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**MEMORANDUM**

TO: Mordechai Biser, Esq., Associate General Counsel, Agudath Israel of America

FROM: Joel Cohen\*

RE: Defending Religious Observance in Child Custody/Visitation Disputes

The purpose of this memo is to serve as a starting point for basic strategy and legal precedent when defending religious observance in custody or visitation disputes between observant and non-observant ex-spouses. Defending religious observance in these disputes is highly fact specific, and the information in this memo can only be useful if it is modified to meet the strategic concerns that arise from the factual situation in each case. This memo does not cover all areas of the law, and will not reach all factual situations. In order to enhance future releases of this memo, please ask all users to forward comments and suggestions to [cls\\_probono\\_project@yahoo.com](mailto:cls_probono_project@yahoo.com).

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\* This memo was developed by students participating in the Columbia University School of Law Pro Bono Project.

## **Introduction**

When faced with custody and visitation disputes, courts apply the “best interests of the child” standard. This standard can be highly subjective, and an effective advocate on behalf of a religious parent must find arguments that persuade the court that it is in the child’s best interest to be raised in an Orthodox Jewish environment and to have Orthodox Jewish beliefs and practices respected during visitation with the non-custodial parent. These arguments can be difficult to make and often require a unique approach. This memo is meant to give attorneys a starting point for developing the appropriate approach in the case before them.

Part I of this memo discusses religious observance issues in a custody dispute. Part II discusses post custody dispute visitation issues. Part III discusses methods of presenting the Orthodox Jewish way of life to a secular court. Part IV discusses the enforceability of rabbinic arbitration agreements.

### **I. Religion as a Factor in Custody Proceedings**

#### **a) The Importance of Custody for the Observant Parent**

Because the custodial parent usually sets the religious upbringing of a child, an award of custody to the observant parent resolves much of the difficulty in securing religious observance. There are a host of issues a court will use to decide custody, and religion itself will rarely be the determinative factor. Nevertheless, religion should not be ignored as a positive factor in determining the child’s best interest. Especially in cases where the child has begun to be raised as an Orthodox Jew, a strong argument can be made that it is in the interests of the child’s emotional and psychological well-being to provide the stability of a continuation of a religious environment.<sup>1</sup>

#### **b) The Standard that Courts May Use In Assessing How Religion Impacts on the Best Interests of a Child.**

Although the determination of custody can have a significant effect on the religious upbringing of a child, many courts prefer not to directly consider the benefits of religion in making custody determinations. However, even courts that do not directly assess the benefits of religion often

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<sup>1</sup> It is important to note that in rare cases, a court will order a non-religious custodial parent to raise the child with a religious upbringing. This can be a useful fallback position if a court refuses to grant custody to the religious parent.

look at religion anyway by analyzing the secular benefits of the religious lifestyle. Thus, it is important to know the standard required by each jurisdiction's, and to make the "best interests of the child" argument in favor of the religious parent within the confines of that standard.

The standards that the courts use are varied. Some courts have held that religion should not be used in making a determination of custody "unless it is affirmatively likely to cause present or future harm to the child's physical or mental well being."<sup>2</sup> Other courts have said that religion should always be considered in custody determinations, and that state statutes providing that religion should be considered in custody determinations are constitutional.<sup>3</sup>

No jurisdiction will weigh the benefits of any one religion, as that would be perceived as a violation of the Establishment Clause. However, some courts are more sympathetic to religious observance and will hold that religious observance is in the child's best interest. For example, in Dean v. Dean, the court held that although it could not choose any one faith over the other, the court would still look to religion when it would help the judge place the child in "an environment which will best promote the full development of his physical, mental, moral and spiritual faculties . . ."<sup>4</sup> In other words, courts can consider the spiritual welfare of the child in custody cases.

Other jurisdictions may choose not look to the spiritual attributes of religion itself but will look at the secular benefits afforded by that religion.<sup>5</sup> In these jurisdictions it is important not to argue that the judge should rule in favor of the religious spouse because of favoritism towards a religious

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2 See Joanne Ross Wilder, Religion and Best Interests in Custody Cases, 18 J. Am. Acad. Matrim. Law. 211, 224 (2002). See also In re Marriage of Short, 698 P.2d 1310 (Colo. 1985); In re Marriage of Hadeen, 619 P.2d 374 (Wis. Ct. App. 1980).

3 See Ervin R. v. Phina R., 717 N.Y.S.2d 849,851 (N.Y. Fam. Ct. 2000) (In visitation dispute between parents who each had custody of one child, and who had chosen to raise that child in accordance with Hasidic and Orthodox Jewish teachings respectively, "The Court will not examine or rule on the appropriateness of the religious practice or belief. Nor will the Court determine the appropriate level of religious belief, but the Court must consider the impact that a parent's conduct has on the child"); See also Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979); See also Ervin R. v. Phina R., 717 N.Y.S.2d at 851 (where "two Orthodox Jewish parents and the mother allowed actions which violated the religious upbringing and agreement of the parties. The Court of Appeals noted that the mother's actions "confused the children and [were] contrary to their religious beliefs and detrimental to their religious feeling." citing Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93 (1982)).

4 Dean v. Dean, 32 N.C. App. 482 (N.C. App. , 1977). See also Blackley v. Blackley, 285 N.C. 358, 362, 204 S.E. 2d 678, 681 (1974).

5 See In re Marriage of Decker, 666 N.W.2d 175, 179 (Iowa App. 2003) ("We do not favor one religion over another in a custody determination . . . However, we do consider in [Appellant's] favor values that he subscribes to as a part of his religion such as honesty, kindness, and responsibility to family."); Fulk v. Fulk, 827 So.2d 736, 740 (Miss. App. 2002) (quoting Albright v. Albright, 437 So.2d 1003, 1005 (Miss.1983)) (holding that differences in religion may not be "the sole basis for custody decisions."); See also Blevins v. Bardwell, 784 So.2d 166, 175 (Miss., 2001) (holding that although not an Albright factor, the "future religious example" of a parent may be considered in a custody determination.)

upbringing.<sup>6</sup> Rather, it is the secular benefits of a religious upbringing that should be stressed.<sup>7</sup> This trend to look at the secular benefits afforded by religious observance means that it is always important to explain the basic scheme of Orthodox Jewish religious observance and argue that it is in the child's best interests to be raised with the stability and values that an Orthodox Jewish environment will provide.

Some jurisdictions require a showing of harm before looking to religious observance. In these jurisdictions, it will be necessary to argue that the lack of religious observance will cause harm to the child. If the child has been brought up in a religious environment, one should argue that it would be emotionally and psychologically traumatic and damaging to suddenly be placed in a non-religious environment.

## **II. Visitation proceedings**

As a general rule, the custodial parent sets the tone for the religious upbringing of a child. However, even after the court has made the determination of custody and has set the child's primary mode of religious observance, visitation with a non-observant parent can still remain a thorny problem for the child and the custodial parent. Conversely, even if the custodial parent is not observant, visitation rights provide an opportunity for the observant parent to bring some measure of religion to the child.

### **a) Visitation by the observant parents where the custodial parent is not religious**

In cases where the non-observant parent gains custody, one must attempt to argue that the non-custodial observant parent should have a say in the religious upbringing of a child. In some rare cases, a non-religious custodial parent can be ordered to send a child to religious school. Even in other cases, the amount of religious exposure a judge will allow depends on the best interest of the child. One should argue that it is best in such cases for the child to be exposed to the religious observances of the non-custodial parent so that the child will be able to freely choose his or her own mode of religious expression when he or she gets older.

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<sup>6</sup> See James G. Dwyer, A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships, 11 Wm. and Mary Bill of Rights J. 845, 925 (April, 2003) ("But to the extent that judges are advancing an ideological or religious agenda by favoring or disfavoring a parent of a particular faith because of agreement or disagreement with the doctrine, they compromise the welfare and diminish the rights of children (that is, from a secular perspective)" )

<sup>7</sup> See *id.* ("To the extent that attention to religion is incidental to genuine concern for some aspect of children's temporal well-being, and courts give the effects on temporal well-being the same weight they would in a non-religious context, this is consistent with the best interests standard and an absolute rights model.")

## **b) Visitation where the custodial parent is religious**

Even after a religious parent is granted custody and the court allows that parent to raise the child in a religious setting, there are many problems that can arise during visitation that have the potential to chip away at the religious observance of the child. When these issues reach the court, it is important to convey to the judge that although the non-observant parent may have visitation rights, that parent should not be able to use those rights to wage a battle for de facto religious control of the child.

### **(1) When visitation rights force the child to engage in anti-religious behavior**

A complicated situation arises when the custodial parent has already won the right to raise the child in a religious setting and the non-custodial parent uses visitation rights in a rearguard action to weaken the child's religious observance. In this set of circumstances, the parent uses the time allotted to him or her under the visitation scheme to expose the child to non-religious activity. It may be difficult to convey to the court the amount of interference that can be caused to a religious upbringing with the violation of an occasional Shabbos observance or the occasional eating of non-kosher food. To compound the difficulty in litigating these issues, constitutional arguments will not protect the child because the child does not have a right to religious freedom that is being violated.

The best way to try to counter this type of activity is to argue to the court that this form of visitation is harmful to the child.

There is some case law that supports this kind of argument. For example, in Funk v. Ossman the Arizona appellate court found that it was in the best interest of a child to be raised solely under Christianity, the custodial parent's religion, and denied the non-custodial Jewish parent's request to allow the child to be exposed to Jewish tradition during visitation. First, the court reaffirmed the rule that "the courts should maintain an attitude of strict impartiality between religions..."<sup>8</sup> Then the court said that despite this presumption of strict impartiality, the court "should always act in accordance with what is best for the happiness and welfare of the child."<sup>9</sup> The Funk court went on to rule that it was in

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8 Funk v. Ossman, 724 P.2d 1247, 1250 (Ariz.App.,1986.) (and that the courts "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." (citing Munoz v. Munoz, 79 Wn.2d 810, 812 (Wash., 1971)).

9 Munoz v. Munoz, supra. ("When it is made to appear that a conflict between divorced parents as to religious instruction is affecting the welfare of their children, a court should always act in accordance with what is best for the happiness and welfare of the child. In legal contemplation, the court recognizes no difference in objectives between religious or other conflicts."). See also Angel v. Angel, 2 Ohio Op.2d 136, 140 N.E.2d 86 (1956).

the best interest of the child to be raised in a single religion, and that the Jewish parent should not be able to expose the child to Judaism during visitations. This same reasoning should apply to cases where there is a Jewish custodial parent, and should allow that parent to protect the child from being exposed to the visiting parent's beliefs.<sup>10</sup>

However, some courts have taken a different view. These courts have held the custodial parent to a higher standard of proof, requiring them to detail the harm that will be caused to the child by the visiting parent's beliefs.<sup>11</sup> In other words, these courts will require a higher showing of harm before they will allow an infringement on the visitation rights of the non-custodial parents.<sup>12 13</sup> In these jurisdictions the only way to counter the non-custodial parents claims will be to detail the specific harms that the child will suffer as a result of being exposed to inconsistent beliefs.

The key point to hammer away at is that forcing the child to violate his or her deeply held Orthodox Jewish beliefs and observances will be emotionally and psychologically traumatic and damaging. You will need to explain the details of Jewish religious observance and why even occasional infringements cause exponential harm.<sup>14</sup> As one child psychologist explained to a non-Jewish judge, "forcing these children to eat at McDonald's is like forcing them to eat worms."

## (2) Creating an atmosphere that is unfriendly to religion

When the non-custodial parent makes disparaging comments about Orthodox Judaism and in similar ways seeks to pressure the child to abandon his or her religious observance, but where the

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10 It is important to note that there may be a difference between the divide between Christianity and Judaism and Judaism and secular practices. Thus, it must still be argued that the addition of non-religious activities harms the child.

11 See e.g., Felton v. Felton 418 N.E.2d 606, 607 (Mass. 1981) ("However, harm to the child from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail."); see also Lewis v. Lewis, 260 Ark. 691, 693, (1976); Compton v. Gilmore, 98 Idaho 190, 192, (1977); Pope v. Pope, 267 S.W.2d 340, 343 (Mo.App. 1954); Goodman v. Goodman, 180 Neb. 83, 88-89, 141 N.W.2d 445 (1966); Munoz v. Munoz, supra at 813.

12 See e.g. Zummo v. Zummo, 394 Pa. Super. 30, 49-50 (Pa. Super. , 1990) ("Under Pennsylvania law, each parent has parental authority during lawful periods of custody or visitation. Consequently, such a parent may pursue whatever course of religious indoctrination which that parent sees fit, at that time, during periods of lawful custody or visitation . . . If the other parent objects and seeks restrictions, the objecting parent must establish a substantial risk of harm in absence of the restriction proposed.")

13 Some of the cases can be distinguished as they are discussing situations where the non-custodial parent orally agreed to raise the child according to the custodial parent's beliefs and later reneges on that agreement. These cases can be read as saying that a parent cannot orally bargain away the right to raise the child according to his tradition. However, the rule still may be that the non-custodial parent's desires are subordinate to the child's need for consistency See e.g., Zummo supra.

14 Please see section II of this guide for a discussion of how to present the Jewish Religion to secular courts.

parent does not actually force the child to eat non-kosher food and the like, the nature of the harm to the child is harder to identify and quantify. But again, one should argue that it is not in the child's best interests to be exposed to harassing and denigrating statements about the custodial parent's religious views.

### (3) Forcing the custodial parent to violate religious beliefs

Sometimes the custodial parent is forced to sacrifice his or her religious beliefs in order to conform to a visitation order. An example of this is when the visitation order requires a child to be produced on Saturday, thereby forcing the religious parent to drive or arrange for someone else to drive the child on the Sabbath. When the court orders visitation rights that forces a parent to act in this manner, they are asking that parent to choose between their religious observances and potentially losing custody of their child. Effectively, this visitation order is forcing the custodial parent to violate his or her religious beliefs.

To counter this kind of order, one should argue that such an order would violate the religious parent's constitutional freedom of religion. Furthermore, one should argue that parental visitation rights should not be used so as to challenge the religious observances of the custodial parent.

### (4) Causing the visiting parent to affirmatively support religion

Some courts have ruled that a non-religious parent should be forced to bring the child to religious instruction during visitation, and that such activity does not infringe on the non-custodial parent's freedom of religion. This line of cases can be useful in ensuring that the child receives a continuous level of religious observance even while spending time with the non-custodial parent.

In Overman v. Overman, the court ruled that the non-custodial parent may not impose his or her religious views on the child unless the non-custodial parent demonstrated that "the child's physical health or emotional development would be significantly impaired unless the custodial parent's rights

were limited.”<sup>15</sup> Essentially, the court removed the non-custodial parent’s ability to attempt to influence the child’s religious training.<sup>16</sup>

In Johns v. Johns, the court upheld an order requiring a non-religious father to bring his children to religious services against a claim that this violated the father’s free exercise rights.<sup>17</sup> The court found that the “chancellor did not order him to attend religious services, but rather that he see that his children did so in order to maintain consistency in the religious regimen that their mother has set for them. Therefore, no limitation has been placed on appellant’s freedom of religion.” In other words, because the chancellor’s order did not impose a direct duty on the father to attend religious services, the father was free to attend or not attend the services with the children. Thus, it can be argued to a court that a non-religious parent should still be required to make sure that a child attends synagogue on the Sabbath or attend other religious activities.

### **c) Visitation where the custodial parent is not religious**

When the custodial parent is not religious, it is likely that the custody order has already granted the custodial parent the right to raise the child in a non-religious lifestyle.<sup>18</sup> In this situation it is still possible for the religious non-custodial parent to argue for the ability to inject a minimum of religious observance into the child’s lifestyle. It is also important to set guidelines that ensure that the timing of the visitation should be respectful of the religious parent’s observance

One should argue that it is beneficial for the child to be exposed to Orthodox Jewish beliefs and observances, or at least not harmful to the child.<sup>19</sup> The non-custodial parent should object to visits at times where it is religiously inconvenient, and can also try to argue that the child should be allowed to spend Shabbos and/or Yom Tov with the religious parent.

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15 Overman v. Overman, 497 N.E.2d 618, 619 (Ind. App. , 1986).

16 See Swartzel v. Swartzel, Ind. App., 492 N.E.2d 71, 73 (1986) (“So long as the non-custodial parent’s visitation rights are not unreasonably interfered with, the custodial parent’s right to choose religious training should be paramount”); But see McLemore v. McLemore 762 So.2d 316, 320 Miss., (June 29, 2000) (Where the court agreed that requiring a mother to take a child to religious services was constitutional, but only because the order was more of a “suggestion.” The court also held that a previous order that the mother bring the child to church was too specific and potentially an establishment of religion, and therefore changed the order to state that the parents should “be vitally interested in seeing that their children get regular and systematic spiritual training.”)

17 See Johns v. Johns, 53 Ark. App. 90, 94 (Ark. App. , 1996)

18 Note that this is not always the case. See Grayman v. Hession, 84 A.D.2d 111, 112 (N.Y. App. Div., 1982)

19 Note that these arguments are the opposite of the arguments the religious custodial parent was making in the section above. There are several factors which may weigh more strongly in favor of exposing the child to Orthodox Judaism.

### **III. Explaining Jewish Orthodox Religious Observance**

As discussed above, it is often necessary to explain the basics of religious observance to a judge. The amount of information needed will depend on the context of the setting – a Judge in an area with many observant Jews may need less basic background information than a judge in a different venue. Additionally, strategic planning is needed to decide how much to push for, recognizing that pushing too hard without the possibility of compromise could jeopardize the Orthodox parent's chances of obtaining custody.

#### **i) Basics of Religious Observance**

The Orthodox Jewish tradition is a seamless web of ancient laws, customs and traditions. There are many spiritual and moral reasons for these laws and customs, and this section does not purport to summarize the theological underpinnings of this religion. Rather, this section will outline the basic tenets of religious life as they apply to the custody determination at hand.

##### **(1) Education**

The Orthodox Jewish tradition is a contradiction. It represents consistency and an unswerving adherence to a 3000-year-old tradition, and yet it remains a vibrant form of life in modern times. The beauty of this ancient religion is that it exists as more than an abstraction. Adherents to Orthodox Judaism balance a rigid discipline with an ability to flourish in the modern world. Adherents can be found in all strata of modern life – as doctors, lawyers, nurses, professors and engineers.

This balance does not occur in a vacuum. A large portion of the Jewish tradition revolves around education and child rearing. The Jewish educational system builds a base of knowledge so that a child has the tools to confront modern life.

The Jewish Orthodox educational system provides a flexibility that belies its seeming rigidity. This system is not monolithic and does not provide a single approach to education. There are many different yet equally valid approaches to Jewish education that vary widely in implementing educational goals and outlook on the Jewish religion. All fall under the rubric of Jewish Orthodoxy. This panoply of choices belies the charge, often made in these sort of cases by the non-observant parent, that Orthodoxy is some form of a cult.

Besides providing for flexibility in educational outlook, Jewish education also provides a fresh perspective and cutting edge education. This system is not a static rehashing of old ideas. Jewish educators reevaluate their approaches to teaching, attend frequent educational seminars and consult with psychologists and child-rearing experts to dynamically apply new teaching techniques and skills to a time-tested base of knowledge.

Despite the many strengths of the Jewish educational system, this system has an inherent, inescapable fragility. Jewish schools require commitment, discipline and hard work. Jewish students study more subject material than their academic age groups in other schools, and they spend more time in school and doing homework. Outside influences disturb the intellectual ecosystem and create exponential difficulties for a child. A Jewish parent who seeks this kind of education is acting in the best interest of the child in seeking a way to allow the child to blend the necessities of religious observance with the needs of modern life.

## (2) Influences of modern media

As part of the Jewish educational process, Jewish children generally have a limited exposure to modern media. Jewish home computers will have child protection software, and exposure to television and print media, if allowed at all, is generally limited and screened for violence and sexual content.

## (3) Sabbath and other holidays

Jewish law requires Sabbath observance. Part of that observance is to not perform work during the Sabbath.<sup>20</sup> Jewish law also requires that no work be performed during Jewish holidays.<sup>21</sup>

## (4) Kosher food

Orthodox Jews must eat kosher food.<sup>22</sup> Kosher food does not mean that the food has received a blessing from a Rabbi. Rather, kosher food derives its status from being suitably

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<sup>20</sup> See Young v. Lane, 733 F.Supp. 1205, 1207 (N.D.Ill. 1990) (“Jews are not allowed by Jewish law to work on their Sabbath.”)

<sup>21</sup> See id. (“On these holidays, Jewish law requires the Jew to do no work. The holidays . . . are: Pesach or Passover . . . Shavuot . . . Rosh Hashana . . . Yom Kippur . . . Succot . . . and Simhat Torah.”) There are also several holidays where work may be performed: Purim, Hanukkah, and Tisha B'av.

<sup>22</sup> Ferman Shaliehsabou v. Hebrew Home of Greater Washington, Inc., 2004 WL 691399 (C.A.4 (Md.),2004) (“As a juridical religion, Judaism is dependent upon compliance with its laws, including the kashruth . . .”)

prepared according to a series of laws. In addition to preparation requirements, the consumption of certain animals is prohibited.

#### (5) Symbolic forms of dress

Males wear a head-covering, often called “Yarmulke” or “Kippa.”<sup>23</sup> Both Orthodox Jewish males and females must follow the Jewish system of dress that requires a requisite level of modesty in specifying how much of the body must be covered.

#### ii) Benefits of Religious Observance

This section will outline the basic areas where there are secular benefits from religious observance. These benefits should be stressed based on the facts of each individual case.

- (1) Religious training is one of the best ways to instill moral values in the children.<sup>24</sup>
- (2) Religious observance provides continuity to a child who has already been observant.
- (3) An education in a Jewish day school or yeshiva is in the best interest of a child. Such schools are far less likely to have problems with drugs, violence, weapons, lack of respect for authority, and the like when compared to public schools or other non-religious private schools.
- (4) Reduced exposure to the sexual imagery and violence on the Internet is in the best interest of the child.
- (5) Proper observance of the Sabbath and other holidays provides the child with a cultural understanding of his or her roots and provides a diversity of experiences.

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23 See Young v. Lane, 733 F.Supp. 1205 at 1207.

24 See Joanne Ross Wilder, Religion and Best Interests in Custody Cases, 18 J. Am. Acad. Matrim. Law. 211, 227 (2002). See eg, Allison v. Ovens, 421 P.2d 929, 934 (Ariz. Ct. App. 1966), cert. denied, 390 U.S. 988 (1968). (Holding that constitutional issues do not prevent the court in a child custody matter, from taking into consideration “the church and Sunday school habits of the children . . . These matters may well indicate the concern which one of the parents may have regarding the moral climate in which the children are being reared.”)

- (6) Reducing exposure to the media is in the best interest of the child. Increased exposure to television may cause attention deficit disorders and increased violent tendencies.<sup>25</sup>

#### **IV. The enforceability of Rabbinic Arbitration agreements in court**

The majority of courts refuse to consider arbitration agreements as binding when it comes to custody and visitation. A court may well not accept the arbitrator's determination of the child's best interest, and the court must independently determine if the arbitration panel's decision is truly in the child's best interest.<sup>26</sup> However, many courts will still allow the arbitration to stand after conducting a de novo review. Other courts take a stricter stance and will void arbitration agreements that consider custody.<sup>27</sup> There is a minority view that will validate the arbitration agreement without conducting an indep

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25 See Early Television Exposure and Subsequent Attentional Problems in Children, <http://www.aap.org/advocacy/releases/tvaprill.pdf>; See also The Blue Tube: Foul Language on Prime Time Network TV, <http://www.parentstv.org/ptc/publications/reports/stateindustrylanguage/main.asp> ("The consensus of the scientific and mental health communities is that children are profoundly influenced by the violent images they see on television and in films. Constant exposure to media violence can result in aggressive, anti-social behavior, and even violent outbursts.")

26 See Kovacs v. Kovacs, 633 A.2d 425, 430 (Md.App.,1993) (Holding that when analyzing an arbitration agreement, the court "must first assess the impact of the agreement on the child and determine if the agreement is in his or her best interest"); See also Bloch v. Bloch, 693 A.2d 364, 369 (Md. App. 1997) (explaining the holding of Kovacs). See also Crutchley v. Crutchley, 293 S.E.2d 793, 798 (N.C. 1982) (holding that "the need for the court to protect the welfare of children outweighs the advantages of arbitration"); Patin v. Patin, 45 Va. Cir. 519, 520 (Cir. Ct. 1998) (holding that the court should consider an arbitrator's determination of child custody but must not "simply enforce an arbitrator's award without determining whether such an award is in the best interests of the child"); See also E. Gary Spitko, Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interest of the Family, 57 WLLR 1139, 1157 (Fall, 2000).

27 See e.g. Kelm v. Kelm, 749 N.E.2d 299, 301 (Ohio, 2001) (Holding that arbitration would not be valid and that "[o]nly the courts are empowered to resolve disputes relating to child custody and visitation."); See also Cohoon v. Cohoon, 770 N.E.2d 885 (Ind.App.,2002) (Holding that arbitration agreements about child custody are void and inconsistent with public policy.); Glauber v. Glauber, 600 N.Y.S.2d 740 (N.Y.A.D. 2 Dept.,1993) ("Accordingly, we hold that the issues of custody and visitation must be put before the court for determination and may not be submitted to arbitration.").