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# Case Tackles Agreements to Raise Children Under a Defined Religion: Part II

Alberto Yohanoff reviews, from a psychological perspective, the decision in 'Weisberger v. Weisberger', in which the Appellate Division modified a religious observance provision arising out of a Stipulation of Settlement and subsequent motion practice.

By **Alberto Yohanoff** | January 11, 2018

In this second installment of the article, we will analyze the matter through the view of a forensic psychologist

## Psychological Perspective

From a psychological perspective, a good starting point may be to recognize that when a couple marries, there is a psychological recognition that life is dynamic and the future may bring unwanted twists. The established criterion in determining child custody in forensic evaluations is the “best interest of the child.” Since the early 1970s, numerous attempts have been made to operationalize this concept (please refer to Michigan Child’s Custody Act, 1970), ultimately there is no consensus regarding the factors that should be taken into account in such an analysis and the definition of best interest remains somewhat amorphous and subjective.

Nonetheless, factors that the evaluators typically consider as they apply to the particulars of the Weisberger’s case include:



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- The capacity of the competing parties to provide children with basic needs (food, clothing, medical) as well remedial care
- The capacity of the competing parties to provide nurturing and guidance and to meet the child's educational needs
- The love, affection and the emotional ties between the children and the competing parties.
- The length of time the children have lived in a particular environment and the desirability to maintain stability and continuity
- The home, school, and community where the children have resided and the permanence of these arrangements
- The children's adjustment to their environment, including length of time of their residence
- Each caretaker's involvement prior to and after the marital separation
- The parents' flexibility and their overall parenting skills
- The level of hostility/friction between parents
- The capacity of each parent to foster relationship with other parent
- The children's wishes

The parental agreement following the separation, in *Weisberger*, was such that the mother—historically the children's primary caretaker and the parental figure the children were most connected to—would remain the primary custodial figure provided that the children were raised in strictly Orthodox manner. One could argue that implicit in the original agreement was that the mother was the best party to provide for nurturing and guidance for the children, and that their educational needs would be met by insuring that they attend the same type of religious institution they attended all along. In other words, the children's need for stability and continuity would be maintained by insuring the permanence of the custodial and educational arrangements that were there all along.

The question raised by *Weisberger* and by other cases in which one of the parents makes significant changes to his or her lifestyle is: How does one define the best interest of the children in the aftermath of these changes? One possibility is that the parent who intends to make significant lifestyle changes that would bear an impact on the children would refrain from doing so to promote the stability and continuity in the children's life, and to prevent the children from being exposed to radically different lifestyles, which may promote confusion. However, how realistic is it to expect from a parent to maintain appearances and deny his or her individual strivings for self-fulfillment even though they committed themselves to do so under a contractual obligation? How does the fact that the mother reneged on her contract affect the best interest analysis in this case?

A “best interest of the child” analysis in this type of case could take different directions, and each option would have a set of positives and negatives. The children remaining in their mother’s care, with regular contact with the father, would ensure that the children remain with the party who has historically been the primary caretaker for the children. This disposition, though it may be consistent with the children’s wishes, would present problems with respect to the children being exposed to conflicting values and religious outlooks in different homes, which would then create confusion regarding the religious values they are being taught, as reflected in their education. In other words, such an arrangement would ensure stability and consistency with respect to caretaking functions, but could sow confusion with respect to issues pertaining to values, education, and religious outlook, all important with respect to the children’s formation of their identity.

The alternative, switching custody to the father, with visitations to the mother, would preserve continuity in the children’s educational upbringing at the cost of transitioning the children to the father, who historically has not been the primary caretaker of the children for most of their young lives. Therefore, one way to look at the *Weisberger* case in an analysis of the child’s best interest is to consider *what aspect of continuity and stability is most important*: the role of primary emotional caretaker for the children, or the philosophical and religious upbringing of the children. A forensic evaluation ordered in such type of case would have to weigh the relative merit of these two competing factors—stability in the context of religious upbringing (and its impact on a child’s budding sense of identity) versus continuity of the primary caretaker (i.e., emotional stability).

The role of religion in child custody disputes is complex and has been examined by several authors (see Benning, 1997 *Drake Law Review*; Blackwell, 2006, *Appalachian Law Journal*; Drobac, 1998 *Stamford Law Review*). The appellate court decision strived to strike a compromise position awarding physical custody to the mother, while enforcing some of the provisions regarding their religious upbringing, and ensuring continuity of contact with the father. Such an imperfect solution essentially translates into consistently exposing the children to conflicting values and religious outlooks by virtue of the back-and-forth between the parental homes. This, in turn, raises question marks as to how these circumstances would bear an impact on the children’s identity formation. On taking a closer look, though, this choice may be a false dichotomy. This is so because an important value in raising children is for the parents to foster the children’s ability to think independently about complex issues such as religious outlook. This would be considered by many professionals to be part of the healthy development of a child, because it involves their understanding that life is nuanced and complex.

An equally important part of the equation in such an analysis of best interests is to factor in the ages of the children and their developmental stages, because the impact of the exposure to different values and religious outlooks could vary depending on the particular age and developmental stage of the children given that children’s age and development would dictate what children are capable of grasping at different ages. See Johnston, Roseby & Kuehle, “In the Name of the Child” (2009)). Furthermore, children are malleable, resilient and can adapt and adjust to changes in their lives, provided that the parents lay the foundations regarding the capacity to think independently. If the children are presented with conflicting messages, it is important that the parents do so through gradual exposure.

The questions raised by *Weisberger* ultimately are part of a broader issue of how parents handle their conflicting values and beliefs and the way they impart them to the children. It seems to the undersigned that, ultimately, an analysis of the children's best interest should be dictated by examining the parent's capacity to love, care, and nurture, alongside the parenting skills they have that enable the children to thrive.

In a best interest of the children analysis, another important criterion that needs to be considered is the capacity of a parent to foster the children's relationship with the other parent (see Eve, Byrne & Gagliardi, "Family Court Review" (2014)). Problems may be compounded when differences in religious outlook, philosophy and values are an excuse to mask the conflicted relationship between the parties. It is important to note that the parents' different religious outlooks and the children's exposure to those differences do not necessarily have to carry negative and confusing messages to the children if the parents' attitude is one of mutual respect. That will determine how the children internalize the back-and-forth between the parents on this issue. If the parents disagree about the values they want to impart or religious observance, but do so in respectful manner, such differences could be viewed as an opportunity to teach the children to develop (over time) an individual point of view that is nuanced and sophisticated. Conversely, if the parents are disparaging of the spouse's alternative lifestyle, this would likely make their exposure to different values and religious outlook more difficult to digest. The way children would make sense of, and internalize, a parent's disparaging remarks and any perceived transgression in observance, would likely vary depending on a range of factors, including the child's temperament, the child's developmental stage, his or her particular vulnerabilities and the child's relationship with each parent (the disparaging parent, and the transgressing parent).

Thus, in the undersigned's opinion it is *the way the parents communicate their differences to the children that is critical*, because respectful disagreements teach the children to be tolerant about differences and can foster and accelerate the children's drive for independence and critical thinking. Stated differently, acknowledging differences in values, religion and philosophical outlook does not condemn the children to an identity crisis or confusion if the parent can communicate these differences appropriately and can be tolerant and respectful of the other's parent teaching. In such a scenario, the parents' philosophical differences become a modeling opportunity that can enhance the children's growth. In other words, *it's all in how things are done*, that is, in the implementation, by the parents, of the court mandates. Exposures to differences and contradictory behavior are important and could be even adaptive in the children's development and should not be viewed as being inherently against the children's best interests (nor avoidable). Mundane examples abound of parents engaging in behavior that contradicts their spoken instructions to their children. Take, for example, the parent who smokes but forbids his children to, or the parent who routinely jaywalks but insists that his child obey traffic rules. Children grow up observing the contradictory behavior of their parents and, over time, come to understand the complexity of human behavior and how to make sense of their own choices.

Thus, in the undersigned's opinion, *Weisberger* ultimately should not be viewed through the eye of a "false" dilemma—is it better to keep the children in the same household to insure stability in their emotional upbringing while risking confusion about their developing identity by exposing them to different practices across homes? Rather, a better way to examine this potential conundrum is that the children's best

interest may be best served by insuring continuity of care with their primary caretaker, while using the religious and philosophical differences across households as an opportunity for the children to learn that their parents differ about religious or cultural values, and that is “ok.” In other words, the parents’ attitude could be instrumental in allowing the children to learn to be tolerant about such differences and use such differences as a vehicle for their personal growth.

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