BY RANDALL H. WARNER

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Gene and Joan are a happily married couple whose daughter, 16-year-old Felicia, is a straight-A student with a penchant for Goth attire. One night, Joan approaches Gene.

"Felicia's getting a tattoo this weekend," she says. "I told her she could."

"You what?" barks Gene.

"A tattoo. You know she's wanted one. It's just a little butterfly on her ankle. She and I talked about it, and I thought it would be a nice reward for all her hard work. It's not that big of a deal these days."

"Not that big of a deal? Are you nuts? There is no way I am letting that child get a tattoo. No way."

"Well, honey," says Joan, "I'll be filing my petition with the family court tomorrow. We'll let the judge decide this."

"Then I'll see you in court," Gene says. "Oh, by the way," he adds cheerfully, "are we still going to your folks' this weekend?"

If the story seems absurd, it's only because the parents are married. Unmarried parents (both divorced and never-married) ask courts to make parenting decisions all the time. They ask judges to decide what school their children will attend, what church they can go to, what medicine they should take and what activities in which they can enroll. They seek orders about haircuts, piercings and names.

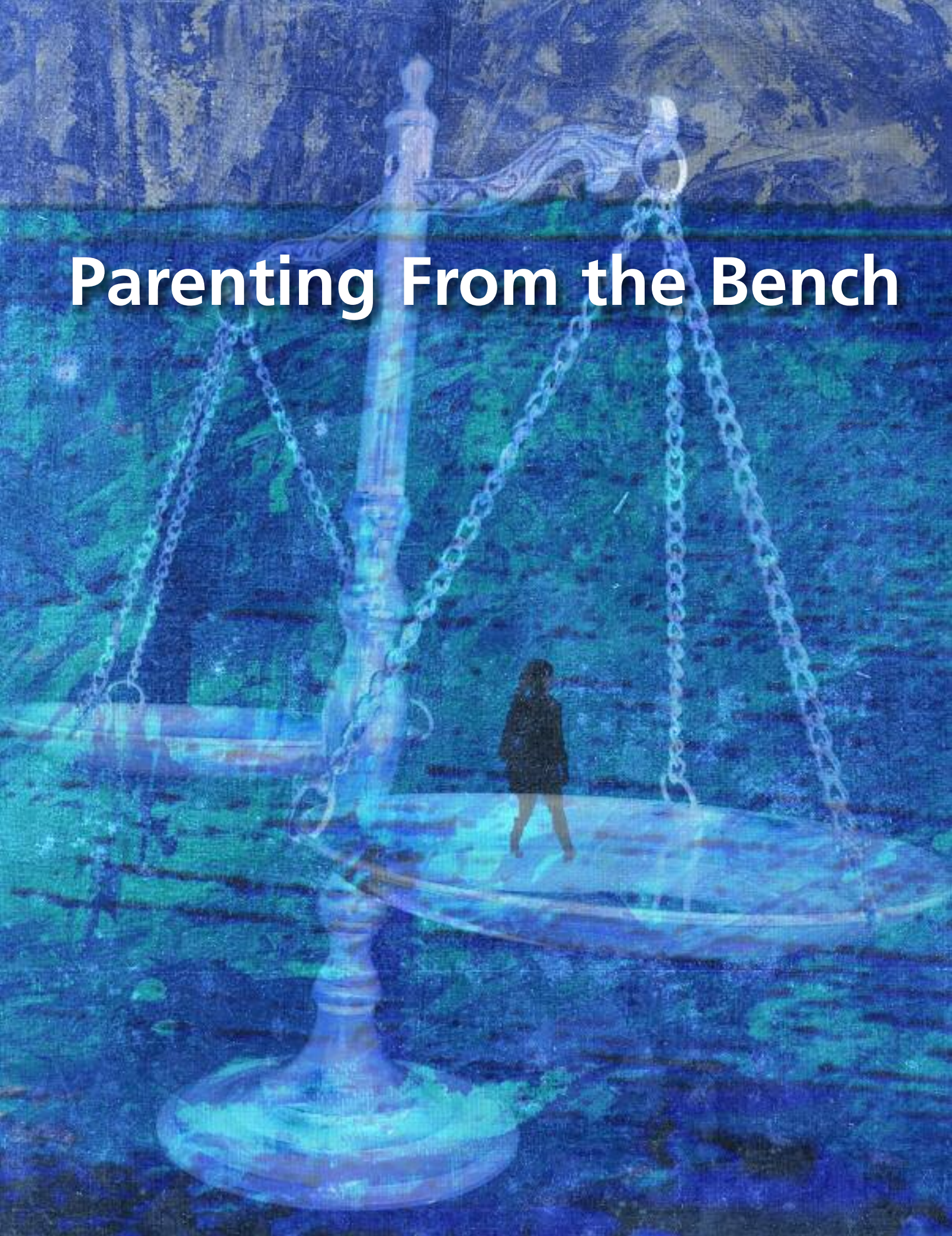
What business do courts have deciding these issues for parents, whether married or unmarried? None, some say. Law-trained judges, they argue, have no expertise in child-rearing that would enable them make parenting decisions for others. And, even if they did, parenting is not an area in which government should be meddling.

Others argue that, when unmarried parents cannot agree on important matters like education and religion, courts have to break the deadlock. Failing to do so only hurts the children, either because important decisions won't be made or, worse, because the dispute will escalate. If courts won't resolve disputes between parents to ensure the children's well-being, who will?

Both perspectives have merit, but what does Arizona law say? Do courts have the authority to make parenting decisions?

Neither the statutory nor the case law provides a definitive answer, though language in a recent Court of Appeals opinion[1] suggests courts can resolve schooling disputes when parents disagree.

This article examines whether courts can or should intervene to make parenting decisions when unmarried parents disagree. It addresses first the policy arguments, then the legal arguments for and against judicial intervention.


Parenting From the Bench

This article comes as I conclude my first tour of duty on the family court bench, and the question of whether and when to intervene in parenting disputes remains, for me, one of the most vexing. This is both because the law is unclear, and because the question brings into sharp focus the tension between the court's role as resolver of conflict, and its duty to leave parenting to parents.

Far too many parents refuse to compromise, never give in, and effectively play highway chicken with their children in the middle.

The Joint Custody Challenge

Married parents have equal say over their children. Each can make important and mundane decisions, and neither has superior decision-making authority. In an ideal world, they discuss matters and make joint decisions. In the real world, they may fall into any number of dispute resolution (or avoidance) patterns, but ultimately they are jointly responsible for deciding what is best for their children.

Joint custody (or, more precisely, joint legal custody) is supposed to work the same way for unmarried parents. It means parents have equal decision-making authority over matters like health care, religion and education.[2] It is to be distinguished from joint *physical* custody, which concerns the division of parenting time, and *sole* legal custody, in which one parent makes the final decision. Parents with joint legal custody are supposed to seek input from each other (we hope), discuss the issue (everyone needs a dream; this is mine), and jointly make decisions in the children's best interests. Hooray for co-parenting!

In reality, unmarried parents sometimes disagree, just like married parents. But there are two big differences.

First, their disputes are often amplified by existing conflict. There are jealousies, old grudges, new boyfriends and girlfriends, divergent parenting ideas, and just plain emotional baggage from the breakup. These can turn an ordinary disagreement into a grudge match.

Second, unmarried parents lack the incentive to resolve disputes that married parents have. For a married couple, coming to loggerheads can mean a disruption in the relationship. They want their marriage to work and they want a peaceful household, which pushes them toward compromise. The alternative—what negotiation wonks call "BATNA," or the best alternative to a negotiated agreement—is too horrible to justify the fight.

Unmarried couples don't have the same threat. They have much less to lose by not compromising. To be fair, most recognize the serious harm that conflict does to children, so they compromise for the children's sake. And judges tend to see only co-parenting failures because the successes don't end up in court. But far too many parents refuse to compromise, never give in, and effectively play highway chicken with their children in the middle.

This fact, some would argue, makes the case against joint custody. But before we go maligning joint custody, let's consider the alternative. Sole custody, while it provides clear decision-making authority, also places parents in an unequal power position by severely curtailing one's parenting rights.[3] This often leads to further conflict and more litigation, especially where parents perceive legal custody as a prize to be fought over perpetually.

I am not here to argue the relative merits of sole and joint custody, which is a whole other topic. What I am saying is that one consequence of joint custody is that parents sometimes disagree, and when they disagree, they sometimes turn to the courts to break the tie. The question is whether courts should or do have the authority to make the parenting decision.

Should Judges Be Parenting From the Bench?

To put some flesh on this issue, consider three hypotheticals involving parents with joint custody. If you think these scenarios are far-fetched, go check the family court docket.

Hypo 1, Xavier vs. Central

Maria is entering high school. Father is an educator and a strong believer in public education. He insists Maria go to Central High, her neighborhood public high school. Mother, a banker, believes Maria's future depends on graduating from an elite private school like Xavier Preparatory Academy. (If you're from Tucson, think Salpointe vs. Tucson High) Money is not an issue, as the child has a trust fund, but neither parent will budge. One parent petitions for an evidentiary hearing so the court can decide which school the child will attend.

Hypo 2, To Pierce or Not To Pierce

Eve is three years old and her Mother wants her ears pierced. Mother, who has numerous piercings, thinks it's cute and the child will be thankful later in life. Father is adamantly opposed. He believes pierced ears are the first step toward lip piercings, belly button piercings and who-knows-what-else piercings. He files an emergency petition to bar Mother from piercing the child's ears.

Hypo 3, The Sunday Morning Showdown

The Father of 12-year-old Jacob is a Conservative Jew who is divorced from Mother, an active member of the Church of Jesus Christ of Latter-Day Saints. Father has enrolled Jacob in bar mitzvah classes that meet every Sunday morning. Mother insists Jacob go to church every Sunday morning and attend the religious education classes there. Mother is convinced that the child cannot be a full-fledged member of

the church while having a bar mitzvah, and Father's rabbi refuses to bar mitzvah a child who regularly attends a church. On cross-petitions, the parents ask for a ruling on which religion the child will be raised in.

This third hypo makes the strongest case against judicial involvement. How is a law-trained judge—someone with no theological expertise, and certainly no special insight about the divine—even remotely competent to decide which religion a child will practice? It is hard even to imagine the standards by which to decide such an issue. And putting aside qualifications, should the government really be deciding that one religion is better than another?

Just imagine what the trial would look like. A rabbi would be called to testify about the merits of Judaism, and a bishop about why the LDS church is better. Each parent might call experts to testify about how one religion is historically or theologically superior. Could the trial be anything but a circus?[4]

This discussion suggests two different objections to court involvement in parental decision-making. One has to do with the judge's qualifications, the other with the role of government and, in particular, courts. Both arguments have perhaps less force in school cases. Schools can be measured against each other, and while the exercise is still pretty subjective, it's not the same as choosing between faiths. And there are big (perhaps constitutional) differences between education and religion when it comes to court involvement.

But still, is this really a decision we want judges making? How is a judge who knows more about *res ipsa loquitur* than the latest math curriculum supposed to pick a school for a child? And by what standard should he or she decide if a child's ears should be pierced?

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If Not Court, Where?

Compelling arguments, but only one side of the story. The other is the prospect that not deciding a parental dispute will result in the child being harmed. Imagine, for example, what might happen if the court declines to choose which high school Maria will attend. Father registers Maria at Central and Mother does the same at Xavier. The first day of school happens to be Father's parenting day, so he takes Maria to Central, only to get an irate call from Mother who wants to know why Maria isn't at Xavier waiting to be picked up after school. Text messages fly. Lawyers send threatening letters. These conflicts can lead to violence in extreme cases, but even in the normal case the child's pre-existing teen angst is made worse by escalating parental conflict.

Preventing this scenario, some argue, is exactly what family courts are for. They are designed to resolve disputes peaceably so people don't resort to destructive self-help. What better reason is there for resolving a dispute than to prevent harm to a child?

And even in cases that do not escalate into harmful conflict, someone still has to break the tie. Eve can't be both pierced and not pierced. Jacob can't attend both bar mitzvah class and church. Maria can't attend two schools. No mechanism exists for unmarried parents to resolve disputes over custodial issues other than seeking recourse in court.

Of course, measures can be taken before resorting to a judicial decision. Parents can be required to mediate, or consult with an education expert or child psychologist. Often these steps will result in resolution, making judicial intervention unnecessary. But sometimes they will not. And in plenty of cases, the need for resolution is too immediate for mediation to take place first. Any family lawyer will tell you that the school cases tend to come in July and August, when school is about to start and the dispute is at a boiling point.

So intervening in parenting matters arguably sticks the judicial nose where it doesn't belong, but declining to intervene may result in harm to a child. It's a Hobson's choice. What, then, does Arizona law say about that choice?

The answer is a resounding "Not clear."

Legal Authority for Courts Deciding Parenting Disputes

The domestic relations statutes authorize courts to decide custody, so whether one parent or both will have final decision-making authority is a judicial decision.[5] They further authorize courts to designate one parent the final decision-maker on "specified decisions."[6] But they do not say expressly that a court, after awarding joint custody, can then decide what school a child will attend or what religion he or she will practice.

The statute most often cited as authority for judges to make these decisions is A.R.S. § 25-403.02, which pertains to parenting plans. Under that statute, parents with joint custody must have a parenting plan that includes "[e]ach parent's rights and responsibilities for the personal care of the child and for decisions in areas such as education, health care and religious training."[7] The statute further says that if the parents cannot agree on an "element" of the plan, "the court shall determine that element," and also may "determine other factors that are necessary to promote and protect the emotional and physical health of the child."[8] When a court decides parenting issues like school and religion, the argument goes, it is just determining an "element" of the parenting plan or a "factor" necessary to protect the child.

The problem with this argument is that it requires a fair amount of reading between the lines on some pretty important issues. The statute authorizes courts to determine *terms* of a parenting plan; it does not say courts can decide disputes under the parenting plan years after it is approved. Many parenting plans, for example, say things like, "Both parents shall make all major educational decisions together for the children."[9] If parents disagree about a major

educational decision, that is not really a dispute about the plan's terms.

A.R.S. § 25-410 also provides arguable authority for judicial intervention in parenting matters. It says that the custodial parent decides education, health care and religious matters, unless the court "finds that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or the child's emotional development would be significantly impaired."[10] Arguably, when parents cannot agree on what school the child will attend or what religion he or she will practice, that significantly impairs the child's emotional development. Thus, the court can limit one parent's authority by ordering that the child be educated or indoctrinated a certain way.

Again, however, this interpretation requires inferring judicial authority where it is not explicit. Some would argue that if the Legislature wants to authorize courts to decide parenting matters, it should do so expressly. Others would argue that the courts have a mandate to protect children, and these statutes should be interpreted broadly to accomplish that objective.

So there you have it: a statutory interpretation argument for each side. But what does the case law say?

First, it says courts can modify custody if necessary.

In the 1971 case of *Stapley v. Stapley*,[11] the court found one parent's religious practices detrimental to the children and, therefore, switched the custody designation.[12] But courts are understandably reluctant to modify custody and, in so doing, alter the balance of parenting power merely because parents disagree. In "Xavier vs. Central," for example, does it justify taking away one parent's parenting rights merely because two rational people reach different conclusions about which school is best?

Second, the 1986 case of *Funk v. Ossman*[13] holds that courts may intervene regarding religious choices "where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child."[14] Does this mean that courts get to decide what is best for the child any time parents have conflicting beliefs that affect the child's welfare? Possibly, though that's a broad reading of the case. Ultimately, the court in *Funk* did not decide which religion was best for the child; rather, it deferred to the Mother, who had sole custody.[15]

The recent court of appeals case of *Jordan v. Superior Court*[16] addressed the standard and criteria family courts must use in deciding what school a child will attend, thus assuming (but not deciding) that they have authority to make such a decision. The family court there decided a school issue, and the appellate court reversed, holding that it applied an improper standard.[17] The court noted that, when parents with joint custody exercise their rights to direct the child's upbringing differently, "the court is called upon to resolve that conflict."[18]

The question of the court's authority to resolve a school dispute was not raised in *Jordan*, so the language on that issue is dicta. Though as dicta goes, it's pretty good dicta. So based on these cases, it's fair to say the authority leans in favor of authorizing judicial intervention, but there remains no definitive answer.

The Surgery Option

These are not easy issues, and I don't claim to have the answer. The policy choices are hard and the legal authority is not definitive. Ultimately, it is the Legislature who must decide the extent to which courts should be parenting from the bench. Until it does, family courts will take it one case at a time, sometimes declining to resolve such issues and sometimes deciding them.

One thing everyone should agree upon, though, is that having judges decide parenting matters should be, like surgery, something to be used only when less invasive procedures have failed or would be futile. Parenting coordinators, mediators and co-parenting therapy can all help parents resolve issues themselves. After all, joint custody was awarded because the court found joint decision-making to be in the child's best interests. It is therefore fair to expect that parents, before coming to court, try really, really hard to do the parenting themselves.

endnotes

1. *See Jordan v. Superior Court*, 212 P.3d 919 (Ariz. Ct. App. 2009).
2. A.R.S. § 25-402(2).
3. *See, e.g., Linda V. v. Arizona Dep't of Economic Security*, 117 P.3d 795, 797 (Ariz. Ct. App. 2005) ("a parent's right to care, custody, and control of his or her children has long been recognized as fundamental").
4. That said, trials over the detriments of a given religion on children have occurred. *See, e.g., Stapley v. Stapley*, 485 P.2d 1181, 1185-86 (Ariz. Ct. App. 1971) (describing trial over whether the Mother's adherence to certain religious principles was harmful to the children).
5. *See* A.R.S. §§ 25-401.01("In awarding child custody, the court may order sole custody or joint custody."); 25-403(A) ("The court shall determine custody … in accordance with the best interests of the child.").
6. *See id.*§ 25-401(2) (defining joint legal custody as "the condition under which both parents share legal custody and neither parent's rights are superior, except with respect to specified decisions as set forth by the court or the parents in the final judgment or order").
7. *Id.* § 25-403.02(A)(1).
8. *Id.* § 25-403.02(B).
9. *See Jordan*, 212 P.3d at 924.
10. A.R.S. § 25-410(A).
11. 485 P.2d at 1181.
12. *Id.* at 1188. The trial court there ruled, among other things, that the mother could not "impose upon an innocent child the hazards to it flowing from her own religious convictions." *Id.* at 1187.
13. 724 P.2d 1247 (Ariz. Ct. App. 1986).
14. *Id.* at 1250, quoting *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971).
15. *Id.* at 1251.
16. 212 P.3d 919 (Ariz. Ct. App. 2009).
17. *Id.* at 926, 930. The court held that the standard is what is in the child's best interests, and there are several criteria for making that determination, including such things as teacher qualifications and curriculum and teaching methods. *Id.* at 926-29. It further held that one parent's educational choice could not be precluded merely because the other parent objected on religious grounds. *Id.* at 926.
18. *Id.* at 927.