text.

165. *Dean v. Dean*, 32 N.C. App. 482, 483, 232 S.E.2d 470, 471 (1977); see also *supra* notes 85-92 and accompanying text.

166. *Petersen*, 111 N.C. App. at 722, 433 S.E.2d at 777; see also *supra* note 49.

167. *Id.* at 721, 433 S.E.2d at 776. The court also allowed questioning of a minister of The Way, Reverend Greene, concerning the absence of The Way from the *Handbook of Denominations*. *Id.* at 722, 433 S.E.2d at 776.

168. *Id.* at 725, 433 S.E.2d at 778.

the threatened harm approach.<sup>169</sup> This evidence concerned religious beliefs that may preclude the Petersens from seeking medical attention for Paul and "unusual discipline" advocated by The Way.<sup>170</sup> Because lack of medical care and severe discipline would threaten Paul's welfare, consideration of this evidence was constitutional.

In *Petersen*, the court did not reach the issue of allowing evidence of religion upon a showing that the child himself possesses sincere religious convictions.<sup>171</sup> The child in this case was too young to hold such convictions. However, the modified threatened harm approach adopted by the Alaska Supreme Court in *Bonjour v. Bonjour*<sup>172</sup> should be used to guide future courts which may be faced with older children with actual religious needs.<sup>173</sup> Applying this standard, a court should give consideration to the true feelings a mature child may have for a particular religion.

While a court's overriding consideration in a custody proceeding must be the welfare of the child, the court must be cautious not to tread upon the constitutional rights of parents. The vast case law on the issue of religion in custody disputes and the controlling Establishment Clause doctrine dictates that, to remain within constitutional boundaries, courts must limit the consideration of religious beliefs and practices to those cases in which beliefs or practices either have caused or substantially threaten to cause harm to the physical or psychological well-being of the child,<sup>174</sup> or when the child herself has cognizable religious preferences.<sup>175</sup> With *Petersen v. Rogers*, the

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169. *Id.* at 723-24, 433 S.E.2d at 777-78.

170. *Id.* The court also viewed as appropriate evidence concerning the Petersens' religious beliefs that "would denigrate or derogate in any way the life-style of these people who are [Paul's] natural, biological parents." *Id.* at 724, 433 S.E.2d at 778. While such evidence may be allowed if supported by proof that denigration of Paul's natural parents would cause psychological harm to him, absent such a showing this evidence would be unacceptable under the threatened harm standard.

171. See *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Alaska 1979); Note, *supra* note 100, at 1703 (arguing that a court may consider religion only when the child has expressed a religious conviction); see also *supra* notes 130-34, 160-61 and accompanying text.

172. See *supra* notes 130-34 and accompanying text.

173. See *Bonjour*, 592 P.2d 1233, 1240 n.14 (noting that while an average fifteen-year-old may be capable of holding actual religious needs, "children aged three, five, and seven are not of sufficient maturity to form an intelligent opinion on so complex a subject as religion or their needs with respect to it").

174. See *supra* notes 142-59 and accompanying text.

175. See *supra* notes 130-34, 160-61 and accompanying text.

North Carolina courts have ceased their "perilous adventure"<sup>176</sup> into the unchartable seas of ecclesiastical matters and are now safely moored to secular doctrine.

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176. *Kircher v. Caughey*, 606 A.2d 257, 261 (Md. 1992) (quoting *Wojnarowicz v. Wojnarowicz*, 137 A.2d 618, 621 (N.J. Super. Ct. Ch. Div. 1958)).