

## WHEN “I DO” BECOMES “YOU WON’T!” — PRESERVING THE RIGHT TO HOME SCHOOL AFTER DIVORCE

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### INTRODUCTION

Like all couples in love, Brenda and Martin Kurowski said, “I do” in the hope of a happy life together.<sup>1</sup> But their marriage could not survive the test of time. They divorced shortly after the birth of their daughter Amanda. The divorce decree provided for Amanda’s joint legal custody, but she lived in her mother’s home. When it came time to send her to first grade, Brenda tried home schooling. Martin objected and sued in a New Hampshire family court, where the parents sparred for three years over various child-rearing decisions. Amanda’s home schooling continued, supplemented by piano lessons, theater group, and three classes at the local public school. By all accounts Amanda—now ten years old—was a successful, sociable girl who performed at or above her academic grade level.

In June 2009 the family court finally held a hearing to decide the home-schooling dispute. The judge noted that Brenda and Amanda were “rigidly” Christian and that Martin’s reaction to their beliefs was a source of strife within the family. Despite four years of successful home schooling, the court ordered Brenda to enroll Amanda in the local public school for the 2009–2010 academic year—a decision which attracted national news media attention.<sup>2</sup> The New Hampshire

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1. The facts in this Introduction are drawn from *In re Kurowski*, No. 09-751, 2011 WL 976509 (N.H. 2011).

2. See Julia Duin, *Home-Schooler Ordered to Attend Public School*, WASH. TIMES (Sept. 4, 2009), available at <http://www.washingtontimes.com/news/2009/sep/04/home-schooled->

Supreme Court affirmed that decision as a reasonable exercise of the trial court's discretion.

With home schooling on a sustained, dramatic-growth curve, the *Kurowski* case is not unique. Indeed, home-schooled families cope with divorce and single parenting like the rest of society. And when separated couples disagree about the decision to homeschool, thorny issues arise, fanned by deeply-held beliefs and strong emotions. This Article will address those issues and explore how courts decide if home schooling is in a child's best interests. Part I of the Article will examine two crucial defenses raised by home-schooling parents in these cases: a fundamental parental liberty interest, and the right to freely exercise one's religion under the First Amendment. Part II will consider the "best-interests-of-the-child" standard and critically analyze six key factors that drive court decisions in these tough custody cases. The Article will discuss strategies used to convince courts to treat home schooling with the same deference as the decision to send a child to public or private school.

#### I. TWO FUNDAMENTAL DEFENSES: IS HOME SCHOOLING "UNTOUCHABLE" BY THE COURTS?

In the first 300 years of its colonial and early history, America's predominant educational choice was to homeschool, producing such figures as George Washington, James Madison, Benjamin Franklin, Abraham Lincoln, Mark Twain, Andrew Carnegie, and Thomas Edison.<sup>3</sup> Though compulsory education laws existed as early as 1642, they did not spread until the mid-Nineteenth Century, when the immigrant population exploded, creating a need to "assimilat[e] new Americans into society."<sup>4</sup> Public schools existed, but they were merely one option for parents.<sup>5</sup> In the early Twentieth Century, as mandatory public schooling took hold, home schooling fell by the wayside. But

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christian-girl-ordered-to-join-publi/?feat=home\_headlines; Shannon Mullen, *Judge Orders Homeschooled Girl to School*, NHPR.COM (Sept. 9, 2009), <http://www.nhpr.org/node/26912>.

3. Chad Olsen, *Constitutionality of Home Education: How the Supreme Court and American History Endorse Parental Choice*, 2009 BYU EDUC. & L.J. 399, 415.

4. Khianna Bartholomew, Note, *Avoiding Implicit Acceptance of Bigotry: An Argument for Standardized Testing of Home-Schooled Children*, 92 CORNELL L. REV. 1177, 1180 (2007); Bruce D. Page, Jr., Note, *Changing Our Perspective: How Presumptive Invalidity of Home School Regulations Will Further the State's Interest in an Educated Citizenry*, 14 REGENT U. L. REV. 181, 185 (2002) (calling home schooling a "return to this nation's historical traditions" and noting that early compulsory education laws "existed to assist parents in their duty of educating their children").

5. Bartholomew, *supra* note 4, at 1180.

in the 1950s—the dawn of wide dissatisfaction with public schools<sup>6</sup>—parents returned to home schooling for an alternative.<sup>7</sup> Over the next forty years the movement expanded, with almost two million students homeschooled in the United States today.<sup>8</sup> This remarkable growth, coupled with an unfortunately high divorce rate in society, will continue to produce the kind of home-school-specific custody disputes discussed in this Article.

Home-school advocates have championed a two-pronged defense to fight these custody cases. They hope these two strategies will raise the level of judicial oversight to the “strict-scrutiny” standard,<sup>9</sup> which could make a parent’s decision to educate their children at home nearly untouchable by the government. The first prong relies on Supreme Court precedent that establishes a fundamental right of parents to rear and educate their children.<sup>10</sup> The second prong invokes the protections of the First Amendment’s Free Exercise Clause.<sup>11</sup> This section of the Article will evaluate the merits of those defenses.

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6. Michael E. Chaplin, Comment, *Peterson v. Minidoka County School: Home Education, Free Exercise, and Parental Rights*, 75 NOTRE DAME L. REV. 663, 668 (1999) (“Ironically, as government control of the educational system grew, so too did citizen dissatisfaction with that system. Early revolts came from parents wanting to move their children from public schools to private schools.”).

7. Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 125–27 (2008) (noting that “early pioneers” of home schooling in the 1950s were liberals and educational progressives, and that it was not until the 1990s that Christian home schoolers dominated the movement).

8. Noah Aleshire, *Defining the New “Species”: Recommendations for California Homeschool Legislation After Jonathan L. v. Superior Court*, 246 EDUC. L. REP. 607, 609–10 (2009) (citing Stacey Bielick, Survey, *1.5 Million Homeschooled Students in the United States in 2007*, ISSUE BRIEF, December 2008, at 1, available at <http://nces.ed.gov/pubs2009/2009030.pdf>) (reporting a study conducted by the U.S. Department of Education’s National Center for Education Statistics for the National Household Education Program, finding an increase of home-schooled students from 1.1 million to 1.5 million between 2003 and 2007).

9. Modern constitutional law provides a three-tiered level of scrutiny applied by the courts to governmental decisions that impact protected individual rights. The lowest level of scrutiny, referred to as the “rational basis test,” merely requires the State to show it has a “legitimate” interest in regulating certain conduct, and that it has chosen a method that is “rationally related” to this governmental interest. A higher level of “intermediate scrutiny” requires the State to demonstrate a substantial interest in addressing the conduct, and that its means are tailored to address that interest. Finally, “strict scrutiny”—an often insurmountable level of review—requires the State to prove to the court that its interest in regulation is “compelling” and that it has chosen a method that is narrowly tailored to vindicate that governmental interest. Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780–87 (1987).

10. See *infra* Part I.A.

11. See *infra* Part I.B.

### A. *Is There a Fundamental Parental Right?*

When family courts order home-schooling parents to enroll their children in public school, the first line of legal defense is to assert a fundamental right belonging to parents. Advocates of home education believe the right to rear and educate one's children—the *Parental Right*, if you will—is merely delegated to the government by parents when they desire state assistance.<sup>12</sup> Thus, the State cannot intrude on parental decisions regarding education, at least not without passing strict scrutiny. This level of review applies equally to a judge-fashioned custody order that interferes with a parent's right to homeschool.<sup>13</sup>

At its very core the Parental Right originates in both natural and common law.<sup>14</sup> The famous jurist William Blackstone deemed the parent-child relationship “universal,” and English common law saw it as a “sacred right with which courts would not interfere.”<sup>15</sup> Indeed, this right was so revered that it went virtually unchallenged for centuries.<sup>16</sup> Finally, in the 1923 case of *Meyer v. Nebraska*,<sup>17</sup> the U.S.

12. See Bartholomew, *supra* note 4, at 1194 (citing *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578 (Okla. 1909) as authority for home-school advocates who maintain that “parents confer authority upon schools to educate their children”). Bartholomew also cites CHRISTOPHER J. KLICKA, *THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION* 43 (2d ed. 1998) (“[T]he public school's authority is given by the parents and limited by the parents.”). *But see* Yuracko, *supra* note 7, at 132 (arguing that the State actually delegates its education power to home-schooling parents).

13. *Renchenski v. Williams*, 622 F.3d 315, 337 (3d Cir. 2010) (ruling that “If the challenged state action . . . infringes on a fundamental constitutional right, we must apply the strict scrutiny standard.” Since the rule covers all state actions, a court order that infringes on a fundamental right must be reviewed under the strict-scrutiny standard.).

14. Home-school advocates find a natural law argument in the Ninth Amendment, which recognizes that the “people” possess other rights that are not enumerated in the Constitution. U.S. CONST. amend. IX; *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting). See also Maria Pabon Lopez & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 HOFSTRA L. REV. 1243, 1251–52 (2008) (arguing that the Parental Right fits better under the Ninth Amendment because it is a natural law right that is also “unalienable”); Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 193 (noting parental rights advocates use the Ninth Amendment “as one primary source of constitutional protection for parental rights.”).

15. Witte, *supra* note 14, at 190 (citing *In re Appeal in Maricopa Cnty*, 536 P.2d 197, 206 (Ariz. 1975) (Struckmeyer, V.C.J. concurring and dissenting)); see also *id.* at 218 (noting the natural rights foundation for Parental Rights are “fundamental axioms” that are “presupposed by all our social, political, and legal institutions.”) (citing *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1973)).

16. *Id.* at 219 (“[I]t probably never occurred to the Framers of the Constitution that parental rights could, as a practical matter, ever be called into question . . .”). Even federal statutory law presumed the existence of this right. At the founding of the Department of Education, Congress stated that “parents have the primary responsibility for the education of their children” and “States, localities, and private institutions have the primary responsibility for supporting that

Supreme Court had its first chance to define the right. The Court called it a "fundamental" substantive due process liberty right protected by the Fourteenth Amendment—a person's individual right to "marry, establish a home and bring up children[, and] . . . give his children education suitable to their station in life . . ."<sup>18</sup> Two years later in *Pierce v. Society of Sisters*,<sup>19</sup> the Court declared, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>20</sup> Unfortunately, neither of these cases defined the level of scrutiny courts should use when the Parental Right is at stake.<sup>21</sup> Yet over the next 80 years the Court continued to recognize it as a "fundamental" liberty interest.<sup>22</sup>

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parental role." Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY'S L.J. 611, 619 (2001) (quoting Department of Education Organization Act, 20 U.S.C. § 3401(3) (1994)).

17. 262 U.S. 390 (1923). The case involved a post-World War I appeal from a teacher being criminally prosecuted for teaching German to a student in a Lutheran school, in violation of a Nebraska "English-only" law. The Court ruled against Nebraska, finding no "reasonable relation" to any competent state interest. *Id.* at 396–97, 403.

18. *Id.* at 399–400.

19. 268 U.S. 510 (1925). Oregon had passed a statute essentially requiring children to be educated in public school—a law that would have shut down all primary private schools in the state. Expressly relying on the *Meyer* liberty interest "of parents and guardians to direct the upbringing and education of children under their control," a unanimous Court struck down the statute, saying it had "no reasonable relation to some purpose within the competency of the State." *Id.* at 530, 534–35.

20. *Id.* at 535.

21. Both cases were decided prior to development of modern constitutional tests. Aleshire, *supra* note 8, at 620; Witte, *supra* note 14, at 194. Though in *Meyer* the Court used language similar to today's "rational-basis" test, it is more likely that it applied heightened scrutiny. See Heather M. Good, Comment, "The Forgotten Child of Our Constitution": *The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 647 (2005) ("Under the Court's current rational basis test, the statute at issue in *Meyer* would most likely have been upheld."). See also Jonathan L. v. Superior Court of L.A. Cnty, 81 Cal. Rptr. 3d 571, 592 (Cal. Ct. App. 2008) (commenting that *Meyer* did not apply strict scrutiny, but a "rational relation review").

22. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and '[r]ights far more precious . . . than property rights . . .'" (alterations in original) (citations omitted)); *Prince v. Mass.*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). See also Linda L. Lane, Comment, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 840 (1998) (arguing that "parents have a fundamental liberty interest in the parenting of their children.").

In 2000 the Supreme Court made its most recent pronouncement on the subject in *Troxel v. Granville*,<sup>23</sup> calling the *Meyer-Pierce* Parental Right “perhaps the oldest of the fundamental liberty interests recognized by this Court,” and confirming that “there is a constitutional dimension to the right of parents to direct the upbringing of their children.”<sup>24</sup> Though every Justice acknowledged the importance of the right, only Justice Thomas was willing to suggest that strict scrutiny is required when the right is invoked.<sup>25</sup> Still, after *Troxel* it is at least clear that some heightened scrutiny applies.<sup>26</sup> Indeed, in an abundance of caution, some judges today will default to strict scrutiny to resolve these parental-rights claims.<sup>27</sup>

### B. *The Free-Exercise-of-Religion Defense*

Although not every family homeschools for spiritual reasons, many families view religion as the driving force of that decision. Some see it as a parental duty to provide their children a complete (i.e., “godly”) education, or at least one that is free from a public

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23. 530 U.S. 57 (2000) (plurality opinion). In that case, a Washington court granted visitation rights to the paternal grandparents of two young girls, despite objections by the girls’ custodial mother. A splintered Supreme Court overturned the visitation order, ruling on federal constitutional grounds that it “violated her due process right to make decisions concerning the care, custody, and control of her daughters.” *Id.* at 75.

24. *Id.* at 65 (plurality opinion). Justice O’Connor’s plurality opinion for four Justices confirmed, “[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 66.

25. See *id.* at 77 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring); *id.* at 87 (Stevens, J., dissenting); and *id.* at 95 (Kennedy, J., dissenting). Only Justice Scalia’s dissent took a contrary position, extolling parental rights in theory but—based on his strict jurisprudential views—refusing to admit the judiciary has authority to find “unenumerated” rights in the Constitution. *Id.* at 91–93 (Scalia, J., dissenting).

26. See Good, *supra* note 21, at 658–59 (analyzing each Justice’s opinion and concluding, “[G]iven the plurality opinion, coupled with Justice Thomas’s concurrence—at least five of the Justices favor at least intermediate scrutiny when a fundamental parental right is at issue.”).

27. See e.g., *Jonathan L., v. Superior Court of L.A. Cnty*, 81 Cal. Rptr. 3d 571, 592–93 (Cal. Ct. App. 2008) (applying strict scrutiny to state home-schooling regulations). See also William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 179–80 (2000) (noting how *Meyer* and *Pierce* provided “the foundation for the Court’s enunciation of a right to privacy that culminated in *Roe v. Wade*,” which of course triggers strict scrutiny). But see Aleshire, *supra* note 8, at 621–23 (arguing strict scrutiny does not apply, based on U.S. Supreme Court and recent Ninth Circuit precedent); Joseph P. Tocco, Note, *Home Schooling in Michigan: Is There a Fundamental Right to Teach Your Children at Home?*, 71 U. DET. MERCY L. REV. 1053, 1060–61 (1994) (discussing cases which applied only a “rational-basis” test in Parental Right home school cases).

school environment “destructive to their beliefs.”<sup>28</sup> To such parents, a family court’s order to attend public school places their children’s tender faith in jeopardy—much like the seeds in Jesus’ parable that fell among thorns and were choked by the hostile plants.<sup>29</sup> These parents invariably turn to the First Amendment’s Free Exercise Clause to defend their right to pass on their religion to their children. But due to nebulous Supreme Court precedent, it is unclear just how much protection that clause actually provides.

Scholars used to believe the Supreme Court would apply the highest level of review to government actions that infringed the free exercise of religion.<sup>30</sup> For instance, in *Wisconsin v. Yoder*<sup>31</sup> the Court had applied strict scrutiny to exempt Amish children from a compulsory high school education law.<sup>32</sup> But all that changed in 1990 when Justice Antonin Scalia penned the majority opinion in *Employment Division v. Smith*.<sup>33</sup> That revolutionary case “clarified” that strict scrutiny was *not* the proper standard to use in free-exercise cases; instead, some lesser scrutiny was to be employed against a “neutral, generally applicable law” that in no way targeted religion.<sup>34</sup> In

28. Laura J. Bach, Note, *For God or Grades? States Imposing Fewer Requirements on Religious Home Schoolers and the Religion Clauses of the First Amendment*, 38 VAL. U.L. REV. 1337, 1343–44 (2004).

29. See *Luke* 8:1–15.

30. See Good, *supra* note 21, at 653 (“[T]he Supreme Court applied the strict scrutiny test in ten cases between 1963 and 1990 . . .”).

31. 406 U.S. 205 (1972). In vindicating the Amish’s free exercise of religion over the state’s strong interest in education, the Court went out of its way to emphasize the unique argument made by the Amish—one that “few other religious groups or sects could make”—demonstrating how their way of life would be seriously impacted by the state law. *Id.* at 235–36.

32. *Id.* at 233–34 (showing the Court’s application of strict scrutiny). However, lower courts have been “reluctant to extend this [*Yoder*] exemption to other educational situations.” Bach, *supra* note 28, at 1376–80. But see *Peterson v. Minidoka Cnty. Sch. Dist. No. 331*, 118 F.3d 1351, 1358 (9th Cir. 1997) (applying *Yoder* to invalidate firing of public school principal who homeschooled his children due to personal religious conviction).

33. *Employment Div. v. Smith*, 494 U.S. 872 (1990). The *Smith* Court upheld an Oregon statute criminalizing the use of peyote—a Schedule I controlled substance—even when used sacramentally by Native Americans as part of a religious ceremony. *Smith* single-handedly changed how courts view free-exercise claims. See Antony Barone Kolenc, “*Mr. Scalia’s Neighborhood: A Home for Minority Religions?*,” 81 ST. JOHN’S L. REV. 819, 840–43 (2007) (discussing the ramifications of the *Smith* case).

34. *Smith*, 494 U.S. at 881–85. Laws that actually target the free exercise of religion are still subject to strict scrutiny. But as Justice Scalia explained, to apply strict scrutiny to neutral laws “would be courting anarchy,” and every person would become a law unto himself. *Id.* at 888 (“The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . .”). The dissenters accused Scalia of rationalizing away precedent where strict scrutiny had been applied. See *id.* at 892 (O’Connor, J., concurring) (“To reach this sweeping result, however, the Court must not

other words, neutral laws—such as compulsory education statutes—might only need to pass a “rational basis” judicial review, which is easily satisfied.<sup>35</sup>

But after *Smith*, religious home schoolers continued to argue that strict scrutiny should apply to their cases, based on a loophole left open by the Court. Specifically, the majority opinion had carved out what became known as the “hybrid rights” exception to its holding:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children . . . The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.<sup>36</sup>

The Parental Right, when combined with a free-exercise claim, was specifically singled out by the Court as a “hybrid right” worthy of strict scrutiny.<sup>37</sup> Not all lower courts agree, however, and there is a split within the Circuit Courts of Appeals on the application of this theory.<sup>38</sup> Despite strong policy reasons to apply strict scrutiny in these situations,<sup>39</sup> it is uncertain today what standard any given court will use.

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only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine . . .”).

35. *But see id.* at 881 n. 1 (upholding *Yoder*, 406 U.S. 205, which exempted Amish children from compulsory school-attendance laws). For an explanation of “rational-basis” review see Pettinga, *supra* note 9, 780–87.

36. *Smith*, 494 U.S. at 881–82 (citations omitted).

37. *Id.* Some commentators view this theory simply “as an exception to the *Smith* Court’s rejection of the compelling interest test.” Chaplin, *supra* note 6, at 683. *See also* Good, *supra* note 21, at 655 (“The hybrid rights doctrine was created in *Smith* precisely for the purpose of distinguishing, *not overruling*, earlier precedent.”).

38. *See* Aleshire, *supra* note 8, at 622 (noting that the Third Circuit views “hybrid rights” as *dicta* and the Tenth Circuit rejected applying the hybrid rights doctrine to a home-schooling regulation, while the Ninth Circuit applies the test in some cases); Chaplin, *supra* note 6, at 683–86 (discussing inconsistent application of “hybrid rights”). For an example of a home-school case where strict scrutiny was applied, see *Jonathan L. v. Superior Court of L.A. Cnty.*, 81 Cal. Rptr. 3d 571, 593 (Cal. Ct. App. 2008). *See also* Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 249–52 (3d Cir. 2008) (rejecting a challenge to a Pennsylvania home-schooling law despite, among other things, parents’ hybrid rights argument).

39. For instance, Heather Good has argued that applying “rational basis” would be “unjust” because schools would choose “the moral and religious foundation that the child learns.” Good, *supra* note 21, at 677. She argues that persons of lower economic status who

### C. *Are These Defenses Effective?*

The previous two sections of the Article outlined the first lines of defense for home schoolers when courts order their children into public school. Under these defenses home schoolers seek judges to assess their cases with strict scrutiny (or at least some level of heightened scrutiny). Yet, as this section will explore, courts may use three tactics to evade these arguments in home-school custody disputes.

#### 1. *Parental Deadlock*

A family court may note that these issues have been brought to its forum precisely because two parents—both with rights and an interest in their child's well-being—cannot agree on the best education decision. This is distinguishable from the situation where the State forces its judgment on a married couple who agree about the decision to homeschool:

A trial court exercising the power of the state may not usurp the role of the parent and unilaterally compel any particular form of education; however, as the arbiter of custody disputes, the trial court may decide which of the competing plans proffered by the custodial parents is in the best interests of the child . . . .<sup>40</sup>

By using its position as the "arbiter" of a parental dispute, a court may avoid the home-schooling parent's first line of defense because there are equal, competing rights at stake. In the face of deadlock, the other parent will also appeal to the Parental Right and personal religious convictions (or lack thereof) as the basis for sending the child to public school.<sup>41</sup> Indeed, this was the argument accepted by the New Hampshire family court in the *Kurowski* case discussed in the Introduction.<sup>42</sup>

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have no private school options available will not have the ability to provide such morals to their children. *Id.* at 676–77. *But see* Bartholomew, *supra* note 4, at 1190–93 (advocating against strict scrutiny).

40. *Morgan v. Morgan*, 964 So. 2d 24, 31 (Ala. Civ. App. 2007).

41. *See id.* at 31 (acknowledging that both parents in a joint-legal-custody case have rights, and stating, "[A] court may apply the best-interests standard in a custody dispute between such parents without implicating the Fourteenth Amendment due-process rights of either parent.>").

42. *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 8 (N.H. Fam. Div. Sept. 17, 2009) (order staying motion for reconsideration) ("To the extent that [the mother] argues that her sole decision to home school Amanda is subject to Constitutional protection, the argument ignores the Constitutional rights of Mr. Kurowski, who also has joint decision-making authority for Amanda.").

But does this approach misuse the judicial process? A court is presented with two people who no longer have the natural incentive to get along, and who cannot agree on basic decisions involving those who matter most—their own tender children. Judges assume that, since they have authority to award custody, they may make substantive decisions for a child with deadlocked parents. But in every family there are a host of disputed issues that might need resolving, such as: should the child be permitted to date before the age of sixteen?; be allowed to go on a school trip?; be permitted to take a part-time job during the school year? In the absence of neglect or abuse, is it really the duty of the courts to make these kinds of substantive decisions for bickering parents? As one court admitted, “Raising children is beyond the competence of impersonal political institutions.”<sup>43</sup> In this area courts should exercise greater restraint.<sup>44</sup>

## 2. *Compelling State Interests*

Even where courts apply strict scrutiny, they might find the government has a compelling interest in the child’s education.<sup>45</sup> Some courts emphasize the state’s obligation to vindicate the child’s *own* fundamental right to an education.<sup>46</sup> Other courts rely on the *parens patriae* doctrine, which holds that “states have the ethical responsibility and legal authority to care for and educate all children for the ultimate benefit of the state.”<sup>47</sup> The Supreme Court itself has provided the

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43. *Rust v. Rust*, 864 S.W.2d 52, 55 (Tenn. Ct. App. 1993) (citations omitted).

44. For instance, federal courts refuse to resolve some disputes outside their scope of competence, such as with the “political question” doctrine. See generally Kenji Yoshino, *Restrained Ambition in Constitutional Interpretation*, 45 WILLAMETTE L. REV. 557 (2009) (discussing the doctrine). Why not allow for the same bumpy resolution process between parents who have a natural, fundamental right to make these tough choices about their children’s situation?

45. See Aleshire, *supra* note 8, at 625 (discussing the compelling state interest in education in the context of home-schooling statutes, and arguing that the state is “obligated . . . to impose limits on parental rights to home school when these rights jeopardize the welfare of the child or have potential for great societal burdens. The social cost of truancy and educational neglect presents just such a social burden.”); Bartholomew, *supra* note 4, at 1179 (noting a state interest in “universal education”). See also Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 86 (2002) (noting that public school attendance serves a state interest in assessing whether a child is being abused at home).

46. See Michael E. Hersher, “Home Schooling” in California, 118 YALE L.J. POCKET PART 27, 28 (2008) (“[R]ecent California cases have held that the right to an education belongs to the student. Since the child’s right to an education is fundamental under these cases, the State has a compelling interest in safeguarding the right through reasonable compulsory attendance statutes.”).

47. Robert C. Cloud, *Balancing Parental Rights and State Interests in Home Schooling*, 235 EDUC. L. REP. 697, 708 (2008).

rationale for this doctrine. In *Pierce*—where the Court famously declared, “[T]he child is not the mere creature of the State”<sup>48</sup>—the Court affirmed the “power of the State” to place “reasonable regulations” on the child’s education.<sup>49</sup> The Court expounded further on this power in *Prince v. Massachusetts*:<sup>50</sup>

Acting to guard the general interest in youth’s wellbeing, the state as *parens patriae*, may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare, [including] to some extent, matters of conscience and religious conviction.<sup>51</sup>

Therefore, if the governmental action being challenged is also narrowly tailored, it may pass even strict judicial scrutiny. In general, this is how states have historically regulated home schooling.<sup>52</sup>

In this way, some courts will apply strict scrutiny and still affirm a decision to force a home-schooled child into public school. In *Jonathan L. v. Superior Court*,<sup>53</sup> a California court applied strict scrutiny to just such an order. Under the unique facts of that case the court recognized California’s “compelling interest” in the welfare of children, noting that the father had sexually abused two of his daughters.<sup>54</sup> Emphasizing that it was not reviewing the activities of a “fit parent,” the court had no hesitation in affirming the court order despite the heightened scrutiny.<sup>55</sup> As this case illustrates, use of strict scrutiny does not necessarily mean a court will allow a child to be homeschooled.

48. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

49. *Id.* at 534.

50. 321 U.S. 158 (1944). In that case, the Court upheld the conviction of a Jehovah’s Witness mother who had her minor daughter distribute religious pamphlets on the street, in violation of child labor laws. While noting the strong rights of parents, the Court also expounded repeatedly on the state’s power. *Id.* at 159–64.

51. *Id.* at 166–67.

52. J. Bart McMahon, Note, *An Examination of the Non-Custodial Parent’s Right to Influence and Direct the Child’s Education: What Happens When the Custodial Parent Wants to Home Educate the Child*, 33 U. LOUISVILLE J. FAM. L. 723, 734–35 (1995) (listing cases where state regulation of home schooling was upheld, and concluding that “a state does have a protected interest in ensuring that all of its children are educated.”).

53. 81 Cal. Rptr. 3d 571, 593 (Cal. Ct. App. 2008).

54. *Id.* at 578.

55. *Id.* at 594 (emphasis omitted) (stating further that if a court’s “requiring a dependent child to have regular contact with mandated reporters is necessary to guarantee the child’s safety, that order would satisfy strict scrutiny. There can be no dispute that the child’s safety is a compelling governmental interest.”).

### 3. "No Harm, No Foul"

Finally, courts might simply duck home-school defenses if the State did not harm any protected rights. In *Reid v. Kenowa Hills Public School*,<sup>56</sup> home-schooling parents sought access to activities in a public school. In denying the claim, the court did not grapple with the parents' free-exercise argument; instead, it noted an inconsistency in their position.<sup>57</sup> The court did not see how secular extracurricular activities benefited the family's religious curriculum.<sup>58</sup> This was also the approach taken by the judge in *Kurowski*, who did not believe the order placing Brenda's daughter, Amanda, in school would impose restrictions on Brenda's ability to teach Amanda religion.<sup>59</sup> Brenda would have plenty of time for religious instruction outside of the public school day.<sup>60</sup>

As demonstrated in this part of the Article, courts have used at least three tactics to get past the first line of defense raised by home-schooling parents in cases where a child has been ordered to attend public school. Indeed, the ease with which courts can dismiss parental rights has led advocates to propose statutes and constitutional amendments to vindicate parental authority.<sup>61</sup> But even where courts can avoid these arguments, the home schooler can win. Part II of the Article will synthesize and analyze six critical factors courts consider when determining whether a parent will be permitted to school at home despite the other parent's objections. These factors are integral to a home schooler's defense.

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56. 680 N.W.2d 62, 65 (Mich. Ct. App. 2004).

57. *Id.* at 69–70. See also Good, *supra* note 21, at 666–74 (discussing several cases where courts have dodged Parental Right and free-exercise issues under a "colorable claim" doctrine, finding, for instance, that parental rights did not include "a broad-based right to restrict the flow of information in the public schools," or a right to "pick and choose the classes that their daughter would attend," or rights premised on "pretext for seeking a heightened standard of scrutiny").

58. *Reid*, 680 N.W.2d at 69–70.

59. *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 8 (N.H. Fam. Div. Sept. 17, 2009) (order staying motion for reconsideration).

60. *Id.* at 7.

61. Jennifer L. Sabourin, Note, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to "Shed Their Constitutional Rights" at the Schoolhouse Door?*, 44 WAYNE L. REV. 1899, 1899–1901 (1999) (noting and arguing against the movement in the 1990s to pass such amendments at the state level, and noting that Texas had already passed such a law).

## II. THE "BEST INTERESTS OF THE CHILD"—SIX KEY FACTORS IN HOME-SCHOOL CUSTODY CASES

The *Kurowski* case in the Introduction to the Article lays out the classic fact pattern oft-repeated in home-schooling custody cases. One parent—usually with physical custody of the child—desires to take her out of public school and teach her at home. But the other parent files for a modification to the divorce decree, seeking either sole custody or the right to choose the child's school. Using the "best-interests-of-the-child" standard, a family court enters the fray and forces the child to attend public school, possibly even changing custody.<sup>62</sup> But how does a court determine what is in the child's "best interests" when it comes to the home-school decision?

The "best-interests-of-the-child" standard has developed over time into a near-universal measuring rod for decisions involving minors. Though the general spirit of the "best-interests" standard remains the same from state to state, its exact details vary widely. Some states lay out specific factors that must be considered when making these determinations.<sup>63</sup> Others, such as New York, have no statutory elements, relying on the courts to develop appropriate guideposts.<sup>64</sup> This part of the Article will suggest that a special set of rules apply in home-schooling cases, regardless of a state's official "best-interests" test. An

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62. *See supra* Introduction.

63. For instance, Indiana sets forth eight very detailed factors:

(1) The age and sex of the child. (2) The wishes of the child's parent or parents. (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age. (4) The interaction and interrelationship of the child with: (A) the child's parent or parents; (B) the child's sibling; and (C) any other person who may significantly affect the child's best interests. (5) The child's adjustment to the child's: (A) home; (B) school; and (C) community. (6) The mental and physical health of all individuals involved. (7) Evidence of a pattern of domestic violence by either parent. (8) Evidence that the child has been cared for by a de facto custodian . . . .

IND. CODE § 31-17-2-8 (2009). *See also* CAL. FAM. CODE § 3011 (West 2009) (evidencing a similar set of factors established in California).

64. NEW YORK DOM. REL. LAW § 70 (McKinney 2009) ("[T]here shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."). *See also In re Carrasquillo v. Cora*, 60 A.D.3d 852, 853 (N.Y. App. Div. 2009) ("The court must look at the totality of circumstances and '[f]actors to be considered in determining those best interests include the parental guidance provided by the custodial parent, each parent's ability to provide for the child's emotional and intellectual development, each parent's ability to provide for the child financially, the relative fitness of each parent, and the effect an award of custody to one parent might have on the child's relationship with the other parent.") (citations omitted).

analysis of these cases reveals six key considerations that determine the outcome of these unique parental disputes.

### A. *The Custody Factor*

The natural starting place for any court refereeing a home-school-specific dispute will be to read the custody arrangement between the parents, if one already exists. When parents seek to formalize legal custody of their child—often due to divorce—the court will either grant one parent sole legal custody or will fashion a shared custody arrangement. The details of the custody decree will vary with the facts of each case. Custody includes a “bundle of rights” over decisions involving the child, such as education choices. Although a married couple shares this bundle of rights, upon divorce a court is forced to divvy them up between the parents.<sup>65</sup> Once a court makes an initial custody determination, it will not modify that order absent some significant change of circumstances.<sup>66</sup> Thus, the original custody arrangement is a decisive moment for parents hoping to later homeschool their children.

#### 1. *Sole Legal Custody*

Throughout American history the parent with sole legal custody—usually the mother<sup>67</sup>—has had almost *carte blanche* authority over decisions involving the child’s education. For most of the past century “a non-custodial parent had no recognized legal interest in directing or controlling the education of a child.”<sup>68</sup> Judges were concerned that non-custodial parents would not know the child’s “talents and abilities” and might not act in the child’s best interests.<sup>69</sup> Indeed,

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65. *Rust v. Rust*, 864 S.W.2d 52, 54–55 (Tenn. Ct. App. 1993) (discussing custody arrangements).

66. *Bowman v. Bowman*, 686 N.E.2d 921, 926 (Ind. Ct. App. 1997) (“A trial court may not modify a child custody order unless the modification is in the best interests of the child . . . . The noncustodial parent must show a change in the custodial home which is of a decisive, substantial, and continuing nature.”) (citations omitted); *Elrod v. Elrod*, 481 S.E.2d 108, 111 (N.C. Ct. App. 1997) (holding that custody orders “entered without any limitations with respect to the education of the children” can only be modified “upon a showing of a substantial change in circumstances and upon the further showing that . . . [it] is in the best interest of the children.”).

67. Unlike Roman and English law, American law developed a preference for maternal custody under the “tender years doctrine.” “The doctrine originated in the nineteenth century as a child-protective reform intended to elevate the interests of children above fathers’ common law proprietary rights in children.” Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 337 (1982).

68. McMahon, *supra* note 52, at 736.

69. *Id.* at 737 (citing *Esteb v. Esteb*, 244 P. 264, 268 (Wash. 1926)).

courts have traditionally held that a non-custodial parent "lost his inherent right to control and direct his child's education at the moment he lost custody of the child," and that these are "decisions exclusively vested in the custodial parent."<sup>70</sup>

That traditional judicial practice was used in *Rust v. Rust*, where a Tennessee appellate court balked at "disturb[ing] the childrearing decisions of otherwise fit custodial parents."<sup>71</sup> Mr. Rust, the non-custodial father of a home-schooled child, objected to his ex-wife's decision to teach their son at home. He was successful in the trial court, winning an order that forced the child into public school.<sup>72</sup> But the appellate court disagreed, citing the "substantially higher" "threshold for interfering with a custodial parent's parenting decisions."<sup>73</sup> The court would "not second-guess these decisions" because a custody decree "creates a new family unit . . . entitled to a similar measure of constitutional protection against unwarranted governmental intrusion as is accorded to an intact, two-parent family."<sup>74</sup> As this case illustrates, parents going through a divorce or initial custody determination should strive to get sole custody of the children to maximize their opportunity to homeschool in the future.

The amount of judicial deference the custodial parent will receive varies according to the particular state's philosophy. In some states, decisions of the custodial parent will still be subjected to rigorous judicial scrutiny. For instance, in *Clark v. Reiss*<sup>75</sup> an Arkansas appellate court upheld an order forcing a child to remain in public school, despite the custodial mother's desire to homeschool. The objection came from the child's non-custodial father. In defending its decision, the court stated, "[A]n award of custody to one parent does not lessen the non-custodial parent's responsibility relative to the children nor does it affect his rights as a parent to provide guidance and to participate in decisions affecting the welfare of the children."<sup>76</sup> Similarly, in *Gardini v. Moyer*,<sup>77</sup> the Ohio Supreme Court removed sole custody from the mother and awarded it to the father merely because of her decision to homeschool. Finding the child's "best interests" outweighed her parental rights, the court considered the

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70. *Id.* at 736-37 (citations omitted).

71. *Rust v. Rust*, 864 S.W.2d 52, 54 (Tenn. Ct. App. 1993).

72. *Id.*

73. *Id.*

74. *Id.* at 55-56 (citations omitted).

75. 831 S.W.2d 622 (Ark. Ct. App. 1992).

76. *Id.* at 624.

77. 575 N.E.2d 423 (Ohio 1991).

mother's home-schooling program to be a "threat" to the child's welfare, even though it complied with the state's home-school law.<sup>78</sup>

These two cases demonstrate that a sole custody award—while very important—will not guarantee the custodial parent will prevail when it comes to choosing the child's schooling.<sup>79</sup> This is even more apparent when a decree grants one parent sole custody but reserves some decisions to the non-custodial parent. In *Taylor v. Taylor*,<sup>80</sup> an exception in the divorce decree authorized the non-custodial father to choose his son's school; he intentionally chose a non-Catholic school over objections by the child's Catholic mother. These types of custody decrees also exist in cases involving home-schooling families<sup>81</sup> and can create nearly insurmountable obstacles to home education.

## 2. *Joint Legal Custody*

Whereas *sole* legal custody gives the custodial parent a marked advantage in a dispute over home schooling, *joint* legal custody creates an obstacle for the home educator. In a joint custody situation a court is less likely to defer to a schooling decision by one parent because both parents have an equal say in their child's education. Therefore, joint legal custody invites parental deadlock. This is critical to understand because in the last thirty years more and more courts have awarded joint legal custody in divorce cases, largely due to the growing "father's-rights" movement.<sup>82</sup> In fact, joint custody arrangements are now "the norm" in many jurisdictions today.<sup>83</sup> Due

78. *Id.* at 425–27; McMahan, *supra* note 52, at 740–41 (discussing the *Gardini* case).

79. Some commentators argue that the custodial parent should have no advantage on these matters. See McMahan, *supra* note 52, at 739–40 (arguing courts should "subordinate parental rights to the right of the child" and that "[i]f home education can prepare a child for life adequately without amounting to a substantial change in the circumstances upon which the court based the original custody order, a custodial parent should be entitled to home educate his or her child.>").

80. 176 N.E.2d 640 (Ill. App. Ct. 1961).

81. See *P.H. v. L.H.*, No. 01-1041, 2003 WL 1923461, at \*4 (Mass. App. Ct. Apr. 23, 2003) ("[T]he judgment of divorce nisi specifically authorized the husband to make all decisions relating to the education of the minor children."); *Elrod v. Elrod*, 481 S.E.2d 108, 111 (N.C. Ct. App. 1997) ("[T]he trial court . . . is not precluded from prohibiting in some circumstances, as a condition of the custody grant, the home schooling of the children . . .").

82. Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315, 322–23 (2006). Adams noted that California's revolutionary joint custody statute "was intended not only to ensure continued contact between divorced fathers and their children, but also to 'enhance their bargaining power in the custody and visitation wars.'" *Id.* at 323 (citation omitted).

83. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365 (2009) (noting seventy percent of child custody decrees

to the inherent risk of joint legal custody cases, those who wish to educate at home should strive to avoid these custody arrangements if at all possible.

The *Kurowski* case in the Introduction is but one example of a joint custody case that resulted in judgment against the home schooler.<sup>84</sup> Likewise, in *Morgan v. Morgan* the trial court granted a mother's petition to keep her child in public school, despite the father's desire to educate him at home.<sup>85</sup> The court noted that parents with joint legal custody "have equal constitutional rights to the care, custody, and control of the child and . . . a court may apply the best-interests standard in a custody dispute between such parents without implicating the Fourteenth Amendment due-process rights of either parent."<sup>86</sup> There the court felt it would be in the child's best interests to stay in public school. Other joint custody decisions also have been resolved against the home-schooling parent.<sup>87</sup>

#### B. *The "Judicial-Prejudice" Factor*

Lawyers often throw about the maxim, "Know thy judge." One meaning of this truism is that—even if the law is on your side—a judge hostile to your cause will find a way to rule against your client. Unfortunately, that saying also holds true in home-schooling custody cases. A review of those decisions reveals that some judges hold a deep-seated and irrational bias against the practice of homeschooling. Indeed, judicial prejudice is perhaps the most important factor for litigants to understand and thwart because the "best-interests" test is subjective and left largely to the judge's discretion.

At the dawn of a new millennium one would expect prejudice against home schooling to be on the decline. Acceptance of this alternative form of education is growing, and there is convincing data to demonstrate that, for many children, home schooling is a better

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in North Carolina included joint legal custody, and that the American Law Institute Principles "contain a presumption in favor" of it).

84. *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 11–12 (N.H. Fam. Div. Sept. 17, 2009) (order staying motion for reconsideration).

85. *Morgan v. Morgan*, 964 So. 2d 27, 28, 36 (Ala. Civ. App. 2007).

86. *Id.* at 31.

87. *See* P.J.S. v. J.S., No. 95-10784, 2002 WL 31998734, at \*1–\*2 (Del. Fam. Ct. Aug. 22, 2002); *Taylor v. Taylor*, No. 281555, 2008 WL 2917650, at \*7 (Mich. App. Ct. July 29, 2008). *But see* *Carrano v. Dennison*, No. 96-0333396, 2001 WL 1267509, at \*1–\*5 (Conn. Super. Ct. Sept. 24, 2001) (allowing home schooling in a joint-legal-custody case).

educational choice than either public or private schooling.<sup>88</sup> The practice of educating at home is now legal in every state,<sup>89</sup> and the number of home-schooled students continues to jump each year, with perhaps more than two million home schoolers in the United States today.<sup>90</sup> It is estimated that the number of children schooled at home at some point in their lives may be as high as twelve percent of the entire student population.<sup>91</sup> Despite this progress, some judges still do not view home schooling as a valid and equal alternative to public school.

### 1. *Blatant Judicial Prejudice*

Anti-home-school judicial bias may be influenced by those far corners of the legal profession that prefer greater state control over students.<sup>92</sup> But, whatever its origin, prejudice is often easy to spot. The Montana Supreme Court encountered an obvious illustration in *In re Marriage of Epperson*.<sup>93</sup> A District Court order, granting the motion of a non-custodial father to force his child into public school, included the following rhetoric:

[T]he Eppersons home schooled their children, essentially denying them access to the outside world. . . . Robert's willingness to send the children to a public school at least opens up the possibility that

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88. See *infra* notes 136–142 and accompanying text (discussing educational superiority of home schooling).

89. Aleshire, *supra* note 8, at 619 (“In 1982, only two states had statutes explicitly recognizing home schooling as an exception to compulsory attendance laws. Today, thirty-five states have home schooling statutes, and all fifty states legally recognize home schooling in some fashion.”).

90. Yuracko, *supra* note 7, at 124–25. See also Louis P. Nappen, *The Privacy Advantages of Homeschooling*, 9 CHAP. L. REV. 73, 80 (2005) (reporting a twenty-nine percent increase in home schoolers in a five-year period, and noting that statistics on the number of home-schooled students may be underestimated).

91. Bach, *supra* note 28, at 1342. To put it in perspective, Kimberly Yuracko writes that there are twice as many home-schooled children as those enrolled in “conservative Christian schools” and that home schoolers outnumber the combined student population of “Wyoming, Alaska, Delaware, North Dakota, Vermont, South Dakota, Montana, Rhode Island, New Hampshire, and Hawaii . . .” Yuracko, *supra* note 7, at 125.

92. Judges are lawyers who often reflect the same values and paradigms as others schooled in the law. To some legal commentators, it is the religious aspect of home schooling that is most unsettling. See, e.g., Yuracko, *supra* note 7, at 156 (desiring more state oversight of home schooling, and criticizing home-school curricula for teaching religious doctrines such as submission, where God desires that “girls should be subordinant [sic] to their fathers and later their husbands.”).

93. 107 P.3d 1268 (Mont. 2005).

the children will receive an adequate education and be exposed to ideas that are not first sifted through their parents' view of reality.<sup>94</sup>

The court went on to note that it did "not *automatically* assume that *every* home schooling situation is *necessarily* inferior to *every* public education situation."<sup>95</sup> Montana Supreme Court Justice Rice believed the District Court's comments were "inappropriate" and could "easily be construed as a judicial assault upon the rights of parents to educate their children."<sup>96</sup> He reported in his concurring opinion that "the [Epperson] children were well adjusted to their environment and well educated, if not exposed to all the wonders of the world."<sup>97</sup> He then chided the District Court for ridiculing the Eppersons, "fault[ing] a parental decision to have no television, fault[ing] the parents' choice of home-schooling over public education and criticiz[ing] parental efforts to transmit their 'view of reality' to their children."<sup>98</sup>

Justices from other high courts have also observed judicial prejudice in the family courts. In *Taylor v. Taylor*, a Michigan lower court ordered a seven-year-old girl into public school when her parents with joint legal custody could not agree on home schooling.<sup>99</sup> Ignoring the fact that the child was thriving under home education,<sup>100</sup> the trial court judge expressed his belief that public schools offered "wider exposure" and "much more diversity, many more opportunities" for children than home schooling, and that it made a child "a more well-rounded person."<sup>101</sup> With regard to the mother's desire to ensure her child received religious instruction as part of the curriculum, the judge moralized that "we live in a very diverse society and it is not beneficial for children to be raised in a bubble where they do not have exposure to other people's cultures and other people's religion."<sup>102</sup> Dissenting from the Michigan Supreme Court's decision not to hear the appeal, Justice Markman reproached the trial court for "*appearing* to substitute its own generally unfavorable attitudes concerning homeschooling for the public policies of this state, which accord no

94. *Id.* at 1276 (Rice, J., concurring).

95. *Id.* (emphasis added) (citation omitted).

96. *Id.* at 1276-77.

97. *Id.* at 1277 n.1.

98. *Id.* at 1276.

99. *Taylor v. Taylor*, No. 28155, 2008 WL 2917650, at \*1 (Mich. App. Ct. July 29, 2008).

100. The girl participated in a home-schooling association for social activities and was assessed by a teacher as having "the skills of a first grader prior to entering that level of schooling." *Id.* at \*2.

101. *Taylor v. Taylor*, 758 N.W. 2d 243, 243-44 (Mich. 2008) (Markman, J., dissenting).

102. *Id.* at 244.

preference for either public schooling or homeschooling.”<sup>103</sup> He saw in the lower court’s comments “a predisposition by the trial court that, everything else being equal, public schooling is invariably preferable to homeschooling . . . .”<sup>104</sup>

Justice Wright of the Ohio Supreme Court provided the most honest confession of this judicial prejudice in his dissenting opinion in *Gardini v. Moyer*.<sup>105</sup> The majority of the court had entirely stripped custody from a home-schooling mother—despite her being a “fit and good mother with normal, ‘delightful’ children”<sup>106</sup>—due to the non-custodial father’s objections to home schooling.<sup>107</sup> The majority accepted “without reservation” the opinion of a “biased” child psychologist expert witness who held “the belief that home schooling is inherently harmful to the normal development of children—all children.”<sup>108</sup> In a moment of remarkable candor, Justice Wright pinpointed the unfair reality of judicial bias:

With . . . our now firmly rooted tradition of communal education, many are skeptical of home schooling. This has to be true of judges whose professions make personal and societal interactions an imperative and whose own education was by necessity filled with personal interactions. . . . I would seek custody, too, if I were in [the father’s] shoes, based, at least in part, on an inherent distrust of home schooling. However, I cannot condone our indictment today of a state-sanctioned, educational alternative before giving it any chance of success.<sup>109</sup>

The institutional, societal bias decried by Justices Markman and Wright are perhaps the greatest threats today to the right to homeschool after divorce.<sup>110</sup>

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103. *Id.* at 243.

104. *Id.* at 244.

105. 575 N.E.2d 423, 427 (Ohio 1991) (Wright, J., dissenting).

106. *Id.* at 428.

107. *Id.* at 424, 427.

108. *Id.* at 428.

109. *Id.* at 427–28.

110. See *Taylor v. Taylor*, No. 281555, 2008 WL 2917650, at \*7 (Mich. App. Ct. July 29, 2008) (recognizing “the trial court did make several statements indicating that it had a general preference not to home school children” but finding no error in trial court’s order).

## 2. *Biased Judicial Assumptions*

Even where bias is not blatant, it is often possible to identify faulty judicial assumptions about home schooling. One common preconception is that parents without college degrees are incapable of providing home education. This preconceived notion can skew the subjective "best-interests" analysis and produce shocking results, such as seen in *Stephen v. Stephen*.<sup>111</sup> Despite the trial judge's opinion that the children were "probably better off with" their home-schooling mother, he threatened to strip sole custody from her and award it to their non-custodial father, whose only concern was that his ex-wife was "not qualified to serve as a teacher."<sup>112</sup> A hearing revealed that the boys were well educated in the home,<sup>113</sup> and "substantial evidence" showed the father to be an unfit parent: a "problem drinker" who drove drunk; a "deadbeat dad" who once had to be taken to court to pay child support; barely exercised his visitation rights; and a neglectful father when he did visit with the children.<sup>114</sup> Yet the judge was ready to place them under that man's sole care to avoid home schooling. The Oklahoma Supreme Court ruled that the judge was wrong to "presume" a high-school-educated mother was "unqualified to educate her children at home."<sup>115</sup> The court said, "The trial court's personal beliefs should not be forced on a custodial parent who has made a legitimate decision for the benefit of the minor children."<sup>116</sup>

Another recurring misconception is that home schooling is somehow inferior to public schooling because it is not "mainstream." In *Rust v. Rust*, an appellate court overturned the trial court's ruling that prohibited a custodial mother from educating her son at home.<sup>117</sup> The court thought the non-custodial father had been improperly granted power to veto the home education of his children merely because the judge believed home schooling "deviates substantially from the mainstream educational program."<sup>118</sup> However, an appellate court will not be able to rescue the home-schooling parent in every

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111. 937 P.2d 92 (Okla. 1997).

112. *Id.* at 94.

113. *Id.* at 96.

114. *Id.* at 97.

115. *Id.* Though the court did not comment on this fact, not every state requires that teachers be certified in order to teach in public or private schools. See Bach, *supra* note 28, at 1357.

116. *Stephen*, 937 P.2d at 97.

117. *Rust v. Rust*, 864 S.W. 2d 52, 54 (Tenn. Ct. App. 1993).

118. *Id.* at 54.

case. For example, in *P.J.S. v. J.S.*, a Delaware court refereeing a joint custody case ordered a child to stay in public school based on the judge's belief that home schooling was a "drastic measure," which he considered a last resort.<sup>119</sup> The mother had good reason to be concerned about her son: he "cried daily" about going to public school, coped poorly with test-related pressure, and was regularly bullied by three older boys.<sup>120</sup> Moreover, the boy's counselor recommended home schooling to help deal with his anger and avoid a "downward spiral."<sup>121</sup> Despite evidence of an "anxiety disorder" triggered by public schooling, the court preferred for the child to face the stress of that environment rather than be homeschooled.<sup>122</sup> Unfortunately, that was the last word on the matter because the court's judgment was never appealed.

While home schoolers complain about being treated differently, they may have unwittingly contributed to the perception that home schooling is outside the mainstream. The movement arose in part as a counter-cultural way for parents to opt out of a failing public education system that, according to some families, promotes teachings that are destructive to core values.<sup>123</sup> With that type of criticism it is no wonder those who support public schooling might "take it personally" when parents withdraw their children to home school.<sup>124</sup> The situation is not helped by the fact that many public school advocates perceive home schooling as a threat to their own system.<sup>125</sup>

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119. See *P.J.S. v. J.S.*, No. 95-10784, 2002 WL 31998734, at \*1-\*2 (finding no evidence "that removing M. from the public school setting and permitting Mother to home school him would be in his best interests, particularly when no other less drastic measures have been employed.").

120. *Id.* at \*1.

121. *Id.* at \*2.

122. *Id.* (noting the boy's "socially driven" anxiety, expressing concern that home schooling's "limited interaction with his peers would [not] help him overcome his fears," and suggesting that if he "resumes displaying stress or anxiety on a daily basis when he returns to school" he should be psychologically evaluated).

123. See Olsen, *supra* note 3, at 421 ("As home education has grown, it has separated itself from mainstream public education and attracted scrutiny that creates more harm than benefit." (footnotes omitted)).

124. See *id.* at 421-22 (arguing public educators must understand why families home school, and rethink the "us v. them" mentality). See also Brad Colwell & Brian D. Schwartz, *Tips for Public School Administrators in Monitoring and Working with Homeschool Students*, 197 EDUC. L. REP. 1, 2 (2005) (arguing school districts "should avoid becoming entangled in a dispute between divorced parents" about home schooling).

125. See McMullen, *supra* note 45, at 102 (explaining that officials invested in the public school system stand to lose budget money from home schooling, and pointing out that these public school educators "have competing goals of protecting the school system itself. Often the institutional goals will represent a conflict of interest when determining whether a home schooled individual's educational needs are being met.").

Some argue that the full acceptance of home schooling will require a change of paradigms from the past century's notion that public schooling is needed to integrate immigrants into American society.<sup>126</sup> Until that time, some judges will continue to view home education in general through the negative lens of the past.

### 3. *Thwarting Judicial Prejudice*

Judicial bias may be the most subtle and deadly danger to home schooling in these types of custody cases. Often it is not possible to "know thy judge's" predispositions about home education until after his ruling. The trial court might believe educating at home should be reserved only for documented special circumstances.<sup>127</sup> Or perhaps the judge feels that home schooling is unhealthy because it lacks structure.<sup>128</sup> Perhaps for that reason, litigants should assume that a trial court needs to be educated on the merits of home schooling and the reasons why it should be treated on equal footing with public and private schools. Many families that school at home are nonconformist by nature; thus, they might not feel the need to "validate" the legitimacy of their fundamental rights. But when their custody rights are in jeopardy before a court, objective expert testimony is necessary to give the judge a factual basis to find in the parent's favor, and to root out potentially fatal judicial misconceptions.

*Carrano v. Dennison* stands as a good model for a person defending the decision to homeschool when the other parent objects.<sup>129</sup> In that joint-legal-custody case, where the parents had never been married and the child lived with her mother, a Connecticut family court granted a mother's petition to educate her daughter at home over the

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126. Olsen, *supra* note 3, at 422.

127. See *In re Stout*, 336 B.R. 138, 143 (Bankr. N.D. Iowa, 2006) (dismissing petitioner's Chapter 7 application because home-schooling expenses deemed a "luxury." The court found no evidence that the daughter's public school was "substandard" and no "professional evidence" recommended the home schooling).

128. In *Clark v. Reiss*, 831 S.W.2d 622, 623-25 (Ark. Ct. App. 1992), the court applied a "clearly erroneous" standard to uphold the conclusion of a family court chancellor who had prohibited a custodial mother from home schooling her children when the non-custodial father objected. The chancellor had reasoned quite simply that removing children from a "structured school system . . . could drastically affect their entire future"; therefore, such a choice "should be a unanimous decision of both parents." *Id.* at 625. He was concerned that the children would suffer because the mother "did not have a structured educational environment." *Id.* In fact, some home schooling methods experiment with a total lack of structure to achieve flexible, fun, and creative learning. See McMullen, *supra* note 45, at 80-81 (discussing the practice of "unschooling" where there is no structure and no formal curricula).

129. *Carrano v. Dennison*, No. 96-0333396, 2001 WL 1267509 (Conn. Sup. Ct. Sept. 24, 2001).

father's objection.<sup>130</sup> Various experts had testified that home schooling was a viable alternative to public schooling and that the child would not suffer harm either socially or academically.<sup>131</sup> Without disparaging either home schooling or public schooling, the court evaluated the evidence objectively and noted that it must decide the case not based on either parent's desires but on the child's best interests.<sup>132</sup> Ultimately, the court allowed the home schooling as long as there was annual testing and the mother continued to be the child's teacher.<sup>133</sup> This case shows that not every court is biased and that it is indeed possible for judges to treat home schooling as an equal and valid form of education.<sup>134</sup>

### C. *The Education Factor*

When a family court applies a "best-interests-of-the-child" standard to a decision about schooling, it should come as no surprise that a major factor will be the quality of education, both in public school and in the home. This is not a wise time for a home-schooling parent to dig in her heels and merely rest on the argument that she has a fundamental right to educate her children, regardless of the effectiveness of her teaching method.<sup>135</sup> Instead, this is the time for expert testimony. And why not? There are significant facts available to demonstrate that home schooling can provide an education superior to formal schooling.

It should be recalled that the original advocates of the modern home-school movement were not religious groups but "educational progressives" who believed that traditional schools were "rigid and

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130. *Id.* at \*1-2, \*4.

131. *Id.* at \*3.

132. *Id.* at \*4.

133. *Id.* at \*5.

134. See McMahon, *supra* note 52, at 744 ("Certainly, a presumption that home education does or does not deny a child an education comparable that the child would receive in public schools should not exist. The courts should evaluate all relevant factors to determine the best interests of the child before rendering a decision that protects the child's educational development."). See also *In re T.M.*, 756 A.2d 793, 793-94, 798 (Vt. 2000) (applying state law in a truancy case, finding the mother had properly followed the state home schooling enrollment statute).

135. *Gardini v. Moyer*, 575 N.E.2d 423, 425 (Ohio 1991) (stripping sole custody from a home-schooling mother whose primary avenue of attack at her hearing was that she had a "God-given right" to educate her children at home).

intellectually stifling."<sup>136</sup> One such pioneer, Raymond Moore, conducted a famous study in the 1960s that concluded "children learn more in a few hours of one-on-one tutoring than they can in a whole day of education in a group setting."<sup>137</sup> This early optimism about home education has been consistently substantiated by statistics gathered over the past thirty years. For example, students schooled at home score significantly higher on standardized tests than their public school counterparts.<sup>138</sup> They also have higher college acceptance rates and often do better in the university setting.<sup>139</sup> Some scholars also point out the lesser quality of public school education for minority children and those from economically-challenged neighborhoods. This is not the case with home schooling, where neither race nor class is a factor in student achievement.<sup>140</sup> Regardless of ethnicity or financial status, home-schooling parents tend to be dedicated teachers, working not for pay but for their child's welfare; they teach one-on-one and can provide effective hands-on instruction

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136. Yuracko, *supra* note 7, at 125–26 (noting that progressive school reformer John Holt had argued that "traditional schools failed to educate children and destroyed their capacity to learn.").

137. See Chaplin, *supra* note 6, at 669 (discussing the Moore studies).

138. See McMullen, *supra* note 45, at 85 (reporting that in 2000, home schoolers scored eighty-one points higher than the general population on the SAT, and that they average in the seventy-fifth percentile on the Iowa Test of Basic Skills); Bach, *supra* note 28, at 1356–57 ("Although there is an increase in standardized test scores among children home schooled by a parent with a baccalaureate degree, those home schooled by parents without a baccalaureate degree, even those who had not completed high school, still average standardized test scores between the 80th and 90th percentile."); Bartholomew, *supra* note 4, at 1184 (citing a 1994 study that found "almost 55% of home-schooled students scored in the top quarter of all students taking standardized tests."). See also McMahan, *supra* note 52, at 726 (citing numerous statistics from the 1980s); Page, *supra* note 4, at 191–92 (relating that in the 1990s home schoolers "substantially" outperformed public and private schoolers "at each grade level and in every area tested.").

139. See Bartholomew, *supra* note 4, at 1184 (providing statistics that at Stanford University from 2000–2001 home schoolers were accepted at twice the rate of non-home schoolers). Of course, not every home schooler will outperform public school students. See Page, *supra* note 4, at 201–02 (noting that available research supports the belief that "most home schooled students excel in their studies," but recognizing that "it is inevitable that some home schooled students will score lower" than average); see also *In re A.V.*, 844 A.2d 739, 742 (Vt. 2003) (noting "ample evidence that each of the children's learning had stagnated during the years in which they were home schooled.").

140. Ed Collom, *The Ins and Outs of Homeschooling: The Determinants of Parental Motivations and Student Achievement*, 37 EDUC. & URB. SOC'Y 307, 331–32 (2005). Mr. Collom's article found that student achievement in public school was impacted negatively if the child was a minority or came from a poorer family. In the home-schooling environment, however, there was no statistical association between the child's level of achievement and his race or family income. *Id.*

and additional help tailored to the child.<sup>141</sup> Expert testimony can establish all these facts at a custody hearing, although there are some practical limits to the use of these statistics.<sup>142</sup>

Perhaps because home schooling is still viewed as “outside the mainstream,” courts evaluating the education factor will look very closely at the parent’s program and curriculum.<sup>143</sup> Judges will also evaluate how well the child has been doing academically in public school.<sup>144</sup> Unfortunately, due to widespread judicial predispositions, this is an area where parents without a college education are often accused of being “unqualified” to teach their own children.<sup>145</sup> To rebut this preconceived notion, experts are essential. In *Carrano v. Dennison*, the trial court took extensive testimony from various experts regarding the educational benefits of home schooling.<sup>146</sup> In its decision allowing home schooling, the court specifically addressed the quality of education, finding that “the type of schooling and even class size is not as important as the type and quality of experiences the child is exposed to. Home schooling can be a rich and diversified experience, and one that is uniquely tailor-made for the child.”<sup>147</sup>

The education factor is crucial to a parent’s right to homeschool, and it provides him a unique opportunity to thwart judicial prejudices and ultimately win the case. This is an area where statistics favor the home educator and where some excellent curriculums have already been vetted. Home-schooling parents should ensure their own programs are academically sound, and then seek out credible expert witnesses to testify extensively during the hearing.

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141. Bartholomew, *supra* note 4, at 1184.

142. See Aleshire, *supra* note 8, at 624 (recognizing that “research on home schooling is limited and notoriously difficult to conduct”).

143. In home-schooling cases parents are strictly evaluated for compliance with state law regarding the home-school program. For instance, in *In re A.V.*, 844 A.2d at 740, 742, home-schooled children in Vermont were ruled to be truant because the state Department of Education found their program to be deficient based on the mother’s submitted plan. Rarely will a court delve into the “report card” of the local public school in this way.

144. See *P.J.S. v. J.S.*, No. 95-10784, 2002 WL 31998734, at \*1–\*2 (Del. Fam. Ct. 2002) (noting that the child was doing well academically in public school and finding no need for the “drastic” change to home schooling).

145. See Bach, *supra* note 28, at 1356–57 (“Although there is an increase in standardized test scores among children home schooled by a parent with a baccalaureate degree, those home schooled by parents without a baccalaureate degree, even those who had not completed high school, still average standardized test scores between the 80th and 90th percentile.”).

146. *Carrano v. Dennison*, No. 96-0333396, 2001 WL 1267509, at \*1 (Conn. Super. Ct. Sept. 24, 2001).

147. *Id.* at \*4.

D. *The Socialization Factor*

Child socialization is another major concern commonly raised about the decision to homeschool. Along with the quality of education, socialization is a topic that must be addressed by the home schooler in every custody hearing.<sup>148</sup> This is another area prone to preconceived notions by judges; therefore, home-schooling parents must be proactive and ensure their own programs cannot fall prey to this pitfall. The concern about child socialization was expressed by one pediatrician during a hearing, who warned that home schooling "'can be very difficult for kids'" because it compresses into a single setting three areas where they must be successful—"at home, at school, and with peers."<sup>149</sup>

Socialization has been cited by numerous family courts as a reason to favor public school over education in the home. The New Hampshire judge in the *Kurowski* case from the Article's Introduction focused on socialization in her decision forcing Amanda into public school.<sup>150</sup> The court in *Elrod v. Elrod* also referenced "socialization" when requiring a custodial mother to cease homeschooling.<sup>151</sup> And, in *In re King v. King*, concerns about socialization influenced the court's decision to split up three children, awarding sole custody of two of them to the father even though the home-schooling mother was their primary caretaker.<sup>152</sup> One consideration was that the father would enroll the children in public school. In affirming that custody decision on appeal, the court opined, "public school offered broader educational advantages and would increase development of the children's social skills."<sup>153</sup>

In light of these judicial concerns, home-schooling parents must present credible expert testimony during the custody hearing.

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148. See Bartholomew, *supra* note 4, at 1185 (noting that "states worry that home-schooled children do not experience proper social and interpersonal development.").

149. McMullen, *supra* note 45, at 83 (citing Barbara Kantrowitz & Pat Wingert, *Learning at Home: Does It Pass The Test?*, NEWSWEEK, Oct. 5, 1998, at 64, 67 (statements of Phoenix pediatrician Daniel Kessler, a member of the American Academy of Pediatrics developmental-behavior group)).

150. *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 7 (N.H. Fam. Div. July 14, 2009) (stating that "enrollment in public school will provide Amanda with an increased opportunity for group learning, group interaction, social problem solving, and exposure to a variety of points of view.").

151. *Elrod v. Elrod*, 481 S.E.2d 108, 109 (N.C. Ct. App. 1997). In that case, however, the father was attempting to gain visitation rights with his children, and he did not necessarily object to home schooling per se. *Id.*

152. *King v. King*, 225 A.D.2d 819, 820 (N.Y. App. Div. 1996).

153. *Id.*

Socialization critics often assume that home-schooled children are raised “in a bubble” without the chance to interact with other kids and to develop “normal” social skills, as they can in public school.<sup>154</sup> But home-school experts argue that public school socialization is not necessarily a good thing for children. Indeed, many applaud this reduced contact, contending there is negative socialization in public school due to harmful peer pressure.<sup>155</sup> The impersonal and high-pressure environment in some public schools might also cause problems for more sensitive students.<sup>156</sup> Finally, home-school experts testify that peer-to-peer socialization is overstated by public school advocates, citing studies that find adult interaction equally important in child development.<sup>157</sup> By taking children out of public school, the students might actually receive more balanced and healthier socialization from a broader age group.<sup>158</sup>

Most home-schooling parents are keenly aware of the concerns about child socialization. That is why they pursue group activities and structure positive socialization into their education plan.<sup>159</sup> Indeed, home schoolers keep quite a busy schedule: “The average home schooler participates in 5.2 activities outside the home per week, and ninety-eight percent of home schoolers are involved in at least two

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154. Page, *supra* note 4, at 194–95.

155. See *id.* at 197 (explaining that the lack of contact pleases home schoolers who “contend that the socialization aspect of schools today is often inappropriate and detrimental to the learning process”). See also Samantha Lebeda, *Homeschooling: Depriving Children of Social Development?*, 16 J. CONTEMP. LEGAL ISSUES 99, 104 (2007) (noting that some believe home-schooled children fare better because they “become independent and self-directed in learning their own values and skills, and . . . avoid reliance on peer approval.”).

156. See *P.J.S. v. J.S.*, No. 95-10784, 2002 WL 31998734, at \*1–\*2 (Del. Fam. Ct. 2002) (ordering a boy to stay in public school despite compelling evidence that the school was triggering serious anxiety in the child).

157. See Lebeda, *supra* note 155, at 102–03 (restating the argument of home-school advocates that “the larger the group of children—such as a typical public school classroom—the fewer meaningful socializing contacts a child can have.”).

158. See Page, *supra* note 4, at 196 (arguing that home schoolers give their children a wider variety of social activities with children of all age groups, which is “doubly beneficial for socialization” and is “contrary to the rule of age segregation practiced in most public schools.”).

159. See Lebeda, *supra* note 154, at 103 (quoting Scott Truansky, *Social Development and the Homeschooled Child*, HOMESCHOOLERS SUPPORT NETWORK,

<http://www.homeschoolsupportnetwork.org/starter.asp> (last visited Apr. 5, 2011)) (“Sports, music, youth groups and service groups teach children how to be productive in relationships and to use good social interaction to be a positive influence on society. These activities may offer enough or even more than enough peer contact.”); McMullen, *supra* note 45, at 83 (noting that many parents join home-school groups, sports, dance, and choir to aid with socialization); Bartholomew, *supra* note 4, at 1185–86 (discussing how parents will use little league or church groups to offset this perception).

activities outside the home a week."<sup>160</sup> Many home-educated students also receive extra socialization through part-time enrollment in the local public school.<sup>161</sup> Parents who fail to take advantage of these social interactions might be setting themselves up for failure at a custody hearing. For instance, in *Bowman v. Bowman*, the judge changed custody of twin boys to their father, noting that the mother's decision to homeschool had reduced her children's "opportunities to interact socially with others and to participate in sports," and that she had not taken advantage of social and athletic activities in the local area.<sup>162</sup>

Home-schooling parents can foster sufficient contacts outside the home to satisfy some judges. In *Brown v. Brown*, the court allowed a father to continue homeschooling his children despite objections by the non-custodial mother.<sup>163</sup> The father presented credible expert testimony affirming that his children "engaged in sufficient activities outside the home classroom to develop necessary social skills."<sup>164</sup> Similarly, in *Carrano v. Dennison*, a mother was permitted to homeschool after expert testimony convinced the court that socialization was a non-issue "if handled properly."<sup>165</sup> The child's activities outside the home were sufficient to convince the judge:

The court finds further that home schooling would be better for [the child], that [she] will have little less socialization in home schooling, considering the shortness of her time for socialization at school and considering her ability to socialize with her neighbors and family friends, and her involvement in Indian Princess and Brownies . . . .<sup>166</sup>

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160. Bach, *supra* note 28, at 1348.

161. See McMullen, *supra* note 45, at 83–84 (citing 2001 statistics from the U.S. Department of Education that report eighteen percent of surveyed home-schooled students attend public school part time).

162. *Bowman v. Bowman*, 686 N.E.2d 921, 927 (Ind. Ct. App. 1997). The children themselves had cited "lack of interaction with past school friends" as a reason they did not enjoy being schooled at home. *Id.* It is important to note that the *Bowman* custody decision was also based on serious issues unrelated to home schooling. The court had several areas of concern about the mother's care for her children, including a spanking incident that left large bruises, the twins' relationship with their stepsister, the mother's subsequent marriage to a man later incarcerated for drug-related crimes, and her inappropriate use of caretakers for the boys. See *id.* at 925–27.

163. *Brown v. Brown*, 518 S.E.2d 336, 337 (Va. Ct. App. 1999).

164. *Id.* at 338.

165. *Carrano v. Dennison*, No. 96-0333396, 2001 WL 1267509, at \*3–\*4 (Conn. Super. Ct. Sept. 24, 2001) (finding no research that home schooling "has any significant effect on a child's socialization ability (most socialization is learned in the home and neighborhood, not in school).").

166. *Id.*

These two cases stand as outstanding models for home-schooling litigants who wish to illustrate the soundness of their home education and socialization plans.

E. *The “Parental Strife” Factor*

One factor that courts are rightly worried about is how parental strife can negatively impact children.<sup>167</sup> The other factors explored in this Article challenge the foundation or wisdom of home schooling; not so with the concern about parental conflict. Instead, this factor focuses on how parents interact. Unfortunately—as one might expect where people have divorced or never built a strong enough relationship to marry—spiteful and passive-aggressive actions will sometimes accompany communications between such parents. When one adds a fundamental conflict about education, the parents might behave in a way that jeopardizes the harmony that would be in the best interests of the child.

1. *Failure to Cooperate*

When parental strife mixes with education, the home schooler may lose, as in *Taylor v. Taylor*.<sup>168</sup> In that joint custody case the parents’ communication had so deteriorated that they could not discuss decisions involving their daughter.<sup>169</sup> When the mother wished to educate her child at home for first grade, this lack of cooperation was the “lynch pin” that caused the court to prohibit the home schooling; neither education nor socialization was at issue.<sup>170</sup> The court said the parents were simply “not willing to set aside their differences as divorced individuals” for the sake of their child’s educational needs.<sup>171</sup> In the court’s opinion, this became a fatal wound to the mother’s case because the result of this failure to communicate would inevitably be

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167. The relationship of the child with each of the parents is a standard consideration under the “best-interests-of-the-child” test. See *supra* notes 67–66 and accompanying text (discussing common factors in that test). Those relationships can suffer when parents engage in open warfare over decisions involving the child.

168. No. 281555, 2008 WL 2917650, at \*1 (Mich. Ct. App. July 29, 2008).

169. *Id.* at \*2. The court found that both parents were to blame for the poor communication. The mother did offer the father to review the chosen home-school curriculum, but she never invited him to any home-school activities. *Id.*

170. *Id.* The mother was using an established curriculum and was assisted by her own mother, a retired schoolteacher. Moreover, the child was part of a home-schooling group that “unites home-schooled children for social activities.” *Id.*

171. *Id.* at \*7.

the "excising" of the father from his daughter's education if she were homeschooled.<sup>172</sup> But the judge believed public school "was well equipped to educate a child of divorced parents and was accustomed to making certain accommodations so that each parent was informed about their child's progress and development."<sup>173</sup> The Montana Supreme Court used a similar line of reasoning in its analysis in *In re Epperson*.<sup>174</sup>

Willingness to give the other parent a role in the education process can go a long way in preserving the right to homeschool. *Carrano v. Dennison* discussed the importance of both parents' cooperation in their daughter's schooling; even the child had testified it was "imperative that the parents come together on this issue."<sup>175</sup> The father had expressed concern that his ex-wife's home schooling would make him "participate less" in his daughter's education.<sup>176</sup> The court rejected his argument and allowed the home schooling. The father could still get involved "by helping her with her homework, by reading with her, inquiring about what she is learning and engaging in educational activities with her on some visitation weekends . . ."<sup>177</sup> Similarly, in *Brown v. Brown*—a case where divorced parents had made their children "the battlefield"—the non-custodial mother objected to the father's home schooling.<sup>178</sup> She offered expert testimony that "the children would be better off in a school where both parents felt welcome and over which the parental conflict was not an issue."<sup>179</sup> The father's expert, on the other hand, emphasized that home schooling would "provide both parents more time to be with their children."<sup>180</sup> In ruling for the home-schooling father, the court explained he had "made some effort to keep [the mother] apprised of their progress and agreed that it would be 'beneficial for [her] to come

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172. *Id.* The trial court had noted that due to the lack of communication, the father would "essentially have no ability to keep track of [his daughter's educational] progress." *Id.* at \*2.

173. *Id.* at \*5.

174. 107 P.3d 1268, 1274 (Mont. 2005) (noting that the home-schooling mother had such strong feelings against the father that she could "barely speak [his] name," and that naming her as the custodian "'would be tantamount to terminating [the father's] parental rights'" (citing the lower court)).

175. *Carrano v. Dennison*, No. 96-0333396, 2001 WL 1267509, at \*4 (Conn. Super. Ct. Sept. 24, 2005).

176. *Id.*

177. *Id.*

178. *Brown v. Brown*, 518 S.E.2d 336, 337–39 (Va. Ct. App. 1999).

179. *Id.* at 338.

180. *Id.*

[to their class] on occasion.”<sup>181</sup> This openness to the other parent’s involvement made all the difference in the resolution of the case.

## 2. *Visitation Impact*

The home-schooling parent should also ensure the education does not negatively impact the other parent’s visitation rights. In *Clark v. Reiss*, the court sided with the non-custodial father in preventing the mother from withdrawing her twin daughters from public school in order to teach them at home.<sup>182</sup> The mother admitted home schooling would alter the father’s visitation rights by requiring him to return the children early after a three-day holiday weekend.<sup>183</sup> The father had become quite active in the public schoolwork of his children, at least since the dispute over home schooling began.<sup>184</sup> He was concerned that home education would prevent him from visiting their school to “check on their progress” and have lunch with them.<sup>185</sup> The court shared the father’s skepticism about home schooling and ultimately required the decision to be “unanimous” before it would be permitted.<sup>186</sup> In this case, the mother should have adapted her home-schooling schedule to work around the father’s visitation. While this might not have changed the court’s ruling, at least it would have avoided her need to ask for a modification of his rights.

*Elrod v. Elrod* illustrates how a visitation issue can spill over into the right to homeschool even where the non-custodial parent is not opposed. There, the non-custodial father had complained of a chronic denial of his visitation rights, due to the mother’s concerns about his psychiatric stability.<sup>187</sup> Home schooling was not yet an issue in the dispute, but the trial court spotted a problem with the children’s “socialization” and ordered the mother to enroll them in public school.<sup>188</sup> Although the mother eventually won on appeal, the appellate court would have allowed the lower court’s order to stand if there

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181. *Id.* at 339.

182. *Clark v. Reiss*, 831 S.W.2d 622, 623, 625 (Ark. Ct. App. 1992).

183. *Id.* at 624.

184. *Id.* The father also showed that “he had conferences with their teachers, collected past homework assignments, and worked with the children each weekend until they were current with their classmates.” *Id.* at 625.

185. *Id.*

186. *Id.*

187. *Elrod v. Elrod*, 481 S.E.2d 108, 109–10 (N.C. Ct. App. 1997).

188. *Id.* at 110. That order was later modified by a consent order which allowed the mother to homeschool “as long as [she] cooperates with [the father’s] visitation with the children.” *Id.* (first alteration in original).

had been evidence "suggesting that the home schooling interfered with Mr. Elrod's visitation rights."<sup>189</sup> As with other cases in this section, *Elrod* demonstrates the benefits of minimizing parental strife and ensuring that home schooling does not block the other parent's access to the children.

#### F. *The Religion Factor*

The problem of using religion as a factor in custody cases has plagued family courts for at least half a century.<sup>190</sup> There is no doubt courts can and do take religion into consideration when assigning custody,<sup>191</sup> but should judges consider a parent's religious participation as a positive or negative factor when it comes to that decision? Can a court award physical custody to one parent, but "spiritual" custody to another?<sup>192</sup> Over the years courts have found no simple or consistent answers to these thorny issues.<sup>193</sup> Earlier the Article discussed how home schoolers raise the free-exercise-of-religion defense to require strict scrutiny review when courts prevent them from teaching at home,<sup>194</sup> but do the religious practices of the parents help or hurt when judges decide what is in the child's best interests?

##### 1. *A Religion Penalty?*

The religion issue is particularly important in these cases because, for many families, religious education is a crucial factor in the decision to educate at home.<sup>195</sup> These same families might dread the government getting involved with their schooling due to a fear of state-sanctioned

189. *Id.* at 111.

190. IRAMARK ELLMAN ET AL., FAMILY LAW 534-39 (2d ed. 1991) (discussing religious custody cases and noting the inconsistency with which courts apply any standards).

191. *See* King v. King, 225 A.D.2d 819, 821 (N.Y. App. Div. 1996) (stating that "[r]eligion is a factor which may be considered but it is not the sole determinant in awarding custody[,] and noting that the family court "attempted to accommodate the parties' different religious attitudes").

192. *See* ELLMAN, *supra* note 190, at 538 (relating case where Roman Catholic mother was granted physical custody of the children but ordered her to raise them in the father's Jewish faith).

193. *See id.* at 537-38 (discussing the "actual-endangerment" and "reasonable-likelihood-of-impairment" tests that courts have developed to assess whether a parent's religious beliefs are relevant to a custody question).

194. *See supra* Part I.B. and accompanying text.

195. *See supra* Part I.B. and accompanying text. *See also* Bach, *supra* note 28, at 1343-44 n.51 (discussing various religious traditions that homeschool, with the fastest-growing group being Muslims).

religious bigotry.<sup>196</sup> Family courts will encounter parents with religious convictions that motivate them to make the many sacrifices associated with home schooling. In other words, religion is likely to become an issue. And where a judge disapproves of a parent's religious practices, there might be a tendency to assign custody decisions to the other parent—a "religion penalty" of sorts. This is yet another area where judicial prejudice can influence the outcome of the case. Even so, judges are likely to base their custody orders on concrete conduct by the parties, not mere religious beliefs.

In *In re Epperson*, the *less-religious* father was granted sole legal custody of his children instead of the *more religious* home-schooling mother.<sup>197</sup> During the hearing, the court described the family as "isolated religious fundamentalists," and said their "off beat" religion had some "screwball aspects"—they were members of the Tridentine Catholic order, an offshoot of Roman Catholicism.<sup>198</sup> There can be no doubt the judge disliked the parents' religious practices.<sup>199</sup> In granting the father custody, he praised him for being less "inflexible" in his religion, but he criticized the mother for being more interested in "indoctrination" than education.<sup>200</sup> The Montana Supreme Court affirmed the lower court's reasoning, citing the family's "intolerant, inflexible and isolated environment."<sup>201</sup> Thus, it seems that both courts apparently felt that parents with an "intolerant" religion are less preferred to more "open-minded" parents. Even under these facts, however, the courts tied their opinions to exhibited behaviors and not simply to religious beliefs.<sup>202</sup>

In a similar situation, the trial court in *Snider v. Mashburn* took sole custody from a conservative Baptist home-schooling mother and awarded the daughter to the father, who had "more liberal" religious

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196. See Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1199 (1997) (discussing how the American tradition of public schooling was partly the result of bigotry against Catholic immigrants being taught in parochial schools in order to "Protestantize" them).

197. *In re Epperson*, 107 P.3d 1268, 1276 (Mont. 2005).

198. *Id.* at 1277 (Rice, J., concurring).

199. The court thought it would be better for the children to be exposed to "ideas that were 'not first sifted through their parents' view of reality,'" and it noted the family "regularly shunned people for 'minor transgressions' such as reciting the rosary . . . in an unacceptable manner." *Id.* at 1274–75.

200. *Id.* at 1275.

201. *Id.* at 1274.

202. The courts were careful to contrast the mother's "inflexible" attitude—which had entirely alienated the children's extended family support system—with the father, who had reconciled with previously "shunned" family members. *Id.* at 1275.

views.<sup>203</sup> In affirming this change of custody, the Alabama Supreme Court focused on the negative influence of the mother's new "missionary" husband, who had disciplined the child, alienated her extended family, and said her father was "going to hell."<sup>204</sup> Though the court pinned its decision to concrete conduct, the mother's religion was clearly part of the perceived problem because the trial court's visitation order contained this far-reaching restriction:

[T]he religious training of the child while in the home of the Mother for visitation shall be made by example, and not by any religious training which would otherwise be disparaging or critical of in any way the beliefs of the Father, and/or the way in which his household is conducted.<sup>205</sup>

The sharp dissent by Alabama Supreme Court Justice Parker complained that the trial court's gag order stripped the mother of "her fundamental right to teach her children the worship of God."<sup>206</sup> He explained why the father's extended family had been isolated: they were ignoring the mother's standards for the child during visitation by "drinking beer in front of the child on nearly a daily basis, uttering profanity in her presence, and permitting her to watch TV shows and dress in clothing contrary to the standards" that the parents had previously agreed upon.<sup>207</sup>

Although in these cases the "more-religious" parents lost custody of their children, courts do not always decide against a religious home schooler. In *Carrano v. Dennison*, the trial court allowed a Jehovah's Witness mother to homeschool despite objections by the father, who was not of the same religion.<sup>208</sup> The court noted that the mother, her new husband, and the child were all active in their church.<sup>209</sup> Likewise, in *Brown v. Brown*, the court permitted a father to homeschool his children, for whom he wanted custody "on Sundays to ensure that they attended church on a regular basis and in a consistent program."<sup>210</sup>

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203. Snider v. Mashburn, 929 So. 2d 447, 459, 461 (Ala. 2005) (Parker, J., dissenting).

204. *Id.* at 450, 452.

205. *Id.* at 461 (Parker, J., dissenting).

206. *Id.* at 466.

207. *Id.* at 460.

208. Carrano v. Dennison, No. 96-0333396, 2001 WL 1267509, at \*2, \*4 (Conn. Super. Ct. Sept. 24, 2001).

209. *Id.*

210. Brown v. Brown, 518 S.E.2d 336, 338 (Va. Ct. App. 1999).

Despite these two cases, when religion becomes a point of contention between the parties, it is possible a court will view the “stricter” religion less favorably than a more “open” one. This was, in fact, one of the ongoing allegations against the family court in the *Kurowski* case; however, the New Hampshire Supreme Court rejected that argument.<sup>211</sup>

## 2. *Minimizing the Scope of Religion*

Some courts will attempt to avoid the religion factor by isolating the education decision from the parents’ faith. In *P.H. v. L.H.*, the court modified an existing order, stripping custody from the home-schooling mother and giving it to the father.<sup>212</sup> When the mother argued the court had put an “unconstitutional restriction” on her “freedom of religious expression,” the court said:

[W]e fail to discern how the wife’s religious beliefs and practices were infringed by the court’s modification judgment. The judgment does not impinge, for example, on the wife’s ability to bring her children to church or to instruct them during her parenting time with them. In fact, the husband testified that he highly encouraged the teaching of Christian values.<sup>213</sup>

The father had previously been given authority in the divorce decree to make education decisions for the child.<sup>214</sup>

The Michigan Supreme Court also minimized the scope of religion in *Taylor v. Taylor*.<sup>215</sup> The lower court considered the religion of both parents before it prevented a mother from home schooling; it found that this factor did not favor either the mother or father, who were both Lutheran.<sup>216</sup> The mother argued that, by placing her daughter

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211. See *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 4, 6 (N.H. Fam. Div. July 14, 2009) (noting Amanda may be too religiously “rigid,” and concluding that her “vigorous defense of her religious beliefs to [her] counselor suggests strongly that she has not had the opportunity to seriously consider any other point of view.”); see also *In re Kurowski*, No. 09-751, 2011 WL 976509, at \*14 (N.H. 2011) (“The trial court did not express disfavor regarding the religious nature of daughter’s beliefs or disapproval regarding her vigorous defense of her religious beliefs.”).

212. See *P.H. v. L.H.*, No. 01-1041, 2003 WL 1923461, at \*1 (Mass. App. Ct. Apr. 23, 2003).

213. *Id.* at \*4. The court further noted that the mother’s church had “no policy with respect to home schooling.” *Id.* at \*4 n.8.

214. *Id.* at \*4.

215. 758 N.W.2d 243 (Mich. 2008), *aff’g Taylor v. Taylor*, No. 281555, 2008 WL 2917650, at \*1 (Mich. App. Ct. July 29, 2008).

216. *Taylor v. Taylor*, No. 281555, 2008 WL 2917650, at \*4.

in public school, she would no longer be able to provide her a religion-based education curriculum.<sup>217</sup> The court dismissed this concern, noting that both parents were "committed" to raising the child in the church, and that she would continue to attend church functions.<sup>218</sup> The court concluded, "There is no indication that her spiritual development will be seriously ill affected or cease as a result of the trial court's holding."<sup>219</sup> In the *Kurowski* case, the judge similarly downplayed the religion factor after the mother's motion for reconsideration accused the guardian ad litem of judicial prejudice.<sup>220</sup>

These cases demonstrate that—although parents involved in an education dispute view their faith as an important consideration—not every court will weigh the religion factor heavily. If a home-schooling parent seeks to have religion become a positive factor in the case, she should present evidence from which the judge can find that public schooling is detrimental to the child's faith. More often, if religion *has* become a significant issue in the dispute, one parent has alleged that the other's religious practices are in some way harming the child. When that type of accusation is leveled, the litigants must beware of potential judicial prejudices: what the judge thinks about the religion (i.e., does it have "screwball aspects"), and if there are any "intolerant" aspects of the faith.

#### CONCLUSION

Judges decide cases. For that reason a family court is likely to choose sides when such a dispute is brought before it by two divorced or unmarried parents—either by ordering the child into public school or allowing the parent to homeschool. Right or wrong, the court is not likely to resolve the matter based on the home-schooling parent's constitutional arguments about fundamental parental rights or the free exercise of religion. There are too many ways for the court to avoid this first line of defense. Instead, the judge will look to state law to determine what is in the "best interests of the child."

Regardless of guidance the State provides about "best interests," there are six key areas that will likely determine the outcome of these

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217. *Id.*

218. *Id.*

219. *Id.*

220. See *In re Martin Kurowski and Brenda (Kurowski) Voydatch*, No. 06-669, at 9 (N.H. Fam. Div. Sept. 17, 2009) (order staying reconsideration) (ruling that the mother submitted no evidence "that would establish a connection between her home schooling and her religion, and no evidence that the public school experience would adversely affect Amanda's religious training . . .").

home-schooling cases. First, how has custody previously been shared between the parents? If the home schooler is the sole custodian, the chance of success is greater than in the joint-legal-custody scenario. Second, has the home-schooling parent shown that his program will provide the child an education that is equal to or better than what is available at the local public school? Expert testimony will be needed to establish that fact. Third, has the home schooler defused the socialization argument by placing the child in activities and groups that will enhance healthy social interactions? An expert witness will also need to testify on that matter. Fourth, is home schooling adversely impacting the quality of the other parent's relationship with the child, or causing harmful parental strife? Fifth, is the home schooler's religion a positive factor that is not harmful to the child? Finally, does the family court judge harbor any predispositions or biases regarding home schooling or religion that affect the ability to fairly evaluate the evidence and make an impartial ruling in the case? Those subtle prejudices must be removed through education and expert testimony.

The right to educate a child at home is a fundamental parental liberty interest that is in real jeopardy when unmarried or divorced parents disagree about home schooling. With some common sense, fair play, and a solid educational program, a home-schooling parent can retain that right even after a custody dispute. But judges should be careful to practice restraint when weighing the factors in these cases, recognizing that the State is not well-equipped to make these decisions. Likewise, judges must set aside any biases or preconceived notions about home schooling and give it a chance. Today, courts should be honest enough to recognize that home schooling deserves to be treated as a valid and equally legitimate method for parents to educate their children.