

# RELIGION AS A FACTOR IN CUSTODY AND ACCESS DISPUTES

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## ABSTRACT

Religion seldom features as a factor in custody and access disputes. When it does, courts are adamant they must be neutral in matters of religion. One religion or denomination is as good as another; likewise a parent having no religion stands on the same footing as a religious one. Cases were surveyed in five Common Law jurisdictions, all of which use the best interests or welfare of the child standard. The law's claim to neutrality in theory leaves something to be desired in practice. Parents belonging to 'minority' or 'unpopular' religions consistently struggle. In custody disputes, the conventional approach taken by the courts is to confine consideration to the social or temporal effects of the parent's religious beliefs and not to evaluate the beliefs themselves. But this approach can still count against parents where the restricted lifestyle dictated by the parent's faith yields a number of social consequences considered adverse to the welfare of the children. In access disputes, attempts by the non-custodial parent to transmit that parent's faith and include the children in his or her religious activities are prone to be viewed with suspicion and characterized as forms of indoctrination where the parent is an adherent of a minority faith.

This article argues that an insistence on clear evidence of harm from the religious practice at issue is the best way to ensure that parents of minority faiths are not unfairly prejudiced by the best interests standard. Focusing on the particulars of the case (rather than an abstract assessment of the religion at issue) and requiring proof of prospective harm seem salutary steps along the road to ensuring the law's neutrality is as vindicated in practice as it is in sentiment.

## 1. INTRODUCTION

Custody and visitation cases essentially involve salvaging operations. Judges are asked to preserve, as best as may be, the interests of any children involved, while at the same time disentangling their parent's spousal relationship. Under the best of circumstances it is a task requiring Solomonic judgment. The difficulties are compounded when emotional issues such as the religious upbringing of children are involved.<sup>1</sup>

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This article examines the role of religion as a factor in custody and access litigation in England, Australia, New Zealand, Canada and the United States. The particular concern is with the religious freedom of separated or divorced parents. Children, especially mature ones, also have religious liberty interests but the full implications of this are beyond the scope of the present article.

If there is one axiom in the custody and access cases involving disputes over religion it is that the law must remain strictly neutral on matters of religion. The cases in England,<sup>2</sup> Australia,<sup>3</sup> New Zealand,<sup>4</sup> Canada,<sup>5</sup> and the United States<sup>6</sup> are replete with statements to this effect.<sup>7</sup> This principle is illustrated by the occasional practice of the court self-consciously hypothetically reversing the religious affiliations of the parties concerned and thereupon pronouncing that the result would be no different.<sup>8</sup>

Neutrality in the sense the courts have used it seems to mean two things. One is that the judge must never let his or her personal religious beliefs intrude upon the determination.<sup>9</sup> Instances of overt personal prejudice appear thankfully rare.<sup>10</sup> Nevertheless, it would be unrealistic to assume a judge's personal predilections, religiously grounded or otherwise, do not, at least subconsciously, affect the decision.<sup>11</sup> Religion would seem to be one of those subjects from which one cannot be aloof since one must either be a believer or non-believer in a particular faith, or at the very least agnostic. The judge must either share or eschew the world view of the party appearing before him or her. Precisely what effect this has on the outcome is unknowable.

The second and predominant meaning of neutrality here is that the law is impartial in religious matters. There is no *a priori* legal preference. One branch of the same religion is not inherently superior to another, nor one religion over another, nor is religion generally to be preferred to non-religion. This neutrality can be grounded in an express constitutional guarantee of religious freedom,<sup>12</sup> but the courts commonly see it as existing quite independently of such guarantees. The Full Family Court of Australia in has put it more eloquently than most:

*[O]n general principles, the courts have recognized that it is not part of the judicial function to rule that one form of religion is to be preferred to any other. There may be many paths to the top of the mountain. Some would say that there is only one. Some would say there is no path. Some would say there is no mountain. It would be presumptuous, vain and temerarious for a judge to make a finding of fact on such an issue.<sup>13</sup>*

The concept of neutrality is however more elusive than it might first appear.<sup>14</sup> While the law may, in an abstract or formal sense, espouse complete impartiality, the reality might be quite different.

## 2. WEIGHING RELIGION: THE COURTS' APPROACH IN CUSTODY DISPUTES

### A. *The Social or Temporal Effects Doctrine*

Consonant with the courts' understanding of neutrality, a decision based *solely* on the parent's membership of a particular religion or the holding of certain beliefs is soundly denounced. As L'Heureux-Dubé J observed in the recent Canadian Supreme Court decision, *Young v Young*:

There is no question that, had the order been based on the sole fact that the respondent adheres to the Jehovah's Witness faith, the order could not be legitimized, as it has long been a tenet of the common law that courts will not prefer one religion over another in the adjudication of custody disputes.<sup>15</sup>

The law was not always so even-handed. The poet Percy Shelley and pamphleteer Annie Besant are two notable nineteenth-century examples of parents whose atheism was sufficient to deprive them of custody of their respective children.<sup>16</sup> Likewise the father who belonged to an unorthodox Christian sect holding 'opinions noxious to society, adverse to civilization, opposed to the usages of Christendom' was held to be an unfit parent and in no way allowed to 'infect' the child in his religion.<sup>17</sup> Lest these be dismissed as somewhat quaint illustrations of a bygone age, modern instances can also be pointed to.

The Full Family Court of Australia in 1981 ordered a rehearing after the trial judge dismissed an application for custody on the basis of the applicants' religion (Exclusive Brethren). Walsh J found the beliefs and practices so repugnant that he could not 'in all judicial conscience' contemplate the applicants having custody. The Full Court found a clear miscarriage of justice here: 'his Honour was in fact pre-empting himself from considering the basic issue of the case. . . he was putting the cart before the horse'.<sup>18</sup>

There are also occasions, admittedly rare, where the courts appear to hold that the beliefs and teachings of a particular religion are in themselves so anti-social that an upbringing in such a religion must inevitably be contrary to the children's best interests.<sup>19</sup>

While discrimination on the basis of religion *per se* is beyond the pale, that does not end the matter. The courts can, and regularly do, prefer one religion over another based on its *social effects or consequences* upon the children.<sup>20</sup> This is not putting religion on trial *as such* as L'Heureux-Dubé J was at pains to point out in *Young*:-

In instances where there is conflict over religion, it is important to emphasize that the court is not engaged in adjudicating a 'war of religion' nor are the religious beliefs themselves on trial. Rather, as courts have often recognized, it is the *manner* in which such beliefs are practised together with the impact and effect they have on the child which must be considered.<sup>21</sup>

Other courts are prepared to admit there is a judgment of sorts being made upon religion, albeit an incidental and entirely justified one. In the Australian case, *Re Paisio*, the court explained:

Nevertheless, there have been cases in which courts have held that the doctrines of a particular religion, or at least those doctrines as interpreted by some of its adherents, have been so detrimental to children as to necessitate that the children should not be in the custody of the parent holding such doctrines. In these cases while the court is necessarily showing disapproval of the practice of a particular religion it is not doing so on any basis that religious teaching in general is harmful or suggesting that only one form of religion is permissible. The court is doing no more than saying that certain practices, albeit given a veneer of religious justification, are in fact so positively harmful to the welfare of the children that they must be removed from the influence of those who advocate such practices.<sup>22</sup>

The Full Family Court then gave the dramatic and non-contentious example of a religion which taught children that violence and murder were acceptable.<sup>23</sup>

The evaluation of the temporal or secular effects of religious beliefs is however itself problematic. The difficulty is that it is not always easy to distinguish between evaluating a religion's secular or temporal effects and evaluating the religion itself. Some argue that the distinction is in fact illusory. Mucci is trenchant in his criticism:

But is this distinction between assessing the effects of the beliefs rather than the beliefs themselves really genuine . . . ? Conduct is, in fact, so inextricably related to belief that to propose . . . that the denial of custody based on the effects of certain religious beliefs is not the same as, and does not involve, making a moral judgment on the character of the beliefs themselves, is *disingenuous in the extreme*.<sup>24</sup>

Beliefs and actions are, at least under some views of religious life, inseparable. If one seriously believes something one will act accordingly, indeed the behaviour evidences the belief – 'faith by itself, if it is not accompanied by action, is dead'.<sup>25</sup> This may be no less so for the non-religious person – take, for example, Mrs Besant who had the effrontery in Victorian England to put her atheistic beliefs into action. The notion that beliefs are one thing and conduct another is a persistent one however.<sup>26</sup> It can find plenty of support in American First Amendment jurisprudence on free exercise of religion and Canadian cases on religious freedom. The cases repeatedly affirm the proposition that religious beliefs *per se* are inviolate and absolutely protected but that religious conduct cannot be and must remain subject to regulation for protection of society and the rights of others.<sup>27</sup> But the distinction is a misleading one to the extent it describes the religious life of many devout believers.<sup>28</sup> In a rare decision which questioned the distinction, Chief Justice Burger explained:

This case does not become easier because respondents [Old Order Amish] were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.<sup>29</sup>

The secular effects approach then also has its dangers. As Professor Schneider, in a valuable essay, observed: 'there must be some discomfort in evaluating even the secular behavioral consequences of religious beliefs'; but, he added, this approach can nevertheless be defended given 'the absence of any satisfactory alternative'.<sup>30</sup> To exclude consideration of even the tangible consequences upon the children of a parent's beliefs is, as we shall see, to preclude consideration of virtually everything in respect of some religious parents. At worst, a mere 'vener of religious justification' as the *Paisio* court put it, would be enough to immunize the most deleterious parental conduct from scrutiny. The most harmful of upbringing practices could be justified in the name of religion. A secular court, if it is to consider anything at all, must be entitled to look at secular consequences. But one should be clear what one is doing here. It is surely not enough to say, as Carolyn Hamilton has argued in her recent treatise, that a court, when invoking the secular effects approach, is 'not, after all, depriving the parent of the child of the right to practise his or her religion freely'.<sup>31</sup> This is an excessively individualistic approach to religious life and seems to assume that transmitting one's faith to one's children is not a fundamental incident of religious liberty. Religiously devout parents, even divorced or separated ones, would be puzzled by this notion. Rather it would seem preferable to squarely acknowledge that this aspect of religious freedom is being curtailed but only because the court is at pains to ensure that the child's best interests will not be adversely affected.

### B. *Treatment of Religious Effects by the Courts*

The negative consequences of a parent's religious beliefs as found by the courts can be analysed under separate headings.

#### (i) '*Social marginalization*' of the children

It is a plausible supposition that children reared in unpopular, extreme or fanatical faiths are likely to be less happy and well adjusted socially than those brought up in the faiths accepted by the community.<sup>32</sup>

Leo Pfeffer's supposition is one which has regularly commended itself to many courts in their ultimate determination to deny custody to the parent of the unconventional religion.<sup>33</sup> The real problem such religions face is not so much they are theologically unorthodox or even that they are a tiny minority. Rather it is what theologians would call their non-aculturated nature. Richard Niebuhr propounded a five-fold typology of religious responses to the problem of the relationship between

faith and culture.<sup>34</sup> These range from the countercultural, at one extreme, to the thoroughly acculturated faith, at the other. 'Acculturation' (also referred to as 'inculturation') refers to the degree of engagement with and similarity to the surrounding culture. Typically, the religions which encounter the most difficulty in custody and access litigation are those which are countercultural, who see their faith responding to culture in the form of a radical and separatist response.<sup>35</sup> A moment's reflection upon the case law across the jurisdictions bears this out: countercultural groups such as Jehovah's Witnesses, the Exclusive Brethren and certain Pentecostal churches appear with monotonous regularity in contrast to much more acculturated faiths, such as Anglicanism and Presbyterianism, which rarely feature. It is the latter which help define the society's norm.<sup>36</sup>

The social marginalization argument has received a mixed response from the courts. Some judges have seen the restricted and secluded lifestyle of the non-acculturated sect as deleterious to the children, whereas others have been loath to find a narrower lifestyle as harmful *per se*.

An example of the former approach is the trial court in *Re Plows*. There, Ferrier J found detriment in the children being raised in the restricted lifestyle of the Exclusive Brethren and set forth a litany of disadvantages:

the children have been and will be withdrawn from activities and attitudes normal to other children within the community at large to the extent that they:

1. are not allowed to eat with others outside the sect;
2. are discouraged from socialising with others;
3. are not allowed to visit public beaches;
4. are not allowed to pursue a tertiary education;
5. are not allowed to listen to the radio or watch television;
6. are not allowed to visit picture theatres, or places of public entertainment;
7. are not allowed to engage in team sports; and
8. are not allowed to join clubs or other communal activities.<sup>37</sup>

Another example, somewhat humorous were the issue not so serious, is the unreported English case, *T v T*. Referring to the mother's Jehovah's Witness religion, Stamp LJ is recorded as saying:

No doubt different minds would take different views on growing up in such a narrow world. . . but. . . it [was] necessary to say no more than it would lead the children into isolation from the rest of the world, socially and intellectually and would deprive them of some of the sweet and wholesome joys of life, presents at birthdays and Christmas, and the charms of crackers and paper hats.<sup>38</sup>

Examples could be multiplied further,<sup>39</sup> but the point is made – some judges place a high premium on assimilation into the mainstream cul-

ture. There is another 'school' however. Scarman LJ in *Re T* provides the counter-balance:

[T]here is a great risk, merely because we are dealing with an unpopular minority sect, in overplaying the dangers to the welfare of these children inherent in the possibility that they will follow their mother and become Jehovah's Witnesses . . .

It does not follow . . . that it is wrong, or contrary to the welfare of children, that life should be in a narrower sphere, subject to stricter religious discipline, and without the parties on birthdays and Christmas that seem so important to the rest of us . . . I am not disposed to accept that the way of life of Jehovah's Witnesses is necessarily worse than the way of life of the majority of the community, or that there is of necessity a danger of damage to the welfare of the children if, the choice being between the normal full life and life within the sect, a parent chooses the life of the sect.<sup>40</sup>

Many, but not all, of the trial courts which viewed social marginalization as a disqualifying factor have been reversed on appeal.<sup>41</sup> However, appellate vindication is at the expense of further emotional and financial cost to the parents concerned.

An assimilationist stance, while once in vogue, now seems to have receded in the face of the pervasive policy of multiculturalism.<sup>42</sup> Evaluating a lifestyle, especially a religious-based one, is akin to adjudication upon religion itself and on that basis similarly beyond the court's competence. Moreover, the assessment seems flawed for another reason. To be an 'outcast' or 'outsider' is not at all wrong in the eyes of some religious groups. To the contrary, 'social marginalization' (they might term it 'separation from the world') is seen by some groups as a positive mark of their spiritual development and an important aspect of their religious liberty.<sup>43</sup>

(ii) *Alienation of the other parent*

If the religion puts a high value on separation and teaches that non or former members are 'damned' or 'unclean' and are to be shunned,<sup>44</sup> including the children's own father or mother, this is viewed harshly. It is surely detrimental to the child's development for one parent to be ostracized. Similarly, if children are isolated from the wider family circle of grandparents, cousins and so on, this is counted against the parent who encourages this.<sup>45</sup> Caution is needed however in the form of evidence that any alienation from a particular parent is due to the other's religious beliefs.<sup>46</sup>

(iii) *Non-supply of medical treatment*

A commonly raised objection in custody disputes involving Jehovah's Witnesses is that the parent may endanger the children's life and health by the refusal of blood transfusions when required. Sometimes the problem is averted by an undertaking to permit transfusions by the Jehovah's

Witness parent.<sup>47</sup> More often, however, courts have simply rejected the threat as a serious one.<sup>48</sup> Parental reluctance to seek conventional medical assistance except as a last resort has also been criticized.<sup>49</sup>

(iv) *Miscellaneous*

Finally, there are a variety of miscellaneous negative effects associated with a parent's religion which have been weighed in the balance against that parent. These include persistent late-night church meetings,<sup>50</sup> excessive corporal punishment,<sup>51</sup> enrolment at a religious school of inferior academic standards<sup>52</sup> and deprivation of a tertiary education.<sup>53</sup>

C. *The Comparative Devoutness of the Parents as a Factor?*

Where the children have developed a religious identity,<sup>54</sup> the comparative ability of the parents of the *same* faith to bring them up in that religion is sometimes considered. In the New Zealand case, *Kidd v Kidd*,<sup>55</sup> both parents were Roman Catholic and were agreed that the three children, aged sixteen, fifteen and ten, should continue to be raised as Catholics. The mother had left to live with another man, also Catholic. The new couple still attended Mass and sought to bring the children along also. Inglis J QC considered the extent to which each parent would enhance or erode the children's Catholic upbringing and training as a relevant factor in deciding which custody option was in the children's best interest for this particular family. After a detailed examination of the evidence, he concluded the father had a 'decisive advantage' in this respect, 'both in practice and by example'.<sup>56</sup> His view was that:

In essence, in regard to this particular factor, the choice is between a home in which the children's religious training and education are supported by the father's practice and example, and a home in which practice and example can only confuse the children at a formative time in their lives.<sup>57</sup>

The father was awarded custody based on this factor plus, it should be noted, a number of other considerations (maintenance of the status quo in particular) in his favour.

*Kidd* ought to be considered exceptional for there is certainly a real danger in this type of enquiry. In one Australian case involving two Orthodox Jewish parents,<sup>58</sup> the trial judge spent a great deal of time on the degree to which each strictly observed Jewish ritual. For example, the wife, who was more 'liberal' in her faith, was cross-examined about her synagogue attendances, her lack of knowledge of Hebrew, of the Bible and rabbinical writings and a host of other religious matters. This inquisition put her in a comparatively bad light and led to custody of the two boys being awarded to the 'more Orthodox' father. The majority of the Full Family Court agreed that the devoutness issue had assumed too much significance in the trial court, but, in accordance with the customary deference to trial court assessments, was not convinced the

exercise of discretion merited a rehearing. Strauss J, dissenting, thought the religious question had 'dominated the proceedings to an undue extent'<sup>59</sup> and favoured a new trial. By contrast was another Australian case, *Re Sheridan*. The trial judge's preference for the mother's brand of 'more relaxed and flexible' Catholicism compared to the father's 'rigid' Catholic faith was sufficient for the Full Family Court to order a retrial.<sup>60</sup>

Where the parents are of *different* religious persuasions, the relative devoutness of each has been firmly rejected as a relevant consideration. In *Zummo v Zummo*, the trial court was criticized on appeal for contrasting the mother's 'active' participation in her Jewish faith with the father's 'sporadic' Catholic religious participation. Such consideration was constitutionally forbidden.<sup>61</sup> Likewise in *Hanrahan v Hanrahan*, the New South Wales Supreme Court firmly declined to favour one parent over another simply because of the mother's 'disinterest in organized religion' in contrast to the father's 'fervent' adherence to the Jehovah's Witness faith.<sup>62</sup>

#### D. *The Parent who is 'Moderate' or 'Sensible' in His or Her Religion*<sup>63</sup>

There is little doubt that courts are unsympathetic to parents who they perceive are 'fanatics' or take their religion 'too far'. For example, in *P(D) v S(C)*, another recent Canadian Supreme Court decision, L'Heureux-Dubé J agreed with the trial judge's characterization of the father, a Jehovah's Witness, as a 'religious fanatic' exhibiting 'intransigent behaviour'. Her Honour detailed how the father spent the greater proportion of his week preaching and door-to-door canvassing, with his part-time work designed simply to provide for his basic necessities thereby allowing him maximum time for these activities. He devoted the rest of his time to Bible study and while he could 'not be faulted for these activities, as such', he nonetheless sought to 'impose his religion on everyone around him'.<sup>64</sup>

The father in that Canadian case would have been advised to have taken the lead of Jehovah's Witness mothers in some other jurisdictions. In the English decision, *Re H*, Hollings J noted with approval that the mother was 'moderate in her beliefs' and was prepared to make concessions on such matters as celebration of Christmas, Easter and the child's birthday.<sup>65</sup> (Perhaps the mother would have allowed the crackers and paper hats beloved by Stamp LJ in *T v T* as well!).<sup>66</sup> Similarly in one New Zealand case, the mother was commended for presenting herself as 'a sensible, practical person who, despite her committal to the church, had the welfare of the children at heart'. The children moreover appeared normal and happy and did not show 'any degree of indoctrination towards the Jehovah's Witness faith'.<sup>67</sup> By contrast, Pentecostal mothers in several Canadian cases were severely criticized for their all-consuming commitment and for putting, as the court saw it, their church life before the needs of the children.<sup>68</sup> It is of course possible that the

courts here are frowning upon excessive devotion to any cause, religious or otherwise, and that a parent's all-consuming passion for a political party or sporting interest would be likewise condemned. If the key is moderation in all things this nonetheless puts the court in the awkward position of deciding what is a 'moderate' preoccupation with religion.

It seems to be a fundamental incursion upon one's religious liberty to curtail what, to the devout believer, are the normal incidents of the exercise of one's faith and 'assume a phoney lifestyle'<sup>69</sup> in order to retain one's children. Baskin J, dissenting in an American decision, *Mendez v Mendez*, put it poignantly:

To be forced to choose between one's religion and one's child is repugnant to a society based on constitutional principles. The soft voice of the minority should be audible to a responsible court sensitive to constitutional rights which include the right to practice an unpopular religion.<sup>70</sup>

### 3. WEIGHING RELIGION: THE COURTS' APPROACH IN ACCESS DISPUTES

Access (or visitation or contact as it is also called) by the non-custodial parent is acknowledged to be, in general, highly desirable.<sup>71</sup> The question in this section is to what extent can the access parent contribute to the child's religious development? Can such a parent discuss his or her religion, take the child to church and so on? Or is it a case of a football game or the zoo but never church? In some jurisdictions the custodial parent has the prima-facie right to determine the children's religious upbringing and thus greater deference is paid to what that parent desires by way of religious instruction and activity.<sup>72</sup> In others, parents have an equal right to determine a child's religious upbringing, even when they are separated or divorced.<sup>73</sup>

#### A. Access Restrictions of a Religious Nature Generally

##### (i) *As minimal restriction as possible*

When framing an access order, some courts have striven to ensure that parental religious freedom is impaired as little as possible. In *Osier v Osier*, the Supreme Court of Maine urged that when designing access orders it 'should adopt a means of protecting the best interests of the child that makes the *least possible intrusion* upon the constitutionally protected interests of the parent'.<sup>74</sup> A restriction, for example, not just upon participation in church but also on 'church-related activity' would seem to be too broad, proscribing clearly benign secular activities such as 'church picnics [or] bicycle rodeos'.<sup>75</sup>

(ii) *Is exposure to different religions harmful?*

While there have been occasions where judges have viewed exposure to differing religions as in itself harmful to the children,<sup>76</sup> the more prevalent view is that there is nothing inherently detrimental in this. Quite the reverse: 'such exposure may be of value to the child'.<sup>77</sup> If access is to be meaningful, children ought to know 'the true nature of their parents',<sup>78</sup> and the parent's faith, if it is more than nominal, must be at the core of his or her identity.<sup>79</sup> Divesting oneself of one's faith, even if it were possible, paints a false picture and benefits no-one. As one American judge observed: 'The process of a child's maturation requires that they view and evaluate their parents in the bright light of reality'.<sup>80</sup>

Nevertheless, there is exposure and there is exposure. As in so many things in life, much would seem to depend on precisely *how* the difference in the parents' religions is presented to the child. The discussion in *Zummo* is enlightening. The majority of the Pennsylvania Superior Court begin by acknowledging that some 'disquietude' or 'disorientation' may indeed arise from conflicting parental religions, as it arises from the fact of divorce in general. Yet they cautioned:

However, stress is not always harmful, nor is it always to be avoided and protected against. The key is not whether the child experiences stress, but whether the stress experienced is *unproductively severe*.<sup>81</sup>

Unless the stress is unproductively severe, the parent and child ought to be allowed to work through the conflict in developing their post-divorce relationship.<sup>82</sup> The majority also remind us of the causation issue – the unproductive stress must result from the religious activity in dispute and not some other reason.<sup>83</sup> Ultimately, it is the *manner* in which religious difference is presented that is all-important, transcending even the most apparently divergent theological divide:

[A] *crimonious* disputes, or situations in which one parent uses religion as a tool to *poison* his or her children with *disrespect* for or *animosity* toward the other parent might present a compelling case for intervention between two Jews or two Christians of similar sects, while a *respectful* but irreconcilable dispute between a Christian and Jew would not.<sup>84</sup>

Mere assumptions and abstract assessments must give way to a careful examination of the *particulars* of the case, a point more fully developed in section 4. While in theory the religious conflict may be harmful, is the way in which the parent is conducting him or herself here, in *these* circumstances, generating undue and destructive stress in the child?

### B. *Types of Religious-Oriented Access Restriction*

There are at least four different kinds of restrictions on religious activity which have been imposed as a condition upon access.<sup>85</sup> Some of the matters subject to restriction for the purpose of access are, it should be

noted, also grounds upon which courts have sometimes denied custody to the religious parent concerned.

(i) *'Indoctrination'*

Simple discussion or communication by the access parent on matters of faith seems permitted.<sup>86</sup> Support can be drawn from the United Nations Convention on the Rights of the Child 1989. Article 14(1) establishes the right of the child to freedom of religion. Article 14(2) then continues: 'State Parties shall respect the rights and duties of parents . . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child'. The Article speaks of 'parents' perhaps implying that married parents acting jointly alone have this duty, but Article 18 also urges State Parties to use their 'best efforts to ensure recognition of the principle that *both* parties have common responsibilities' for the upbringing of the children. Separated or divorced parents would appear then to have responsibilities to direct the child in his or her ultimate journey of faith. Direction would need to be just that – overbearing or coercive efforts, which show no respect for the child's free exercise of religion, would seem to be beyond the pale. In *Young, Cory & Iacobucci JJ* explain:

We find it difficult to accept that any genuine and otherwise proper discussion between a parent and his or her child should be curtailed by court orders. Indeed, curtailment of explanatory or discursive conversations or exchanges between a parent and child should be rarely ordered in our view.<sup>87</sup>

Accordingly, the majority of the Canadian Supreme Court set aside the trial judge's order prohibiting the Jehovah's Witness father from discussing his faith with the children (or allowing third parties to) without their mother's consent. Significantly, the Court could find no evidence that Mr Young's religious instruction had adversely affected the children's mental or physical health. The trial judge had simply based his decision on a fear that continued instruction would lead to a deterioration in the children's relationship with the father, especially the elder two daughters who disliked the religious instruction.

In contrast to genuine discussion is any form of forced religious instruction or 'indoctrination'. Sometimes courts view this as virtually inevitable given the fervour of the parents' faith.<sup>88</sup> On one occasion the judge even put himself in the child's shoes and questioned whether the child could really enjoy repeated and protracted religious meetings, Bible studies and so on.<sup>89</sup>

The obvious problem here is drawing the distinction between discussion and indoctrination. It is difficult, perhaps even futile, to distinguish between the two.<sup>90</sup> Surely one person's 'instruction' or 'discussion' is another's 'indoctrination'. The majority of the Canadian Supreme Court in *P(D) v S(C)* was prepared to make the distinction and to uphold the

trial judge's order that during access visits by the three- and-a-half-year-old daughter, the father: 'may *teach* the child the Jehovah's Witness religion but does not have the right to *indoctrinate* her continually with the precepts and religious practices of the Jehovah's Witnesses'.<sup>91</sup> The gist of the mother's complaint was that following access visits, the daughter repeated various Jehovah's Witnesses teachings, namely, making repeated references to 'Jehovah', 'Jehovah made [the daughter], the moon, made the stars, made everything' and told her startled mother it was wrong to dress up on Halloween or to celebrate Christmas (there being no Santa Claus).<sup>92</sup> (There is no mention in this case of the reading of Bible stories, the Jehovah's Witness father's 'crime' at first instance in *Young*). L'Heureux-Dubé J, for the majority, affirmed the original restriction:

It is important to note that the trial judge's order refers to the appellant's 'religious fanaticism' and not to the *normal* exercise of his religion in respect of his child. . . The disputed order does not prohibit any *communication* by the appellant with C: it only prohibits him from *indoctrinating* his daughter in the way he is doing, both by his words and by his activities.<sup>93</sup>

Sensible compliance with such a direction would be well-nigh impossible.<sup>94</sup> A wary parent might well refrain totally from any mention of his or her religion lest this be construed by a suspicious and hostile former spouse as indoctrination. A more zealous, albeit imprudent parent might walk the tightrope and risk losing access indefinitely. Matters are not advanced by being even handed and prohibiting both parents from indoctrinating the children<sup>95</sup> – or, for that matter, allowing each to indoctrinate equally.<sup>96</sup>

(ii) *Attendance at church or other religious meetings*

A condition of access may be that the access parent not take the children to his or her church or other religious meeting.<sup>97</sup> Some parents foresee this being a problem and show the requisite 'moderation' by undertaking not to take the children to their gatherings.<sup>98</sup> If the children are relatively mature the court may tailor access so that their attendance at the custodial parent's (and their) church is uninterrupted. In the New Zealand case, *Cotter v Cotter*,<sup>99</sup> for example, the access mother, a Jehovah's Witness, wished to take the two boys, aged four and nine, to her church on Sunday mornings. The court thought this would be 'confusing' and directed instead that the mother ensure the boys be ready at 9am sharp Sunday morning for their father to pick them up to attend their regular Elim (Pentecostal) church service.

Again it would seem to be a facet of parental religious liberty to take one's children to church. However for more mature children who have developed a religious identity, the courts are prepared to offer some

deference to their wishes, deference which might not be shown were the parents still together.<sup>100</sup>

(iii) *'Witnessing'*

A problem which seems primarily to have arisen with respect to Jehovah's Witnesses<sup>101</sup> is the practice of parents taking the child along with them while they 'witness' or canvass door-to-door.<sup>102</sup> Courts typically frown upon this activity which they usually dub as 'proselytizing'.<sup>103</sup> The assumption – evidence is usually conspicuously absent – is that the child is indirectly coerced into doing this and that he or she abhors the activity. This may or may not be so,<sup>104</sup> but evidence should be essential. On one of the few occasions where the court appears to have scrutinized the issue carefully, it saw no evidence of any ill effects on the children (aged ten and twelve) accompanying their father on his 'field ministry' (note the non-pejorative description). The worst that the court could see would be the children would 'become bored, or accept the routine as ordinary experience'.<sup>105</sup>

(iv) *Denigrating the other parent's religion*

Finally, the court may order both parents to refrain from denigrating each other's religion.<sup>106</sup> While there may be some symbolic value in such vague orders it would be better to avoid such directions and leave the matter to the parents' 'good sense',<sup>107</sup> or lack of it.

#### 4. SUGGESTED SAFEGUARDS

It is my submission that requiring evidence of harm is the key to minimizing the risk of religious prejudice and ensuring that the religious liberty of devout parents, especially those of minority religions, is preserved. There are, it is submitted, two safeguards, which overlap, which should be borne in mind. The courts should: (i) concentrate on the particulars of the instant case rather than on the general, and; (ii) require proof of likely harm to the child as opposed to reliance upon conjecture.

##### A. *Focus on the Particular*

[E]ach child must be considered as an individual and his or her needs and welfare assessed within the context of the particular family unit. It is a question of *this* child, with *this* particular father and mother and with *this* upbringing. It is dangerous and undesirable to apply any generalized notions to the extent that the general is allowed to blot and blur the particular.<sup>108</sup>

The need to focus on the particulars of the instant case is always critical but is especially so in disputes involving religion. The entire exercise is in danger of rapidly degenerating into a trial of religion if the concrete circumstances are overlooked and instead the court examines *in*

*abstracto* whether the upbringing in the religion at issue is in the children's best interest.<sup>109</sup>

There are some obvious pitfalls in too general an approach. First, the parent may or may not actually adhere to their church's doctrines. The tenets of a religion ought to be irrelevant to the assessment except in so far as it can be shown that they are held and practised by the parent (or others) in respect of the child.<sup>110</sup> Secondly, the church's teachings in practice may not have the effect claimed. For example, it is rare for a Jehovah's Witness child not to be given a blood transfusion in an emergency given the broad powers allowing doctors to override parental refusal of consent.

A colourful example of whether the danger of an abstract approach was averted is *Harris v Harris*.<sup>111</sup> While the mother belonged to the Free Will Holiness Pentecostal Church, a sect which believed in snake handling, to rest the decision on custody on the fact of her membership alone was wrong. Reversing the trial judge, the Supreme Court of Mississippi looked more searchingly and found that there was no proof that the mother and child had ever attended a service where snakes were handled or that she had the slightest inclination to take the child to such a service. Indeed, the evidence showed the practice of snake handling had of late fallen into disuse.<sup>112</sup>

By contrast, Latey J in the English decision, *Re B and G (Minors)*<sup>113</sup> took the opportunity, in assessing custody of children of a Scientologist father and stepmother, to launch into a detailed twenty-one page critique of the 'cult'. This led him to conclude it was 'immoral and socially obnoxious' as well as 'corrupt, sinister and dangerous'.<sup>114</sup> After such a damning assessment there was only one way the determination would go. Despite the fact that the children had been with their father and stepmother for five and a half years, and, notwithstanding the fact those parents 'impressed [the judge] as a very nice couple',<sup>115</sup> the mother was awarded custody with ample access for the father. Surely the focus ought to have been on harm suffered or likely to be suffered by the children due to the father's beliefs. There was some evidence of this in the form of 'auditing', which was characterized by his Honour as 'brainwashing',<sup>116</sup> but not much else. It seemed to be enough to find that this religion was 'pernicious' *ergo* children should not be raised in it.

That decision was upheld on appeal but the North Carolina Court of Appeals recently refused to countenance a similar enquiry by a trial judge. In *Petersen v Rogers*,<sup>117</sup> Hunt J at first instance was troubled by her ignorance of 'The Way' and allowed extensive expert testimony about its tenets and doctrines. The survey traversed such questions as the sect's beliefs on the Trinity, tithing practices, speaking in tongues, evil spirits and so on. This theological examination was denounced on appeal as being entirely unrelated and irrelevant to the welfare of this particular child. The experts had never met the child. Crucially, there

was no evidence he was adversely affected by The Way's religious practices; quite the opposite, as the trial court found. The Petersens had simply been 'subjected to the inquisition of their religion at trial'<sup>118</sup> and a new trial was ordered.

### B. *The Importance of Proof*

Absence of clear evidence that the children are suffering or will likely suffer harm should be a warning that the line is being crossed between proper consideration of religion relevant to a child's welfare on the one side and improper curtailment of religious freedom on the other. The Australian Full Family Court make the point well in *Re Paisio*:

[T]he court must take the utmost care to avoid merely subjective attitudes and steer a careful course between the right of any citizen to bring children up in certain religious or non-religious beliefs and the point at which the practice of the right will *positively* and from a *proven objective* viewpoint obstruct the welfare of children.<sup>119</sup>

Evidence of harm, or the lack of it, was at the centre of one of the two recent Canadian Supreme Court appeals both involving Jehovah's Witnesses.<sup>120</sup> In *P(D) v S(C)*, the dissenting judges, McLachlin and Sopinka JJ, decried what they perceived as the 'lower evidentiary standard'<sup>121</sup> for determining the child's best interest adopted by the Quebec Court of Appeal. The minority could find no evidence that the child suffered or was likely to suffer any harm from the Jehovah Witness father's supposed 'religious fanaticism'.<sup>122</sup> As we saw earlier, the evidence was that the child, following access visits, had made repeated references to 'Jehovah' and had told her mother that various religious festivals ought not to be celebrated. Neither this nor the presence of conflict between the parents were enough for the minority. In the middle wavered Cory and Iacobucci JJ who decided, despite their misgivings, to side with the majority. Their trepidation was plain:

The decision of the trial judge in this case is quite frankly troublesome. There was *very little evidence* that access by the father was not beneficial to the child. However there was *some* evidence that the child's behaviour after visits with the father was such that it *might* be interpreted they had been disturbing for her.<sup>123</sup>

'Very little evidence' which 'might' be construed (by whom?) in a certain fashion we would ordinarily dub conjecture. Cory and Iacobucci JJ's approach is attributable in large measure to the traditional deference appellate courts pay to the trial judge's superior, first-hand assessment of the witnesses and evidence.<sup>124</sup>

If evidence is crucial the question is, what sort of evidence and to what standard? This is a more difficult issue. In general terms it is submitted a court should be concerned solely with facts indicating a

*substantial* prospect of harm. There are many formulations in the cases<sup>125</sup> but perhaps the best is by the majority of the Superior Court of Pennsylvania:

[T]he party seeking the restriction must demonstrate by competent evidence that the belief or practice of the party to be restricted actually presents a substantial threat of present or future physical or emotional harm to the particular child or children involved . . .<sup>126</sup>

The corollary of this is the rejection of conjecture:

[C]ourts have rejected speculation by parents and by experts as to potential future emotional harm to a *particular* child based upon the assumption that such exposure is *generally* harmful.<sup>127</sup>

While it seems sensible to adopt a prophylactic approach and consider not just present impairment but also prospective harm, the standard ought, out of respect for the freedom at stake, be set high. *Zummo* speaks above about a 'substantial threat' not merely 'some probability' and, while this is still talking in generalities, it sends the right signal.

As to the crucial issue of precisely what constitutes 'harm', specificity is again difficult. The majority in *Zummo* in the first of the two quotations above speak of physical or emotional harm. Sopinka J in *Young* offered the following:

'Harm' is a term which in this context connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological or moral well-being will be adversely affected.<sup>128</sup>

The threat of physical injury to the children from a religious practice seems a straightforward matter to assess. Evaluating whether religious practices pose emotional or psychological harm seems much more difficult.<sup>129</sup> Again the danger would be in viewing a narrow, socially restrictive lifestyle as in itself psychologically harmful to a child's development.

What about the degree of harm? I have argued that the likelihood of harm should be a substantial one to avoid falling into the trap of mere conjecture. It could be argued that the degree of harm required ought to be a substantial one also. This would be probably going too far. It is hard not to agree with Hamilton that a requirement that substantial harm exist or be threatened is 'too high a threshold' as it unduly emphasizes parental religious rights at the expense of children's best interests.<sup>130</sup> Schneider likewise considers that the child protection standard 'can let go by some pretty clearly harmful things'. As he points out: '[t]his [standard] may be tolerable under ordinary assumptions about 'intact' families, but it may seem less wise when we are dealing with post-divorce families'.<sup>131</sup> One may legitimately harbour doubts about the likelihood parents will still have their children's best interest solely

at heart following divorce. It is not unknown for parents to let their personal animosity get the better of them and use children in their battles. It would seem then better not to require harm to qualified by the epithet 'substantial' or 'serious'. If any adjective be needed it could be described as real harm, in the sense of harm which can be supported by credible or competent evidence. As Stephen Toope has urged, if religious freedom is important, then courts should insist upon 'reliable proof', proof which raises *'bona fide'* concerns that the religious beliefs and practices of the parent have led or are likely to lead to harm to the child'.<sup>132</sup>

What role does expert evidence play? At first glance it appears hard to see who could be an expert on whether a particular religious upbringing was harmful or beneficial to a child. Do we ask a theologian, an expert in comparative religion, adherents of the religion at issue or someone else? Most commonly the expert is a psychiatrist or psychologist. There is a danger here however that a mental health expert's professional opinion may give a veneer of scientific respectability to what is nothing more than personal opinion.<sup>133</sup> In *Mendez v Mendez*, three experts, two psychologists and one psychiatrist, found the Jehovah's Witness mother to be an altogether fit and loving parent. Yet they testified that this religious upbringing was not in the child's best interests since it would not integrate the child into the 'mainstream of [American] culture' as well as the father's Catholic faith would. Baskin J, dissenting, denounced this so-called expert testimony:

What does emerge from the record is a demonstration of the experts' personal biases against the mother's religion. Their disdain for the mother's religion induced them to speculate as to the possibility of harm to the child in the future even though no evidence of harm existed.<sup>134</sup>

Similarly there must be cause for concern where the mental health experts do not even interview the child yet are prepared to make blanket predictions about the dire nature of upbringing in a particular religion.<sup>135</sup>

## 5. CONCLUSION

Religion is seldom a factor in custody and access cases<sup>136</sup> and this would appear to be an altogether desirable state of affairs from most judges' standpoint. No court would willingly rush into opening this 'Pandora's box'<sup>137</sup> or to entering the 'tangled web'.<sup>138</sup> Nonetheless, religious matters are sometimes unavoidable and the religious upbringing of the child may be one of the material considerations affecting his or her welfare in the particular case.

The law begins from a premise of neutrality. A judge's personal religious predilections are meant to be excluded. Further, the law eschews

any preference in matters of religion. One particular variety of belief, or for that matter unbelief, is as good as another. Nevertheless, a survey of the case law across a number of jurisdictions witnesses far from neutral results in practice. 'Minority' or 'unpopular' religions or sects consistently struggle. At first glance the courts' concern with merely the objective consequences of religious beliefs rather than the beliefs *per se* appears unimpeachable. Courts ought to be able to assess anything that has an adverse impact on the children and that includes parental religious practices if harmful. Yet the outworking of this approach often leaves something to be desired. In the custody arena, the courts are prone to view the restricted lifestyle children of the sect will be raised in as the root cause of a number of serious adverse temporal consequences. It is however no consolation to a Jehovah's Witness, Exclusive Brethren or Pentecostal parent to be told: 'it is not your religious beliefs as such which disqualify you as a parent but rather the social effects of those beliefs'. The judgment is plainly one upon the religion itself. In the access context, courts have also harshly treated attempts by parents of unconventional religions to include their children in their religious life. Indoctrination seems to be easily found if one is a Jehovah's Witness but never if one is an Anglican or Methodist. The sad reality is that the breadth of the welfare or best interests of the child test can be easily manipulated by shrewd parents able to play the religion card. How can the entire exercise be prevented from degenerating into a trial of religion, one in which minority faiths face an uphill task?

It is submitted no parent should have his or her religious beliefs and practices counted against them unless there is evidence these will engender harm to the children. A two-step process articulated by the Supreme Court of Maine seems worth consideration.<sup>139</sup> It might be called the 'ignore-unless' approach. First, the court should assess the suitability of each parent without considering either parent's religion. If the initial assessment indicates it is only the religious practices of the non-preferred parent that are at issue, the Pandora's box can be kept tightly closed. Secondly, if the preferred parent is the one whose religion is contentious, the next stage is to carefully evaluate the consequences of those beliefs and practices. Neither custody nor access should be restricted on the basis of mere assumptions about the likely impact of the parent's religion upon the child's well-being. Rather, the courts ought to focus upon the particular circumstances of the case at hand and scrutinize the facts for evidence of a substantial threat of harm (physical, emotional or psychological) from the religious practice at issue. An insistence on proof of likely harm to this particular child is the best guarantee a court will not simply reflect community prejudice.

'But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.'<sup>140</sup> The words of the US Supreme Court are particularly salutary in the field of custody and

access battles. Religious parents might well be 'moderate' or 'sensible' and curtail their religious liberty for fear an unsympathetic court may construe their expression of faith as detrimental to the children. But courts sensitive to this fundamental freedom ought not to place separated or divorced parents in such a quandary.

## NOTES

<sup>1</sup> *Zummo v Zummo*, 574 A 2d 1130, 1132 (Pa Super 1990) per Kelly & Rowley JJ.

<sup>2</sup> See eg *Re Carroll* [1931] 1 KB 317 at 336 per Scrutton LJ ('It is, I hope, unnecessary to say that the court is perfectly impartial in matters of religion for the reason that it has no evidence, no knowledge, no views as to the respective merits of religious views of various denominations.');

*Re Collins (An Infant)* [1950] 1 Ch 498 at 502 per Evershed MR ('It has been said many times that a temporal court is not able to decide in any case which religion affords the greater benefits to its adherents.');

*Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 at 171 per Purchas LJ.

<sup>3</sup> See eg *Evers v Evers* (1972) 19 FLR 296 at 302 (NSW Sup Ct) ('... the courts cannot prefer Christianity to any other religion, or prefer any religion to none at all.');

*In the Marriage of Paisio (No 2)* (1978) 5 Fam LR 281 at 283 (Full Fam Ct) ('... the courts have recognised it is no part of the judicial function to rule that one form of religion is to be preferred to another.').

<sup>4</sup> See eg *P v F* (1983) 2 NZFLR 27 at 29 per McAlloon J (Dist Ct) ('[I]t is not the function of the Court to adjudicate on the merits of different religions.');

*N v N* (1987) 2 FRNZ 534 at 536 per Inglis J QC (Fam Ct) ('The concern of the Family Court is not to say which of two methods of practising Christianity is the better, for the Court cannot take sides on matters of religion.')

<sup>5</sup> See eg *Young v Young* [1993] 4 SCR 3 at 92 per L'Heureux-Dubé J (Sup Ct) ('... it has long been a tenet of the common law that courts will not prefer one religion over another in the adjudication of custody disputes') (dissenting in result but not on this issue); *Sullivan v Fox* (1984) 38 RFL (2d) 293 at 301 per McQuaid J (PEI Sup Ct) ('... the law also does not differentiate between religious beliefs, but sets them upon an equal plane and requires that they be equally respected').

<sup>6</sup> See eg *Zummo v Zummo*, above n 1 at 1134–5 per majority of the Pennsylvania Superior Court ('It has long been a fixed star in our constitutional constellation that no government official, high or petty, have any authority whatsoever to declare orthodoxy in matters of religion. . . . Moreover, as courts may not divine truth from falsity in matters of religious doctrine, custom or belief, courts may not give weight or consideration to such factors in resolving legal disputes in civil courts.');

*Pater v Pater*, 588 P 2d 794, 798 (Ohio 1992) per Ohio Supreme Court ('Courts have repeatedly held that custody cannot be awarded solely in the basis of the parents' religious affiliations and that to do so violates the First Amendment to the United States Constitution');

*Osteraas v Osteraas*, 859 P 2d 948, 952 (Idaho 1993) per majority of the Idaho Supreme Court ('When the state, speaking through its courts, intimates that parents choose not to observe a certain (or indeed, any) religious faith are subject to having their custodial rights jeopardised because of that choice, the import will be to force upon each of those parents a painful and unconscionable decision to either hold to their beliefs or maintain custody of their children. Such a decision would thus impinge upon their right to choose and adhere to their own respective beliefs, thereby violating the free exercise clause.')

<sup>7</sup> And it seems in Europe also: see the recent decision by the European Court of Human Rights, *Hoffman v Austria* (1993) 17 EHRR 293 at 316.

<sup>8</sup> See eg the early New Zealand cases, *In re McSweeney* [1943] GLR 239 at 246 per Smith J (CA); *In re Scoon (An Infant) (No 2)* [1946] GLR 419 at 421 per Smith J. Recently, L'Heureux-Dubé J, in *P (D) v S (C)* [1993] 4 SCR 141 at 183 (Sup Ct), revived this tradition: 'If the court were concerned with the practice of a Catholic, Protestant or atheist, to mention only a few religious beliefs, the decision would be the same. . . .'

<sup>9</sup> See Balcombe LJ in *C v C* [1991] 1 FLR 223 at 230: '[I]n making a decision on welfare the judge should not be influenced by subjective considerations. To take an example: the issue may be whether the child is to be brought up in the faith of religion A or in that of religion B. The judge may be a member of religion A, and a firm believer in its tenets: nevertheless, he must try to ensure that his personal beliefs do not affect his judicial function in deciding where the child's welfare lies.'

<sup>10</sup> For an example last century, see Jessel MR in *In re Besant* (1879) 11 Ch D 508 at 513 when, in a moment of unusual candour, the Master of Rolls left no doubt as to his view of Mrs Besant's atheist beliefs: 'Not only does Mrs Besant entertain those opinions which are reprobated by the great mass of mankind (whether rightly or wrongly I have no business to say, *though I of course think rightly*) . . .' (emphasis added). See also the infamous custody case involving the poet Shelley: *Shelley v Westbrooke* (1817) Jac 266; 37 Eng Rep 850. For a more recent example of where the judge let his colours show, see *K v K* (1979) 5 Fam LR 179 at 193–4. Toose J spends several paragraphs pointing out how the Exclusive Brethren, '[w]hile they claim to be Christians they do not appear to follow the ordinarily accepted precepts of Christianity.' This brief theological excursus was, with respect, quite unnecessary. To note that the Brethren relied upon a verse from a translation other than the 'authorised version of the Bible' seems quite bizarre.

<sup>11</sup> For an interesting discussion see Stephen Carter, 'The Religiously Devout Judge' (1989) 64 *Notre Dame L Rev* 932.

<sup>12</sup> See eg Carmichael J in *Evers v Evers*, above n3 at 302, who buttressed his statement regarding neutrality by reference to the free exercise of religion clause of s 116 of the Commonwealth Constitution (Australia). See also eg *Osteraas v Osteraas*, above n6 at 952 and *Pater v Pater*, above n6 at 798 (neutrality required by virtue of the free exercise and establishment clauses of the First Amendment of the American Constitution)

<sup>13</sup> *Re Paisio*, above n3 at 283 (emphasis added).

<sup>14</sup> 'We can agree on the principle of neutrality without having agreed on anything at all'; Douglas Laycock 'Formal, Substantive and Disaggregated Neutrality Toward Religion' (1990) 39 *De Paul L Rev* 993 at 994.

<sup>15</sup> Above n5 at 92. See also *Hanrahan v Hanrahan* (1972) 19 FLR 262 at 266–7 (NSW Sup Ct).

<sup>16</sup> *Shelley v Westbrooke*, above n10; *In re Besant*, above n10.

<sup>17</sup> *Thomas v Roberts*, 3 De G & Sm 758 at 774; 64 ER 693 at 700 (1850) per Sir Knight Bruce VC.

<sup>18</sup> *In the Marriage of Grimshaw* (1981) 8 Fam LR 346 at 351. See also the European Court of Human Rights' decision, *Hoffman*, above n7, where the majority were convinced the Supreme Court of Austria had based their decision to refuse custody to a Jehovah's Witness mother essentially on the basis of her religious adherence.

<sup>19</sup> See eg *Re B and G (Minors)*, discussed in section 4A and *Leppert v Leppert*, 519 NW 2d 287 (ND 1994) where the Supreme Court of North Dakota pointed out the mother, a follower of her father's own sect, insisted she must raise her children in their antisocial teachings. These tenets included: the treating of all non-adherents as God's enemies, lying and stealing and violent behaviour to outsiders, refusal to pay taxes (as well as hunting and fishing licenses) and refusing to purchase liability insurance on their vehicles as the law required.

<sup>20</sup> See eg L'Heureux-Dubé J in *P(D) v S(C)*, above n8 at 181: '[I]n ruling on a child's best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent . . . affects the child's best interests.'; *Macgillivray v Macgillivray* [1967] SASR 407 at 411 per South Australian Supreme Court: 'the Court is bound to take note, not of the metaphysical truth or falsehood of the various beliefs as to which it knows nothing, but of the secular consequences to the child of an upbringing under [the parents'] respective auspices'; *Morris v Morris*, 412 A 2d 139, 143 (1979) per Pennsylvania Superior Court: '[W]e neither intend to, nor are capable of, rendering a value judgment on the intrinsic truth of the varied religious beliefs, but confine our investigation solely to any detrimental effect their practice may have on the development of the child.'; *Re R*, above n2 at 171: 'The impact of the tenets, doctrines and rules of a society upon a child's future welfare must be one of the relevant circumstances to be taken into account by the court . . .'

<sup>21</sup> Above n5 at 93 (original emphasis).

<sup>22</sup> *Re Paisio (No 2)*, above n3 at 284.

<sup>23</sup> *Ibid* (referring to the thuggee cult in 19th century India).

<sup>24</sup> Joseph Mucci, 'The Effect of Religious Beliefs in Child Custody Disputes' (1986) 5 *Can J Fam L* 353 at 359–60 (emphasis supplied). See also Andrew Bainham, 'Religion, Human Rights and the Fitness of Parents' [1994] *CLJ* 39 at 40: 'The state is now apparently required to distinguish between religion *per se* and the social effects of that religion. Such an approach seems scarcely credible since all religions are in effect 'package deals' . . . to discriminate between parents because of the consequences of their religion is arguably to discriminate quite simply on the basis of religion.' A. Bradley refers to the loss of custody on the basis of consequences, not beliefs, as 'a peculiar kind of neutrality': *Religions, Rights and Laws* (Leicester University Press, Leicester, 1993)

at 49. McQuaid J in *Sullivan v Fox*, above n5 at 298, was not prepared to hold there was any real difference between the beliefs versus consequences approaches.

<sup>25</sup> *James* ch2 v17 (New International Version).

<sup>26</sup> See generally Gabriel Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Syd L Rev* 195.

<sup>27</sup> See eg *Reynolds v United States*, 98 US 145, 166 (1878) ('[I]aws are made for government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices'); *Cantnoell v Connecticut*, 310 US 296, 303-4 (1940) (the First Amendment 'embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct must be subject to regulation for the protection of society'); *Bowen v Roy*, 476 US 693, 699 (1986). In Canada see *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 (Sup Ct) at 50 per La Forest J and at 89 per Iacobucci and Major JJ.

<sup>28</sup> See an excellent discussion by Marci Hamilton, 'The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct' (1993) 54 *Ohio State LJ* 713.

<sup>29</sup> *Wisconsin v Yoder*, 406 US 205, 220 (1972).

<sup>30</sup> Carl Schneider, 'Religion and Child Custody' (1992) 25 *U Mich J L Reform* 879 at 889 and 891.

<sup>31</sup> Carolyn Hamilton, *Family, Law and Religion* (Sweet & Maxwell, London, 1995) at 197.

<sup>32</sup> Leo Pfeffer, 'Religion in the Upbringing of Children' (1955) 35 *Boston U L Rev* 333 at 366.

<sup>33</sup> See Bray C J. in *Macgillivray*, above n20 at 411: '[T]he Courts it seems to me implicitly to have assumed that, other things being equal, the normal conventional upbringing is to be preferred to the eccentric or unusual one.' See also *Ormond v Ormond*, unreported, Family Court, Hastings, New Zealand, 9 September 1986, FP 020/186/86, at 21, where Judge Inglis QC commented: 'Where there is a choice between a highly restrictive outlook, supported by threats of hellfire and damnation, and a more relaxed but properly controlled outlook which is shared by most people, it is much safer to prefer an approach to children's upbringing which has stood the test of generations.'

<sup>34</sup> *Christ and Culture* (Harper & Row, New York, 1951). The five types are 'Christ against Culture', 'Christ of Culture', 'Christ Above Culture', 'Christ and Culture in Paradox' and 'Christ the Transformer of Culture.' It is the first of these, 'Christ against Culture', which is the countercultural response. For excellent discussion against the background of American law, see Angela Carmella, 'A Theological Critique of Free Exercise Jurisprudence' (1992) 60 *Geo Wash L Rev* 782 and Michael McConnell, 'Christ, Culture and Courts: A Niebuhrian Examination of First Amendment Jurisprudence' (1992) 42 *De Paul L Rev* 191.

<sup>35</sup> John Tibor Syrtash in his pioneering Canadian study, *Religion and Culture in Canadian Family Law* (Butterworths, Toronto, 1992) at 87 puts it this way: 'The courts are prejudiced against those religions that encompass an entire way of life, and which insulate themselves from the community as a whole . . .' See also Hamilton, above n31 at 213.

<sup>36</sup> See Vittorio Toselli, 'Religion in Custody Disputes' (1990) 25 *RFL* (3d) 261 at 267: 'One cannot help but notice that mainstream religions are never the subject of an allegation of direct harm. This is probably because, being practised by large numbers of people, they help define the community standard.'

<sup>37</sup> *In the Marriage of Plows (No 2)* (1979) 5 *Fam LR* 590 at 591 per Ferrier J. The majority of Full Family Court however upheld the Exclusive Brethren mother's appeal and awarded joint custody.

<sup>38</sup> (1974) 4 *Fam Law* 190 at 191. This English Court of Appeal decision is unreported but a lengthy and reliable summary is provided in this specialist journal. It should be noted that the decision to award custody to the father was also affected by the court's concern with mother's alleged mental instability. On a similar vein see the judge's raised eyebrows at the fundamentalist mother's stultifying view that the children should not read fairy stories or anticipate the arrival of Father Christmas in *Ormond*, above n33 at 20.

<sup>39</sup> Regarding criticism of the lifestyle of Exclusive Brethren see: *Mauger v Mauger (No 1)* (1966) 10 *FLR* 285 (Qld Sup Ct); *K v K*, above n10; *In the Marriage of Firth* (1988) 12 *Fam LR* 547 (Full Fam Ct Aust); *Hewison v Hewison* (1977) 7 *Fam Law* 207 (Eng CA) (the strict Exclusive Brethren milieu was more handicapping to the children than a more relaxed Baptist atmosphere; the mode of life of the sect was 'harsh and restrictive'); *Quiner v Quiner*, 59 *Cal Rptr* 503, 532 (Ct App 1967) per Holland J (first instance) ('the intellectually blighted microcosm of the Exclusive Brethren' would 'severely handicap' the child's development); *Re R*, above n2 at 173 ('stifling religious conditions of the fellowship').

Regarding criticism of the Jehovah's Witnesses' lifestyle see: *Buckley v Buckley* (1973) 3 *Fam Law*

106 (Eng CA); *Re Paisio*, above n3 at 285 (trial judge noted the child would have 'a somewhat narrower circle of friends and interest' and would become conditioned and reject other forms of social life and intercourse); the Austrian Supreme Court in *Hoffman v Austria*, above n7 at 299 (the children will become 'social outcasts') and also Valticos J (dissenting) in the European Court of Human Rights (at 319–20) (children would be 'set apart from normal social life' and the Jehovah's Witness faith would contribute 'to marginalising them and restricting their future and their development'); *Mendez v Mendez*, 527 So 2d 820 (1987)(Dist-Ct of Appeal of Florida), cert denied, 485 US 942, reh'g denied, 485 US 1030 (1988).

For criticism of other denominations' fundamentalist lifestyles, see *Moseley v Moseley* (1989) 20 RFL (3d) 301 at 303–4, 320 (Alberta Prov Ct); *Stolarck v Nolan*, 584 A 2d 1034, 1036 (Pa Super 1991)(trial judge criticised the 'sterile world with very rigid precepts' of the father's fundamentalism which allowed for 'no spontaneity, artistic expression' etc)

<sup>40</sup> *Re T* (1981) 2 FLR 239 at 245 and 247. The Court of Appeal allowed the Jehovah's Witness mother's appeal. For other decisions where that religion's confined lifestyle was down played see: *Re H(A Minor)*(1981) 2 FLR 253 (Eng); *In re C (Minors)* [1978] Fam 105 at 119(Eng CA)(narrow lifestyle, isolation, non-celebration of birthdays etc 'all matters of relatively light weight'); *C v C* [1975] Rec Law 137 (NZ Mag Ct); *Evers v Evers*, above n3 at 300; *Pater v Pater*, above n6. For cases where the narrow lifestyle of the Exclusive Brethren was not viewed disfavouredly, see: *Re Plows*, above n37 per Wood SJ (social and mental stimulus from within the numerous members of the sect); *Quiner v Quiner*, above n39 per majority of the Court of Appeal.

<sup>41</sup> Therefore suggesting to some that there is really no cause for concern that minority religions are getting a raw deal: see Schneider, above n30 at 892 ('[appellate] courts are aware of just that danger and have leaned over backwards to avoid it').

<sup>42</sup> See eg the majority in *Quiner v Quiner*, above n39 at 512, who could not say the Exclusive Brethren raised child would not, even under the doctrine of separation, 'grow up into a constructive, happy, law-abiding citizen, and contribute to the 'rich cultural diversities' which helped make this country great . . .' See generally Andrew Bainham, 'Family Law in a Pluralistic Society' (1995) 22 *J Law & Soc* 234.

<sup>43</sup> See McConnell, above n34 at 198, n35.

<sup>44</sup> See eg *Moseley v Moseley*, above n39 at 306 and 319 (children encouraged to view their father as a sinner and among the 'damned' and that he will die and 'burn in a lake of fire'); *Mauger v Mauger*, above n39 at 287 and 317 (Exclusive Brethren father did his utmost to encourage the children to view their mother as 'unclean and iniquitous'); *Quiner v Quiner*, above n39 at 513 and 520 (Exclusive Brethren mother taught child that his father was 'unclean' and should not eat with him); *Lyndon v Lyndon*(1986) 3 FRNZ 37 at 38(Fam Ct) (mother described by father belonging to a 'born-again' Christian Fellowship as a 'witch').

<sup>45</sup> See eg *Ormond v Ormond*, above n33 at 16 and 25.

<sup>46</sup> See *Evers v Evers*, above n3 at 300, where Carmichael J noted that there was no evidence the Jehovah's Witness children had rejected their 'disfellowshipped' mother, despite their religious beliefs about her eternal fate.

<sup>47</sup> See eg *Re T*, above n40 at 250; *Re H*, above n40 at 257.

<sup>48</sup> See eg *Evers v Evers*, above n3 at 300 (in view of the statutory powers given to doctors, the problem was 'a matter of minimal importance'); *Ostler v Ostler*, 410 A 2d 1027 (Maine 1980) (Sup Ct Maine) (trial court in granting custody to the non-Jehovah's Witness parent gave 'undue weight' to the blood transfusion issue).

<sup>49</sup> See *Moseley v Moseley*, above n39 at 307 and 321 (mother would seek medical help, following prayer, only after the children continued to be 'very very ill' after several days) cf *Re B and G(Minors)*[1985] FLR 135 at 157 (children's health not neglected despite Scientologist parent's dislike of orthodox medicine).

<sup>50</sup> See eg *Moseley v Moseley*, above n39 at 321(innumerable late night attendances with three very small children 'unusual and potentially over-tiring' for them); *Schulz v Schulz* (1978) 12 RFL (3d) 141 at 151 and 155 (Brit Colum Sup Ct) (regular late night attendances despite mother's expressed desire to see them in bed by 8.00pm); *Hilley v Hilley*, 405 So 2d 708, 709 (Ala 1981)(children frequently accompanied evangelist mother to meetings that lasted until 11.00 pm).

<sup>51</sup> See *Moseley v Moseley*, above n39 at 305 and 321(frequent 'spankings' by mother including some administered by the pastor) cf *McNeil v McNeil* (1989) 20 RFL (3d) 52 at 61 (Brit Colum Sup Ct) (moderate spanking by Pentecostal mother ought not to be condemned); *In the Marriage of Haden*, 619 P 2d 374, 375, 384 (1980)(Ct Appeal Wash)(majority downplayed one admitted incident where the Pentecostal mother had her children hold down her fifteen-year-old daughter

while she spanked her with a table tennis bat. The minority viewed this as 'outrageous child abuse' and evidence of the mother's unfitness to be a parent).

<sup>52</sup> See *Schulz v Schulz*, above n50 at 147–8 (change of schooling to a very small Church school with dubious adherence to the core curriculum and no properly trained teachers) cf *Stolarick v Novak*, above n39 at 103 (no evidence the Christian school had inferior academic standards. The children were performing normally and even above average in some respects).

<sup>53</sup> See *K v K*, above n10 at 183 and 194 ('unnecessarily restrictive' attitude to education by Exclusive Brethren mother who opposed university education, although might consider technical tertiary education): *Re Plows*, above n37 and accompanying quotation; *Hewison v Hewison*, above n39 at 203 (children 'handicapped in respect of future education, professional qualification and opportunities for academic life and technical skills'); *H v F* (1993) 10 FRNZ 486 at 490 (NZ Fam Ct).

<sup>54</sup> See *Zummo v Zummo*, above n1 at 1149. The majority of the Superior Court considered such an identity is only to be recognized: (1) when it is asserted by the child himself and (2) where the child is sufficiently mature to understand the significance of such an assertion. They suggested as a 'starting point' a child of twelve years and older as generally mature enough for this purpose, while one eight years and under is not so. See further the influential article by Collin Mangrum, 'Exclusive reliance upon Best Interests may be Unconstitutional: Religion as a Factor in Child Custody Cases' (1981) 15 *Creighton L Rev* 25 at 55–6. In *In the Marriage of N(No 2)* (1981) 7 Fam LR 889 at 899 (Full Fam Ct Aust) Evatt CJ & Fogarty J commented: 'Where the children have been accustomed to a particular religious upbringing or life style the question of continuance or change in a particular case may be a relevant factor'.

<sup>55</sup> Unreported Family Court, Hastings, New Zealand, 31 May 1990, FP 021/128/89, Judge Inglis QC.

<sup>56</sup> *Ibid* at 19.

<sup>57</sup> *Ibid* at 21.

<sup>58</sup> *Re N (No 2)*, above n54.

<sup>59</sup> *Ibid* at 907.

<sup>60</sup> *In the Marriage of Sheridan* (1994) 18 Fam LR 415. The court comment (*ibid* at 422): 'it would be inappropriate for questions of preference in religious practice or *degrees of religious adherence* to constitute an aspect of the adjudication of this custody matter' (emphasis added)

<sup>61</sup> Above n1 at 1152. See similarly, *Osteraas*, above n6 (trial court wrongly compared 'religiously inactive' mother to active father) and *Bonjour v Bonjour*, 592 P 2d 1233 (Alaska 1979) ('devout' father's active involvement in 'an organised religious community' wrongly contrasted with mother's non-churchgoing 'passive interest' in the absence of the child having actual religious needs).

<sup>62</sup> Above n15 at 266–7. Jenkyn J also added the converse was true, ie, a religious upbringing, even a 'contentious and controversial one,' was not to be preferred *per se*, to an upbringing by a parent who was a 'non-practising but nominal adherent of some other faith [the mother being a lapsed Roman Catholic], or who is an agnostic or atheist.'

<sup>63</sup> See Bradney, above n24 at 48. The moderation thesis is explored thoroughly in (and summed up by the sub-title to) Professor Stephen Carter's widely-publicised book, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books, New York, 1993). Carter comments (at 4): 'Aside from the ritual appeals to God that are expected of our politicians, for Americans to take their religions seriously, to treat them as ordained rather than chosen, is to risk assignment to the lunatic fringe.'

<sup>64</sup> Above n8 at 187. Fanaticism is not necessarily restricted to minority faiths. In *Re S (Minors)* (1992) 2 FLR 313, the strength of the Roman Catholic father's 'religious fervour' was a cause for concern for the English Court of Appeal.

<sup>65</sup> Above n40 at 258. His Honour later refers (at 260) to the 'level-headed parent'. See also *Re T*, above n40 where the Jehovah's Witness mother was prepared to make similar concessions.

<sup>66</sup> See the quotation accompanying n38 above.

<sup>67</sup> *C v C*, above n40 at 137.

<sup>68</sup> See *Moseley v Moseley*, above n39 at 320–1 (mother neglected the nurturance needs of the children in her zealous pursuit of her religion) and *Schulz v Schulz*, above n50 at 155 (mother's judgment clouded by her fervent and unquestioning commitment to her church). Cf *McNeil v McNeil*, above n51 at 58 where, despite the mother's level of involvement which 'would be viewed by the average person as extreme', she had become 'more moderate' of late. Crucially, there was no evidence of any adverse effects to the children from her 'fundamentalism'.

<sup>69</sup> Sopinka J's phrase in *Young*, above n5 at 107.

<sup>70</sup> Above n39 at 824.

<sup>71</sup> See eg *In the Marriage of Litchfield* (1987) 11 Fam LR 435 at 442 (Fam Ct of Aust) per Mullane J: 'The current view of access is that generally it is highly desirable that a child should have as much contact as possible with both parents, so that there may be created in the child feelings of security often missing in the case of a child with one parent.' Sometimes this principle is recognised in the legislation itself: see eg s 16(10) of the *Divorce Act*, RSC 1985 ('... the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child...') and the discussion by McLachlin J in *Young*, above n5 at 117.

<sup>72</sup> For example Canada – see McLachlin J in *Young*, above n5 at 127 (although her Honour notes this power invested in the custodial parent is not absolute); Australia – see *Hanrahan*, above n15 at 266 and *Ruldoph v Dent* (1985) 10 Fam LR 669 at 672; United States – see eg *Johnson v Nation*, 615 NE 2d 141, 145–146 (Indiana App 5 Dist 1993) (the custodial parent's right is 'paramount' unless it 'unreasonably interferes' with the access parent's visitation rights). Many States have codified the rule: see Carolyn Wah, 'Religion in Child Custody Cases: Presenting the Advantage of Religious Participation' (1994) 28 *Fam LQ* 269 at 272 n11 for a full list. See also s408 of the Uniform Marriage and Divorce Act 1987.

<sup>73</sup> For example New Zealand, pursuant to ss 3 and 6 of the Guardianship Act 1968, each parent has an equal right to control the children's religious upbringing notwithstanding separation: see eg *Lyndon v Lyndon*, above n44 at 39 and *N v N*, above n4 at 537. In England, s 2 of the Children Act 1989 implies that the duties and rights of parenthood are equal. 'Parental responsibilities' are defined to include those existing at [Common] Law, of which the right to determine the child's religion is undoubtedly one. Both married parents retain parental responsibilities following divorce: see Stephen Cretney & Judith Masson, *Principles of Family Law*, 5th ed (Sweet & Maxwell, London, 1990) at 485 and 489.

<sup>74</sup> Above n48 at 1031 (original emphasis). Under Canadian *Charter* jurisprudence, the Supreme Court has propounded a principle of ensuring any restriction on religious freedom being the 'least intrusive means' required. See G.D. Chipeur and T.M. Bailey, 'Honey, I Proselytized the Kids: Religion as a Factor in Child Custody and Access Disputes' (1993) 4 *National Journal of Constitutional Law* 101 at 121.

<sup>75</sup> *Kirchner v Caughey*, 606 A 2d 257, 262 (Md 1992).

<sup>76</sup> See eg Grant J, concurring with the majority in *Le Doux v Le Doux*, 452 NW 2d 1, 6 (Neb 1990) who could not see how parents with conflicting religious beliefs could raise their children 'without reducing their minor children to a totally confused, psychologically disastrous state' and *Morris v Morris*, above n20 142. For criticism of *Le Doux* and excellent discussion of the topic generally, see Collin Mangrum, 'Religious Constraints During Visitation: Under what Circumstances are they Constitutional?' (1991) 24 *Creighton L Rev* 445.

<sup>77</sup> L'Heureux-Dubé J in *Young*, above n5 at 96.

<sup>78</sup> *Fatemi v Fatemi*, 489 A 2d 798, 801 (1985) per Beck J (Pennsylvania Superior Ct).

<sup>79</sup> McLachlin J in *Young*, above n5 at 125, criticised the trial judge for failing to consider how the benefits would result to the children from 'coming to know their father as he was – that is, as a devoutly religious man devoted to the Jehovah's Witness faith'.

<sup>80</sup> Beck J in *Fatemi*, above n78 at 801.

<sup>81</sup> Above n1 at 1155 (emphasis added).

<sup>82</sup> *Ibid* at 1156. The majority note the impeding of this process may itself generate stress.

<sup>83</sup> *Ibid* at 1156. See also *Pater v Pater*, above n6 at 801 and *Kirchner v Caughey*, above n75 at 262.

<sup>84</sup> *Ibid* at 1156 (emphasis added). See similarly Sopinka J in *Young*, above n5 at 108: '[C]onflict between parents on many matters including religion is not uncommon, but in itself cannot be assumed to be harmful unless it produces a *prolonged acrimonious atmosphere*'. (emphasis supplied)

<sup>85</sup> Courts are more likely to restrict clearly defined religious activity than aspects of religious behaviour that pervade everyday life. For example, if one's faith precluded use of a telephone on the Sabbath it is unlikely the non-custodial parent would be required to allow the child to use it on that day if desired: see Donald Beschle, 'God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings' (1989) 58 *Fordham L Rev* 383 at 403 (citing *Kadin v Kadin*, 515 NYS 2d 868, 870 (A D 2 Dept 1987)).

<sup>86</sup> See *Zummo*, above n1 at 1157 where the majority comment: 'Both parents have rights to inculcate religious beliefs in their children.' (original emphasis).

<sup>87</sup> Above n5 at 110. See a similar statement by them in *P(D) v S(C)*, above n8 at 191 ('frank discussion' will not be automatically harmful, indeed it may often be beneficial).

<sup>88</sup> See eg *Mauger v Mauger*, above n39 (trial judge commented that the Exclusive Brethren father was 'a fanatic who could not be trusted not to try to indoctrinate the children whenever he saw

them'; *Re Plows*, above n37 at 594 per Asche SJ ('impossible' for such a sincere woman not to attempt to influence the children toward the Exclusive Brethren; '[i]ndeed, it would be casting an almost intolerable burden on her' to restrain her; *Moseley v Moseley*, above n39 at 319 and 322 ('no half-way' with the mother who was so "totally committed to her faith" that she would 'not be willing to compromise'; to enjoin her from indoctrinating the children would 'place upon her an impossible burden'); *Re R*, above n2 at 178 (no 'half-way house' possible in respect of the Exclusive Brethren adoptive grandparents).

<sup>89</sup> See *Hanrahan*, above n15 at 264 per Jenkyn J.

The distinction is drawn in the Canadian cases concerning religious instruction in public schools: see eg *Canadian Civil Liberties Assn v Ontario (Minister of Education)* (1990) 65 DLR (4th) 1 at 27 (Ontario Court of Appeal): '... s 2(a) of the Charter prohibits religious indoctrination but it does not prohibit education about religion. While this is an easy test to state, the line between indoctrination and education, in some instances, can be difficult to draw'.

<sup>91</sup> Above n8 at 152 (emphasis added).

<sup>92</sup> *Ibid* at 195.

<sup>93</sup> *Ibid* at 182 (emphasis added).

<sup>94</sup> See Shanahan J, dissenting, in *Le Doux*, above n76 at 11, who criticized the access restriction requiring the Jehovah's Witness father from exposing the children to 'any religious practices or teachings inconsistent with the [Roman] Catholic religion'. The father's comprehension of Catholicism could hardly be an objective standard for measuring compliance with the order. See further Schneider, above n30 at 903.

<sup>95</sup> See eg *Hanrahan*, above n15 and *Piper v Piper* [1994] NZFLR 62 (NZ Fam Ct).

<sup>96</sup> See *Kiorgaard v Kiorgaard* [1967] Qd R 162 at 166 (Qld Sup Ct) where Hoare J decried this 'middle course' as 'patently absurd'.

<sup>97</sup> See eg *T v T*, above n38; *K v K*, above n10; *Re S*, above n64; *P(D) v S(C)*, above n8; *Schulz v Schulz*, above n50; *Fougere v Fougere* (1987) 6 RFL (3d) 314 (New Brunswick CA.) It is curious how the benefits of social interaction amongst the child's peers in a religious setting are consistently ignored or down played whereas secular interaction in a sporting or other setting is valued.

<sup>98</sup> See eg *Young*, above n5.

<sup>99</sup> Unreported, Family Court, Hastings, 19 May 1992, FP 020/246/90, von Dadelszen J.

<sup>100</sup> See eg the New Zealand case, *C v F* (1992) 9 FRNZ 439, where the eleven year old Exclusive Brethren boy's religious beliefs were recognized by curtailing the form of access sought by the mother, a former member. But cf *Re R*, above n2, where this New Zealand case is distinguished and the court emphasises that a nine-and-a-half-year old child's wishes and firmly-held religious convictions are not paramount in a *custody* determination.

<sup>101</sup> But see criticism of a Baptist father's involvement of his daughter in his door-to-door evangelising in *Kirchner v Caughey*, above n75 at 263.

<sup>102</sup> See eg *Re H*, above n40; *Fougere v Fougere*, above n97; *P(D) v S(C)*, above n8; *Young*, above n5 (undertaking not to take canvassing given by father); *Skedgwell v Ewington* [1992] NZFLR 641 (Fam Ct) (Note, the order restricting canvassing applied to the non-guardian step-father).

<sup>103</sup> See eg *Hanrahan*, above n15 at 264; *Kirchner v Caughey*, above n75 at 263. On the question of what constitutes improper 'proselytism' versus 'bearing Christian witness' or 'true evangelism' see the recent decision of the European Court of Human Rights, *Kokkinakis v Greece* (1993) 17 EHRR 397 at 422.

<sup>104</sup> In *Skedgwell*, above n102 at 649, the child, aged twelve, said she disliked canvassing and felt uncomfortable and embarrassed about her step-father's persistence with householders during a canvassing trip.

<sup>105</sup> *Evers v Evers*, above n3 at 300-1. See further Wah, above n72 at 283 (properly supervised, the child may benefit from time spent with his or her parent and in seeing the latter explain his faith).

<sup>106</sup> See eg *K v K*, above n10; *Re Plows*, above n37; *Piper v Piper*, above n95; *Schulz v Schulz*, above n50.

<sup>107</sup> McLachlin J in *Young*, above n5 at 129.

<sup>108</sup> *Kidd v Kidd*, above n55 at 3 per Judge Inglis QC (original emphasis). See also *N v N*, above n4 at 536.

<sup>109</sup> See *Hoffman v Austria*, above n7 at 307 para 87.

<sup>110</sup> *Mauger v Mauger*, above n39 at 302 per Skerman J (Qld Sup Ct). In *Re H*, above n 40 at 257 (Eng), Hollings J noted that the Jehovah's Witness mother would tell doctors that the children's father, to whom she deferred, would desire a blood transfusion for the children if it ever were required. Thus, she would respect these wishes 'even though they ... went against the tenets of her faith'.

<sup>111</sup> 343 So 2d 762 (1977).

<sup>112</sup> As the court observed drolly (*ibid* at 764): 'The church members believe that a person anointed by God to handle a snake can do so without harm. But so far it appears that none of the members of the Red Bay Church has ever felt so anointed.' See also *Ryan v Ryan* (1986) 3 RFL (3d)141 where the Newfoundland Unified Family Court down played the father's 'off beat' interest in the Rosicrucian Order, witchcraft, the occult and the paranormal. There was no evidence that he would endeavour to snuffe his son in these things during access periods but, to be on the safe side, a restriction on encouraging such interests was ordered.

<sup>113</sup> [1985] FLR 135. Affirmed by the Court of Appeal: [1985] FLR 493.

<sup>114</sup> [1985] FLR 135 at 157.

<sup>115</sup> *Ibid* at 157. Although Latey J immediately added: 'save in those parts where they are poisoned by scientology'.

<sup>116</sup> *Ibid* at 140.

<sup>117</sup> 433 SE 2d (NC App 1993).

<sup>118</sup> *Ibid* at 778.

<sup>119</sup> Above n3 at 284 (emphasis added).

<sup>120</sup> *Young v Young*, above n5 and *P(D) v S(C)*, above n8.

<sup>121</sup> Above n8 at 195.

<sup>122</sup> This is the trial judge's (Frenette J) description.

<sup>123</sup> *Ibid* at 191 (emphasis added).

<sup>124</sup> *Ibid* at 192. See also *G v G* [1978] 2 NZLR 444 at 447: '[O]f course, an appellate Court, which has not heard and seen the witnesses, will rarely be able to conclude in a case where the exercise of the discretion depends essentially on the evaluation of witnesses, that the decision of the trial judge was wrong.' See also *Harrison & Wollard* (1995) 18 Fam LR 788 at 802–803 (Full Fam Ct Aust) (deference ought to shown the trial judge, who has had the advantage of seeing the parties in court but this case was 'one of those relatively rare cases' where 'even on a conservative approach, it was difficult to avoid the conclusion that the [first instance] decision was clearly wrong').

<sup>125</sup> See eg Sopinka J in *Young*, above n5 at 108.

<sup>126</sup> *Zummo v Zummo*, above n1 at 1157.

<sup>127</sup> *Ibid* at 1155 (original emphasis). See also the Supreme Court of Massachusetts: 'Harm to the child from conflicting religious instructions or practices, which would justify such a limitation [upon parental religious freedom], should *not be simply assumed or surmised*; it must be *demonstrated in detail*': *Felton v Felton*, 418 NE 2d 606, 607 (1981) per Kaplan J (emphasis supplied).

<sup>128</sup> Above n5 at 108.

<sup>129</sup> See Bernadette Walsh, 'Religious Considerations in Custody Disputes' (1988) 18 *Family Law* 198.

<sup>130</sup> Above n31 at 214.

<sup>131</sup> Above n30 at 899.

<sup>132</sup> 'Riding the Fences: Courts, Charter Rights and Family Law' (1991) 9 *Can J Fam L* 55 at 90. Toope continues (*ibid*): 'The insistence upon proof of real or reasonably apprehended harm, rather than the reliance upon a judge's internalized and socially constructed notions of 'best interests' goes some way towards protecting the beliefs and practices of minority sects while ensuring the continuing ability of society to protect its children'.

<sup>133</sup> See Carolyn Wah, 'Mental Health and Minority Religions: The Latest Weapon in Custody Battles' (1994) 17 *Int'l J Law & Psychiatry* 331 at 334–5. There is also the suspicion that psychiatry as a profession is 'professionally unsympathetic with religion', Schneider, above n30 at 901.

<sup>134</sup> Above n39.

<sup>135</sup> See eg *Petersen v Rogers*, above n117 and *Pater v Pater*, above n6, where the respective courts criticised the expert testimony as failing to address itself to the circumstances of the *particular* child and family at hand.

<sup>136</sup> See eg *Re N (No 2)*, above n54 at 899: 'Only in *unusual* circumstances will the court be prepared to consider whether the nature and degree of religious observance of one parent and the proposed religious upbringing of that parent should have such an effect on the welfare of the child that it should assume significance in a custody dispute. There are *rare* cases where a parent's religious upbringing is seen as inimical to the welfare of the child' (emphasis supplied). This sentiment was reiterated recently by the Full Family Court in *Sheridan*, above n60 at 421. There are those who predict a rise in religiously-charged custody and access battles given an increase in inter-faith marriages: see Wah, above n72 at 269–70: '[US] statistics indicate that if any family law

practitioner has not handled a child custody or visitation case in which religion was a significant factor, that opportunity will present itself in the very near future'.

<sup>137</sup> *Quiner v Quiner*, above n39 at 517.

<sup>138</sup> *Osteraas v Osteraas*, above n6 at 952.

<sup>139</sup> *Osier v Osier*, above n48 at 1029–1030: '[1][T]he divorce court should make a preliminary determination of a child's best interest, *without giving any consideration to either parent's religious practices*, in order to ascertain which of them is the preferred custodial parent. Where the preliminary determination discloses that the religious practices of only the *non preferred* parent are at issue, any need for the court to delve into a constitutionally sensitive area is avoided. [2] If, on the other hand, that preliminary determination discloses a preference for the parent whose religious practices have been put in issue, the divorce court, in fashioning an appropriate custody order, may take into account the *consequences upon the child* of that parent's religious practices.' (original emphasis)

<sup>140</sup> *West Virginia State Board v Barnette*, 319 US 624, 642 (1943) per Justice Jackson.

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