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Child Custody Determinations in a Multicultural Society:

The Use of Tribal Affiliation and Religion in Private Child Custody Disputes in the United States

"All of us form our own personal identities, based in part, on our religious, racial and cultural backgrounds. To say … that a court should never consider whether a parent is willing and able to expose to and educate their children on their heritage, is to say that society is not interested in whether children ever learn who they are."[1]

Rules of law relating to the family form the cornerstones of society and shape the daily lives of individuals. Child custody adjudications exemplify the significance and extensive influence of this legal field, as the determination of custody often serves as a determination of who will have primary control over the child's religion, education, moral upbringing, and cultural awareness. For several decades, the "best interests of the child" standard has governed child custody adjudications in the United States.[2]

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[1] Jones v. Jones, 542 N.W.2d 119, 123 (S.D. 1996).

[2] Almost all states use the best interests of the child standard when determining custody. Maria Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 Harv. Latino L. Rev. 229, 234 (2008); *see also* Michael Grossberg, *How to Give the Present a Past?: Family Law in the United States 1950–2000*, *in* Cross-Currents: Anglo-American Family Law 1950–2000, at 8 (Stanford N. Katz et al. eds., 2001).

This flexible standard allows a family law court to consider any and all factors affecting the child on a case by case basis.[3] It also weaves a complicated web of ambiguity and vagueness for judges to untangle in private custody determinations.[4] The court must understand the relevancy of the various factors in order to safeguard a child's growth and development. This task becomes increasingly complex when the consideration includes cultural factors, which it inevitably must in a nation as diverse as the United States. So the question remains: How is a secular judge to make such determinations in a multicultural, multiracial, and multireligious country?

The United States has become an increasingly diverse nation since its inception.[5] The founding fathers were faced with the inherent tension between creating and maintaining strong national institutions while protecting individual rights by allowing religious, personal, and cultural autonomy.[6] Their successors confronted the challenge of balancing these dual goals in times when immigration substantially increased the diversity of the nation.[7] Early twentieth century reforms aimed at reversing discrimination drastically changed the composition of the immigrant population and, consequently, the composition of America itself.[8] The

[3] 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, 384 (1989).

[4] *See* Barry Bricklin, *The Contribution of Psychological Test to Custody-Relevant Evaluations*, *in* The Scientific Basis of Child Custody Decisions 132(Robert M Galatzer-Levy & Louis Kraus eds., 1999) ("[T]here is no legally accepted definition of the 'best interests of the child standard,' and for practical and conceptual reasons, there may never be such a definition.").

[5] *See* Jill Norgen & Serena Nanda, American Cultural Pluralism and Law xiii (3d ed., 2006).

[6] *Id.*

[7] *See id.*, at xiv. At the beginning of the nineteenth century, most immigrants were from northern and western Europe and thus generally physically and culturally similar to the earliest settlers.*Id.* at xiv. Later immigrants from southern and eastern Europe and Asia comprised a far less homogenous group than their predecessors and were often hostilely viewed as a threat to American culture. *See id.* The latter half of the twentieth century saw a greater number of immigrants arriving from the Middle East, Asia, and Central and South America. *Id.* at 66.

[8] *See id.* at xv (identifying a "grudging[] acceptance" of non-white immigrants in order to fulfill the nation's need for workers).

country's minority population exceeded 100 million in 2007,[9] and the United States Census Bureau forecasts that minorities will compose over half of the nation's population by 2050.[10]

The increasing population, diversification, and political mobilization of minorities has altered the mainstream American view of culture. The United States followed the trend of other Western democracies, shifting from a mono-national ideal to a multicultural model without complete assimilation or exclusion of non-dominant groups.[11] The country is unique in that its fundamental tolerance manifests itself in individual constitutional rights rather than special status or explicit privileges given to minority groups.[12] Yet within the parameters of American cultural "pluralism,"[13] a concept emerged that required the acknowledgement of the rights and autonomy of cultural groups in order to acknowledge the rights and autonomy of the individual.[14] Accordingly, family law courts have incorporated multiculturalism into their decisions and specifically recognize the minority perspective and culturally relevant issues even when settling private disputes. In child custody jurisprudence, the best interest of the child standard recognizes the importance of and incorporates cultural factors into decisions involving children from ethnologically diverse and autonomous groups.

[9] Robert Bernstein, *U.S. Hispanic Population Surpasses 45 Million, Now 15 Percent of Total*, U.S. Census Bureau News,1 May, 2008, *available at* http://www.census.gov/Press-Release/www/releases/archives/population/011910.html.

[10] *An Older and More Diverse Nation by Midcentury*, U.S. Census Bureau News, Aug.14, 2008, *available at* http://www.census.gov/PressRelease/www/releases/archives/population/012496.html. Furthermore, sixty-two percent of the nation's population of children is expected to be comprised of minority group members in 2050, up from forty-four percent in 2008. *Id.*

[11] Will Kymlicka, *The Global Diffusion of Multiculturalism: Trends, Cause, Consequences*, *in* Accommodating Cultural Diversity 17, 17–18 (Stephen Tierney ed., 2007).

[12] *See generally* U.S. Const. amends. I–X; *see also* Norgen & Nanda, *supra* note 5, at xv (describing how the Bill of Rights demonstrates the entwinement of freedom and tolerance with its strong protections for minority groups).

[13] *See* Bruce T. Murray, Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective 9 (2008) ("Pluralism is a philosophical commitment to diversity, a belief that there is some intrinsic good in difference.").

[14] *See* Helder De Schutter, *Towards a Hybrid Theory of Multinational Justice, in* Accommodating Cultural diversity, *supra* note 10, at 35, 45, 53–54. (opposing this liberal nationalist view and instead favoring the promotion of cultural groups in order to support the individual).

This Article explores the use of tribal affiliation and religion as factors in the best interest of the child determination in private child custody cases. Part I provides an overview of best interests of the child standard. Part II discusses the impact of tribal affiliation on custody determinations. Congress passed the Indian Child Welfare Act of 1978 (ICWA) to stop the widespread, state-mandated separation of indigenous children from their families and culture, but the Act is now applied to private disputes. ICWA's underlying presumption assumes that it is the best interest of an Indian child to be placed in an Indian home. Part III addresses the issue of religion and child custody. Parents have constitutional protections to raise their children as they see fit and to practice their religion without state interference, so courts must exercise caution when using religion as a factor in the best interest of the child standard in private custody cases. The Article concludes by emphasizing a need for cultural competency in private child custody determinations.

I Best Interest of the Child Standard

The guiding doctrine of family law in the United States is that the child's well-being is the paramount concern to any decision.[15] In accordance with this principle, private child custody determinations have evolved from rules-based adjudication to judgments founded on a discretionary standard.[16] Historically, the country followed an absolute paternal preference.[17]

[15] *See, e.g.*, Lehr v. Roberston, 463 U.S. 248, 257 (1983) ("[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."); Am. Psychological Assoc., Guidelines for Child Custody Evaluations in Divorce Proceedings, Guideline I.2 (1994) ("In a child custody evaluation, the child's interests and well being are paramount. Parents competing for custody as well as others, may have legitimate concerns, but the child's best interests must prevail."); Joseph Goldstein et al., The Best Interests of the Child: The Least Detrimental Alternative 81–82 (1996) (favoring the child-centered guidelines even if some argue they "neglect the needs and rights of the adults").

[16] Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. Ill. U. L. Rev. 449, 451 (2005).

[17] *Id.* at 452 (describing the standard as a rule derived from the ancient roman *paterfamilias* canon and explaining how historic British law mandated that courts awarded fathers custody of children in all disputes).

After a transitional period, maternal preference rules gradually emerged in the latter half of the nineteenth and into the beginning of the twentieth century.[18] Courts interpreted statues that eliminated the paternal preference to favor custody awards to mothers when children were young, and this rule became known as the "tender years doctrine."[19] The great social changes in the country during the 1960s and 1970s precipitated the general-neutral best interests of the child standard, the preferred doctrine of modern American family jurisprudence.[20] The best interest standard focuses on the psychological well-being of the child and seeks to provide the best possible environment for his or her emotional growth.[21]

As family law is a matter left to the control of the states rather than the federal government, each state articulates its best interests of the child standard differently. Thus, the standard varies widely depending on the state of adjudication.[22] Some states explicitly list the criteria a judge should consider in the best interest of the child determination, and culture is often a required factor for courts to consider in these jurisdictions.[23] The best interests of the child standard varies further depend-

[18] *See id.* at 454 (attributing the change to a recognition that women were better caretakers as well as women obtaining greater social and economic power).

[19] *See id.*; Beschle, *supra* note 3, at 386. The rules favoring mothers foreshadowed the best interest standard as it shifted the court's focus to the needs of the children. Peskind, *supra* note 16, at 454 ("[B]y the end of the eighteenth century, the focus on children as economic tools of their father evolved into a consideration of the needs of the children and the parent better able to provide for those needs. This paradigm shift implicitly recognized the importance of children's interests distinct from the needs of parents.")

[20] Peskind, *supra* note 16, at 455–56. The change may also be partially attributed to constitutional challenges to the gender-biased preference. *See, e.g.*, People *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 182–83 (N.Y. Fam. Ct. 1973) (finding that the tender years doctrine violated the Equal Protection Clause of the Fourteenth Amendment).

[21] Louis Kraus, *Understanding the Relationship Between Children and Caregivers*, *in* The Scientific Basis of Child Custody Decisions, *supra* note 3, at 58. *But see* Glenn H. Miller, *The Psychological Best Interest of the Child Is Not the Legal Best Interest*, 30 J. Am. Acad. Psychiatry Law 196, 196–97 (2002) (opposing the psychological matters as the sole determining factor).

[22] Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 Yale L. & Pol'y Rev. 267, 269–80 (1987) (citing a lack of consistency among the factors used by different states and noting that, even when states provide statuary guidance in establishing criteria to consider in the best interests of the child determination, they do not assign weight to individual factors).

[23] The Minnesota statute, for example, defines "best interests of the child" as "all relevant

ing on the presiding judge interpreting the factors outlined in state law.[24] The factors serve as mere guidelines without a specific formula for making decisions.[25] Trial court judges are thus left with substantial discretion to decide such matters.[26] As one judge stated, "A child custody determi-

factors" and lists thirteen factors specifically to be considered and evaluated by the court:

(1) the wishes of the child's parent or parents as to custody;
(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
(3) the child's primary caretaker;
(4) the intimacy of the relationship between each parent and child;
(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
(6) the child's adjustment to home, school, and community;
(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
(8) the permanence, as a family unit, of the existing or proposed custodial home;
(9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03 of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;
(10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
(11) the child's cultural background;
(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
(13) except in case in which a finding of domestic abused as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

Minn. Stat. § 518.17 subd. 1(a) (2007).

[24] Some commentators contend that the best interests standard results in more out-of-court negotiations between parties than actual adjudications. *See* Eleanor E. Maccoby & Robert H. Mnookin, Dividing the Child: Social And Legal Dilemmas of Custody 282 (1992).

[25] *See, e.g.*, Minn. Stat. § 518.17 subd. 1(a) (2007). The Minnesota statute has been criticized for stating its factors too broadly and not weighing their importance. *See* Andrew Schepard, Children, Courts, & Custody: Interdisciplinary Models for Divorcing Families 164 (2004).

[26] Moreover, the trial court's decision will not be disturbed on appeal unless there is a

nation is much more difficult and subtle than an arithmetical computation of factors. It is one of the most demanding undertakings of a trial judge. …"[27] Consequently, the best interests of the child standard may be as challenging in its application as admiral in its goal.

Difficulty in adjudication is the best interests standard's main drawback.[28] The indeterminate standard forces reliance on the subjective preferences and biases of the fact finder.[29] The judge may have to choose between caregivers on the basis of any number of differences, from the mundane practice of bedtime routines to the fundamental question of the child's religious upbringing.[30] The American Law Institute criticized the best interests standard for exactly this reason, because, when faced with such questions, "the court must rely on its own value judgments, or upon experts that have their own theories of what is good for children and what is effective parenting."[31] So while flexibility is the standard's main advantage, it may also be its greatest liability.[32]

Naturally, there have been countless suggestions for more concrete standards to replace the best interests,[33] but it would be nearly impossible to reach a consensus as to the best child-rearing methods in a society as diverse as the United States.[34] As one scholar commented, "[T]he situa-

clear abuse of discretion. 24A Am. Jur. 2d *Divorce and Separation* § 929 (2008).

[27] Dempsey v. Dempsey, 292 N.W.2d 549, 554 (Mich. Ct. App. 1980).

[28] *See* American Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.02 cmt n.6 (2008) ("[T]he best interest of the child test … has long been criticized for its in indeterminacy.").

[29] *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1, 6 (1987).

[30] American Law Inst., *supra* note 28, at § 2.02 cmt n.6.

[31] *Id.*

[32] *See* David L. Chambers, *Rethinking the Substantive Roles for Custody Disputes in Divorce*, 83 Mich. L. Rev. 478, 478, 480 (1984) (arguing that the best interest standard seems "wonderfully simple, egalitarian, and flexible" but is simultaneously too broad, in that it provides courts with insufficient guidance, and too narrow, in that some circumstances favor the recognition of factors other than the child's interests).

[33] *See generally* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & Contemp. Probs. 226 (1975) (providing the seminal criticism of the standard); *see also* Goldstein et al., *supra* note 15, at 193 (stressing the importance of stability in a child's upbringing and thus favoring a primary caregiver preference).

[34] *See* Maccoby & Mnookin, *supra* note 24, at 282 (describing alternatives to the best interests standard, such as the primary parent standard and a presumption of joint physical custody).

tions in which children live are so various, complex, and unpredictable that no adequately comprehensive, detailed and principled set of standards could be drawn up that would satisfactorily guide courts or agencies in making decisions about children."[35] Furthermore, the freedom of parents to raise their children as they choose promotespr cultural communities necessary for maintaining American pluralism.[36] While the best interests standard is criticized for being indeterminable and unpredictable, such open-endedness is necessary because each individual child and family situation is unique.

Two cultural factors, tribal affiliation and religion, highlight this dichotomy between individualization and uncertainty. Both factors are distinctive in the fact that federal law influences their application in best interests determinations. The Article first examines tribal affiliation, since it has a special place in child custody jurisprudence in the United States. Federal law specifically considers the role of culture in ICWA.

II The Role of Tribal Affiliation in Child Custody Determinations

Some state statues require courts to consider the child's culture as one of many factors in the best interests test of a private custody determination, but the federal government made such consideration binding in the case of Indian children. In 1978 Congress codified the concept that recognized Indian tribes as distinct, internally sovereign entities that had the right to either control or participate in decisions concerning the custody and adoption of Indian children.[37] ICWA signified a marked shift from the country's prior policy of assimilation,[38] in which abusive state legal

[35] Carl E. Schneider, *On the Duties and Rights of Parents*, 81 Va. L. Rev. 2477, 2485 (1995).

[36] *See id.* at 2486.

[37] *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2006)).

[38] Historically, American policy and law sought to force assimilation of Native Americans within the greater society. *See generally* Richard B. Collins, *A Brief History of the U.S.-American Indian Nations Relationship* 33, *in* Human Rights 3 (2006). Although a small percentage of the general population, it is unlikely that any other ethnic group's existence has been more affected by the law and policy than the Native Americans. Stella U. Ogunwole, U.S. Census Bureau, We are the People: American Indians and

practices lead to the "wholesale removal of Indian children from their homes."[39] Prior to the enactment of ICWA, the state had removed about one-third of all Native American children from their families and placed them in adoptive families, foster care, or institutions.[40] The crisis in Indian child welfare appeared to stem from the failure of state agencies to consider cultural and social differences between Native American and non-native communities in the placement process.[41]

One of the dual purposes of ICWA purports to address this issue. As stated in the Act's preamble, ICWA was intended to promote the "stability and security of Indian tribes and families."[42] It declares that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[43] In addition to recognizing the tribe's communal interests in preserving its cultural integrity, ICWA was also intended to promote the "best interest of Indian children."[44] The Act is premised upon the belief that it is in the best interest of an Indian child to retain the unique values of tribal culture. Thus, ICWA simultaneously serves to preserve the tribe and protect the best interest of the child.[45] In order to meet these goals, the courts must avoid the long-standing prejudice against Indian childrearing customs. Consideration of tribal affiliation is a first step in meeting this objective.

This Section describes how the holistic culture of Indian life is a vital component of the tribal affiliation inherent in ICWA's premises. It further details the statutory criteria required for ICWA's use in child custody adjudications. The Section then traces the evolution of ICWA's applica-

Alaska Natives in the United States 2 (Feb. 2006), *available at* http://www.census.gov/population/www/socdemo/race/censr-28.pdf (last visited 1 Sept., 2008) (stating that Native Americans are currently the smallest ethnic group in the United States, representing just 1.53 percent of the nation's total population); *see generally,* N. Bruce Duthu, American Indians and the Law, xxi (2008).

[39] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

[40] *Id.*

[41] *Id.*, *citing* 124 Cong. Rec. 38, 102 (1978) (statements by Rep. Udall and Rep. Lagomarsino).

[42] 25 U.S.C. § 1902 (2000).

[43] *Id.* at §1901(3).

[44] *Id.* at §1902.

[45] The Act protects "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Id.*

tion from cases involving the state to its expanded use in private custody determinations. The Section highlights the increased state compliance with and overall importance of the federal act in recent years.

2.1 Holistic Culture of Native Americans Component of Tribal Affiliation

Tribal affiliation is a component of "ethnicity," which "includes aspects such as race, origin or ancestry, identity, language and religion."[46] Much debate has centered on the use of race in custody decisions. The law bans its consideration in such determinations, as the Supreme Court concluded that the harm in considering race in a custody case was greater than the potential good.[47] However, sensitivity to the need for children to be exposed to their ethnic heritage is distinguishable from racial considerations. Thus, a court may consider whether a parent is able to expose his or her children to their culture and educate them about their heritage.[48] ICWA is therefore constitutionally valid, as courts find it proper to consider a child's ethnic heritage as a factor in the best interest of the child standard.[49]

The state practices that lead to the widespread removal of Native American often stemmed from cultural ignorance about Native American families.[50] The premise of Native American culture is that individual existence is dependent upon survival of the group.[51] Native American culture focuses more on the collective rights of the community than individual rights.[52] Many Native Americans perceive themselves as part of the larger cultural group and not as a completely autonomous individual.[53] In accord with this view, every child belongs to both its nuclear family

[46] Statistics Canada, Ethnicity, July 25, 2008, *available at* http://www.statcan.ca/english/concepts/definitions/e-race.htm.

[47] *See* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984).

[48] Jones v. Jones, 542 N.W.2d 119, 123–24 (S.D. 1996).

[49] *See, e.g.*, *id.* at 123.

[50] *See* Tanri Nagarsheth, *Crossing the Line of Color: Revisiting the Best Interests Standard in Transracial Adoptions*, 8 Scholar 45, 52 (2005) (["T]he removal of Native American children stemmed from the nation's failure to comprehend Native American child-rearing practices.").

[51] *See* Duthu, *supra* note 37, at 137.

[52] *See generally*, *id.* at 137–140.

[53] *See generally id.*

and the tribe.[54] Removing a child from his tribe deprives that child of his or her heritage and the community of a valued member.[55]

A component of this holistic culture is the tradition of children being raised in the context of the tribe rather than only within their immediate family.[56] Tribal members with childrearing responsibilities direct their efforts not only toward their biological children but towards all tribal children.[57] Moreover, grandparents, aunts and uncles, and cousins frequently raise children because of domestic obligations to the extended family.[58] This method of caretaking directly contrasts the Anglo-American custom, in which the parents are the primary and often only caregiver for their children.[59] This practice is so ensconced in American tradition that the United States Supreme Court has maintained that the right to raise one's children is considered "essential" and "the basic civil rights of man."[60] In light of the aforementioned differences between the childrearing values and practices of mainstream and Native cultures, special consideration is required in custody cases in which Native American families are involved in order to ascertain the best interest of their children and avoid discriminatory decisions. ICWA provisions seek to ensure such consideration.

2.2 ICWA's Early Applications

Congress passed ICWA in order to avoid individual and communal cultural deprivation. To accommodate the unique values of Native American culture, ICWA designates tribal courts as the preferred forum for adjudication of Native American child welfare cases.[61] The ICWA statute provides different jurisdictional rules for Indian children domiciled on and off the reservation. Specifically, the Act vests tribal courts exclusive jurisdiction over child custody proceedings involving an Indian child

[54] *Id.*
[55] *Id.*
[56] *Id.* at 151.
[57] *Id.*
[58] *Id.*
[59] *See* Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?*, 38 Creighton L. Rev. 815, 853 (2005).
[60] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted); *see generally* Jill E. Korbin, Child Abuse & Neglect: Cross-Cultural Perspectives 3 (University of California Press, 1981).
[61] 25 U.S.C. § 1911(a) (2006).

residing or domiciled on a reservation.[62] In cases in which an Indian child lives outside the reservation, ICWA requires transfer to a tribal court under certain circumstances, including upon the request of the tribe or the parents.[63] The Act provides that the state court maintains jurisdiction if the tribe declines jurisdiction after receiving appropriate notice, a parent objects to the transfer, or there is good cause not to transfer the proceeding to a tribal court.[64] ICWA also proscribes a heightened standard for termination of parental rights and placement preferences for Indian custodians when a state court presides over the custody proceeding.[65] For adoptive placements, the Act gives preference to "a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[66] State courts were slow to comply with ICWA during the first several decades following its enactment, but an increase in litigation resulted in an increase in application of the Act.

The United States Supreme Court has heard only one case dealing with ICWA. In *Mississippi Choctaw Band of Indians v. Holyfield*, a Native American mother residing on a reservation had given birth to twins outside of it, and both parents consented to adoption in a state court with the intent of placing the babies with a non-Native American family.[67] Counsel for the adoptive parents argued that the Choctaw mother wanted to place the children outside of the tribe and provide them with opportunities unavailable on the reservation.[68] The Court overruled the lower courts' rulings of ICWA as inapplicable to the proceedings and held that "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe." [69] The Court held that although the statute itself did not include a definition of the term "domicile," the

[62] *Id.*
[63] *Id.* § 1911(b).
[64] *Id.*
[65] *Id.* § 1915.
[66] *Id.* §1915(a). There are similar placements for foster care or preadoptive placement expressed in 25 U.S.C. § 1925(b).
[67] Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30, 39 (1989).
[68] *See* Brief of Appellee, Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980).
[69] 490 U.S. at 59.

meaning of the term must be construed according to congressional intent to effectuate the purposes of the Act.[70] This case reinforced the emphasis the Act places on the tribe's role in child custody determinations.

2.3 Criteria for ICWA to Apply to Child Custody Determinations

As evidenced by the *Holyfield* decision, the judicial system strives to meet ICWA's dual goals. However, courts may not apply the Act unless three criteria have been met. First, the child must be an "Indian child."[71] Statutorily defined, "Indian child" means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[72] Second, it must be established that the Indian child is the subject of a "child custody proceeding."[73] The Act defines "child custody proceeding" to explicitly include foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[74] Third, the proceeding must not involve awards arising out of a divorce proceeding or juvenile detention as a result of criminal activity.[75]

Establishing that the Indian child is the subject of a child custody proceeding often leads to controversy, especially when a party is trying to prove a foster care placement. Each of the four proceedings are described by the Act, which defines "foster care placement" as

> any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.[76]

This definition was a decisive issue in *Gerber v. Eastman*.[77] In this case, the Minnesota Court of Appeals found that a non-Indian father's attempt

[70] *Id.* at 47.
[71] 25 U.S.C. § 1903(4) (2006).
[72] *Id.*
[73] *Id.* § 1903(1)(i–iv).
[74] *Id.*
[75] *Id.* § 1903(1).
[76] *Id.* § 1903(1).
[77] Gerber v. Eastman, 673 N.W.2d 854 (Minn. Ct. App. 2004).

to obtain custody of his Indian child, who was in the custody of his maternal grandmother, was not a foster care placement as established by the Act.[78] The court considered the policy implications of its decisions. It concluded that denying custody to a biological parent would not serve ICWA's goals of preserving the tribe and family.[79] Thus, the appellate court ruled ICWA inapplicable on these grounds.[80] It is unclear if the court truly believed that the proceeding failed to fall under the statutory definition of a foster care placement or if it was simply placing the paramount right of the parent above the interest of the tribe.[81]

As evidenced by *Gerber v. Eastman*, courts do not automatically apply ICWA to child custody determinations involving Native American children. Careful statutory interpretation is necessary to determine whether a particular child custody dispute is governed by ICWA, and many courts have found that the Act does apply to private custody matters. While some cases may appear to contradict the *Gerber* decision, all states follow the criteria expressed by ICWA. The differences lie in the courts' resolution of the ambiguities stemming from the imprecise language of the statute, varying weight given to ICWA's policy considerations, and the fact-specific nature of child custody proceedings.

2.4 *Starr v. George*: Application of ICWA in a Private Child Custody Dispute

A private custody dispute involving ICWA may arise when both parents are unable to care for their children. A tragic example of this situation is the case of *Starr v. George*, in which both parents were unavailable to fulfill their caretaking responsibilities because the children's mother was imprisoned for murdering their father.[82] A custody dispute between the

[78] *Id.* at 857 (finding that the grandmother failed to establish that the placement at hand would be a foster care placement, because the child would be returned to the custody of her parent rather than placed in a foster home or the home of a guardian or conservator).

[79] *Id.* at 858.

[80] *Id.* at 857–58.

[81] In either interpretation of the decision, the case was subject to Minnesota's Uniform Child Custody Jurisdiction and Enforcement Act and not exclusive tribal court jurisdiction. *Id.*

[82] Starr v. George, 175 P.3d 50, 51–52 (Alaska 2008). Denni Starr had fatally stabbed Buddy George while he was holding their infant daughter and was consequently sen-

maternal and paternal grandparents ensued over the two Tlingit children, whom the court and involved parties undisputedly considered "Indian children" within the meaning of ICWA.[83]

The Alaska Superior Court found that ICWA did not apply to the case because the dispute did not raise either of the dual concerns of ICWA but rather justified application of the Act's divorce exception.[84] Thus, although the local tribal council of the parties had recognized the maternal grandparents' adoption of the children, the court found it was in the children's best interest to award custody to the paternal grandparents.[85] In overruling the appellate court's decision, the Alaska Supreme Court found ICWA to be applicable in the dispute.[86] While the court had previously extended the divorce exception to unmarried parents, it concluded that the exception did not apply to grandparents, even in situations where the parents were unavailable.[87] In light of precedent and policy concerns, the court found that ICWA did not contain an exception for disputes between extended family members, including grandparents.[88]

Although the Alaska Supreme Court ultimately affirmed the superior court's decision,[89] its decision evidenced the growing trend of applying ICWA to private custody disputes. Congress enacted ICWA to curb state-mandated removal and its original application was exclusively to matters in which the state was a party. In fact, the Act only explicitly applies to certain custody proceedings, and courts have interpreted ICWA to be inapplicable to custody disputes arising out of divorce proceedings.[90] This so-called divorce exception serves to guarantee that the interests of the tribe do not interfere with the fundamental rights of parents.[91] However, since the Act requires compliance in both voluntary and involuntary

tenced to thirty-one years in prison. See Starr v. State, 2007 WL 293072, *1–2 (Alaska App. 2007).

[83] Starr v. George, 175 P.3d at 54 n.16 (citing 25 U.S.C. § 1903(4) (2006)).

[84] *Id.* at 53.

[85] *Id.* at 54.

[86] *Id.* at 54–55.

[87] *Id.* at 54 (citing John v. Baker, 982 P.2d 738, 747 (Alaska 1999)).

[88] *Id.* (citing A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982)).

[89] Starr v. George, 175 P.3d at 59 (affirming because the tribal adoption proceedings did not accord the paternal grandparents due process and were thus not entitled to full faith and credit in the state courts).

[90] *See, e.g.*, DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 513 (8th Cir. 1989);); In re D.A.C., 933 P.2d 993, 1000 (Utah Ct. App. 1997).

[91] Starr v. George, 175 P.3d at 55.

proceedings, courts may apply ICWA in cases where caregivers do not have rights as paramount as those of parents. Custody disputes involving grandparents are a prime example of ICWA's applicability to private custody disputes.

2.5 Other Examples of ICWA's Application in Private Child Custody Disputes

Some jurisdictions have taken a similar approach to the Alaska Supreme Court in *Starr v. George* in the adjudication of private child custody matters involving Native children. Since ICWA is premised upon the belief that it is in the child's best interest to maintain a relationship with the tribe, many courts have found that the most effective way for states to incorporate the customs and traditions of Indian tribes in child custody determinations is to allow tribal intervention. They defer to tribal courts, even when the case exclusively involves family members, if the prongs of ICWA applicability are met. Such tribal inclusion helps determine the best interest of the child and avoid cultural bias against Native values and customs.

In *In re Custody of A.K.H.*, the Minnesota Court of Appeals held that intrafamily disputes between grandparents and parents were not excluded from the coverage of ICWA.[92] In a dispute between the mother and paternal grandmother, the *A.K.H.* court found that intervention by the tribe would serve to further the purposes of the Act.[93] While all parties seeking custody of the child were members of an Indian tribe, the court maintained tribal intervention was necessary to determine the best interest of the child.[94] It found that a person was not necessarily capable of raising a child "to respect the unique social and cultural environment of Indian life" simply because that person was a member of a tribe.[95] The court was concerned that state agencies would not be the best judge of custodial fitness, since they had previously failed to take the special circumstances and problems of Indian families into account in home studies.[96] Thus, the court concluded that "input from the Indian tribe [was] desirable"

[92] In re Custody of A.K.H., 502 N.W.2d 790, 796 (Minn. Ct. App. 1993).
[93] *Id.* at 795.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 795–96.

for custody determinations involving Indian children even when the custody was guaranteed to be in an Indian home.[97] The court maintained that tribal sovereignty had to be respected in family law cases and tribal governments were best suited for evaluating cultural premises underlying Indian childrearing.[98] In doing so, the court acknowledged that the justice system had failed to recognize the uniqueness of Native American culture and emphasized that lack of this cultural understanding was just as devastating in disputes in intrafamily disputes as it was in cases where the state removed children from their homes.[99]

The South Dakota Supreme Court followed the majority rule typified by the *A.K.H.* court in *In re Guardianship of J.C.D.*[100] It held that ICWA applied to a child custody proceeding between parents and grandparents when good cause did not exist to deny the transfer to tribal court.[101] The court reasoned that if "the rights acquired by the grandparents qualified as an ICWA guardianship," such as a foster care arrangement, the placement was a proceeding contemplated by the Act.[102] The court concluded it was a matter for the tribe to determine the best interest of the child.[103] Using a similar analysis, the Washington Supreme Court held that ICWA applied to a dispute between parents and grandparents in *In re Mahoney*.[104] However, the majority applied the state's best interest of the child standard rather than use ICWA's standard.[105] The dissent disagreed with the majority's application of the best interest of the child standard and favored ordering a new trial with use of ICWA standards, which would have considered the children's welfare in "the context of relevant family structure and cultural background."[106] The dissent stressed that Indian culture is not well understood by the state and the court has an inherent bias in favor of Anglo-American values.[107]

[97] *Id.* at 795.
[98] *Id.* (citing Mississippi Choctaw Band of Indians v. Holyfield, 490 U.S. 30, 34 (1989)).
[99] *Id.*
[100] *See* In re Guardianship of J.C.D., 686 N.W.2d 647 (S.D. 2004).
[101] *Id.* at 649.
[102] *Id.* at 648.
[103] *Id.* at 650.
[104] In re Mahaney, 51 P.3d 776, 783 (Wash. 2002).
[105] *Id.* at 893, 784.
[106] *Id.* at 899, 787 (Chambers, J. dissenting).
[107] *Id.*

The applicability of ICWA to child custody determinations is as important today as it was at the time of its enactment.[108] The use of the Act in private disputes emphasizes its significance in modern child custody jurisprudence and has sought to protect the interests of Native American children, their families, and their tribes. While tribal affiliation is a more recent addition to the best interests standard, religion has its roots deep in the history of child custody determinations.[109] However, unlike tribal affiliation, use of religion is limited rather than mandated by the federal government.

III The Role of Religion in Child Custody Determinations

Religion is another factor many courts consider in private child custody determinations, but a trial judge is constitutionally limited in making such decisions. Religious liberty in the United States originates in the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[110] The Supreme Court's First Amendment philosophy has changed significantly over time and continues to evolve today. In the middle of the twentieth century, the Court adopted the metaphor that the First Amendment served as "a wall of separation between church and

[108] ICWA is also significant in a context extending beyond family law. *See* Duthu, *supra* note 37, at xxi (describing how contemporary legislation, including ICWA, has made great strides in recognizing the right of Native Americans to maintain their culture on the own terms and regain or preserve control over their own legal matters).

[109] Family law students are routinely exposed to the case of *Shelley v. Westbrook*. (1817) 137 Eng. Rep. 850 (Ch.). In a time when fathers' common-law rights over legitimate children were almost limitless, the poet Percy Bysshe Shelley was legally deprived of custody because he was an atheist. *See id.;* Megan Doolittle, *Fatherhood, Religious Belief and the Protection of Children in Nineteenth Century English Families*, *in* 33 Gender and Fatherhood in the Nineteenth Century (Trev Lynn Broughton & Helen Rogers, eds., 2007).

[110] U.S. Const., amend. 1. The Substantive Due Process Clause also provide parents with great control over choosing their own and their children's religion, thus further inhibiting interference from the justice system and particularly trial court judges in custody adjudications. *See* U.S. Const., amends. 5, 14.

state."[111] In the latter half of the century, the Court came to view the wall of separation as a mere "blurred, indistinct, and variable barrier."[112] While the Court's current position is difficult to define, it appears less supportive of an absolute separation of church and state and more open to permitting the government "some latitude in recognizing and accommodating the central role religion plays in [American] society."[113]

Furthermore, the modern Court is increasingly using words like "pluralism" and praising diversity and its historic importance to the nation in its decision involving the Establishment and Free Exercise Clauses.[114] As one scholar declared, "We have to think about the First Amendment in light of who we have become. … This requires moving from a model of unity at the expense of diversity, to a model that expresses unity in the interest of diversity."[115] Thus, interpreting the principles of religious liberty may not just be a challenge for the judiciary, but one for all Americans.[116]

This Section highlights the importance of religion in the United States. It then describes the court's unwillingness to infringe on the free exercise and establishment rights of parents and the resulting reluctance of judges to truly consider religion as a factor in the best interest of the child standard. Even where proscribed by statute, judges generally do not consider religion unless there is a showing of harm. Such practice has its basis in the nation's history and is exemplified by numerous cases in the private custody context.

[111] Everson v. Board of Education of Township of Ewing, 330 U.S. 1, 16 (1947) (citing the views of Thomas Jefferson).

[112] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (citing Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

[113] County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage."); Murray, *supra* note 12, at 153.

[114] Murray, *supra* note 12, at 153 (citing, for example, *County of Allegheny*, 492 at 627 (O'Connor, J. concurring in part and dissenting in part).

[115] *Id.* at 22 (quoting Charles C. Haynes, Church and State and the First Amendment, Lecture at the FACS/Pew Journalism, Religion & Public Life Seminar (Sept. 23, 2003).

[116] *Id.* at 170.

3.1 Religious Freedom and Diversity in the United States

Religious interplay with the law has deep roots in American history.[117] The founding fathers wanted to preserve and promote freedom of religion to shield the already religiously diverse country from religious conflicts Europe had experienced in the preceding centuries.[118] Today the United States embraces religion more than any other developed nation.[119] The majority of the population accepts diversity and the state strives to provide equal recognition and respect to all religions,[120] but religious practices outside the mainstream have historically invoked hostility and led to prohibition and prosecution by the state.[121] The conflict can become quite pronounced when it involves the welfare of a child.

Child welfare has been and continues to be a contentious issue in First Amendment jurisprudence. Families serve as an important means of sustaining religious culture, and American families are becoming increasingly diverse. There has been an increase in interfaith marriages and children claiming a different religious identity than their parents.[122] These demographic changes require that modern courts pay greater attention to the issue of religion and walk a fine line between protecting the constitutional rights of parents and the welfare of the child in both private cases

[117] *See* County of Allegheny v. ACLU, 492 U.S. 573, 589 (1989) ("This nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American continent.").

[118] A Delicate Balance: The Free Exercise Clause and the Supreme Court, The Pew Forum on Religion and Public Life (Oct. 2007) *available at* http://pewforum.org/assets/files/free-exercise-1.pdf.

[119] A 2002 Pew study reports that fifty-nine percent of Americans claim that "religion plays a very important role in their lives," as compared to thirty-three percent of the British, thirty percent of Canadians, and just eleven percent of the French. *See* Murray, *supra note* 12, at 4.

[120] *See* Carolyn Hamilton, Family, Law and Religion 1–2 (1995). The United States is a nation with diverse religious affiliations—over 3,000 groups—but has a strong majority of Christians, with over seventy-eight percent of the population belonging to the faith. *See* Murray, *supra note* 12, at 4, 10.

[121] Norgen & Nanda, *supra* note 5, at 139. Conflicts have most notably arisen between the government and members of fundamental religions and minority religious groups, including Mormons, Jehovah's Witnesses, and the Amish. *See, e.g.*, Religious Composition of the U.S., *supra* note 54 (showing that Mormons comprise 1.7 percent of the total population, Jehovah's Witnesses make up 0.7 percent and the Amish represent less than 0.6 percent of all Americans).

[122] *See* Michael Loatman, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 Va. J. Soc. Pol. & L. 89, 89–90 (2005).

and those matters in which the state is directly involved.[123] This potential clash of interests often pushes family law to the forefront of freedom of religion debates.

3.2 Threat of Harm Standard

In the context of family law, courts have consistently protected the interest of parents with respect to controlling religious upbringing of their own children.[124] The United States Supreme Court case *Wisconsin v. Yoder* is often cited for this issue.[125] The *Yoder* test provides that only a grave threat of harm may justify state intrusion on a parent's free expression or fundamental right to direct the education and upbringing of a child and "parental authority in matters of religious upbringing may be encroached upon only upon a showing of a 'substantial threat' of 'physical or mental harm to the child.'"[126]

Courts often apply a similar test to the one set forth in *Yoder* to matters outside the educational arena, including high-profile cases involving life threatening medical situations. The Supreme Court stated in another landmark case, *Prince v. Massachusetts*, that a parent's right to practice religion did not include "the liberty to expose … the child … to ill health or death."[127] Resultantly, courts have been willing to order medical treatment for children whose lives are in danger, even if it is against their parent's religious beliefs.[128]

It appears that courts use a similar standard considering the potential grave threat of harm in determining the best interest of the child in private disputes. While religion may still influence the court's opinion, judges carefully compose their decisions to downplay its role or avoid the subject altogether. Following this practice, most courts only deny custody on the basis of religion when the religious practices of the custodian are inimical to the welfare of the child.

[123] *See* Carolyn Hamilton, family, law and religion 337–38 (1995).

[124] *See* 124 A.L.R. 5th 203.

[125] 406 U.S. 205 (1972).

[126] *Id.* at 230 (treating the matter as an issue of parents' constitutional rights rather than addressing the best interest of the child).

[127] 321 U.S. 158, 166–67 (1944)

[128] *See, e.g.*, Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488, 505 (W.D. Wash. 1967) (upholding legislation authorizing courts to order blood transfusions necessary to save the lives of children against the religious objections of their parents).

3.3 Neutral Approach to Weighing Religion Unless Harm Found

The United States seems to recognize the necessity for tolerance and respect in a pluralistic society, but private disputes among families pushes courts to the limits of the religious impartiality. The Supreme Court has interpreted the First Amendment to mean that the government "must be neutral in matters of religious theory, doctrine, and practice."[129] The government may not be hostile to or advocate any religion, and "it may not aid, foster or promote one religion … against another."[130] Many courts have taken the position that religion may be only considered in the best interests of the child standard if viewed with a strict impartiality between religions.[131] In custody cases, the Free Exercise and Establishment Clauses have been interpreted to mean that a trial judge must maintain absolute neutrality with regard to favoring one religion over another or even a religious parent over a non-religious parent.

Traditionally, such judicial determinations favored the more religious parent, but today non-religious activities are also viewed as possible means of developing the moral and social responsibility of a child.[132] Furthermore, secular courts do not weigh the relative merits of religions or question an individual's beliefs.[133] Rather than passing judgment on a religion, the courts attempt to determine the impact of a religion on the

[129] *See* Epperson v. Arkansas, 393 U.S. 97, 103 (1968)

[130] See id.

[131] There are numerous cases supporting the view that a court in a child custody proceeding cannot pass judgment on the comparative merits of religions. *See, e.g.*, Osteraas v. Osteraas, 859 P.2d 948, 953 (Idaho 1993); In re Marriage of Decker, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003); Ficker v. Ficker, 62 S.W.3d 496, 499 (Mo. Ct. App. E.E. 2001); Gould v. Gould, 342 N.W.2d 426, 432 (Wis. 1984).

[132] Kent Greenawalt, *Child Custody, Religious Practices, and Conscience*, 76 U. Colo. L. Rev. 965, 968 (2005).

[133] *See* Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. App. 1967), *hearing granted and parties reached settlement rendering judgment moot,* 59 Cal. Rptr. 503 (Cal. App. 1967). The appellate court supported this approach by maintaining:

> 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 in the best interests of the child, we open a Pandora's box which can never be closed. By their very nature religious evaluations are subject to disbelief and difference of opinion. The First Amendment in conjunction with the Fourteenth solves the problem; it legally prohibits such religious evaluations.

Id. at 516.

welfare of the child and ascertain whether its practices would harm or endanger the child's health or well-being.

To decide for one custodian on the basis of religion alone would be a breach of the Free Exercise and Establishment Clauses, so courts must consider the practical consequences of membership of a particular religion.[134] A court may discriminate against a parent on the basis of religion in limited circumstances. While it cannot hold that one parent's religion is preferable, a court can find that it is not in the best interests of the child to follow the practices of a certain religion. The court must assess the effects of the parent's religious practices on the child rather than evaluate the religion itself.[135] If evidence substantiates that the religious practices endanger the child's welfare, the court may justifiably refuse to grant custody to the practicing parent.[136]

When looking at the totality of the circumstances, a court may find that one parent's religious practices may be harmful to the child or not in his or her best interests. If it such practices and tenets of belief are simply not in the child's best interests, courts tend to rule in favor of a parent's right to transmit religious values to the child. Courts very rarely find that it is against a child's best interest to be brought up within the practices of one parent's beliefs.

3.4 *Shepp v. Shepp*: A Private Child Custody Case Emphasizing a Parent's Constitutional Right of Free Exercise of Religion

A recent and prime example of the court's reluctance to curtail a parent's right to religious freedom in a private dispute is *Shepp v. Shepp*.[137] The 2006 case posed the question of whether a parent who preached beliefs contrary to the law should lose joint custody of his child.[138] In *Shepp v. Shepp*, both parents had converted to the Mormon faith before marriage, but the father was later excommunicated from the church because of his

[134] *See generally*, Neela Banerjee, *Religion Joins Custody Cases, to Judges' Unease*, N.Y. Times, Feb. 13, 2008, *available at* http://www.nytimes.com/2008/02/13/us/13custody.html?_r=1&scp=1&sq=religion%20custody&st=cse&oref=slogin.

[135] *See* Hamilton, *supra* note 119, at 185–86.

[136] *See id.*

[137] Shepp v. Shepp, 906 A.2d 1165 (Pa. 2006).

[138] *Id.*

fundamentalist beliefs, which included polygamy.[139] The father shared custody with the couple's one child after the divorce, and he taught her about plural marriages as part of his fundamental Mormon philosophy.[140] In a hearing to determine the father's request for primary custody, the trial court found that both parents appeared to have "adequate character, conduct, and fitness."[141] The one exception to this finding the court noted was the fact that the father acknowledged a belief in polygamy.[142] If acted upon, this belief would be illegal in the commonwealth and "immoral and illogical."[143] The court awarded primary custody to the mother and prohibited the father from teaching his nine year-old child about polygamy.[144] The Superior Court affirmed, as it found it to be in the child's best interest to restrict the father's plural marriage teachings until she was eighteen years old.[145]

The Supreme Court of Pennsylvania balanced the competing interests of free exercise of religion as guaranteed by the First Amendment of the United States Constitution and the best interest of the child standard, which included the public policy consideration of assuring children contact with and care from both parents after a divorce.[146] The court expounded that child custody decisions had to focus on the "character and conduct" of the individual parties involved.[147] It also held that it could prohibit a parent from advocating religious beliefs that constitute crimes, such as polygamy, but only where "it [was] established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child."[148]

In this case, no harm was established and thus the court neither prohibited the father's speech nor revoked his shared physical custody of the child.[149] In reversing the lower court's decision, the Supreme Court of Pennsylvania avoided infringing the father's constitutionally protected

[139] *Id.* at 1166.
[140] *Id.* at 1167.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 1168.
[145] *Id.*
[146] *Id.* at 1168–69.
[147] *Id.* at 1174.
[148] *Id.* (following the framework of *Wisconsin v. Yoder,* 406 U.S. 205 (1972)).
[149] *Id.*

rights. *Shepp v. Shepp* is representative of a growing line of cases that recognize the role of religion in child custody determinations but fail to make decisions based on this factor for fear of breaching the parent's right of free exercise of religion.

3.5 Other Examples of Religious Considerations in Private Child Custody Determinations

Even in the face of constitutionally-required religious neutrality, it is the paramount interest of the court to find what is in the best interest of the child and "[t]o hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interest of the child."[150] Yet case law demonstrates that courts almost always avoid touching the religion question unless the religious practices are inimical to the child's best interests. In instances where religion is not a grave threat of harm, the courts make custody determinations based on factors other than the parties' beliefs.

Where actual harm is found, courts rule against the parent's right to indoctrinate the child. In *In the Marriage of Hadeen*, the court held that religious practices could be considered in custody determinations to the extent that they would jeopardize the physical safety or mental health of the child.[151] The case centered on a parental dispute that arose where the mother was raising her children as members of the First Community Churches of America.[152] The trial court found that the separatist sect was harsh and deprived children of normal social contacts.[153] Reasoning that the child's mental health and opportunity for personal growth would be better developed with the non-sectist father, the trial court took custody of four of the five daughters away from the mother.[154] The appellate court reversed, finding that there was no evidence that the practices of the separatist sect had any effect on the well-being of the child.[155] The court concluded that there had to be a showing of "reasonable and substantial likelihood" of immediate or future impairment before it could consider

[150] Bonjour v. Bonjour, 592 P.2d 1233, 1238 (Alaska 1979).
[151] *See* In re the Marriage of Hadeen, 619 P.2d 374 (1980).
[152] *See id.* at 375.
[153] *Id.*
[154] *Id.* at 379.
[155] *Id.* at 382.

and weigh the practices of the religion in a private dispute.[156] The court did not consider the mother's use of corporal punishment, rejection for disobedience, and teachings of alienation of non-members, because it held that such practices were part of her religion and thus improper considerations for the court to review in the absence of temporal harm.[157] This exemplifies the impossibility the courts face: balancing the best interest of the child standard with free exercise of a religion that includes practices the majority vehemently opposes.

Some states do not require an explicit showing of immediate harm but rather purport to take all circumstances into account when considering religion as a factor in private child custody determinations. The analysis in these jurisdictions follows closely with the cases described above, but they often decide against awarding custody to the strictly religious parent in instances in which states requiring a showing of harm would be unlikely to come to such a conclusion. In *Burman v. Burman*, the court maintained that it had a duty to examine the impact of the parent's beliefs on the child even in the absence of evidentiary support of future impairment.[158] Again the case involved a mother raising her children in a fundamentalist sect in opposition to the father's wishes.[159] As part of the Tridentine Church, the mother believed the child was illegitimate since the parents were not married in the church and was willing to desert the child if she disobeyed the rules of the church.[160] The Nebraska court ruled it was not in the best interest of the child to remain with her mother and awarded custody to the father.[161] Without a showing of temporal harm, the court exposed itself to criticism that it was in breach of the mother's constitutional right to free exercise of religion.[162]

A similar standard was applied in *Ex parte Snider*, a case in which a staunchly conservative Christian mother petitioned the Alabama Supreme Court to reverse a child custody order granted in favor of her

[156] *Id.*

[157] *Id.* The dissent felt the punishment inflicted by the mother constituted child abuse. *Id.* at 584 (Dore, J., dissenting).

[158] 304 N.W.2d 58, 61 (1981).

[159] *Id.* at 60.

[160] *Id.*at 62.

[161] *Id.*

[162] *See, e.g.*, R. Collin Mangrum, *Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 Creighton L. Rev. 25 (1981).

ex-husband.[163] The mother believed that the lower court granted the change in custody based solely on her religious beliefs.[164] She had remarried and moved her daughter to an isolated rural area, far from her ex-husband and extended family, in order to be closer to her missionary work.[165] Following what they believed to be the Biblical standards of childrearing, the mother and her new husband used corporal punishment on the child and alienated her from her father and grandparents.[166] The Alabama Supreme Court quashed her petition for custody, because it found that the lower court had not used her religious beliefs as the "sole determinant" in the custody award and the evidence presented was sufficient to establish the change in custody would be in the child's best interest.[167] The *Snider* court was careful to avoid infringing on the mother's free exercise of religion, although the dissent argued the order impermissibly restricted her right to control her child's religious upbringing.[168] This case illustrates the fine line that judges must walk in balancing the competing interests to which they are constitutionally bound in child custody cases.

Families transmit their religious values to their child, which results in a continuation of the faith. Much like ICWA's role in preserving tribal culture, religion serves to perpetuate the parents' religious convictions through the teaching of their children. While courts in the United States attempt to recognize and respect the various faiths, religion remains a controversial consideration in child custody disputes.

Conclusion

The best interests of the child standard governs private child custody determinations in the United States. The flexible standard incorporates a variety of factors to be considered and evaluated. While family law is generally a matter left to the state, federal law dictates two factors in the best interests analysis. Both of these factors incorporate the cultural aspects reflected in American diversity and demonstrate a fascinating intersection of family law and constitutional theory. Through enactment of ICWA,

[163] Ex parte Snider, 929 So.2d 447, 449 (Ala. 2005).
[164] *Id.* at 450.
[165] *Id.*
[166] *Id.* at 460 (Parker, J., dissenting).
[167] *Id.* at 459.
[168] *Id.* at 461 (Parker, J., dissenting).

Congress mandated consideration of tribal affiliation in specific custody cases involving Indian children. On the other end of the spectrum, the First Amendment limits the role that religion may play in private child custody disputes. The use of these cultural factors is debated and can be controversial when incorporated into a best interests analysis.

This Article does not take a position on whether the use of these factors actually ascertains the best interests of the child, but does encourage cultural competency in child custody jurisprudence. Since diverse families are the fastest growing segment of the United States' population, the consideration of cultural issues will likely pervade future private custody decisions. Successful adjudications will require more than simply embracing the nation's diversity. They will compel a recognition of the major influence culture has on parenting practices and necessitate an understanding of differing values, norms, traditions, and beliefs of the parties involved in custody determinations. Contemporary child custody jurisprudence seeks to synchronously protect children's welfare and preserve their heritage. The best interests of the child standard grants trial courts great discretion and challenges secular judges to allow children "to learn who they are." Society is interested.