CHILD LAW AND RELIGIOUS EXTREMISTS: SIGNS OF A CHANGING JUDICIAL POLICY?

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In a previous article in this journal,[1] I concluded by saying that

> the courts should not be willing to sacrifice the welfare of the child in favour of freedom of religion where a parent's practice of his religious conviction seriously endangers either the mental or physical welfare of the child. Constitutional freedom of religion is not an excuse for failure to protect children from the consequences of their parents' beliefs and actions.[2]

The purpose of this article is to examine two recent decisions to discern possible changing judicial attitudes toward the problem of children in the custody of parents with extreme religious views.

Of course, not even this writer would suggest that there is a feasible legal means of controlling the exercise of religious belief per se, but the distinction between religious belief and religious practice is by no means an unreasonable one to draw. Indeed, it is a distinction already drawn by Waite C.J. of the United States Supreme Court in *Reynolds v. U.S.*[3] as early as 1879. The Chief Justice illustrated the importance of the distinction by posing this question: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[4]

Although it may be immediately thought that any analogy drawn between the human sacrifice, referred to by Waite C.J., and the general effects on children of being brought up by members of extreme religious groups is tenuous at best, there is evidence that, in some situations, the analogy may not be quite so strained. For example, an Australian newspaper[5] noted reports of two instances where very young children had been hospitalized as a result of having been subjected to eccentric diets. The report states:

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[1] Bates, *Child Law and Religious Extremists: Some Recent Developments*, 10 OTTAWA L. REV. 299 (1978).

[2] *Id.* at 312.

[3] 98 U.S. 145, 25 L. Ed. 244 (1879).

[4] *Id.* at 166, 25 L. Ed. at 250.

[5] *The Australian* (Sydney), February 6, 1979.

> [T]he parents of a 13 month old boy became converted to a cult which believed in eating uncooked vegetables. Since birth the child had received only breast milk and fruit. He was unwell, extremely anaemic and lethargic. His weight and height were below normal and he was deficient in proteins, calories and vitamins.

The report also cites the case of a nine week old boy admitted to hospital as an emergency patient after having been fed on a macrobiotic infant food with the unlikely name of *kokoh,* which consisted of rice, wheats, oats, beans and sesame seed. This particular concoction had been singled out by medical practitioners as being especially unsuitable as a major dietary constituent for infants. The analogy is even more appropriate where control techniques are used by these groups on their adherents (as typified by the recent Jonestown tragedy). It is hardly surprising that the families of youthful converts have taken to "deprogramming" them, or that litigation has resulted from their actions.[6] American courts, however, have tended to favour the sects rather than the families.[7]

In view of instances of babies suffering from malnutrition and the apparently dehumanizing conduct of the cults, taken together with the arguments advanced in my earlier article,[8] it is heartening to be able to comment on two recent decisions, one Canadian and one Australian, which seem to mark a change in the apparently entrenched judicial attitude[9] towards child law and religious extremism.

The Canadian case of *Pentland v. Pentland*[10] raised some of the problems in an acute and, unfortunately, not uncommon fashion. There, a 17 year old boy had been severely injured[11] in a motorcycle accident and, after hospitalization, needed blood transfusions. The custodial parent, the child and the child's stepfather refused to consent to the transfusion on religious grounds — they were members of the Jehovah's Witnesses sect. However, the child's grandmother and natural father were willing to consent to the transfusions. A major problem which faced Winter J. in the *Pentland* case was that the usual method of circumventing the requirement of parental consent was closed to him as the accident victim, being over the

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[6] *See* Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234, 3 Fam. L. Rep. 2774 (1977), *rev'g sub nom. In re* Katz, 3 Fam. L. Rep. 2359 (Cal. Super. Ct. 1977); Halender v. Unification Church, 1 Fam. L. Rep. 2797 (D.C. Super. Ct. Fam. Div. 1975).

[7] The exception being Vavuris J. in the *Katz* case at first instance, *supra* note 6. For comment, *see* Bates, *supra* note 1, at 300-01.

[8] *Supra* note 1, at 309-12.

[9] *See* Bates, *supra* note 1 *passim*.

[10] 20 O.R. (2d) 27, 5 R.F.L. (2d) 65 (H.C. 1978).

[11] In the words of Winter J.:

> [T]here were multiple fractures of the forehead, . . .a severing of the optic nerve in one eye, his jaw bones were broken, there was a probable bruising of the heart as well as many other unenumerated injuries. There was a severe drop in the blood count to the extent that the doctors were convinced that without blood death was imminent. . . .

Id. at 29, 5 R.F.L. (2d) at 68.

age of 16, was not a child within the meaning of section 20(1)(a) of The Child Welfare Act of Ontario,[12] and hence not a "child in need of protection" as defined in section 20(1)(b)(x).[13] The judge noted the terms of the Act, but said, "The Courts have always reserved unto themselves the role of the friend and protector of the child. This is a lad of just barely 17 years of age and falls within that category."[14] Applying the terms of the Act *mutatis mutandis* to the instant situation and commenting that, in his view, the child at the time in question was in need of protection, and would continue to be as long as his physical condition was liable to deteriorate,[15] Winter J. awarded custody to the boy's grandmother.

Of particular note is the following statement of principle enunciated by Winter J.:

> I hold that every child has the right to life and to the continuation of life so long as is humanly possible. I further hold that every child has the fundamental right to the best medical care available in his community. To the extent that such medical care is wilfully withheld by a parent or guardian then the child is being neglected and is a neglected child. In those circumstances I accept it as my duty to remove the custody of the child from that parent or guardian and to place the custody of the child in a person who will not deny to the child what I deem to be his fundamental rights.[16]

The judge went on to comment that he did not think that the child's own refusal of consent was the product of a rational, reasoned thought process.[17]

The *Pentland* case is a valuable decision for two reasons. Firstly, it provides an additional way of protecting a child in such a situation from the practical consequences of his parents' religious beliefs. In *Pentland,* the usual course of making the child a ward of the Crown was not open to the court, and the more usual alternative, *viz.*, awarding custody to the hospital involved, was, in Winter J.'s view, undesirable in that such a solution might well result in delays which could imperil the boy's life.[18] A proper result had been reached by the expedient device of varying a custody order. Secondly, the approach of Winter J. towards the Jehovah's Witnesses marks a significant departure from that which had earlier been expressed by Johnson J. of the Saskatchewan Queen's Bench in *Tardif v.*

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[12] R.S.O. 1970, c. 64.

[13] This section provides that a child under the age of 16 may be deemed a "child in need of protection" and thus be made a ward of the Crown if:

> the person in whose charge he is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for his health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified practitioner, or otherwise fails to protect the child adequately.

[14] *Supra* note 10, at 30, 5 R.F.L. (2d) at 69.

[15] *Id.* at 31, 5 R.F.L. (2d) at 70.

[16] *Id.* at 31, 5 R.F.L. (2d) at 71.

[17] *Id.* at 32, 5 R.F.L. (2d) at 71.

[18] *Id.* at 31, 5 R.F.L. (2d) at 70.

Tardif,[19] where it was said, "The fact that [the father] is a member of Jehovah's Witnesses and does not believe in blood transfusions is not a factor which enters into my considerations. Circumstances requiring a parent's decision in the event such medical procedure came into question are merely the substance of pure speculation and do not bear any weight in my decision."[20] The very facts of *Pentland v. Pentland* themselves suggest that the attitude of Jehovah's Witnesses towards blood transfusions is not a matter of speculation. In *Pentland*, the mother and stepfather reacted precisely as the earlier case law[21] had suggested that they would. Of course, interference with parental decision, in one form or another, is not new, but the use of custodial arrangements in this way is. *Pentland* represents a simple and elegant solution to what, on the facts of the particular case, was a two-fold problem.

In Australia, the direct custody issue came before Ferrier J. of the Family Court of Western Australia[22] in *In the Marriage of Plows and Plows*.[23] In that case, both mother and father applied for the custody of their two children, aged nine and six years. The mother was a member of the Exclusive Order of the Plymouth Brethren; the father had been a member until he was expelled from the sect in 1976. The reason for his expulsion was his refusal to terminate his business activities. Prior to his expulsion, the husband, for the same reason, had been what the sect termed "restricted",[24] which meant, *inter alia*, that other members of the sect were not permitted to communicate with him; for familial purposes, the order resulted in the wife's refusal to sleep with her husband or to have meals with him.[25] On the husband's final expulsion from the sect, the wife left the matrimonial home, taking the children with her. On two occasions the wife, apparently at the instigation of the elders of the Plymouth Brethren, attempted to obtain the husband's signature on a separation agreement which provided for extremely restrictive conditions of access to the children by the husband. On both occasions, the husband refused.

At the outset, Ferrier J. noted:

> The principal difficulty in determining these proceedings arises out of the wife's adherence to the Plymount [*sic*] Brethren sect. Were it not for that adherence I would say that it is almost conceded by the husband that the best

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[19] 24 R.F.L. 283 (Sask. Q.B. 1975).

[20] *Id.* at 287.

[21] *See* Bates, *supra* note 1, at 305-06.

[22] The state of Western Australia has taken advantage of a provision, contained in s. 41 of the Commonwealth Family Law Act 1975, enabling states to create their own family courts; thus far, Western Australia is the only state to have done so.

[23] 79 F.L.C. 78,112 (Fam. Ct. W. Aust.).

[24] From a religious point of view, his rights to attend meetings and practice rites of the group were suspended, even though, formally, he remained a member of the Brethren.

[25] In itself, not an insignificant breach of matrimonial responsibility. The term "cohabitation" has been described by L. ROSEN, MATRIMONIAL OFFENCES 29 (3d ed. 1975), as "living together in the same house as man and wife, which usually includes sleeping and eating together, and the usual close association of man and wife".

> interests of the welfare of the children would be catered for if they remained in the care and control of the wife.[26]

The judge commented that the husband made no criticisms of the wife's general capacity as a mother, but confined his claim for custody to the deleterious effects on the children which might result from the mother's membership in the Brethren.[27] This submission had two thrusts: firstly, that the children's opportunity to mix with their peers was curtailed to some degree (they were not permitted to eat lunch with other children or to visit cinemas), and that after they reached the age of twelve,[28] their freedom to mix with non-members would be increasingly limited. In respect of this limb of the husband's submission, the judge did not regard those strictures as being necessarily detrimental to the children's welfare, and stated that he was not basing his judgment on those grounds.[29] The second limb, however, went further. In the judge's own words:

> [T]he beliefs held by the wife and the proximity of the children to her while in her custody will result in the development of attitudes . . . which will prove harmful to them as members of the community at large. Those attitudes will result in a withdrawal from the community and acceptance of rules of existence contrary to those accepted by most around them.[30]

Corollary to that contention, it was further argued on behalf of the husband that, were the children to remain with the mother over a long period of time they would become "so inculcated with the views of the wife and the sect that they would subjectively regard the husband as an iniquitous person from whom they should withdraw any communication, affection or filial loyalty".[31]

Ferrier J. was strongly critical of the evidence given by the wife:

> [S]he is a woman trained to, and obsessed by, her religious beliefs, paramount to any other sensibility or emotion; paramount even to her natural maternal love of the children and to her concept of the unit of a family. . . . So strong are her views and beliefs that it is improbable that they would change even if deprived of custody of the children by order of the court. Notwithstanding anything that she has said, so strong are her views that even if deprived of custody she would, whenever the chance presented itself, continue to feel justified in attempting to indoctrinate the children to a state of mind in which they accepted that those who did not hold the same view were not worthy of communication or social contact.[32]

The judge also pointed to the apparently paradoxical nature of the wife's contention that she could encourage the children to love and respect a man whom she regarded, because of his expulsion from the sect, as

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[26] *Supra* note 23, at 78,115.

[27] *Id.*

[28] The age which the sect regards as the age of responsibility. *Supra* note 23, at 78,116.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 78,116-17.

[32] *Id.* at 78,118.

iniquitous.[33] He was not especially impressed with the evidence given by the husband either, and made reference to evasiveness and reticence in cross-examination regarding his conduct in the home after his expulsion, and minor dishonesty in financial matters.[34] However, the judge was of the opinion that his behaviour was explicable in terms which ultimately reflected his concern for the welfare of his children.[35]

In some respects, the most important part of Ferrier J.'s judgment referred to the specific consequences which would be likely to occur were the children to be placed in the custody of their mother:

> It will lead to [a] suspicion, if not a conviction, that normal human relationships with others not subscribing to their own views is [*sic*] undesirable to the extent of being unconscionable because it would have the effect of perverting them from their views. Their views, as is evident from the views held by their mother, would subordinate the values of the social organisation within Australia to their own values with regard to a concept of adherence to the sect as the natural and fundamental group unit within society rather than to the family.[36]

Ferrier J. commented that society was a hegemony of individuals, springing from family groups, many of whom allied themselves with other larger groups: communication between groups and ideas was essential if the ideas which governed society were to be formulated.[37] He went on:

> Thus, should an entity, whether an individual or a group, having powers to influence or indoctrinate the minds of young children so use those powers as to imbue those minds to the end that they would withdraw from using the ability to communicate and interchange ideas within the mass around them, then it would result in a situation undesirable to society at large and harmful to the object children in their development towards full membership within society.[38]

Accordingly, Ferrier J. awarded custody of the children to the father and, although allowing the wife reasonable access,[39] granted an injunction restraining the mother from allowing the children to attend meetings or engage in the practices of the Plymouth Brethren.

In the Marriage of Plows and Plows is, it is suggested, an important decision which has considerable implications for the law, not only in Australia, but in Canada and elsewhere. It is notable for Ferrier J.'s analysis of the practices of the sect, and his projections of both personal and social effects on the children, of exposure to its teachings. *Plows* comes close to the approach which I advocated in my original article that, where the teachings of a religious body can be shown objectively to be potentially harmful to the child, the court is under a responsibility to protect the child by removing it from the care of the parent holding such

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[33] *Id.*
[34] *Id.* at 78,119.
[35] *Id.* at 78,120.
[36] *Id.* at 78,120-21.
[37] *Id.* at 78,121.
[38] *Id.*
[39] Which he suspended until the end of 1979.

beliefs.[40] Indeed, as Ferrier, J. suggested in *Plows*,[41] the consequences of extreme and irrational religious belief in the broader context of society at large may also be relevant.

Conclusion

The decisions in *Pentland* and *Plows* suggest a change of judicial policy in relation to custody disputes involving parents who are members of extreme religious groups. This is a development which the present writer entirely welcomes and hopes will be followed in appropriate cases in the future. The fact that religious belief is the basis of anti-social or irrational behaviour in respect of children should not provide a legal excuse for ignoring the consequences of that behaviour. In the words of Waite C.J. in the *Reynolds* case:

> Can a man excuse his practices . . . because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[42]

In the wider area of children's law *Pentland* and *Plows* reinforce the tendency of the courts to interfere positively in the relationship. Cases from England,[43] Australia,[44] Canada[45] and the United States[46] all demonstrate this trend. Since we now know more about the internal dynamics of the family, particularly in respect of such phenomena as child abuse and incest, this development has been both necessary and desirable and must continue if the law is to play a proper role in the protection of children in particular, and family life in general.

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[40] *See* Bates, *supra* note 1, at 308.

[41] *See* text accompanying note 37 *supra*.

[42] *Supra* note 3, at 166-67, 25 L. Ed. at 250.

[43] *See, e.g.*, O'Connor v. A., [1971] 2 All E.R. 1230, [1971] 1 W.L.R. 1227 (H.L.); *In re* W., [1971] A.C. 682, [1971] 2 All E.R. 49 (H.L.); J. v. C., [1970] A.C. 668, [1969] 1 All E.R. 788 (H.L.); *Re* D.J.M.S., [1977] 3 All E.R. 582 (C.A.).

[44] *See, e.g.*, Barnett v. Barnett, [1973] 2 N.S.W.L.R. 403 (C.A.); In the Marriage of Chapman and Palmer, 78 F.L.C. 77,667 (Fam. Ct. Aust.).

[45] *See, e.g.*, Doey v. Doey, 3 R.F.L. (2d) 38 (B.C.S.C. 1977).

[46] *See* particularly *In re* Welfare of Snyder, 85 Wash. 2d 182, 532 P. 2d 278 (1978).