

# For Heaven's Sake, Give the Child a Voice: An ADR Approach to Interfaith Child Custody Disputes

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## I. INTRODUCTION

The right to maintain complete control over the rearing of children is traditionally held to be a fundamental right of parenting.<sup>1</sup> However, enforcement of this parental right often fails to accommodate the rights of children.<sup>2</sup> Courts have attempted to protect the rights of children by setting standards by which the choices of parents are limited in regard to child-rearing practices.<sup>3</sup> One particularly troubling context in which this conflict of rights manifests itself is when courts have been importuned to assist parents in determining child custody arrangements upon the dissolution of their marriage. While factors have been somewhat consistently laid out to determine this issue in accordance with the "best interests" of the child,<sup>4</sup> some relevant factors lie outside of the authority of the courts. Religion is

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1. See U.S. CONST. amend. V; U.S. CONST. amend. XIV. See also George L. Blum, Annotation, *Religion as a Factor in Child Custody Cases*, 124 A.L.R. 203, §2[b] (2004).

2. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

3. See George L. Blum, Annotation, *Religion as a Factor in Visitation Cases*, 95 A.L.R. 5th 533 (2002).

4. *Id.* Under the Uniform Marriage and Divorce Act, courts must determine child custody in accordance with the "best interest" of the child by considering relevant factors. Those factors include, but are not limited to: the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with parents, siblings, and other persons who may significantly affect the child's best interests; the child's adjustments to his home, school, and community; and the mental and physical health of all individuals involved. *Id.*

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one such factor<sup>5</sup> in that it directly affects the well being of the child, while at the same time, consideration of religion as a factor in child custody disputes is in many cases unconstitutional.<sup>6</sup> However, it would be disadvantageous to all parties involved to ignore religion as a factor entirely based on these grounds.<sup>7</sup> There has been ample study devoted to the problems that arise when courts are faced with custody disputes intertwined with issues of religion. Unfortunately, many of those studies conclude without proposing an effective solution or by suggesting an alternative without defining what that alternative might be.<sup>8</sup>

A solution must be employed that allows religious consideration in a forum more suitable to facilitating a resolution in the complete best interest of the child and parents. Mediation provides this forum by facilitating a negotiation in which parents are allowed to develop their own collaborative solutions to interfaith child custody disputes. Through techniques unique to the practice of mediation, parents are more capable of resolving religious conflicts affecting child custody, and thereby enabling the parties to create a parenting plan and binding mediation agreement that would not only resolve immediate divorce contestations, but also provide a basis from which to resolve future issues. The flexibility of mediation also allows for

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5. Some states have codified the best interest standard to include the child's spiritual well being. *See, e.g.*, Alaska Stat. § 25.24.150(c)(1) (1983). However, despite the inclusion of religion as a factor, courts remain limited in their consideration of religion due to constitutional parameters. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV; U.S. CONST. amend. I.

6. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV; U.S. CONST. amend. I. The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee parental liberty, while the First Amendment guarantees freedom of religion. *Id.* Under the Establishment Clause of the First Amendment, courts are forbidden to indicate preference for or support of one religion over another. U.S. CONST. amend. I. Therefore, "American courts have insisted that harm to the children be shown before denying custody on the basis of religion, although they have disagreed over the certainty and amount of harm necessary." Shauna Van Praagh, *Religion, Custody, and a Child's Identities*, 35 OSGOODE HALL L.J. 309, 330 (1997). For further discussion of harm required, see *infra* Part III.

7. *See* *Morris v. Morris*, 412 A.2d 139, 142 (Pa. Super. Ct. 1979). "It would be an egregious error for our courts in a custody dispute to scrutinize the ability of the parents to foster the child's emotional development, their capacity to provide adequate shelter and sustenance, and their relative income, yet not review their respective religious beliefs." *Id.*

8. *See, e.g.*, C.E. Schneider, *Religion and Child Custody*, 25 U. MICH. J. LAW. REF. 879, 896-97 (1992) ("Courts must somehow resolve custody disputes between divorcing parents, even when those disputes involve a parent's religious beliefs . . . . What we must work toward here, as elsewhere in the law of child custody, are courts that try as diligently and earnestly as possible to encourage parents to agree on their own to custody arrangements they would find satisfactory and that try, when all else fails, to decipher the child's best interests as thoughtfully and decently as possible.") (emphasis added). While Schneider seems to be suggesting the right approach, he does not offer ways in which we might encourage parents to do so.

considerable advocacy of the child's rights without the burden of legislature that requires the balancing of parental-rights against state responsibilities.

Part II of this article purports to identify the need for an alternative to litigation in these cases by defining the social context in which these cases have become more prevalent, the constitutional barriers faced by courts, and the inadequate protection afforded to children's rights in traditional litigation. In response to that need, Part III proposes a specific mediation model, drawing guidance from the courts, that involves: an evaluative stage in which the parents and child are afforded an opportunity to express their interests, a facilitative stage in which the mediator and other participants assist the parties in resolving the dispute with an aim towards consistency, and the formulation of an agreement that serves the best interests of the child and is perceived as fair by the parents. The mediation model utilizes a structured and process-oriented approach, which incorporates the participation of advocates for both the child and the religious preferences of the parents. Part IV concludes this article by emphasizing that the use of the proposed mediation techniques provides a solution to the problems faced by courts, divorcing couples, and children in the context of determining the religious upbringing of children in custody conflicts.

## II. THE NEED FOR AN ALTERNATIVE

In a society where divorce is prevalent,<sup>9</sup> there has been a general rise in child custody conflicts over the past several decades, due in part to courts abandoning historical, gender-biased custody presumptions in favor of a gender-neutral, judicially determined "best interests" of the child analysis.<sup>10</sup>

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9. See Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, JUV. JUST. BULL., Dec. 2001, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/189181.pdf>. "America is a society with a substantial divorce rate. Each year, more than 1,000,000 children in the United States are affected by the divorce of their parents, and of all children who are born to married parents this year, half are likely to experience a divorce in their families before they reach their 18th birthdays." *Id.*

10. The majority opinion in *Zummo v. Zummo*, 574 A.2d 1130, 1135 (Pa. Super. Ct. 1990), summarizes the legislative history:

Historically, courts have resolved such conflicting claims to post-divorce parental authority with rules and rigid presumptions rather than searching or individualized analysis. Until the early nineteenth century the ancient doctrine of *patria potestas* gave fathers virtually unlimited right to custody and control of all legitimate off-spring until they reached the legal age of majority. In the early nineteenth century, courts began to reject *patria potestas* in favor of a *pariens patria* power of the government to award custody in accordance with the judicially determined "best interests" of the children. In

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Additionally, custody conflicts focusing on religious issues have increased due to shifting social patterns and norms.<sup>11</sup> While custody disputes have traditionally been resolved through litigation, these disputes involving religious differences present unique challenges in formal litigation, most notably constitutional limitations and the inadequate protection of children's rights resulting from those limitations.

*A. A Real World Example: The Reyes Case*

A bitter dispute that has recently received considerable media attention accurately represents the problems faced by parents of different faiths embarking upon divorce and child custody proceedings in the traditional litigation system. A judge in Cook County, Illinois, recently issued a temporary restraining order (TRO) against a father, Joseph Reyes, forbidding him from exposing his three year-old daughter, Ela, to any religion other than Judaism during his designated visitation.<sup>12</sup> The TRO was requested and ordered after Joseph e-mailed photos of Ela being baptized in the Catholic Church to Ela's mother in November 2009.<sup>13</sup> Ela's mother, Rebecca Shapiro, is Jewish, and although Joseph converted to Judaism following his marriage to Rebecca, he currently identifies himself as Catholic.<sup>14</sup> Rebecca maintains that the couple agreed to raise Ela in the Jewish faith during their marriage, while Joseph contends that there was no

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practice, however, rejection of the paternal preference embodied in the *patria potestas* doctrine merely paved the way for a maternal preference *via* the tender years presumption which dominated the "best interests" analysis.

*Id.* The "tender years" doctrine encompasses the "presumption that when the children were of 'tender years,' the mother, unless shown to be unfit, should be given preference over the father in the award of custody." Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1976).

11. 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>. In addition to the general increase in parental conflict over custody, the increased incidence of interfaith marriage and willingness by Americans to convert play an important role in the upsurge of custody cases focused on religion. *Id.*

12. Cynthia Dizikes & Kristen Mack, *Divorcing Couple War Over Child's Religion*, CHI. TRIB., Feb. 16, 2010, available at <http://www.chicagotribune.com/news/local/ct-met-interfaith-divorce-20100216,0,2673258.story>.

13. *Id.*

14. *Id.* Joseph converted to Judaism after marrying Rebecca in October 2004. *Id.* He claims that the decision to convert was not voluntary; rather, it was the result of immense pressure from Rebecca's parents that was putting a heavy strain on their marriage. Cleo Andreadis, *Joseph Reyes on Being Barred from Taking Child to Church*, ABC NEWS, <http://abcnews.go.com/TheLaw/father-face-months-jail-taking-daughter-church/story?id=9845952> (last visited Feb. 24, 2010) (providing a transcript of Reyes's Feb. 16th 2010 interview with ABC correspondent, Chris Cuomo).

such agreement,<sup>15</sup> and rather that Ela was exposed to both Jewish and Catholic traditions since birth.<sup>16</sup> Joseph claims that the judge who issued the TRO failed to follow the “best interest of the child” standard and instead “engaged in name-calling, gave his decision, based it on the distinction that he made in his mind’s eye between Judaism and Catholicism, and that was the end of it.”<sup>17</sup> In response to the TRO, Joseph invited a news crew to follow him and Ela as they attended mass at Holy Name Cathedral.<sup>18</sup> Joseph is currently being held in contempt for violating the order, a charge that carries a maximum jail sentence of six months.<sup>19</sup> Joseph stated, “The fact that this order was even issued speaks to the fact that judges are willing to encroach on fundamental rights simply to appease an unreasonable party in divorce hearings.”<sup>20</sup> Just weeks after the TRO was issued, the court entered a Judgment for Dissolution of Marriage granting Joseph the freedom to take Ela to church during his visitation time,<sup>21</sup> a decision entirely inconsistent with the TRO he is accused of violating. The inconsistent rulings in this case present an ideal opportunity to demonstrate how a specific mediation model can serve to minimize the negative consequences of resolving these disputes in traditional litigation.

### *B. A Constitutional Problem*

Under the Establishment Clause of the First Amendment, parents are guaranteed a constitutional right to freedom of religion,<sup>22</sup> which translates to a right to determine the religious upbringing of their children as well.

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15. Dizikes & Mack, *supra* note 12.

16. See Andreadis, *supra* note 14. In his interview with Chris Cuomo from ABC News, Joseph stated:

There was no religious decision made in terms of Ela will be raised in this religion. Basically my wife and I had both practiced openly. For example, we would celebrate Christmas together, we would celebrate Easter together, we would also celebrate Rosh Hashanah together, we would celebrate Hanukkah together. So, it wasn’t a matter of, you know, one or the other, it was a matter of celebrating both.

*Id.*

17. *Id.*

18. See *id.*; Dizikes & Mack, *supra* note 12.

19. Dizikes & Mack, *supra* note 12.

20. Andreadis, *supra* note 14.

21. In re Marriage of Reyes, No. 08 D 4072 / 08 D 4080 (Ill. Cir. Ct. 2010) (Judgment for Dissolution of Marriage).

22. See U.S. CONST. amend. I.

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Consequently, a court is limited in its authority to decide custody issues based on religious criteria.<sup>23</sup> Courts have wide discretion to limit parental freedom when the child's welfare is at stake, however, they must avoid making this determination directly on religious grounds.<sup>24</sup> Where a careful balance must be struck between the best interest of the child and the constitutionally protected religious freedom of the parties involved, courts are forced to expend valuable time and resources focusing on achieving this balance rather than directly resolving the issue at hand.<sup>25</sup>

Religion arises in several contexts within child custody disputes, the most difficult being that in which both parents intend to give the child religious training, but each parent subscribes to a different religion.<sup>26</sup> This is precisely the context of the aforementioned *Reyes* case. In these disputes, courts are faced with the issue of weighing one religion against the other: a

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23. See Blum, *supra* note 3, at §2[b] (“It is typically held that any state action regarding religion . . . must satisfy three criteria to be permissible under the Federal Constitution: (1) it must have a secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and, (3) it must not foster excessive government entanglement with religion.”).

24. See *Morris v. Morris*, 412 A.2d 139, 143 (Pa. Super. Ct. 1979) (“In matters of custody [. . .] the courts of this Commonwealth, in accord with those in other jurisdictions, have consistently held that while religious beliefs must not constitute the sole determinant in a child custody award, the court may consider those beliefs in rendering a decree.”); *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971) (“Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.”); see also *Ex parte Hilley*, 405 So. 2d 708 (Ala. 1981) (requiring a mother to curtail all religious activities that caused her to be away from the children was an abuse of discretion and effectively restricted her free exercise of religion; only if the court found that her involvement in the church would be detrimental to the children's well being, could the issue of religion be considered); *Bonjour v. Bonjour*, 592 P.2d 1233 (Ala. 1979) (directing the trial judge to consider the religious and social needs of the child is constitutional only in so much as there is an actual showing of those needs); *Osier v. Osier*, 410 A.2d 1027 (Me. 1980) (holding that a determination of custody involving inquiry into the religious practices of the parents is only appropriate where the court had made a threshold determination that the religious practice in question directly endangers the child's well-being and the parents conflicting interests are sufficiently balanced to minimize infringement on the parent's rights).

25. See *infra* note 33 and accompanying text. See also Praagh, *supra* note 6, at 334 (“The often uncompromising nature of religious beliefs means that no court-directed scheme of custody and access will fully meet the constitutional demands made by both parents.”). Litigation already poses huge financial and emotional burdens on the parties involved, therefore pursuing litigation in a context unfit for court intervention simply exacerbates these burdens.

26. Religion may enter the equation in many different contexts, but it is in this specific context that this article focuses. For additional situations where religion may become the core of the custody dispute, see Praagh, *supra* note 6, at 338 (explaining two situations where divorce in a diverse society includes parents of different religions where a religious community dictates a strict way of life or denial of custody to one parent might be “a severe blow to the particular community which, in turn, may articulate a claim based on equal standing and multiculturalism”).

determination forbidden by the Establishment Clause.<sup>27</sup> Consequently, judges are unwilling or unable to take on custody disputes deeply rooted in religion,<sup>28</sup> posing a problem for the parties endeavoring to resolve these disputes.<sup>29</sup> When judges *have* been willing to adjudicate, the outcome has been inconsistent,<sup>30</sup> leaving parents and children at the mercy of the court and interfering substantially with parental freedom.<sup>31</sup>

### C. *Protecting Children's Rights*

The inconsistent outcomes of custody disputes involving parents of different religions also puts children's well-being at risk by failing to provide individually tailored standards for determining a child's best interest in a context where these interests are highly complex and varied.<sup>32</sup> Additionally, the right of the child to practice the religion of their choice—or

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27. See U.S. CONST. amend. I.

28. See Banerjee, *supra* note 11. When judges do rule on these cases, they are faced with the serious concern that their judgment will be seen as an attack on the religious community or communities to which the parents belong. See *id.* Since mediation is a private process specifically tailored to the parents' individual case, and has no binding effect on future disputes, this risk is eliminated. See *id.*

29. Additionally, the question often arises whether to enforce pre-divorce religious training agreements. This determination is beyond the scope of this paper, but for further discussion, see *Zummo v. Zummo*, 574 A.2d 1130, 1143-1149 (Pa. Super. Ct. 1990).

30. *Id.* at 1149. Since states are free to determine their own criteria for resolving the issue, the case law is varied and the determinations, strictly circumstantial. *Id.* See also discussion *supra* Part II.A.

31. In the *Reyes* case, the judge chose to address the interfaith issue; a choice that Joseph found appalling. Andreadis, *supra* note 14. In his "20/20" interview, he states, "My jaw, it just hit the ground because [the judge] basically went through his reasoning which was all based on doctrinal separation; an area that typically, the judicial system abstains from getting into." *Id.* Joseph additionally states, "There are dads all over this country whose rights to be a parent are being infringed upon, there are dads who aren't seeing their child because someone, the estranged wife, decided to go into court and make a bunch of false accusations." *Id.* This statement is indicative of the negative response parents often have in these cases; one which can be mitigated tremendously by the mediation process.

32. See Praagh, *supra* note 6, at 335. "[It] is evident . . . that 'best interests' and 'harm' are both terms with open-ended definitions and, further, that they operate as sides of the same coin, both used to justify a judge's decision as to the scope of custody and access." See *id.* Joseph Reyes provides a real example of a parent who is aware of the shortcomings of the "best interest" standard. He states, "There's this standard which is completely undefined. The best interest of the child standard is really just a cloak for the courts to do whatever it chooses to do. That's horrible." Andreadis, *supra* note 14.

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none at all—finds no place in a court adjudicated custody case<sup>33</sup> where only the temporal well-being of the child may be considered. Primary focus by courts on the constitutional concerns surrounding parents' rights<sup>34</sup> often means that the equal right of children to freedom of religion fall by the wayside.<sup>35</sup> As the outcome of a custody dispute dictates the religious circumstances of the children more so than the parents, the main focus should not be whether the parents' rights are jeopardized, but rather whether

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33. See James G. Dwyer, *Parent's Religion and Children's Welfare: Debunking the Doctrine of Parent's Rights*, 82 CAL. L. REV. 1371, 1381 (1994). Dwyer comments on two cases in which the Supreme Court dealt with the Free Exercise Clause in conjunction with parenting (*Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Jehovah's Witnesses v. King County Hospital*, 390 U.S. 598 (1968)). Dwyer states:

These cases thus endorse an interpretation of certain constitutional provisions as conferring on some persons rights to control not only their own behaviors and life choices, but also those of certain other persons—namely, their children. Both cases appear to prescribe a balancing test, weighing the parents' interest in fulfilling their religious aspirations through their children against the State's interest in protecting the welfare of children and in promoting other societal values. Neither decision considered whether children have a right to protection from such manipulation by others.

Dwyer, *supra*, at 1382. He goes on to point out that in another Supreme Court case dealing with the Free Exercise Clause and parenting (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)), the majority states, "parents' free exercise right to control their children's lives also trumps any conflicting preferences or interests of the children, except where a state demonstrates that the children are at risk of serious harm . . . . The court thus suggested that parental free exercise rights can operate to limit the religious liberty of children." Dwyer, *supra*, at 1387-88.

34. See *id.* at 1424-26. The main rationale for the court's persistence in protecting parental control rights under the constitution is a matter of tradition rather than legitimacy:

That some practice or rule has a long tradition does not, however, mean that it is in anyone's interests; a tradition might persist even though on the whole it diminishes the well being of all concerned parties, including those who appear to be its beneficiaries. . . . However, when good reason exists for challenging such a traditional practice or rule, courts should ask whether it does in fact serve the interests supposed to underlie it, and whether it is indeed just and consistent with other legal principles. If a traditional rule or practice fails this test, then it no longer merits constitutional protection.

See *id.* Although today, children are considered to hold constitutional rights of their own, the continued practice of enforcing the parent's Free Exercise rights sometimes at the expense of the child's rights indicates that the legal system still falls short of providing parents and children equal protection under the law. See *id.*

35. See *Schneider, supra* note 8, at 899. "[W]e accord parents rights because we assume they are the best decision-makers for their own children. But people in and after a divorce are often wrapped up in a battle with each other, and they may only too easily lose sight of their children's interests." See *id.* See also *Praagh, supra* note 6, at 350 n.114. "[T]he ability to choose to be religious or not, or to adhere to a specific religion, is incorporated into the meaning of freedom of religion for adults." *Id.* "[W]hile a right to religious freedom, traditionally understood, does not appear to capture the perspective of children of interfaith parents engaged in a dispute over custody and religion, consideration of that perspective might contribute to a more child-responsive understanding of such a right." *Id.* at 351.

the children's rights are adequately protected in developing a custody arrangement that effectively serves their individual needs and interests.<sup>36</sup>

The aforementioned barriers faced by courts, coupled with the inadequate protection of children's rights, suggest the need for an alternative forum better suited to resolving custody issues rooted in religion. Mediation provides such a forum where parents are afforded an opportunity to maintain control over the determination of child custody issues in accordance with the objective and actual best interests of the child.

*D. Avoiding Future Litigation to Modify Custody Arrangements*

Although it may be temporarily beneficial to have a judge render a final decision in an especially complex custody dispute, the likely dissatisfaction of one or both parties increases the likelihood of the parties straying from the court order or returning to court to modify the arrangement.<sup>37</sup> Once the court has mandated a separation agreement, incorporated in the divorce decree, it can only be altered in the future if the court either finds that there was a clearly erroneous determination of the child's best interests or where the challenging party demonstrates a change in circumstances that no longer renders the arrangement in the best interest of the child.<sup>38</sup> In both situations, the parties are forced to return to litigation and effectively repeat the custody battle, requiring additional time, money, and stress. Through the flexibility of mediation procedures, a plan for the resolution of future disputes can be incorporated into the mediation agreement, reducing the need for future litigation.

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36. See generally Praagh, *supra* note 6, at 349. In reference to court adjudicated custody cases: "Custody and access arrangements concerning religion should be scrutinized for any infringement of the religious freedom of the children involved." *Id.* While the child's rights may take a back seat to the constitutional rights of the parents in a litigation setting, mediation provides a setting in which these interests can be afforded adequate protection prior to an arrangement being reached, therefore limiting the need for post-agreement scrutiny.

37. See Schneider, *supra* note 8, at 903. "People have particularly strong motives for following their own preferences in religion, and it is particularly problematic for government to monitor what happens in the privacy of families. Courts will thus often fail to persuade parents who disagree over religion to do what the judge asks." *Id.*

38. Blum, *supra* note 1.

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*E. Additional Advantages to Mediation*

There are further benefits to mediating religion-based custody disputes in regard to the mental and emotional well-being of all parties involved. First, courts recognize that “emotional distress to a child ‘arising from a parental dispute regarding a child’s religious upbringing may depend more on the manner in which the dispute is conducted, than the theological aspects of the dispute itself.’”<sup>39</sup> Second, the psychologically damaging effects of divorce for parents may also be mitigated in the mediation process by focusing on reaching an agreement that is perceived as fair rather than a simple application of the law as attempted by courts.<sup>40</sup> Finally, mediation poses less of a financial burden on parties,<sup>41</sup> which may serve to reduce the overall stress of the dissolution and facilitate a more effective resolution.

If one considers these benefits in the context of the *Reyes* case, it is clear that dragging a three-year-old child through the media circus that has ensued as a result of litigating this dispute could have long term psychological consequences for Ela. Additionally, the fact that Joseph does not view the arrangement as fair, as evidenced by his violation of the TRO, has psychologically damaging effects on both parents. These effects have manifested themselves in a protracted and unnecessary custody battle that has lasted well over a year.<sup>42</sup> The result is a waste of time and resources for both the parents and the courts.

*F. Mandatory Mediation*

Although not directly related to cases involving religion, many states have recognized the general challenges encountered by family law courts and have enacted mandatory mediation requirements authorized by statute

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39. *In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 345 (Cal. Ct. App. 1996) (quoting *Zummo v. Zummo*, 574 A.2d 1130, 1156 (Pa. Super. Ct. 1990)).

40. See Nina Meierding, *The Impact of Cultural and Religious Diversity in the Divorce Mediation Process*, *MEDIATION Q.*, 1992, at 297-305.

Despite the fact that divorce is one of the most traumatic occurrences in life, cultural and religious responses to divorce are irrelevant in the formal court process. Many divorcing couples, adrift in a sea of conflicting emotions, feel that the court is not interested in what is fair, only what is the law . . . . A cultural and religious frame of reference directly affects each party’s perspective on fairness, recognition of the importance of the conflict, and willingness to mediate and resolve the conflict.

*Id.* at 297.

41. CINNIE NOBLE, L. LESLIE DIZGUN & D. PAUL EDMOND, *MEDIATION ADVOCACY: EFFECTIVE CLIENT REPRESENTATION IN MEDIATION PROCEEDINGS* 21-22 (1998).

42. The *Reyes*’ divorce proceedings began in 2008. Dizikes & Mack, *supra* note 12.

for contested divorces.<sup>43</sup> While statutes mandating mediation may serve to minimize time and resources expended by inappropriate litigation, in contested divorce cases, the initial mandated mediation often serves to evaluate the conflict between parties rather than effectively facilitating a resolution. In addition, divorcing couples that are mandated to participate in mediation might be less likely to cooperate in reaching an agreement without court intervention. Mediators must be willing to encourage the parties to participate in further, voluntary mediation sessions, where the parties would likely find themselves in a more suitable forum to resolve difficult conflicts, such as determining the religious upbringing of their children.

### III. THE MEDIATION APPROACH

Before delineating a specific approach to mediation in these cases,<sup>44</sup> it is beneficial to look at the way in which courts have traditionally dealt with child custody disputes and then incorporate the religious interests of the parties involved. The mediation should still include consideration of all other relevant factors in addition to those involving religion.<sup>45</sup> Looking to the courts, judges may consider religious criteria in determining custody only when religion bears directly on the child's general welfare.<sup>46</sup> Among states, there are three prevalent legal standards for doing so: actual or substantial harm,<sup>47</sup> risk of harm,<sup>48</sup> and no harm required.<sup>49</sup> When there is

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43. See ALASKA STAT. § 25.24.060 (2009) (authorizing parties to request mediation, and authorizing courts to mandate mediation, if not requested, at any time if it determines that mediation may result in a more satisfactory settlement between parties); CAL. FAM. CODE § 3170 (West 2009) (authorizing courts to mandate mediation of contested issues in child custody and visitation proceedings); IOWA CODE § 598.41 (authorizing courts to mandate mediation prior to ruling upon joint custody proceedings, absent history of domestic abuse or resulting physical or emotional harm to the parties involved); OR. REV. STAT. § 107.755 (2009) (authorizing courts to mandate mediation and provide a mediation orientation session for all parties in which child custody, parenting time, or visitation is in dispute).

44. This article focuses primarily on using mediation to reach an agreement as to the religious upbringing of children subsequent to divorce; however the proposed techniques might also be applicable to additional elements of the child custody agreement.

45. See, e.g., Blum, *supra* note 3. See also *supra* text accompanying note 23.

46. See cases cited *supra* note 24; Dwyer, *supra* note 33, at 1428.

47. See *Pater v. Pater*, 588 N.E. 2d 794, 799-801 (Ohio 1992) (holding that religious customs that restrict a child's social activities are insufficient to justify court intervention absent a showing that these customs harm the mental or physical health of the child).

48. See *MacLagan v. Klein*, 473 S.E.2d 778, 786-87 (N.C. Ct. App. 1996) (holding that religious considerations were appropriate where exposing a Jewish child to Methodist services might

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clear evidence of actual harm to the child or a clear risk of harm, it may be more appropriate to pursue litigation in order to reach a custody arrangement that is in the best interest of the child. However, when this risk is unclear and the decision is a matter of weighing the relative merits of one religion over another, mediation is a more appropriate place to start in resolving the dispute. Absent clear standards for determining the best interests of the child, the mediator must take responsibility for ensuring that the child's interests are adequately represented in the mediation process and in the agreed upon custody arrangement.<sup>50</sup>

Arguably the most extensive commentary on a court's consideration of religion as a factor in a child custody case occurred in a Pennsylvania Superior Court case, *Zummo v. Zummo*.<sup>51</sup> In *Zummo*, the mother, an actively practicing Jew, and father, a sporadically practicing Roman Catholic, importuned the court of common pleas to resolve a dispute regarding the religious upbringing of their children subsequent to their divorce.<sup>52</sup> The trial court, applying the "best interests" of the child standard, restricted the father's right to expose the children to his religious practices, based on six religious factors.<sup>53</sup> On appeal, the superior court vacated the trial court's restriction of the father's religious rights and thoroughly discussed the trial court's improper application of the religious factors.<sup>54</sup> The superior court's analysis and discussion of the trial court's decision provides an excellent

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interfere with the child's Jewish identity and adversely affect her emotional welfare in the future), *overruled on other grounds by* Pulliam v. Smith, 501 S.E.2d 898, 900 (N.C. 1998).

49. See *Johns v. Johns*, 918 S.W. 2d 728, 733 (Ark. Ct. App. 1996) (deferring to the wishes of the custodial parent without consideration of harm to the child).

50. See DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 79-80 (Phyllis Bernard & Bryant Garth eds., 2002). See generally Meierding, *supra* note 40, at 2 ("The mediator should not be an advocate for either party but, at the same time, should not allow the mediation process to assist a coercive party to achieve his or her ends."). This proposition should extend to the children involved in the mediation as well. While the mediator should not advocate on behalf of the child directly, they are still responsible for ensuring that the child's rights and interests are not compromised by the rights and interests of his or her parents.

51. 574 A.2d 1130 (Pa. Super. Ct. 1990)

52. *Id.* at 1141.

53. *Id.* at 1142. The superior court stated:

The trial court noted several factors in support of the challenged restrictions: the Zummo's had orally agreed prior to their marriage that any children to their marriage would be raised as Jews; during the marriage the children were raised as Jews; it was in the children's best interests to preserve the stability of their religious beliefs; the father's practice of Catholicism was only sporadic while the mother's practice of Judaism had been active; Judaism and Catholicism are irreconcilable; and, exposure to both religions might "unfairly confuse and disorient the children, and perhaps vitiate all benefits flowing from either religion."

*Id.*

54. See *id.* at 1142-58.

model for formulating a mediation approach that allows these factors to be applied properly in an appropriate forum.

*A. Choosing a Mediator*

The ability to choose a particular mediator varies greatly depending on the circumstances of the case. Unfortunately, this choice may be paramount in determining the ultimate success of the mediation. Facilities exist specifically for the mediation of interfaith disputes, whether or not it is in the context of a divorce.<sup>55</sup> However, some parents, upon seeking the dissolution of their marriage, may not have access to these specific facilities, may not realize that religion is going to play a key role in their custody arrangement, or both.<sup>56</sup> As a result, it is the responsibility of the mediator to be educated about the special needs of these parties and be informed about their options.<sup>57</sup> It may not be necessary to refer the parties to an interfaith mediator, but rather, a more practical solution would be to keep spiritual leaders and advisors as references that can participate in the mediation process as advocates for each side. It is often the case that clergy from different religions will volunteer to provide assistance during the mediation process.<sup>58</sup>

Under this model, parents should be encouraged to either invite their own clergy to participate or select a volunteer from a list provided by the mediator.<sup>59</sup> The clergy members, with proper training, will act as either co-mediators, advocates, or both for each parent. While it may be beneficial for

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55. For an example of a mediation facility specifically designed for interfaith disputes, see Pulling Together Mediation Center, <http://pullingtogethermediation.com> (last visited Apr. 9, 2010).

56. Particularly those parties who find themselves in court mandated mediation.

57. Regardless of whether the mediator is chosen by the parties or appointed by the courts, this article assumes that mediators hold an advanced degree and have availed themselves of the proper experience and skills necessary to facilitate the mediation of complex and highly sensitive family law disputes.

58. For those parties who may be unable to afford a mediator trained specifically in interfaith mediations, organizations such as the Center for Church-State Studies at DePaul University in Chicago offer training sessions for clergy volunteers in order to provide them with the skills necessary to participate in interfaith mediations. See The Interfaith Family Mediation Project, [http://www.law.depaul.edu/centers\\_institutes/ccss/ifmp.asp](http://www.law.depaul.edu/centers_institutes/ccss/ifmp.asp) (last visited Apr. 9, 2010). Mediators should seek out similar organizations in their area, and inform the parties of their availability and the benefits of interfaith mediation.

59. *Id.* If possible, parents should be encouraged to provide their own clergy member because they would likely already have a trusting relationship with him or her and would benefit from the continued involvement of that person post-mediation.

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the clergy to maintain a temporary role in the process, ideally they would be able to stay with the parties throughout the mediation in order to maintain consistency and improve the overall outcome of the custody arrangement.

*B. Evaluative Stage*

Facilitating a successful child custody negotiation among parents with different religious beliefs requires focusing on the interests of both the parents and the children involved. Since religion is often viewed as a basic need, it is an interest rather than a legal issue.<sup>60</sup> Therefore, an integrative bargaining technique that focuses on the individual interests of the parties rather than their positions is most effective in negotiating an agreement.<sup>61</sup> The mediator should take an active but impartial role in facilitating this negotiation.<sup>62</sup> While it is important for the parties to maintain control over the negotiation process, it may become necessary for the mediator to suggest an approach, reiterating the importance of the child's best interests, if the parties are unable to create their own. At this stage, the participation of clergy members is valuable for providing parents with answers to their faith related questions, as well as providing the clergy with the opportunity to obtain the information necessary to later suggest possible custody arrangements.<sup>63</sup>

The most effective approach will be one that clarifies the interests of all involved parties and works towards best meeting those needs while maintaining a perception of fairness between both parents.<sup>64</sup> The mediator should initiate an evaluative stage of the mediation<sup>65</sup> in which he or she starts by asking each parent to clearly explain their religious position and what interests would be met through the child's exposure to those religious views. It may be helpful to encourage the parents to focus on the interests of the child by inquiring into the perceived effects and benefits of their religious position on the development of the child.<sup>66</sup> Once both parents have had an opportunity to clarify their interests, they should also be given an

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60. See generally NINA MEIERDING, DIVORCE MEDIATION TRAINING MANUAL § 2-3 (2003).

61. *Id.*

62. *Id.* § 3-6.

63. The Interfaith Family Mediation Project, *supra* note 59.

64. See MEIERDING, *supra* note 61, § 2-4.

65. There is often an evaluative stage and a facilitative stage of mediation, although both may occur simultaneously throughout the process. By conducting a mini-evaluation at the outset of the mediation, the mediator may be better equipped to steer the negotiation appropriately for the individual circumstances of the dispute. However, this evaluation is separate from the initial evaluation performed by the child advocate as referred to later in this Part.

66. See Schneider, *supra* note 8 and accompanying text.

opportunity to express their concerns regarding the competing interests of the other party. The mediator's role at this point should be to find any consistent themes between the interests expressed by each parent,<sup>67</sup> and then determine if these common aims could be reached without restricting the child's access to the respective religious teachings.

Because the negotiation will ultimately affect the child's religious exposure and training, the child's personal interests must be paramount in the process. Without firm rules governing mediation, there is a risk of the child's rights not being adequately respected.<sup>68</sup> Similar to the approach taken by courts, the focus of the negotiation process should be to find an arrangement that serves the best interest of the child.<sup>69</sup> Looking to standards developed by courts to determine what constitutes the child's "best interest" may be helpful in addition to the child's participation in the mediation process through an advocate to clarify their specific needs and interests and

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67. For example, if one parent expresses that the child should be raised Catholic because the Church teaches important values and principles, and the other parent expresses that the child should be raised Jewish because the Jewish community provides access to role models who may play an important role in the child's life, the mediator might suggest that the overarching theme is an interest in the child's cultural and moral development which may be achieved through access to both religions. *See infra* note 88.

68. *See Schneider, supra* note 8 and accompanying text.

69. While it is the responsibility of the mediator to maintain the focus of the mediation on the best interests of the child, there is considerable flexibility in a mediation that cannot be achieved through litigation. In order to maintain a reasonably consistent "best interest" standard, courts sometimes intervene when intervention is either unnecessary or ineffective. *See Schneider, supra* note 8, at 901. Since "courts are poorly situated to gather, analyze, and evaluate evidence" relating to religious conflict, the focus turns instead to a standardized approach to determining the child's best interest in an attempt to prevent all harms to children. *Id.* However,

Parents always do things that make children unhappy, and judging by the prevalence of neurosis, always do things that have lasting harmful effects on children. It can be difficult for a court to tell when things have gone beyond that irreducible baseline and to decide what should be done when they have.

*Id.* at 903. The majority in *Zummo* comments:

For children of divorce in general, and children of intermarriage as divorce especially, expose to parents' conflicting values, lifestyles, and religious beliefs may indeed cause doubts and stress. However, stress is not always harmful, not is it always to be avoided and protected against. The key is not whether the child experiences stress, but whether the stress experienced is unproductively severe.

*Zummo v. Zummo*, 574 A.2d 1130, 1155 (Pa. Super. Ct. 1990). Mediation diminishes the risk of unnecessary court intervention because a decision reached by both parties, focused on the child's rights, and cautiously steered by the mediator, stands a much better chance of utilizing a customized standard for determining the child's best interest. Additionally, the child advocate should be properly trained in psychology and child development, rendering them capable of determining when the child's stress is "unproductively severe."

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their perception of the proposed religious training arrangement to fulfill those needs.<sup>70</sup>

Without unduly limiting the parents' control of the process, the mediator should play an active role in facilitating an opportunity for the child to express his or her religious interests.<sup>71</sup> Just as some courts will consider the preferences of the child in custody arrangements, the child's preferences must be considered in mediation.<sup>72</sup> The interests of the child can often be divided into two interdependent categories: integrity interests<sup>73</sup> and identity interests.<sup>74</sup> While very young children may be unable to effectively state their interests,<sup>75</sup> older children should be given an opportunity to participate

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70. See discussion *infra* notes 75 and 76.

71. For a more extensive discussion on the benefits of children's participation in divorce mediation, see Jennifer E. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 FAM. CT. REV. 105 (2008) (In a study conducted comparing child-focused intervention in mediation with child-inclusive intervention, "[a]greements reached by the [Child-Inclusive] group were significantly more durable, and the parents in this group were half as likely to instigate new litigation over parenting matters in the year after mediation as were the [Child-Focused] parents.").

72. California Family Code Section 3042 states "if a child is of sufficient age and capacity to reason so as to form and intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody." CAL. FAM. CODE § 3042(a) (West 2004).

73. "The integrity interest of children refer to the protection of their bodies, minds, and spirits from harm or damage. Such damage is understood to have a negative impact on children's development and dignity, and is thus contrary to their interests, needs, and perhaps rights." Praagh, *supra* note 6, at 359.

74. "The notion of identity interests generally refers to a child's belonging to a community or communities. The significance of identity interests is premised on the idea that children develop a sense of identity as they grow and that connection with individuals and groups informs that identity." *Id.* at 357.

75. The maturity of a minor does not always directly correlate to age, therefore there is no bright line rule for when a minor is mature enough to maintain or express religious interests. Some courts have attempted to make this determination, but concede that it is largely circumstantial. See, e.g., *Bonjour v. Bonjour*, 592 P.2d 1233, 1240 (Ala. 1979) stating,

The maturity of a minor will, of course, vary from case to case and will not always correspond to the minor's chronological age. In our discussion, we have spoken of a fifteen-year-old minor. We believe that, under ordinary circumstances, an average fifteen year old will be of sufficient intellectual and emotional development to warrant a court in giving serious consideration to the child's expressed needs with respect to religion, assuming that the child has some actual needs. While we express no opinion as to the minimum age a child must attain before he or she can properly be classified as having religious needs, the child must be of sufficient age to have developed some understanding of religion and its place in his or her life. We note favorably, however, one court's holding that 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.

*Id.*

in the mediation to the extent necessary to fully express their interests.<sup>76</sup> Because relative authority and bargaining power is unequal here, the interests of the child should be obtained during a caucus<sup>77</sup> to ensure the cooperation of the child and the accuracy of the information gained.<sup>78</sup> The best way to do this would be to appoint an advocate for the child that is trained in child development.<sup>79</sup> This advocate would be responsible for providing therapeutic counseling to the child,<sup>80</sup> and then upon the child's request,<sup>81</sup> would participate in the mediation on the child's behalf. The appointed child advocate would also conduct a fact-specific evaluation of the relative risk of harm to the child, at the outset of the mediation, based on several factors. These factors include, but are not limited to: the age of the child,<sup>82</sup> the strength of the child's current religious identity,<sup>83</sup> and the impact of current parental conflict on the child's integrity.<sup>84</sup>

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76. The preferences and participation of children should not be rendered useless merely because they are considered too young to have the capacity to accurately express their interests. Rather, it simply becomes a factor to consider when weighing their interests against those of the parent's and those of the child as perceived by the parents.

77. See Meierding, *supra* note 61, § 6-2 to 6-3.

78. A careful balance must be struck here. While it is important to have the child's interests advocated in the mediation, asking a child to choose between two religions may be in effect like asking them to choose between their parents. Rabbi Jeffrey A. Marx, *Divorce and Interfaith Family*, [http://www.interfaithfamily.com/relationships/marriage\\_and\\_relationships/Divorce\\_and\\_the\\_Interfaith\\_Family.shtml](http://www.interfaithfamily.com/relationships/marriage_and_relationships/Divorce_and_the_Interfaith_Family.shtml) (last visited Apr. 9, 2010). This often places them in an unfair position and should be done with careful consideration. *Id.*

79. See McIntosh et al., *supra* note 71, at 107. Participating clergy may also be effective advocates for the child when the use of a trained professional is impractical.

80. See *id.* Counseling may be provided prior to the mediation and, if necessary, throughout the entire process.

81. It is more important that the mediator and child advocate obtain full disclosure of the child's interests, in order to evaluate the circumstances of the case in the initial phase of the mediation, than having the interests of the child disclosed to the parents in the mediation. Thus, the child advocate should inform the child of the confidentiality of their communications and only disclose that information to which the child gives their consent. Should the child request that no part of the communications be disclosed in the mediation, the advocate may still use the information to make a preliminary evaluation of the feasibility of mediation, but need not participate in the mediation on behalf of the child.

82. See Dwyer, *supra* note 33, at 1427 ("There is disagreement . . . about the age at which children become competent to make certain decisions for themselves and to engage responsibility in certain activities."). However, the use of a child development specialist as an advocate for the child's rights in mediation allows for a case specific application of those rights regardless of the child's level of competence.

83. "[T]he child's development thrives on connections that enrich her identity and, at the same time, depends on protection from damage or harm." Praagh, *supra* note 6, at 360. Therefore, an

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Although inappropriate to determine custody, several of the factors discussed in *Zummo* provide insight into the minds of the parties and help to reveal their relative interests in the mediation. Those factors which should be considered, if applicable, at this stage in the mediation are: (1) whether the parents had a pre-divorce religious training agreement; (2) the relative devoutness of the parents; (3) the relevance of the perceived differences in religions; and (4) the child's pre-divorce religious training.<sup>85</sup>

First, the existence of a pre-divorce agreement regarding the religious training of the child indicates that the parents had once agreed upon the most appropriate approach to their child's upbringing. As a result of the divorce, a significant change in circumstances was created and requires the initial agreement to be altered to take into account this change. It may be helpful to use this agreement as a starting point for the parties to express the interests involved in reaching the initial agreement and how the change in circumstances has affected those interests.<sup>86</sup>

Second, the relative devoutness of each parent should not indicate which parent is more qualified to determine the religious training of the child,<sup>87</sup> but getting an idea of how active each party is in their respective religions will help to clarify the strength and scope of their interests in the mediation.

Third, exploring the relevance of perceived differences between religions provides an opportunity to find consistency within the aims of

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evaluation of the child's religious identity is paramount to a determination of the importance of maintaining the stability of the child's beliefs.

84. See INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT: THEORY, RESEARCH, AND APPLICATIONS 339 (John Grych & Frank Fincham eds., 2001).

85. See *Zummo v. Zummo*, 574 A.2d 1130, 1142 (Pa. Super. Ct. 1990).

86. For example, in the *Reyes* case, Rebecca asserts that the couple agreed to raise Ela in the Jewish faith during their marriage. Dizikes & Mack, *supra* note 12. However, Joseph disagrees with this contention and a mediated discussion of both parents' understanding of the supposed agreement would be beneficial to assist the mediator in eliciting all necessary facts and positions. While a judge would be limited to the sworn testimony of each parent in court, the mediator has a unique opportunity to facilitate a more thorough discussion of the facts as well as speaking to each party directly in a caucus providing a more comprehensive picture of the specific circumstances of the case.

87. See Dwyer, *supra* note 33, at 1427-1428 (stating

It is not self-evident that a connection exists between parents' religious beliefs and children's interests . . . [to establish this connection] [i]t is necessary to show that the very fact of adhering to a religion—any religion—whose tenets include preferred modes of parenting makes a parent better able or more disposed to further the temporal interests of the child.)

Additionally, "[c]hildren absorb beliefs, values, ideas, customs, personality components, a sense of future, and historical linkages (as in ethnic identification) from both parents. Just because one parent attends to certain tasks more so than the other does not mean that the latter is less important in the child's development." Stanley Clawar, *One House, Two Cars, Three Kids*, 5 FAM. ADVOC. 14, 16 (1982).

each. A common concern contemplated (arguably inappropriately) by courts faced with the decision of whether to allow the child to be exposed to different religions is how inconsistency or instability of religious teachings may affect child development.<sup>88</sup> The beneficial impact of consistency and stability on child development is widely recognized; however, there is no clear indication that exposure to multiple religions necessarily correlates with a negative impact on child development.<sup>89</sup> Under certain circumstances it may actually prove beneficial to allow parents' different religions to coexist in the life of the child.<sup>90</sup> By allowing the parties an opportunity to express the perceived differences in their respective religions and the effect those differences may have on the child, the mediator is able to gain a better understanding of the religious conflict and identify additional underlying interests of the parties.

Finally, consideration of the child's pre-divorce religious training is essential to a determination of his or her interests. By identifying the child's religious identity, if any, based upon their past religious exposure and the child's current religious perceptions, the child's subjective religious needs and interests can be accounted for in the greater context of the custody negotiation.

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88. "We conclude that while the desire to provide or maintain stability in the already tumultuous context of a divorce is generally a significant factor in custody determinations, courts constitutionally cannot have any interest in the stability of a child's religious beliefs." *Zummo*, 574 A.2d at 1152.

89. *Id.* at 1157. "The caselaw, commentaries, and empirical studies all suggest . . . that while some [children] may suffer emotional distress from exposure to contradictory religions, most do not." *Id.*

90. The court in *Zummo* uses the example of Christians and Jews to note that while they may have very different tenets, there are also significant similarities. Thus, "irreconcilability does not inevitably signify conflict and hostility." *Id.* at 1154. The opinion also quotes Samuel Sandmel's book, *We Jews and Jesus*:

We are not so much opposed as we are different from each other, working in co-operation. The helmsmen of the craft of faith are of different persuasion, but through steering carefully across the currents and crosscurrents of troubled times their direction may well be toward a mainland of understanding, and thereby of blessing to humanity.

SAMUEL SANDMEL, *WE JEWS AND JESUS* 150-52 (1965). By focusing on the similarities rather than differences between religions, parents may be able to find common aims that could ultimately lead to the belief that compromise and coexistence of different faiths does not necessarily mean inconsistency and conflict, but rather a more extensive foundation on which the child can build his or her own religious identity. The Reyes case provides a good example of parents exposing their child to differing religious traditions during their marriage and indicates that the concern is not necessarily one of inconsistency to the child but rather a power play between the parents as a result of the divorce conflict. See generally *Andreadis*, *supra* note 14 (discussing the circumstances of the child's religious exposure during and after the parent's marriage).

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Different mediation techniques are appropriate depending on the specific circumstances of the case. Where the competing interests of the parents would not directly cause harm to the child, a technique may be appropriate in which the labels of each religion are removed in order to allow those religious aims to co-exist.<sup>91</sup> On the other hand, where the different religions of the parents are in direct conflict and would create an inconsistent and harmful environment for the child, it may be necessary to limit the religious freedom of one or both parents, in order to protect the well-being of the child.<sup>92</sup> If it becomes clear that the parents are unable to reach an agreement that would serve those interests, the mediator has an ethical duty to end the mediation in favor of court intervention.<sup>93</sup> Therefore, in the evaluative stage of the mediation, the parties and children should be as open as possible to provide the mediator and other participants with a full understanding of the facts and interests in the particular case. To ensure full disclosure of facts and interests, the mediator is responsible for creating an environment in which the parties feel they can express themselves openly and safely.<sup>94</sup> With the relevant facts and interests in mind, it is the role of the mediator, with the assistance of the other participants, to evaluate the particular circumstances of the case to determine the relative risk of harm to the children involved before proceeding to the facilitative stage.

### C. *Facilitative Stage*

Once the circumstances of the particular case have been evaluated, the mediator should move forward into a facilitative stage in which they assist the parties in the resolution of their conflict. This can often be done in a four step process: (1) assess, (2) educate, (3) problem-solve, and (4) negotiate.<sup>95</sup> The mediator begins by assessing the circumstances of the conflict, then

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91. See discussion *supra* note 91.

92. Courts have repeatedly done so without being able to consider the benefits and burdens of stability.

[T]he First Amendment . . . precludes a preference for some religion over none, regardless of the *secular* benefits presumed to be at stake . . . . The exclusion of the benefits of stability in religious inculcation and of religiosity in general are apparently part of the price that must be paid for religious freedom and constitutional recognition of parental rights.

*Zummo*, 574 A.2d at 1151-52. Fortunately, this can be remedied in mediation.

93. See DISPUTE RESOLUTION ETHICS, *supra* note 50. Additionally, this duty applies when the agreement unfairly represents the interests of either party involved. *Id.*

94. See MEIERDING, *supra* note 61, § 3-10. This may require the use of caucus to gather additional information from one spouse that they might otherwise be uncomfortable communicating in the presence of the other spouse. *Id.*

95. *Id.*

conveying to the parties the findings of the evaluative stage.<sup>96</sup> The clergy participating in the mediation will provide insight to the mediator by advocating for each respective party and assisting in suggesting solutions. Where the mediator is able to find common ground within the interests of both parents, these consistencies should now be presented to the parties. It is especially important for the mediator to remain impartial at this stage in the process and refrain from allowing personal biases to navigate the facilitation of negotiation.<sup>97</sup> Here, the advocate for the child may also participate in the process by conveying the child's interests in relation to those expressed by the parents. Providing the parents with a complete picture of the circumstances of the case, including the interests of the child, is paramount to facilitating resolution of the conflict. This can be accomplished with much greater success when there are multiple viewpoints and expertise provided by the clergy as well as an advocate for the child.

Despite the child's interests being expressed to the parents through the advocate, in some cases, what constitutes the best interests of the child might not be entirely clear on the surface of the dispute. Since the effect of religion on child development can be an extremely complicated subject, it may be necessary to provide an additional parental education component to the mediation process.<sup>98</sup> By offering both parents access to current research on religion and child development, as well as general information on parenting post-divorce, the parents will be better able to brainstorm solutions to the religious conflict that incorporate the interests of the child. The participating clergy provide a valuable resource here, but may not provide enough objective insight and knowledge regarding the psychological and developmental consequences of the proposed arrangement.

Once the parents are educated as to the psychological implications of the dispute and ultimate agreement on the child, the mediator should encourage the parties, with the assistance of all participants, to brainstorm potential

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96. The mediator must be careful not to disclose information gathered during confidential communications, such as during caucus.

97. "It is often difficult to set one's own standards of fairness and equity aside." Meierding, *supra* note 40, at 298. However this can be achieved by "... [H]elping the parties protect themselves and their own interests by assisting them in understanding the consequences of their agreement, while respecting the cultural values and norms that the parties bring to the table." *Id.*

98. *See generally* MEIERDING, *supra* note 61, § 3-25 to 3-26. Parents should be educated as to the perceived effect of access to different religions and the effect of religion in general on child development.

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solutions.<sup>99</sup> The additional factors discussed in *Zummo* should be considered in formulating an agreement that is consistent with the best interest of the child, and giving equal weight to their right to religious freedom.

First, the importance of maintaining stability of the child's beliefs should be considered based on a determination of their relative religious identity.<sup>100</sup> Where a child's religious identity is strong, it may be in the child's best interest to maintain the stability of those beliefs.<sup>101</sup>

Second, the perceived probability of harm resulting from exposure to "inconsistent" religions should be considered without making any automatic assumptions of harm. Since harm is speculative, it should be discussed, but parents should be educated as to both sides of the argument regarding the effects on child development.<sup>102</sup> This information can be incorporated into

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99. This can be done either together in a mediation session, or separately between sessions in preparation for negotiation.

100. "[T]he government is inherently and constitutionally incompetent to determine whether stability or instability in religious beliefs would be in the best interest of a child." *Zummo v. Zummo*, 574 A.2d 1130, 1151 (Pa. Super. Ct. 1990). However, they discuss the inappropriateness of the assumption that stability is preferred to instability:

Stability in a path to damnation could not be said to be more in a child's "best interests" than an instability which offered the hope of movement toward a path to eternal salvation. Similarly, if all religions or a particular religion were merely harmful and repressive delusion, then stability in such a delusion could not be said to be more in a child's "best interests" than instability which might pave the way to escape from the delusion.

*Id.* at 1150. In the mediation setting, the child advocate, as well as the child's parents in some cases, is better suited to evaluate the importance of stability under the particular circumstances of the case.

101. Where the child has been raised in accordance with one religion and clearly identifies with that religion, there is a greater risk of harm in separating them from that religious identity than say a child who is either too young to have formed an attachment to any particular religion, or whose access to religion has not been paramount in the development of their personal identity. *See, e.g., MacLagan v. Klein*, 473 S.E.2d 778 (N.C. Ct. App. 1996). This case, brought before the Court of Appeals of North Carolina, provides an example of a situation in which the child's sense of religious identity was strong enough that instability in religious training constituted actual harm to the child's well being. *Id.* at 787. As a result of the courts' intervention in the parents' custody dispute, custody was awarded to the mother, then to the father, and then to both parents jointly in subsequent hearings. *Id.* at 781-84. The parents had an initial agreement to raise the child in the Jewish faith, and the child had identified with the Jewish faith since she was three years old. *Id.* at 787. However, during the litigation process, when the child was between four and five years old, the child was exposed to Methodist services and teachings by her grandmother and mother. *Id.* at 782. The appellate court affirmed the trial courts' order of joint custody, restricting decisions regarding the child's religious training and practice to her father on the grounds that she "experienced stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being." *Id.* at 787-88. While this case brings into question the court's competence in determining at what age a child has a legally recognizable religious identity, it illustrates the court's application of a child's religious identity to the importance of stability in religious teachings, in ascertaining the child's best interests.

102. Commentators differ in opinion as to whether exposing a child to different religions, on its face constitutes harm to the child. *See Morris v. Morris*, 412 A.2d 139, 142 (Pa. Super. Ct. 1979)

the parent education component so that when this factor is discussed, the parents will be able to have an informed discussion as to whether the specific circumstances indicate a high probability of harm resulting from inconsistency. While in some cases it is beneficial for children to have access to multiple religious teachings and traditions in that they have a better foundation for choosing their own religion, this is not always the case. When children are exposed to conflicting religious ideas and told by one parent that the religious teachings provided by the other parent are wrong, this creates confusion and undoubtedly constitutes a threat to the integrity of the child.<sup>103</sup> In these circumstances, the parents should be encouraged to put their own interests aside, as much as possible, and focus on reaching a compromise that serves the interests of the child. The parents' reluctance to compromise on such an important issue as the religious training of their children may undoubtedly create impasse in the negotiation. However, the

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(stating, "Quite apart from any concern with the child's spiritual salvation . . . it is beyond dispute that a young child reared into two inconsistent religious traditions will quite probably experience some deleterious physical or mental effects."). This statement is a broad generalization and evidence of the judge's personal bias used to justify the opinion. *See also* Praagh, *supra* note 6 and accompanying text. Overgeneralizations and bias such as this can be avoided in mediation through the use of properly trained mediators. Mediator trainer, Nina Meierding, states, "[b]ecause societal and cultural norms are in a constant state of flux, the mediator must be continually evaluating and incorporating culturally bound issues into the negotiations. Mediators must leave not only their egos at the door but also their own ethnocentric attitudes about fairness." Meierding, *supra* note 40, at 8; *but see* Dwyer, *supra* note 33, at 1434 (stating

It seems unlikely that any individual, upon reaching adulthood, would resent having had a range of options in matters of belief, lifestyle, and health preserved for her during her childhood. It seems reasonable to believe that she might want to make her own choices as an adult in accordance with the personal attitudes and ambitions she has developed, rather than having almost all options closed off to her just because her parents wished to determine her life for her.)

*See also* Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Option Proceedings*, 58 *FORDHAM L. REV.* 383, at 407-12 (discussing studies conducted on the relationship between religion and emotional well-being and concluding that "there is consistent evidence that religion is a source of mental and emotional well being," but the important factor is stability). Therefore, if taken out of the context of religion, the teachings of both faiths can be reconciled without creating instability and inconsistency in parenting, the risks to the child's welfare can be minimized or eliminated entirely.

103. Courts have been confronted with similar situations, but are unable to restrict custody or visitation rights on religious grounds, "except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child." *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971). In mediation, however, it is possible for the parents to negotiate an agreement on their own terms thereby increasing individual satisfaction with the result. Additionally, if they are educated as to the psychological effects of conveying conflicting messages to the child, they will be less likely to do so.

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mediator should expect this and employ techniques to overcome this impasse, such as reminding the parties of risks they may face by failing to reach an agreement and resorting to court intervention.<sup>104</sup>

Where the risk of harm from exposing the child to different religions is low, it may be possible to allow both parents to maintain their right to pass on their religious beliefs and traditions to the child without providing directly contradictory messages. In considering the interests of all parties involved, it may be helpful to take the issue out of the rigid context of religion and focus more specifically on the desired aims of a particular religious or non-religious upbringing. Presumably each parent, at least in cases of interfaith marriages, respects the right of the other to practice a different religion or hold different beliefs.<sup>105</sup> While in a divorce context this respect may have been lost, the fact that it once existed naturally flows to an understanding that the child should be afforded that same respect to choose his or her own religious path.<sup>106</sup> If the parents are able to understand this concept, they will be more likely to agree that access to multiple religions could be beneficial in affording the child the freedom to choose their religion, rather than having it forced upon them in accord with their parent's constitutional rights.<sup>107</sup> By interpreting the best interest of the child in terms of what custody arrangement will provide the child with the best possible foundation for exercising his or her own religious freedom, the specific labels of religion should be removed in favor of establishing an agreement

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104. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 313-14 (2003). While these techniques are often effective in overcoming impasse, the possibility of reaching fatal impasse is still very real. When the mediation process is not feasible or ineffective in facilitating an agreement between parents, the next step should not automatically be litigation. With the uncertainty of court-adjudicated custody arrangements looming on the horizon, parents may benefit from pursuing some form of arbitration prior to resorting to the courts. The use of non-binding arbitration may be successful in facilitating a religious training arrangement in particularly complex or high-conflict disputes, and this should be considered as a next resort. With non-binding arbitration, parents are able to get an idea of what the outcome might be if the case is put before a judge, without the risk of the decision's binding effect. Therefore, it is more likely that they will be inclined to reach a settlement or return to mediation to negotiate an acceptable custody arrangement without resorting to litigation. Since the arbitrator is an impartial judge, unlike the mediator, the results of this dispute resolution process should more closely resemble the possible outcome of litigation at only a fraction of the cost, both in finances and time.

105. In situations where one spouse converted prior to the marriage or after separation, the parents may be less understanding of the right of the child or other parent to hold different religious beliefs. In this case, the mediator may be required to reiterate the right of the child to freedom of religion and suggest ways in which the parents' respective religious beliefs can co-exist.

106. *See* Dwyer, *supra* note 33.

107. *See id.*

that provides this foundation based on specific aims of the respective parent's religious interests.<sup>108</sup>

*D. Drafting an Agreement*

The ability of parents to reach an agreement in mediation, rather than resorting to court intervention, signifies their capacity to compromise in their competing parental authority. The reduction of inter-parental conflict goes a long way towards improving the child's ability to adjust productively to the dissolution of their parents' marriage.<sup>109</sup> The agreement must be in writing and address the agreed upon solutions to all faith related issues, including, but not limited to, the following: (1) the specific religion or interfaith compromise in which the child will be raised; (2) how and with whom the child will spend religious holidays; (3) who will provide religious instruction; (4) who will pay for outside instruction if necessary; and (5) what religious and cultural practices will be followed by the child in the homes of each respective parent.<sup>110</sup>

Upon reaching a custody arrangement, it is necessary for the parents to avoid communicating destructive or conflicting ideologies to the child. A positive coexistence of different religions greatly reduces the risk of harm to the child's welfare and reduces the need to return to mediation or litigation in the future to alter custody arrangements.

IV. CONCLUSION

Due to the constitutional barriers faced by courts when dealing with interfaith custody disputes, and the shortcomings of the "best interest" of the child standard for adequately protecting the children's rights, there is a clear need for alternative means of resolving these disputes. By evaluating the specific circumstances of the case and focusing on the rights of children, application of several factors, borrowed from the court in *Zummo*, provides

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108. While the focus often turns to the difference between religions and a concern about inconsistent teachings, there also exist significant commonalities between different religions. For further discussion see *supra* Part III.B and note 90.

109. "Research is . . . consistent in showing that continuing interparental conflict is one of the most important predictors of variability in children's post divorce adjustment. As early as the first year after divorce . . . children fare better when conflict is reduced than when conflict remains high." See INTERPARENTAL CONFLICT AND CHILD DEVELOPMENT, *supra* note 84.

110. Marx, *supra* note 78.

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mediators and divorcing couples alike, with a dispute resolution approach better suited to address the unique challenges of interfaith custody disputes. A clergy and child-inclusive model of mediation additionally serves to meet the needs of all parties involved and creates a successful and durable interfaith custody arrangement.