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FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of PAISIO

Evatt CJ, Asche and Marshall SJJ

12 June, 14 November 1978

(1979) 36 FLR 1; 26 ALR 132; 5 Fam LR 280; [1979] FLC 78,512 (¶92-291)

FAMILY LAW – CUSTODY – WELFARE AND RIGHTS OF CHILDREN – FREEDOM OF CHOICE AND CONCEPT OF RIGHTS – FREEDOM OF RELIGION – EFFECT OF WIFE'S RELIGIOUS BELIEFS: *FAMILY LAW ACT* 1975 (CTH), S43(c).

The parties were married in 1961 separated in 1976. There were three children of the marriage. The wife is a member of the Congregation of Jehovah's Witnesses whereas the husband does not at present practise any religion. All three children at first lived with their mother with the husband having access. In 1976 the two oldest children decided to live with the father and the woman whom he intended to marry. The youngest child continued to live with the mother.

The mother moved to Hobart despite the father's opposition. Since that move the child has come three times to Sydney so that the father could exercise access. On 25 March 1977 by an application, prompted by the wife's move to Tasmania, the husband sought custody of all three children.

The trial judge considered the concept of children's rights within the context of s43(e) of the *Family Law Act* and expressed the view that a child's potential and ultimate development to adulthood is shaped by his environment and especially his parents' view of what they should become. His Honour observed in the case of Jehovah's Witnesses the strictness and condition of separateness from society, which would deny the child the sort of freedom of choice entailed in the concept of rights. Custody of all three children was granted to the father with access to the mother. The wife appealed against that decision.

HELD: Appeal dismissed.

1. An Australian court cannot commence with any premise that as a matter of public policy one religion is to be preferred to another or that a "religious" upbringing is to be preferred to a non-religious one.

***Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* [1943] HCA 12; (1974) 67 CLR 116; [1943] ALR 193; and**

***Evers v Evers* (1972) 19 FLR 296, applied.**

2. Nevertheless, the doctrines of a particular religion may be so detrimental to children as to necessitate that children should not be in the custody of the parents holding such doctrines.

3. The trial judge was entitled to take into account the effects of the narrowness of the environment in which the child could be kept.

4. The trial judge neither misapplied his discretion nor adopted wrong principles nor made a mistake as to the facts, which, in any event, were hardly in dispute. The appeal should be dismissed.

APPEAL:

This was an appeal by a wife from the decision of Cook J wherein he ordered that the husband have custody of the three children of the marriage.

EVATT CJ, ASCHE and MARSHALL SJJ: In the affidavits and during the trial and in the course of his Honour's judgment, a great deal of time was devoted to the issue of the wife's religion. There were suggestions from the husband that the wife's intense involvement in the tenets and practice of the faith of the Jehovah's Witnesses was such that it would be harmful to E for her to remain with the wife. Indeed some of the matters raised by the husband could fairly be said to have no other basis than that it would be harmful to any child to be brought up in the practice of that religion at least if that practice was regular and intense.

In approaching a dispute of custody or access which involved an examination of the system of beliefs or attitudes to religion (which may include agnostic or atheistic attitudes) in which children are being brought up, the Court must still commence with and never lose sight of the principle that the welfare of the children is the paramount consideration.

An Australian court cannot commence with any premise that as a matter of public policy one religion is to be preferred to another or that a "religious" upbringing is to be preferred to a "non- religious" one. It is in the sense that s116 of the Constitution has relevance and we refer to the case of *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116; [1943] ALR 193. Section 116 proclaims not only the principles of toleration of all religions, but also the principle of toleration of absence of religion.

And see *Evers v Evers* (1972) 19 FLR 296. But even without calling to aid s116 it is clear that on general principles the courts have recognized that it is no part of the judicial function to rule that one form of religion is to be preferred to another. The present approach, however, is best illustrated by the remarks of Jenkyn J in *Hanrahan v Hanrahan* (1972) 19 FLR 262 at 266:

> "There is no principle of law which requires the Court, in a case where it is of the view that a female child's interests would otherwise best be served by entrusting her to her mother, to decline to take that course simply because of the mother's disinterest in organized religion when the father happens to be a fervent adherent to some Christian faith; still less, in my view, could this be so if the faith to which the father happens to subscribe is one which, in some respects, is highly contentious and controversial, and which has been the subject of unfavourable comment and criticism in the courts of the land. Conversely, where the Court is of the opinion that the interests of a child are best served by the child remaining with one parent, the fact that the child is likely to be brought up in that parent's religion even though it be a contentious and controversial one, provides no reason in itself, in my view, for taking the child from that parent's custody and giving custody to the other parent, who is a non-practising but nominal adherent to some other faith, or who is an agnostic or atheist."

Nevertheless there have been cases in which courts have held that the doctrines of a particular religion, or at least those doctrines are 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 children that they must be removed from the influence of those who advocate such practices.

So far as the practices of Jehovah's Witnesses are concerned, Carmichael J in *Evers v Evers*, *supra*, examined these practices and concluded: "I have not been able to find evidence in this case which convinces me that a Jehovah's Witness, by the practice of his religion, tends to destroy our social order."

In the present case, his Honour the learned trial judge, gave a great deal of attention to the question of the religious practices of the wife. It is not too much to say that he agonized over the matter in a sincere attempt to see that the welfare of the child was properly considered. His Honour examined the tenets of the faith and studied a book which was placed in evidence as illustrating the principles of the faith. In the end, although his Honour did spend a great deal of time on this question, it seems to us that his Honour certainly did not come to his conclusion on the basis that the practise of the wife's faith was harmful to the child; and it seems to us that the only relevance that his Honour ultimately placed on this factor was that, in his view, and on the evidence, the child would have a somewhat narrower circle of friends and interests than she would if she were placed in the custody of the husband.

Criticism was also raised as to the alleged interpretation of his Honour of s43(c). The sub-section provides that the court shall in the exercise of its jurisdiction have regard to the need to protect the rights of children and to promote their welfare. His Honour considered that the rights of the child in relation to religious worship was one of the issues to be taken into account.

In his Honour's view the greatest right a child has is the right to be free; this involves freedom of choice. An over-protective parent could deny, unwittingly, the child's right to be wrong.

Looking at the particular religion involved in this case, his Honour said that while it does permit an awareness and an alertness to what is happening in the world, "nevertheless there appears to me to be a strictness and a condition of separateness from society as a whole".

He considered that education in that religion would tend to lead an actively participating child to become conditioned and to reject other forms of social life and intercourse. Thus the child may lose the right to freedom of choice.

His Honour referred to *Evers v Evers* and took the view that the free exercise of religion might in fact be denied by reason of the very environment in which the child is kept. His Honour considered, that in protecting the rights of the child, he should be concerned with the effects of becoming totally involved in that religious practice and with the realities of interference with the child's growth and development as a social being. He saw this as a factor to be considered together with other factors.

At a later point his Honour returned to this question and expressed the view that there were elements in the faith which result in the child being separated out from reasonably normal contact with its peer group. There might be a tendency for the child to withdraw to a greater extent in puberty or later adolescence, from contact outside the faith.

It is clear that these factors were considered by His Honour together with all the other relevant factors relating to the circumstances of the child in the mother's household. His Honour was right to consider them. It must be a question of degree whether the exercise of a particular religion and the bringing up of a child in that religion could be seen as a denial of the child's right to a free choice in matters of religion. His Honour did not determine that there was such a denial in this case though he was entitled to take into account the possible effects of the narrowness of the environment in which the child would be kept.

Ultimately it was the relationship between the child and her siblings which seemed most significant to his Honour. He saw great benefits to her in maintaining this relationship and had some doubts that she might take "a strong action directed by her religious beliefs against a full contact with and participation in the life of the brother and sister and her father". We cannot find any suggestion in his Honour's judgment that the religious beliefs held by the mother and inculcated in the child were detrimental to the child or the child was in any way suffering thereby.

Although his Honour made a number of observations about this section (s43(c)), it does not seem to us, with respect, that his Honour ultimately arrived at any positive conclusion on this question. It does not seem to us that any discussion that his Honour did have on this section in any way caused him to misapply the law or to depart from the principle that the welfare of the child was the paramount consideration.

His Honour viewed favourably both the wife and the husband and also Mrs M whom he said impressed him as "a person of sensitivity, perception and gentleness". The difficulty which his Honour found himself in was obviously propounded by the fact that both parents were entirely suitable custodians.

So far as E's relationship with her parents and Mrs M and her siblings was concerned the Family Report said that E was a happy outgoing child, happy at school enjoying her work and that the wife had established for E "a warm structural stable environment". The Report also said, "she related warmly and spontaneously to her mother". On the other hand, the Report also said that E was "manifestly fond of her father and siblings", that "a meaningful and warm relationship existed between E and Mr Paisio", that "M and S" both reacted with warmth to Mr Paisio", were "relaxed and quite socially adjusted". The Report also said that E's contacts with Mrs M "appeared spontaneous and respectful", that "M would appear to have a close relationship with her brother, sister and father. She also appears to relate well with Mrs M", that she was "a cheerful well adjusted child who had demonstrated her ability to cope with changes in her environment".

His Honour clearly on the one hand appreciated that the child was secure and happy in her present environment and had expressed strongly a wish to remain in that environment and that there would be many advantages for her to be with her mother. He recognised that there

were problems that might arise in the break with the faith in which the child had been practising for some years: see pp34 and 35. On the other hand his Honour was satisfied that the husband would not violently or ruthlessly seek to remove that faith from the child although the husband had frankly expressed an intention that he would try to change the child's beliefs.

In the end, his Honour came to the conclusion that the welfare of the child dictated that she should go to her father and her brother and sister with proper access to the mother. We are not persuaded that in doing so, his Honour misapplied his discretion or adopted wrong principles or made a mistake as to the facts which, in any event, were hardly in dispute.
