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Can a parent choose to turn down life-saving medical treatment for a child on religious grounds? Can private adoption agencies deny same-sex parents the right to adopt children on religious grounds? Can children be forced to attend religious observances different from their own when they are in foster care? These are just some of the issues raised when thinking about religious issues in child welfare cases. This article will address some of the most common issues and how to navigate them as a practitioner.

Both religion and the right to parent are constitutional issues, so if the State is going to intervene in either, there must be a significant rationale. This article will also address several of the larger issues at the intersection of religion and child welfare, as well as the more quotidian aspects of religion affected when the State decides to intervene in a family—the ones not making headlines. It first will examine parents’ rights in terms of religious upbringing of their children, focusing on educational, disciplinary, and medical issues and on whether there is a religious defense to State intervention in those domains. It then will discuss what are frequently called “residual rights”—the rights parents retain when their children are removed from the family. Third, it will look at what rights children have to continue to participate in their preferred religion when they are removed from their families. Finally, it will examine the role of religion in determining who may foster and potentially adopt children.

Is There a Religious Defense to Abuse and Neglect Allegations Regarding Education, Medical Decisions, and Corporal Punishment?

Whether the State considers removal of a child from a family comes down to a question of child safety. The issue is one of whether there is harm or a risk of harm. Each state defines that level of harm differently, but there must always be at least a significant risk of abuse or neglect before the State will intervene to either provide services or remove a child from the home. States regulate many issues related to children and abuse and neglect, but the three to be discussed here involve education, corporal punishment, and medicine.

Educational Rights

From a religion perspective, parents likely have the most leeway with educational rights. All states require children to
attend school until a certain age, often at least age sixteen, but their school need not be a public school. Instead, many children attend private schools, and there is a new push for homeschooling in both the religious and nonreligious communities. In addition, many self-study programs are specifically available to children to enable them to catch up on credits they have missed, often as a result of being in the foster care system and frequently changing schools. All of these, so long as they follow particular laws, suffice to meet the legal requirements for children’s education.

The U.S. Supreme Court has generally deferred to parents’ rights since the early twentieth century. The Court ruled that Amish parents did not have to send their children to school after the eighth grade in the famous 1972 “Amish exception” case, Wisconsin v. Yoder. This case seems to be the only one in which the Supreme Court allowed religion to overcome the compulsory education laws. But courts do not generally intervene in choice of school as long as parents are meeting the compulsory educational requirements in their particular state.

Religion and education also interact when parents homeschool their children in an effort to hide them from society at large. In a recent case from Perris, California, it was discovered that homeschooling was used as an opportunity to hide children and abuse them. It was then the State got involved, and ultimately those parents lost their children, some of whom were no longer minors, and the parents were criminally convicted and sentenced to prison.

Once children become involved in the child welfare system, the State sometimes requires children to attend school out of the home in order to ensure their safety. This happens most frequently in situations where the State agency believes having someone external to the family watching the child is a sufficient safety measure. Children sometimes can remain in their parents’ home so long as parents send their children to a school or daycare because the State then has some additional assurance the children are not being abused or neglected. In circumstances other than these, the State is not generally in the position of deciding what type of education is best for children so long as the education comports with the law.

**Medical Decisions**

The issues surrounding religion and medical decisions are those most commonly making national and international news. The Child Abuse Prevention and Treatment Act (CAPTA) requires that states, as a condition of receiving federal funding, have laws allowing children to be removed from parents when there has been medical neglect. CAPTA makes explicit that it does not require parents to obtain medical treatment over their religious objection. CAPTA also states that it neither prohibits nor requires a state to find child abuse or neglect when a parent is following the parent’s religious beliefs and relying on spiritual, but not mainstream, recommendations for medical treatment. The issue, therefore, is convoluted.

Because the definitions of abuse and neglect are different in each state, the analysis always begins with the question of whether the action, regardless of the reason for the action, would be considered abuse or neglect pursuant to that state’s definition of those terms. If the answer is yes, then the question becomes whether there is a religious defense. In many instances, religious defenses to medical decisions (in contrast to physical-discipline decisions) are available.

For example, one of the issues now arising frequently in the news is the question of vaccinations because of the measles outbreaks across the United States. As more people contract measles, the question of whether parents can opt out of vaccinations on religious grounds is gaining steam. Failing to provide a child their vaccinations can be seen as one indication of medical neglect, but until recently, there has been a religious defense to that. Now three states, California, Mississippi, and West Virginia, have no personal-belief exception to the requirement to vaccinate. Many states have introduced similar legislation to limit the personal-belief exception as a result of these outbreaks. Thus, the question of religion versus medical intervention is at the forefront of this year’s legislative sessions, but the issue certainly does not end with vaccinations.

Each religion defines for itself which medical interventions are permitted and which are prohibited. In any case in which a family argues for a religious exemption to a finding of medical neglect, the first question is whether a medical intervention would comport with their particular religion’s mandates. Another important question is the level of harm that will come to the child with a lack of intervention. Finally, a key question is what the child wants.

The level-of-harm question creates the most friction often because it is rarely raised until a child is extremely sick. By that point in time, many medical procedures are not cures, and there is rarely a guarantee of success. Thus, forcing someone to accept a medical intervention contrary to a religious belief may still result in harm or even death. Some medical interventions themselves cause harm, and a question that anyone, regardless of religion, must ask is whether the risk of harm outweighs the possible benefit. When these cases get to a court, it is the court that must answer this question. These cases often involve a doctor’s testimony and sometimes the testimony of multiple doctors. These are the cases that become the battles of the experts, and the State and court must determine how to protect the child from the least amount of harm.

Furthermore, if the child is old enough to speak, these cases also can involve testimony from the child. There are no easy answers to any of these questions, and each one must be analyzed on a case-by-case basis, but religion, by itself, is not a bar to state intervention when medical issues are involved. Medical cases, however, require many more steps than schooling and corporal punishment cases.
Corporal Punishment
There are many people who believe religion teaches, if not dictates, that corporal punishment is appropriate. Certainly not everyone who is religious shares this belief, but the issue of corporal punishment and religion arise frequently enough that courts must intervene. Here, however, parents arguably have the least leeway to use religion as a defense.

All fifty states allow parents to use some form of corporal punishment. Internationally, this is not true. There are countries that do not allow parents to hit children at all, including New Zealand and a good number of South American countries. However, even though U.S. states allow parents to use corporal punishment, at some level, it becomes physical abuse in all states. Where to draw the line between what constitutes acceptable corporal punishment and physical abuse always requires a case-by-case analysis specific to state laws and individual circumstances.

In terms of the law, what makes physical abuse different from medical issues is that there is no religious defense to physical abuse. If a court determines an action to be physical abuse, there is no religious exception. Religion cannot be used as a shield to protect parents from the removal of their children when physical abuse has occurred. What this ultimately means is that a finding of physical abuse will be based on the nature of the action and its effect on the child.

Rights Retained by Parents When Children Are Removed
Many states define by statute the "residual rights" parents retain to make decisions about their children once the state intervenes and removes children from their parents. Parents can generally continue to make these specific decisions unless the State proves that such retention of rights is not in a child's best interests or there is a safety risk. In most states, the decision-making rights parents continue to have post removal include the right to determine the child's religious upbringing. Thus, a parent could object to a child being taken to a church other than the one the parent attends, or even not being taken to the particular church the parent wants the child to attend.

In most states, parents retain the right to make serious medical decisions, but if the child was removed because of medical neglect, the parents' rights to make medical decisions will likely be reduced or removed entirely. In other cases, parents continue to have the right to make major medical and educational decisions even when their children have been removed from them. Each jurisdiction has different procedures for how these rights are removed. For example, in California, a special form must be filed to remove the parents' right to make educational and developmental decisions for the child.

Despite continuing to have these rights, sometimes the reality of cases is such that children are exposed to religions different from the one in which they were raised, and parents may not know about it. Thus, it is important when representing a parent to ask whether the parent has particular religious beliefs and how those are being addressed in a foster home. Can a parent object to a same-sex couple fostering a child based on religious beliefs? That question has not been answered.
Children’s Rights Regarding Their Religious Choices Upon Removal from Parents

Children’s rights to religious choices underly the issues seen most often by children’s attorneys in child welfare cases. These are not the situations making headlines, but as a child’s attorney or even as a parent’s attorney, one sees that the resulting issues affect the daily lives of clients and frequently get lost in the child-safety issues that are the main focus of the cases. The resulting situations are the ones that affect children the most frequently and deeply in the majority of cases. They are anecdotal and are rarely addressed by statute other than in children’s bills of rights addressing removal from parents.

Though not ratified by the United States, the United Nations Convention on the Rights of the Child protects children’s right to practice their religion as a norm of international law. Many states do protect children’s right to religion through statutory bills of rights for foster youth. Some states further provide children the right to refuse to attend religious practices that are not their own while in foster care.

Many religious communities encourage fostering in order to help vulnerable children. Thus, many children placed into foster homes are living with foster parents who are very religious. Children who enter foster care come from many different religious backgrounds, and sometimes being placed in a home that practices a different religion causes confusion and sometimes even causes the child emotional harm.

These issues can arise in all aspects of life, in everything from baptizing a child to a child not being allowed to read Harry Potter books because the foster family believes they are antithetical to their religious practices. While Harry Potter could appear to be just a book, for children, it can be a way of connecting to their peers. Additionally, children who are vegetarian for religious reasons have been placed into homes where the family eats meat, and children have been forced to eat it even though it violates their religious beliefs and they believe there are serious repercussions for eating it. Children are taken to Christian churches despite their own families practicing a different religion. This can certainly cause a child to be confused, but at a deeper level, it can also cause a child to feel judged. Many religions teach that their way is the correct way, so if a child has been raised in one religion and then attends a service in another religion that teaches it is the correct way, the child could begin to feel a sense of inner turmoil—as though something is wrong with the child.

From a practice perspective, it is important that lawyers for children ask children their views on going to church or other religious institutions when foster families take them. Often children enjoy attending church with foster families, but they cannot be forced to attend. Lawyers for children also must ensure that children’s rights to their own religious upbringing are respected. It is important to ask parents and children about their religion when children are placed in foster care to ensure the child continues to be able to participate in whatever aspects of that religious training the child and parents want.

Finally, it is important to point out there is an ongoing debate about who can foster and who can adopt. In many states, private foster agencies license foster and adoptive homes, and where those foster agencies are religiously motivated, many of them have refused to license same-sex couples.

While somewhat tangential to the other issues addressed throughout this article, the question of who can foster and adopt gets to the heart of religion in child welfare and even children’s rights within the context of child welfare. The ultimate goal of child welfare is to reunify, and if that is not possible, to ensure children have permanency as quickly as possible. There are already an insufficient number of foster and adoptive homes in the United States, so disallowing someone to adopt because of their sexual orientation undermines child welfare policy and children’s rights to permanency. Still, there remain many foster care licensing and adoption agencies who would interfere in the ability of same-sex couples to adopt children for religious reasons.

Conclusion

Religion underlies all aspects of child welfare in America. It is important to remember that religion is neither a shield to protect families from entering the child welfare system nor is it lost entirely as an aspect of the analysis. Religion permeates the analysis of every case that enters the system. These issues affect children at the core of who they are and cannot be lost in other issues that can potentially seem more pressing. Religious practices can be one aspect of stability in a system that moves them from home to home and into different situations. Whether representing children or parents in child welfare cases, asking clients about their religious preferences and how the removal of children affects them is central to the representation.

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