1987

The Best Interest of the Child and the Constitutional Rights of Cult Member Parents: Resolution of a Conflict

Richard Barnes Montana

Follow this and additional works at: https://digitalcommons.nyls.edu/journal_of_human_rights

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol5/iss1/5

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.
THE BEST INTEREST OF THE CHILD AND THE CONSTITUTIONAL RIGHTS OF CULT MEMBER PARENTS: RESOLUTION OF A CONFLICT

I. Introduction

Child custody determinations are arguably the most difficult task to face the judiciary.¹ A jurist, in an attempt to vindicate "the best interest of the child,"² though accorded great discretion,³ must not only be cognitive of and sensitive to the child's interests, but the parents' interests as well.⁴ Deciding precisely what a child's best interests are, "often eludes understanding."⁵


⁴ A custody dispute resulting in an award to one particular parent (not all disputes end this way, however, see Beck v. Beck, 86 N.J. 480, 432 A.2d 63 (1981) (where the court awarded joint custody of the child); Birch v. Birch, 11 Ohio St. 3d 85, 463 N.E.2d 1254 (1984) (where the court awarded custody of the child to the state due to the apparent unfitness of both parents) necessarily entails inhibiting the noncustodian's ability to enjoy the love and companionship of his child, Smith v. Smith, 90 Ariz. 190, 193, 367 P.2d 230, 233 (1961), and to raise his child as he sees fit. See Roe v. Doe, 29 N.Y.2d 188, 324 N.Y.S.2d 71, 272 N.E.2d 567 (1971). Though it is generally within the discretion of the parent to decide the manner by which to raise and educate his child, Zablocki v. Redhail, 434 U.S. 374 (1978); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), this general proposition is upheld by courts only in the event that no abuse or neglect is employed. 29 N.Y.2d at 191-92, 324 N.Y.S.2d at 74-5, 272 N.E.2d at 570-71.

⁵ Musetto, supra note 1, at 431. The court's role in child custody determinations falls within the rubric of parens patriae, literally, "parent of the country." This concept originates from the English common law where the king had the prerogative to act as guardian to persons such as infants and the psychologically impaired. In the United States, parens patriae refers to the traditional "role of the state as sovereign and guardian of persons under legal disability." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971).
Certain statutes and judicial decisions do, however, offer guidelines by which to fashion custody orders.

In no instance is a custody decision more critical and problematic than when it may serve to contravene an individual's fundamental rights guaranteed by the U.S. Constitution. This note examines such a situation: when one prospective custodian is a member of a cult. Furthermore, the social and constitutional considerations and ramifications involved when a judge must accommodate the child's best interest and the cult member's rights will be analyzed.

6. The National Conference of Commissioners on Uniform State Laws has approved and recommended the Uniform Marriage and Divorce Act; § 402 provides:
The court shall determine custody in accord with the best interest of the child. It shall consider all relevant factors including: . . . the interaction and interrelationship of the child with his parents, siblings, and any other person who may significantly affect the child's best interests; . . . and the mental and physical health of all individuals involved. The court shall not consider conduct of the proposed custodian that does not affect his relationship to the child.

7. Almost every custody decision proclaims, in one form or another, the need to protect from impairment the physical and psychological health and welfare of the child. See, e.g., Clift v. Clift, 346 So. 2d 429, 435 (Ala. Civ. App. 1977); In re Marriage of Hadeen, 27 Wash. App. 566, 571, 619 P.2d 374, 379 (Ct. App. 1980).

8. See supra notes 2, 6 & 7.


The dictionary defines “cult” as: “worship; reverential honor [of], . . . devoted attachment to, or extravagant admiration for, a person, principle, etc. . . .” WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 443 (2d ed. 1980). For the purposes of this note, however, a precise formulation of the definition of a cult is unnecessary if not unrealizable. Whether a particular group is accurately labeled a “cult” is unimportant. Whether a group so labeled engages in conduct which threatens the health and welfare of a child is all important. The term will be employed here to refer to unconventional religious, political, and psychotherapy groups which are often communal, authoritarian, and totalistic in nature. See Molloo v. Holy Spirit Ass’n, 179 Cal. App. 3d 450, 457 n.12, 224 Cal. Rptr. 817, 828 n.12 (1986) (setting forth this general definition of a cult).
In short, “a cult is any group stigmatized as a cult.” Robbins, supra.
Although all courts agree that it is necessary and permissible to abridge a parent's religious or associational freedoms through a custody award when concomitant practices threaten

11. The first amendment of the Constitution states: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." U.S. Constitution amend. I. This prohibition applies via the fourteenth amendment to the states, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943), and includes judicial decisions as well as statutes. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

The purposes of the two religion clauses, the establishment and free exercise clauses, are distinct but related. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). "The clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.'" Marsh v. Chambers, 463 U.S. 783, 791 (1983) (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947)). The establishment clause serves to ensure that no religious activity is sponsored, favored, or commanded by the state. Walz v. Tax Comm'n, 397 U.S. 664 (1970). This clause requires that the state " 'may not be hostile . . . to the advocacy of no religion, and it may not aid, foster, or promote one religion . . . against another.' " Child Custody, supra note 2, at 1703 n.6 (quoting Everson v. Arkansas, 393 U.S. 97, 103-04 (1968)).

The free exercise clause mandates that no state shall act in a manner which serves to inhibit the exercise of an individual's religious beliefs merely because it disfavors a particular denomination. Nyquist, 413 U.S. at 756; Cantwell, 330 U.S. at 296. In short, "[g]overnment may not interfere with organized or individual expression of belief or disbelief." Minersville School District v. Gobitis, 310 U.S. 586, 593 (1940). The Supreme Court has asserted that the free exercise clause requires that an individual not be forced to choose between adherence to her religious beliefs and secular law. Sherbert v. Werner, 374 U.S. 398, 404 (1963).

The Court has stated that it "repeatedly has recognized that tension inevitably exists between the free exercise and establishment clauses . . . and that it may often not be possible to promote the former without offending the latter. As a result of this truism, our cases require the state to maintain an attitude of neutrality, neither advancing or inhibiting religion."

See Child Custody, supra note 2, at 1702 n.2 (quoting 413 U.S. at 788).

12. The Court has long maintained that the first amendment carries with it a peripheral right: freedom of association. NAACP v. Alabama, 357 U.S. 449 (1958). Though this right "is not expressly included in the first amendment, it is necessary in making the express guarantees fully meaningful." Griswold v. Connecticut, 381 U.S. 479, 481 (1965). The freedom to associate protects from governmental intrusion those associations that are designed to facilitate express first amendment rights of religion and speech. Such protected associations, however, are not limited to religious and political groups. Associations which accrue social, legal, or economic benefits to its members may be included as well. See Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. at 452.

The Court has also recognized a freedom of intimate association. This associational right protects from governmental intrusion "choices to enter into and maintain intimate human relationships." The characteristics of such associations are "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others." 468 U.S. at 618, 620.
impairment of a child's health or welfare, cult membership poses uniquely complex questions in determining the existence of physical or psychological harm to a child. From amidst emotion and controversy, this note attempts to discern actual danger from incrimination, fact from prejudice or stereotype, so that clear standards may emerge to guide the courts in the endeavor of constitutionally and socially responsible child placement.

II. CONSTITUTIONAL ANALYSIS

A religious belief, as articulated by the Supreme Court, is that belief "based . . . upon a power or being, upon faith, to which all else is subordinate or upon which all else is ultimately dependent." The Court has also stated that a religious belief is one that "occupies a place in the life of its possessor parallel to that filled by orthodox belief in God." This definition is sufficiently broad to encompass many cults.

The first amendment protects the holding of any religious

13. See supra notes 6-7.
14. For the purposes of this note, we shall assume that one potential custodian is a member of a cult and the other may or may not be a member of a conventional group not generally considered to be a cult; and that upon divorce or separation each parent desires custody and is otherwise a fit parent.
17. See generally Definition of Religion, supra note 15. The religious cults include: the Church of Scientology; the Children of God; the Unification Church; ISKCON (Hare Krishna); the Divine Light Mission; the People's Temple; Love Israel; the Northeast Kingdom Community Church; the River of Life Tabernacle; Black Hebrews of the Children of Israel; and The Way International. See generally D.G. BROMLEY & A.D. SHUPE, STRANGE GODS: THE GREAT AMERICAN CULT SCARE (1981) [hereinafter D.G. Bromley & A.D. Shupe]; A.J. Rudin & M. Rudin, PRISON OR PARADISE: THE NEW RELIGIOUS CULTS 31-97 (1980); C. Stoner & J. Parke, ALL GODS CHILDREN (1977). This list is by no means exhaustive as there have been reported to be "200-1,000 religious cults." Delgado, When Religious Exercise Is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief, 37 VAND. L. REV. 1071, 1072 n.2 (Oct. 1984) [hereinafter Deprogramming] (citing Lanier, America's Cults Gaining Ground Again, U.S. NEWS AND WORLD REPORT, July 5, 1982, at 37, 39).
belief no matter how unorthodox or bizarre it may appear to society at large.\textsuperscript{18} Courts may not question the authenticity nor weigh the merits of an individual's religious beliefs or doctrines.\textsuperscript{19} Moreover, the government, through its laws or courts, is absolutely forbidden from interfering with an individual's religious belief merely because the religion is the object of public derision.\textsuperscript{20}

The constitutional grant of associational freedoms, as interpreted by the Supreme Court,\textsuperscript{21} is broad enough to include certain secular cults whether they be deemed "expressive"\textsuperscript{22} or "intimate"\textsuperscript{23} association. The first amendment protects expressive association against governmental intrusion based upon the content or subject matter of the political or social expression.\textsuperscript{24} The government may not regulate such expression merely because

\begin{itemize}
  \item 20. Davis v. Beason, 133 U.S. 333, 342 (1890); Cantwell, 310 U.S. at 303-04; Reynolds, 98 U.S. at 166. This applies to both the free exercise and the establishment of religion. Governmental preference for a particular religion may interfere with religious belief of another through intimidation.
  \item 22. "Expressive associations" include those groups which by design serve to bring individuals together "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts, 468 U.S. at 622 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-09, 923-33 (1982)); see Larson v. Valente, 456 U.S. 228, 244, 246 (1982); In re Primus, 436 U.S. 412, 426 (1978).
  \item 24. The psychotherapy cults may also fall under the heading of "intimate associations." Though the Supreme Court definition of intimate association appears to be limited to those relationships within the context of one's family, such as marriage and child rearing, arguably therapy cults and the concomitant patient-therapist relationships are sufficiently small, selective, and exclusive to fulfill the definition of an intimate association. See supra note 12. See generally Karst, supra note 3.

\end{itemize}
the message conveyed is unpopular or controversial. 25 Although the Supreme Court maintains that a "careful assessment" of the nature of a particular "intimate" association is necessary to determine whether it is to be accorded full first amendment protection against governmental regulation, 26 this assessment should not be premised upon prejudice or stereotype.

Freedom to practice one's religion or engage in expressive or intimate association is not completely immune to governmental restriction. 27 Although the beliefs of a religion and the expressive ideas of an association are protected absolutely, 28 the conduct or practices related to them are subject to infringement through regulation adopted in pursuit of compelling public interests. 29 Likewise, governmental action that serves to advance a particular religious denomination may be justified only by compelling public interests. 30

Thus, in the context of child custody disputes, the first amendment prohibits the courts from designating a custodial parent based upon an evaluation of the comparative merits of his religious beliefs. 31 This is, of course, the case regardless of

25.  Id. at 115.
28.  See Davis v. Beason, 133 U.S. 333, 342 (1890); Cantwell, 310 U.S. at 304.
29.  See Bob Jones University v. United States, 461 U.S. 574 (1983). The Court determined that a compelling public interest in eradicating racial discrimination in education justified denial of tax-exempt status to the university although such denial would place a burden upon the exercise of religious beliefs. See also Prince v. Massachusetts, 321 U.S. 158 (1943), where, in order to vindicate the compelling public interest of child safety, the Court upheld a statute that criminalized the selling of religious newspapers by a child in public despite the fact that the child believed it was her religious duty to engage in such conduct.

This prescribed standard also provides that the governmental action fashioned to vindicate a compelling public interest must be closely tailored to that end. That is, the governmental action not only must pursue a compelling public interest, but also must do so without undue infringement of rights protected by the Constitution. Bob Jones University, 461 U.S. at 604; Thomas v. Review Bd., 450 U.S. 707 (1981); Cantwell, 310 U.S. at 303-04.

In the context of child custody determinations, however, it is unnecessary to address the second prong of this test or standard because, as a practical matter, only one course of action is presented to a court. In the event it finds that a potential custodian's religious or associational practices pose a threat to the physical or psychological health and welfare of a child, a court may deny custody to that parent. Such judicial intervention is ipso facto closely tailored or "least restrictive."

the unpopularity or unconventionality of a prospective custodian's religion.\textsuperscript{32} Courts should likewise be forbidden from determining child placement based upon the intent to suppress or inhibit the expression of ideas or lifestyles connected with protected associations.\textsuperscript{33} Because the state has a compelling interest in “safeguarding the physical and psychological well-being of a minor,” the first amendment does not prevent a court from examining the religious or associational practices of prospective custodians in order to determine whether such practices entail harm or endangerment to the child’s health or welfare.\textsuperscript{35}

Clear evidence indicating “a reasonable and substantial likelihood of immediate or future impairment” of a child’s physical or psychological welfare as a consequence of a prospective custodian’s religious or associational practices, justifies placing the child with the other parent and serves to ameliorate any apparent violation of first amendment proscriptions.\textsuperscript{36} If, however,
a court merely recites adverse or potentially adverse effects which might inure to a child and, in actuality, there exists no substantial evidence to support such apprehensions, then suspicions may be raised regarding the true motives of the court in awarding custody as it did. Did the court act permissibly, in furtherance of a compelling public interest—child safety—or did it act impermissibly, based upon mere approval or disapproval of a prospective custodian’s religion or association in contravention of the first amendment?8

If the court does in fact cite as the basis of its placement decision impairment of a child’s physical or psychological health and welfare due to the custodial parent’s religious or associational practices, or asserts that it has based its determination upon any such considerations, the order, on its face, does not violate the first amendment. The placement of the child with a religious parent may appear to promote one parent’s religion over the other’s, and if the noncustodian is religious, inhibit his free exercise of religion by dint of apparent judicial disapproval thereof. Likewise, if the placement is with a nonreligious parent, it may appear to restrict the free exercise of religion or freedom of association of the noncustodian. Such “indirect” impact upon first amendment freedoms does not, however, offend the Constitution.8

required that manifest, present harm be evidenced in order to justify a denial of custody founded upon parental religious practices.

It is the opinion of this writer that the standard enunciated in Hadeen, best fosters an accommodation of the competing interests of the welfare of a child and the first amendment rights of the parent. The rule set forth in Clift, appears not to afford sufficient protection to a prospective custodian’s religious freedom in that it may invite mere speculation as to any potential danger inherent in particular religious tenets. The doctrines outlined in both Osier and Quiner, on the other hand, seem to inadequately safeguard a child’s health and welfare in a situation which indicates a likelihood of future harm though none is actually present or immediate.

37. Smith v. Smith, 90 Ariz. 190, 194, 367 P.2d 230, 233 (1961) (stating that “[a] judgment supported only by the tenuous threads of . . . possible [detriment to a child] derived from deviation in normal activities will not withstand the thrust of constitutional guarantees”).

38. The Supreme Court has on many occasions proclaimed that governmental action which has only an incidental effect of either advancing or inhibiting religious activity is not violative of the first amendment. See, e.g., Mueller v. Allen, 463 U.S. 388 (1983); Widmar v. Vincent, 454 U.S. 263 (1981) (both cases were decided in the context of the establishment clause); Braunfeld v. Brown, 366 U.S. 599 (1961) (the Court stated that so long as the state is advancing a secular goal, “indirect burden on religious observance is permissible unless the state may accomplish its purpose by means which do not impose
The argument may be made, however, that any judicial action that has the effect of curtailing an individual's right of free exercise or association, no matter how incidental, stands in violation of the first amendment rubric.39

In the context of child custody disputes, however, only those custody orders which are based upon an evaluation of the potential for visitation of harm upon a child due to a parent's religion or protected association can have the effect of impermissibly abridging a prospective custodian's first amendment rights. When custody is determined in this manner, an individual's religion or protected association may be designated as the reason for the denial of custody. Only in this event is a parent justified in viewing the decision as forcing him to choose between gaining custody of his child and maintaining his affiliation with a religion or protected association.40 Only when harmful religious or associational practices form the basis for denying a cult member custody could it be possible for that parent to forego such practices and rationally hope to then be awarded custody of his child. For if custody is determined in accordance with considerations other than religion or association, altering one's beliefs and/or practices should, of course, have no bearing upon the

39. See Sherbert v. Werner, 374 U.S. 398, 403 (1963) (the Court appeared to have adopted this view, but in an apprehensive if not confused manner).
40. See infra note 47 and accompanying text.
award. If, however, altering one's lifestyle in regard to religious or associational practices does appear to have an effect on a custody order, then it becomes evident that a court is in fact basing its determination upon an evaluation of a prospective custodian's religion or association and it must, therefore, cite a compelling public interest, i.e., protection of the child's health and welfare, served by such action.\textsuperscript{41} If no clear, substantial evidence exists to support a custody order purportedly based upon considerations other than religion or protected association, then doubts may be raised regarding the court's true motives. The less evidence that exists to support such determination by the court, the more justified the noncustodian is in viewing the decision as demanding that an unconstitutional choice between custody and adherence to his religion or association be made.\textsuperscript{42} If, however, it were not the case that only those custody orders which are based upon consideration of a prospective custodian's religion or protected association may be viewed as engendering such a choice, any subjective reaction on the part of a cult-member parent claiming violation of his first amendment rights pursuant to any custody decision would unnecessarily and unjustifiably cast a shadow over the decision.

In the event that the judicial record presents no substantial evidence upon which to support a custody award professed to be founded upon considerations other than religion or protected association, then suspicions may be raised as to whether the court did, in fact, make the decision free of an evaluation of a prospective custodian's religious or associational affiliation. In such a case, when the court has failed to cite as the reason for its determination the religious or associational practices of a prospective custodian, two extremely troubling scenarios arise: 1) where the court has acted upon impermissible consideration of the merit of a parent's religion or protected association; or 2) where the court was apprehensive to cite the genuine reason for its decision, i.e., visitation of harm upon a child pursuant to religious or association practices, for fear of being called upon to justify any apparent contravention of first amendment doctrines.

The first scenario embodies an unconstitutional judicial act,

\textsuperscript{41} See \textit{supra} notes 36-37 and accompanying text.
\textsuperscript{42} See \textit{infra} note 47 and accompanying text.
NOTES

a court not citing the religion or protected association of a parent as the basis for its determination because no harm to the child was evident from testimony regarding concomitant practices and, therefore, the required compelling public interest did not exist to justify placement away from a prospective custodian based upon her religion or association. In other words, the court based its directive upon disapproval of a particular religion or association in clear contravention of the first amendment.\textsuperscript{43} The first scenario may also translate into an unconstitutional judicial act in that the court does not cite religion or protected association as the reason for its order because it was endeavoring to promote a particular religion, or religion in general, and no compelling public interest existed to justify that apparent abridgement of the establishment clause.\textsuperscript{44}

The second scenario embodies an unconstitutional judicial act in that the court found that a parent's religious or associational practices endangered the health and welfare of the child, justifying the court-ordered placement with the other parent and any apparent infringement of the noncustodian's first amendment freedoms, but avoided enunciation of this as the basis for its decision as is constitutionally mandated,\textsuperscript{45} in an effort to eschew controversy. This scenario may also translate into another unconstitutional judicial action: a court apparently disregarding findings of physical or psychological endangerment to the child and placing the child with a religious parent in an attempt to promote that religion, or religion in general, without support of a compelling public interest to justify such action. In fact, this version flies in the face of not only the establishment clause and the compelling public interest of protecting against impairment the health and welfare of the child, but also the paramount consideration of all custody determinations: the best interest of the child.\textsuperscript{46}

To reiterate, a court that has founded its custody directive upon an evaluation of a particular prospective custodian's religious or associational affiliation, or any practices concomitant therewith, and is unable or simply chooses not to cite substantial

\textsuperscript{43} See supra notes 31-33 and accompanying text.
\textsuperscript{44} See supra notes 11, 12, 30 and accompanying text.
\textsuperscript{45} See infra note 47 and accompanying text.
\textsuperscript{46} See supra notes 2, 6, 7, 11, 29-30, 34-35 and accompanying text.
evidence of the likelihood of harm to a child’s physical or psychological well-being as the reason for placement away from such parent, has abridged the noncustodial parent’s right of free exercise or association by impermissibly placing that parent in the position of choosing between actively engaging in activity protected by the first amendment and suffering the loss of custody of her child.47

Although courts normally engage in ad hoc balancing of first amendment rights and competing state interests48 in a custody dispute, once it has been established that a prospective custodian’s religious or associational practices may visit harm upon his child, a judge has no choice but to place the child with the other parent.49 A custody determination based upon genuine concern for the child’s health and welfare may not be challenged through an attempt to vindicate a parent’s constitutional rights. This is so, provided that the court is able to cite substantial evidence indicating actual or likely danger to the child.50 The central concern, therefore, becomes a court’s ability to accurately define that which is physically or psychologically harmful to a child, and in what manner a parent’s membership in a religious or secular cult may contribute to this danger.51


The drawback of balancing competing interests lies in the inevitable necessity for a jurist to invoke his own personal values and in effect choose that which he deems more important.

49. Almost every custody decision, at least implicitly, adopts this rule. See, e.g., Waites v. Waites, 567 S.W.2d 326 (Mo. 1978); In re Marriage of Short, 675 P.2d 323 (Col. Ct. App. 1983).


51. As has been illustrated, courts disagree as to what constitutes harm from religious or associational practices. See supra notes 36-37 and accompanying text. See also infra notes 181-197 and accompanying text.
III. THE INTERESTS OF THE CHILD

Due to her dependent status in society, a child requires a “family” to provide “on a continuing basis...an environment which serves her numerous physical and mental needs.” This view, which recognizes the child’s needs as controlling in custody disputes, serves society’s interests as well. The child of adequate parents stands a better chance of becoming an adequate parent herself in the future.

Although courts “disagree on the certainty and amount of physical harm that must be shown” in order to justify denial of custody, the fact remains that recognition of physical harm in general is not problematic. Courts have been slow, however, in delineating a clear and concise strategy for recognizing what constitutes the more complex danger of psychological injury to a child.

The most critical elements of a child’s psychological well-being are that she is wanted and that the child has an opportunity to maintain “on a continuous basis a relationship with at least one adult who is or will become [the child’s] psychological parent.” Though the hallmark of a healthy “parent-child” relationship is the continuity of contact between the psychological parent and child, this concept should not be viewed as so absolute as to countenance the complete separation of the child from

52. J. Goldstein, supra note 1, at 3. This phrase is indicative of the fact that society views children as unable to be fully responsible for themselves or to determine and safeguard their best interests. Id.
53. “Family” refers to the “fundamental unit” responsible for the care of the child. Id. at 13.
54. A child is “in need of direct, intimate, and continuous care by those who are personally committed to assume such responsibility.” Id. at 3. See infra note 162 and accompanying text.
55. J. Goldstein, supra notes 1, at 7. See also supra notes 2, 6 and accompanying text.
56. J. Goldstein, supra note 1, at 7.
57. Id.
58. Child Custody, supra note 2, at 1705 n.18.
59. J. Goldstein, supra note 1, at 4.
60. Id. at 98 (para. 10.2); See also Musetto, supra note 1 at 436, 443.
61. “A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent.” J. Goldstein, supra note 1, at 98 (para. 10.3); See Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 (Super. Ct. 1982).
An equally important element of a child’s psychological health is maintaining contact with the noncustodial parent. In short, religious or associational practices that mandate that a custodial parent forego the continuity of contact with his child or sever all ties between his child and the noncustodial parent, constitute psychological harm to the child and justify denial of custody.

A more subtle element of a child’s mental health is the necessity of permitting “the child to be a child in accord with his or her age.” A prospective custodian’s religious or associational practices that do not allow a child to engage in natural, “age-appropriate pursuits” impede her sound psychological development and therefore justify denial of custody.

The final consideration involves the recognition of how important it is that the child be confident in the belief that her custodian is “in charge and in control.” A child’s secure psychological existence must not be menaced by external forces that threaten to breach the continuity of contact with her custodian. Any examination of the prospective custodian’s religious or associational practices must include a searching inquiry into the possible existence of the conditions necessary for the child’s psychological well-being.

IV. CHARACTERISTICS OF CULTS

A. Overview

The literature regarding cults is replete with documentation of physical and psychological abuse of children. Commentators

62. See Musetto, supra note 1, at 442.
64. This phrase refers to the relationship between a wanted child and psychological parent. See supra notes 60-61 and accompanying text.
65. See Burnham v. Burnham, 208 Neb. 408, 304 N.W.2d 58 (1981); see also supra notes 60-63 and accompanying text.
66. See Musetto, supra note 1, at 438.
67. Id.
68. J. GOLDSTEIN, supra note 1, at 116.
69. Id. at 118.
70. See infra notes 75-108 and accompanying text.
have offered explanations for these practices including the totalistic\(^7\) and authoritarian\(^2\) nature of cults, as well as mind control or brainwashing.\(^3\) This portion of the note, however, reviews those practices that on their face pose danger to the physical and mental health and well-being of a child and would thereby justify denial of custody. For the purposes of this section, the precise causality of the abusive practices is not of central concern; what is critical is the mere existence of such practices in conformity with religious or associational beliefs.\(^4\)

### B. Physical Endangerment

The most harrowing documentation of child abuse relates to the People's Temple.\(^5\) Reports tell of frequent and severe public beatings with a heavy wooden paddle for such transgressions as holding hands or stealing food.\(^6\) The now defunct People's Temple is by no means the only cult to be accused of practicing such abuse.\(^7\) One particular article describes fatal beatings of children in three separate cults in accord with the teachings of the group.\(^8\)

In addition to beatings, the brutal discipline of children in certain cults includes torture. One cult practices torture by

---

\(^{71}\) See infra notes 112-17 and accompanying text.

\(^{72}\) Id.

\(^{73}\) See infra notes 129-36 and accompanying text.

\(^{74}\) The recitation of physically and psychologically harmful practices of particular cults is merely meant to inform, not inflame, the reader. It is not the purpose of this note to imply that all cults engage in such abusive practices as depicted below, but rather to point up the fact that such unfortunate activity is a reality.

\(^{75}\) The People's Temple was a religious commune founded by the late Jim Jones. As most readers will recall, it eventually established itself in the jungle of Guyana where, in 1978, Jones commanded his disciples to ingest poison-laced Kool-Aid. Approximately 300 of the over 900 dead were children. See F. Conway & J. Siegelman, Snapping: America's Epidemic of Sudden Personality Change (1979) [hereinafter Snapping]; Markowitz & Halperin, Cults and Children: The Abuse of the Young, 1 Cultic Studies J. 143, (Fall/Winter 1984) [hereinafter Cults and Children].

\(^{76}\) See Snapping, supra note 75 at 237; W. Appel, Cults in America: Programmed for Paradise 108 (1983) [hereinafter Appel].


\(^{78}\) See Landa, supra note 77, at 4.
electro-shock,\textsuperscript{79} and another by locking children in closets.\textsuperscript{80} Members of the People's Temple were reported to have engaged in the practice of tying up children and leaving them overnight in the jungle, and dropping them into deep wells where other members would terrorize the child.\textsuperscript{81}

There exists a large store of reports of sexual abuse of children in certain cults.\textsuperscript{82} Instances of rape,\textsuperscript{83} child sex, adult-child sexual relations and incest\textsuperscript{84} have been described.\textsuperscript{85} Such conduct is openly tolerated, if not encouraged, in some groups.\textsuperscript{86}

Perhaps the most frustrating of all accounts of physical abuse are those describing the denial of medical care to children.\textsuperscript{87} Many reports depict the tragic scenes of children dying due to treatable, if not curable, diseases and infections.\textsuperscript{88} Certain cults dispense with the use of physicians and hospitals and deny children immunization from common childhood disease.\textsuperscript{89}

Finally, certain cult doctrines and/or rituals result in deprivation of adequate sleep and/or dietary regimens.\textsuperscript{90}

C. \textit{Psychological Endangerment}\textsuperscript{91}

The practices of many cults include the separation of children from their biological parents.\textsuperscript{92} Children may be reared by

\begin{itemize}
\item \textsuperscript{79} See Snapping, supra note 75, at 237 (describing the methods of the People's Temple).
\item \textsuperscript{80} See Cult Phenomenon, supra note 77, at 28 (describing the Church of Armageddon).
\item \textsuperscript{81} See W. Appel, supra note 76, at 107-08. Punishment also included solitary confinement to cellars, rooms, and boxes resembling coffins. \textit{Cults and Children}, supra note 75, at 148.
\item \textsuperscript{82} See Clapp, supra note 77, at 61, col. 3.
\item \textsuperscript{83} See \textit{Cult Phenomenon}, supra note 77, at 28.
\item \textsuperscript{84} See Landa, supra note 77, at 4.
\item \textsuperscript{85} Though these abuses are categorized as "physical," one can well imagine the concomitant psychological injury visited upon the child.
\item \textsuperscript{86} Clapp, supra note 77, at 61, col. 3.
\item \textsuperscript{89} Landa, supra note 77, at 3.
\item \textsuperscript{90} See \textit{Cults and Children}, supra note 75, at 146.
\item \textsuperscript{91} See supra notes 59-69 and accompanying text.
\item \textsuperscript{92} See \textit{Cults and Children}, supra note 75, at 146; Pappo v. Hoy, Transcripts, Mar. 21, 1986, at 8 (Testimony of Miss Jody); Mar. 21, 1986, at 8 (Testimony of Mr. Putz); Apr. 1, 1986, at 30 (Testimony of Miss Jody).
\end{itemize}
other members of the group "or even geographically separated from their parents."93 Parents and children may be prohibited from forming meaningful relationships,94 or "parental absorption within cult work may well make it difficult for parents to involve themselves in rearing their children."95 This separation of parent and child effectively precludes the parent from fulfilling the child's psychological needs of affection and nourishment.96 Thus the parent cannot fulfill his role as psychological parent,97 and the child will not feel wanted, knowing that his parent's allegiance is first and foremost to the cult.98

Cult doctrine often requires that members dissociate from the rest of society.99 This normally entails the complete separation of a child from a parent outside the group.100 Thus, a child in the custody of a cult member may have no opportunity to cultivate a meaningful relationship with the noncustodial parent.101

In many cults, psychological abuse takes the form of depriving children of their natural expression of sorrow, want and even hunger.102 This emotional deprivation may also include forbidding children from entertaining fantasies103 or engaging in psychologically beneficial play experience.104 In short, very often, children of cults are not permitted to behave as any normal

93. Cult Phenomenon, supra note 77, at 28.
94. Id.
95. Cults and Children, supra note 75, at 146, 152.
96. Id. at 146.
97. See supra note 61 and accompanying text.
98. This is clearly detrimental to the child's psychological well-being and, therefore, justifies denial of custody to the cult member. See Burnham v. Burnham, 208 Neb. 498, 501, 304 N.W.2d 58, 61 (1981). A wanted child is one who receives affection and nourishment on a continuing basis and who feels that he or she is and continues to be valued by those who take care of him or her. See J. Goldstein, supra note 1, at 98; Musetto, supra note 1, at 436-37, 442-43.
100. See Cult Phenomenon, supra note 77, at 28.
102. See Landa, supra note 77, at 2.
Such psychological deprivation is sufficient in its own right to justify denial of custody to the cult member engaging in such conduct. The unfortunate truth is, however, that cult members have been depicted as engaging in physical abuse in order to deter the emotions and conduct of children which they deem undesirable. This nexus of physical and psychological abuse represents the most tragic of situations involving the children of cults. When a cult member allows another member to abuse his child, or allows his allegiance to the cult to upset his relationship with his child, the child cannot be secure in the feeling that her parent is "in charge and in control."

Although physical and psychological endangerment is not a necessary consequence of cult affiliation, "the very character of the cult organization and lifestyle provides significant predisposing factors." The fundamental trait of a cult is the near absolute control over the members' lives by the leadership. Through isolation and doctrine, cult members develop an apprehension, if not hostility, toward the outside world, which is viewed as misguided and a threat to the group's very existence. The only way for the cult member to thrive, therefore, is to adhere to the teachings of the cult. Members develop a

---

105. Musetto, supra note 1, at 438.
106. See supra note 98 and accompanying text.
107. See Landa, supra note 77, at 5.
108. Physical abuse in and of itself may result in an array of psychological disorders. In no instance is psychological injury more damaging than when it is the product of physical and psychological abuse. Children have no outlet for their intense emotions and therefore turn them inward, transforming those feelings into contempt for themselves. Id.
109. Often cult leaders will designate those who are to administer the abusive measures or undertake the task themselves. See Cults and Children, supra note 75, at 149.
110. See supra notes 61, 92-98 and accompanying text.
111. See supra notes 68-69 and accompanying text.
112. Cults and Children, supra note 75, at 145.
113. Id. at 147 (citing West & Singer, Cults, Quacks, and Non-professional Psychotherapists, in Comprehensive Textbook of Psychiatry III (Kaplan, Freedman, & Sadok ed. 1980)). This control may be exerted by a single leader claiming divinity, and maintained by a hierarchical structure of leadership as is the case in most religious cults. See D.G. Bromley & A.D. Shupe, supra note 17, at 23-56. Control may also be exerted by a single leader or group of leaders claiming to possess knowledge of the correct or enlightened manner by which to conduct one's life, as is the case in many political and therapy cults. See Labor Group, supra note 23.
114. See Cults and Children, supra note 75, at 148-49; Appel, supra note 76, at 91.
deep dependency upon the group and begin to welcome the
guidance that answers all questions regarding conduct and
thought.\textsuperscript{115} In the context of child endangerment, "the immen-
sity of the group's task makes questions of child abuse pall in
comparison."\textsuperscript{116} Any perceived deviance from the cult's princi-
pies is viewed as deserving the harsh measures necessary to
maintain the group.\textsuperscript{117}

D. Judicial Determination

A judge whose responsibility it is to determine whether to
place a child with a cult member must not allow his decision to
be premised upon mere rumor, accusation, prejudice, or stereo-
type regarding cults. By the same token, a judge, when con-
fronted with hard evidence of abusive practices as described
above, cannot risk passing it off as exaggerated. There is no
doubt that particular cults engage in perverse treatment of chil-
dren.\textsuperscript{118} The onerous task remains—determination whether the
cult with which the prospective custodian is affiliated does, in
fact, practice such abuse.

The determination must be based upon hard evidence indi-
cating the credibility of all witnesses acquired through thorough
examination by party attorneys. The evidence not only must in-
dicate the existence of harmful practices, but also must reveal
that the cult member will allow himself or others to engage in
such practices.\textsuperscript{119}

A decision based upon the finding of abuse when such de-
terminations are questionable raises suspicions about the court's
motivation and may stand in violation of the Constitution. A de-
cision allegedly based upon considerations other than cult mem-
bership may raise similar concerns when the award of custody to
the non-cult member cannot be supported by the evidence
presented. Finally, a decision based upon considerations apart
from cult membership that places custody with the cult member
and flies in the face of evidence presented as to potential harm
to the child, risks contravening the paramount rule of all cus-

\begin{thebibliography}{9}
\bibitem{115} See Cults and Children, supra note 75, at 153.
\bibitem{116} Id.
\bibitem{117} Id. See also Cult Phenomenon, supra note 77, at 28.
\bibitem{118} See supra text accompanying notes 75-108.
\bibitem{119} See infra notes 126, 181-85 and accompanying text.
\end{thebibliography}
tody disputes—placement in accord with the best interest of the child.\textsuperscript{120} Placement in a potentially harmful environment is completely unjustifiable although it may serve to preserve the religious and associational freedoms of the cult member.\textsuperscript{121}

V. Brainwashing in Cults\textsuperscript{122}

The discussion thus far has focused on manifest harm to the physical and psychological health and well-being of the children of cult members.\textsuperscript{123} A more complex problem arises, however, when there is substantial evidence to support a cult member's testimony that although the group may engage in harmful practices, she herself does not, nor will she allow others to subject her child to these practices.\textsuperscript{124} Aside from the contention that the cult member's testimony is not credible in general,\textsuperscript{125} a judge must be prepared to hear the argument that the cult member is a victim of brainwashing and therefore is helpless to resist engaging in abusive conduct in the future.\textsuperscript{126} A similar problem arises when no evidence exists indicating harmful practices by the cult, but it is asserted that the cult member is the victim of brainwashing and therefore should be denied custody in general. It could be argued that some time in the future the cult may dictate that abusive measures be employed and the custodian would be powerless to resist.\textsuperscript{127} It could also be argued that brainwashing in and of itself renders a parent unfit because it prevents her from fulfilling her role of psychological parent.\textsuperscript{128}

The term brainwashing was apparently coined in the early 1950s to explain the technique used by the North Koreans to radically change belief and behavior in order to extract informa-
tion from U.S. Servicemen during the Korean War. The most widely recognized study of brainwashing is that of Robert Jay Lifton, a psychiatrist. Lifton analyzed the technique as it was employed by the Communist Chinese in the late 1940s. The method entailed control of the surrounding environment including: isolation; physical and emotional stress designed to destroy the individual's senses of guilt and anxiety; and threats of death and brutality followed by sudden reprieve or leniency. Whereas Lifton used a psychoanalytical model of brainwashing, Edgar Schein employed a social-psychological model to focus on the processes employed by the Communist Chinese to alter beliefs.

In accord with this general model of brainwashing, many commentators assert that what distinguishes cults from other religions or protected associations is the use of brainwashing. Accounts by former cult members and observers describe such methods as “stress, overwork, sleep deprivation, isolation from the rest of society, and in some cases abuse or threats, . . . sensory bombardment of various forms and inadequate diet, . . . isolation from friends and family, . . . deprivation of privacy, repetitious chanting and lectures, instillation of guilt, subservience, and dependency,” and, finally, “dispensing of existence.” These techniques in various combinations are reported to “produce an individual who has neither the opportunity nor capacity to assess critically his or her engagement with the [cult].”

129. See Snapping, supra note 75, at 99.
131. Id. See also Snapping, supra note 75, at 100.
132. Lifton employed terms such as “ego-destruction” to describe the methods of the communist Chinese. See R. LIFTON, supra note 130.
133. E. SCHEIN, COERCIVE PERSUASION (1961). Though Schein’s social-psychological model focused upon the group processes employed, his findings were quite similar to those of Lifton. See Deprogramming, supra note 17, at 1074 n.9.
134. See, e.g., Delgado, Religious Totalism: Gentle and Urgent Persuasion, 51 CAL. L. REV. 1 (1977); Labor Group, supra note 22.
135. Deprogramming, supra note 17, at 1080-81 (citations omitted).
136. Lifton, The Appeal of the Death Trip, N.Y. Times Magazine, Jan. 7, 1979, at 15, col. 1 (describing cult doctrine that holds that only those who follow the group's teachings are "entitled to exist").
137. Deprogramming, supra note 17, at 1081.
Though no doubt exists that certain cults employ these coercive methods to one degree or another, numerous commentators maintain that actual brainwashing is both very rare and extreme. These observers hold that those who claim that cults brainwash their members make such accusations based not upon informed or scientific scholarship, but rather upon popular journalistic, sociological and biased accounts of cult activity.

Edgar Schein's own study of brainwashing reveals that though highly successful in regard to obtaining "cooperation done to avoid punishment or obtain amenities," actual ideological conversion was extremely rare. Research also indicates that the voluntary turnover rate in most cults is quite high. One can only ask the question: if cults do brainwash their members to the point of annihilation of the capacity for critical reflection, how is it that so many members leave of their own volition?

Actual brainwashing requires imprisonment and force, but such elements are generally lacking in the methods of cults, and for good reason. One is that they require great effort on the part of those doing the brainwashing; another is that they are inefficient. Even if cults had refined the technique to the point


139. See Anthony, supra note 138, at 79.

140. D.G. Bromley & A.D. Shupe, supra note 17, at 99; on the order of 1%. "[O]ne can only conclude that, considering the effort devoted to it, the Chinese program was a failure." Id. (quoting Schein, The Chinese Indoctrination Program For Prisoners of War: A Study of Attempted Brainwashing, in READINGS IN SOCIAL PSYCHOLOGY 332 (Maccoby, Newcomb, & Hartly 3d ed. 1958).

141. See Anthony, supra note 138, at 86. As high as 75% in certain groups. Regulation Panel, supra note 138, at 118.

142. See D.G. Bromley & A.D. Shupe, supra note 17, at 112.

143. Robbins, A Comment On Ash's Conception Of Extremist Cults: With A Postscript On Models Of Thought Reform, 1 CULTIC STUDIES J. 120, 124 (Fall/Winter 1984). The only available account that mentions the use of physical restraint is one in which a disillusioned inductee was prohibited from leaving the cult's compound for a period of approximately one hour. D.G. Bromley & A.D. Shupe, supra note 17, at 105-12.

144. D.G. Bromley & A.D. Shupe, supra note 17, at 105-12.

145. See supra note 140 and accompanying text.
of efficiency, they would not want robots or zombies as members. Such individuals would not possess the enthusiasm and commitment necessary to fulfill the demands of their group.

Firsthand observation of cults did not find mindless robots kept subservient due to inadequate diet. Rather, interviews revealed members of the Unification Church who had entered and remained for varied reasons and possessed a "high degree of introspective sensitivity and reflective candor in discussing reservations about [the group]."

The fact remains, however, that mental health professionals claim, based upon interviews with former cult members, that brainwashing is a reality in many groups. One possible explanation for the discrepancy of opinion lies in the misinterpretation of thought reform as brainwashing. Cult members do undergo personality change—give up prior commitments, goals and lifestyles—due to the influence of their respective groups, but this cannot be mistaken for conversion to unthinking automatons dispossessed of all capacity for reflective thought. Many individuals in our society come under the influence of a variety of forces of persuasion, such as: the adoption of more conventional religious doctrines; the entering into convents, monasteries or seminaries; the adoption of alternate lifestyles and modes of dress in accord with fad and fashion; and the influence of public education, mass media, and various forms of literature. The degree to which these influences are deemed dangerous is as much based upon an observer's prejudice as it is upon objective appraisal.

Several reasons can be offered to account for former cult

147. Id. at 211.
148. Id. at 111. Unannounced visits to group homes found meals to be "nutritious."
149. Id. at 110-11.
152. Id. at 108-109.
members' assertions of brainwashing in cults. Included among them is the desire to spare themselves and their families the embarrassment of having to admit the making of a mistake in joining the cult or accept blame for the undertaking. Studies show that only those former cult members who were subjected to "deprogramming" believed they were brainwashed to begin with. Those who left cults voluntarily maintain that their initial conversion did not occur against their will. These facts do not merely indicate that certain cult members were subjected to brainwashing and others not, but rather that one's conception of his cult experience is in large part determined by the need to rationalize membership.

A court, faced with the accusation that a prospective custodian is the victim of brainwashing and devoid of the capacity to resist the abusive practices of the cult, must make a painstaking inquiry into the credibility of testimony as it pertains to the cult member's capacity for critical reflection. This inquiry is only necessary, of course, if no substantial evidence exists to buttress a finding that the parent will engage, or allow others to engage,

155. See generally, Edwards, Crazy For God (1979) (former member of the Unification Church discussing his affiliation with the group, including the use of brainwashing).
156. One's ability to proclaim that he was in fact brainwashed effectively relieves the responsibility for any of his actions in the first place. D.G. Bromley & A.D. Shupe, supra note 17, at 201. See also, Robbins supra note 10, at 38.

Robert J. Lifton has himself stated that the "loose usage [of the term brainwashing] makes the word a rallying point for fear, resentment, urges toward submission, [and] justification for failure." Lifton, supra note 130, at 4.
157. D.G. Bromley & A.D. Shupe, supra note 17, at 201. Anti-cult literature fails to acknowledge that most cult members join respective groups due to specific personal needs often manifested as a consequence of disenchantment with conventional society as they know it, including preexisting familial relationships. Id. at 110; L.B. Sullivan, Counseling And Involvements In New Religious Groups, 1 Cultic Studies J. 178, 187-89 (Fall/Winter 1984).
158. This term refers to the often forcible capture and detention of cult members in an effort by friends, family, and/or hired deprogrammers to reconvert them to their prior lifestyle. For a general discussion of this procedure, see T. Patrick & T. Dulack, Let Our Children Go! (1977).
159. Regulation Panel, supra note 138, at 120.
160. Id.
161. "There are competing versions of a general psychological theory that says human beings have a need to make their attitudes consistent with their actions ... [A]ttitudes about these actions are usually formed to explain them in ways that are plausible to the actor-thinker." D.G. Bromley & A.D. Shupe, supra note 17, at 234 n.29 (citing L.A. Festinger, A Theory Of Cognitive Dissonance (1957); Bem, Inducing Belief in False Confessions, 3 J. Personality Soc. Psychology 707 (1977)).
in abusive practices toward her child. If such evidence does in fact exist, custody should be denied that prospective custodian further inquiry notwithstanding. Absent such findings, however, only in the event that a prospective custodian is wholly lacking capacity for critical reflection, is a judge justified in denying custody in the interests of the child’s physical or psychological welfare. The finding that a parent is without faculty to think or reason critically, however, makes speculation into the eventual-ity of abuse to the child unnecessary. For once it has been established that a prospective custodian has been subjected to brainwashing, thereby manifesting lack of ability to maintain a meaningful relationship with the child, the court may justifiably reason that someone other than the parent is controlling the upbringing of the child. This determination indicates that the cult-member parent cannot achieve the role of psychological parent to his child and justifies denial of custody.\textsuperscript{162} In addition, the fact that someone other than the parent is responsible for rearing her child indicates that the child will not be confident that his parent is in control and in charge. This too would justify the denial of custody.\textsuperscript{163} Of course, any custody order based upon a prejudicial and, therefore, not factual determination that the parent is brainwashed and thereby unable to fulfill his proper role, constitutes a violation of the religious or associational rights accorded the parent by the first amendment of the Constitution.\textsuperscript{164}

If there is no credible and substantial evidence to support a claim of brainwashing, then the parent outside the cult is left only with the argument that due to the nature of many cults,\textsuperscript{165} the cult member should be denied custody because harmful practices may arise in the future, though none may be evident

\textsuperscript{162} Though no custody decision has yet addressed directly the issue of brainwashing, courts have determined that the continued presence of a fit parent who through daily affection, guidance, companionship, and discipline fulfills the child’s psychological and physical needs is crucial to the child’s emotional well-being. Jordan v. Jordan, 302 Pa. Super. 421, 425, 448 A.2d 1113, 1115 (Super. Ct. 1982). In the event a particular parent is unable to fulfill these needs, custody should be placed with the other parent. J.E.I. v. L.M.I., 314 S.E.2d 67, 72 (W. Va. 1984).

\textsuperscript{163} In re Maxwell, 8 Ohio App. 3d 302, 456 N.E.2d 1218 (Ct. App. 1982). See also J. Goldstein, supra note 1, at 98, 116; Musetto, supra note 1, at 436-37, 443.

\textsuperscript{164} See supra notes 18-20, 24-26, 31-33 and accompanying text.

\textsuperscript{165} See supra notes 112-17 and accompanying text.
during the custody proceeding. This argument must fail, however, because the court may only base a decision upon firm evidence indicating harm will be visited upon the child. The Constitution demands that in a custody dispute of this nature, there exists no mere speculation as to impairment of a child's health and welfare.\textsuperscript{166} This must be the rule, for any custody decision premised upon speculation and not hard evidence is open to attack on the grounds that it was, in fact, not based upon a genuine concern for the best interest of the child.

No custody decision to date has addressed the issue of brainwashing. Courts have on occasion, however, grappled with this perplexing issue in other contexts. In \textit{Katz v. Superior Court},\textsuperscript{167} the California appeals court was pressed to determine whether petitioners (specific members of the Unification Church) had in fact been successfully subjected to brainwashing, thereby justifying respondents (parents of the respective cult members) appointment as conservators.\textsuperscript{168} The court received into evidence expert testimony as to the mental condition of each church member \textit{viz.} alleged infliction of mind control techniques.\textsuperscript{169} A psychiatrist and clinical psychologist each submitted testimony asserting that each cult member was in fact subjected to "coercive persuasion" similar to that employed against American prisoners of war during the Korean conflict,\textsuperscript{170} and that each suffered from consequent emotional and cognitive impairment necessitating treatment and appointment of conservators.\textsuperscript{171}

At the same time, however, the court received into evidence the expert testimony of another psychiatrist who pointed out that an attempt at "'coercive persuasion' in the absence of drugs, hypnosis, physical captivity or some greater fear was no more than speculative theory."\textsuperscript{172} This expert witness also maintained that the cult members suffered from no psychological

\textsuperscript{166}. Quiner v. Quiner, 59 Cal. Rptr. 503 (Cal. App. 1967).
\textsuperscript{168}. \textit{Id}.
\textsuperscript{169}. \textit{Id} at 971-80, 141 Cal. Rptr. at 245-50.
\textsuperscript{170}. \textit{Id} at 975-77, 141 Cal. Rptr. at 248-9. \textit{See supra} notes 129, 134-36 and accompanying text.
\textsuperscript{171}. 73 Cal. App. 3d at 975-78, 141 Cal. Rptr. 248-50.
\textsuperscript{172}. \textit{Id} at 979, 141 Cal. Rptr. at 250. \textit{See supra} notes 138-39, 143-46 and accompanying text.
pathological condition and directly contradicted the parents' experts regarding their conclusions as to subjection to coercive persuasion and the need to appoint conservators.\textsuperscript{173}

In addition, the prospective conservatees offered testimony of a clinical psychologist who stated that none of the cult members psychologically tested exhibited "symptoms similar to those experienced by prisoners of war who were subjected to similar tests." This psychologist "expressly repudiated the findings of the parents' experts . . . and made it clear there was no emergency."\textsuperscript{174}

The court held that the very inquiry into the existence of brainwashing was in effect questioning the validity of the church members' faith, and was, therefore, a violation of the petitioners' first amendment rights and must be abandoned.\textsuperscript{175}

The disposition of the brainwashing issue in \textit{Katz} not only illustrates the conflicting nature of opinion regarding this issue and the difficulty that is sure to confront a court in its endeavor to qualify the mental state of a prospective custodian, but also the care a court must take in addressing concomitant first amendment freedoms. A court engaged in custody proceedings, however, must not follow the lead of the California court in \textit{Katz} and shy away from engaging in a specific inquiry and determination as to the mental state of the prospective custodian. This is so no matter how burdensome such a determination is or how sacred first amendment rights are deemed to be. A court is constitutionally permitted to, and, indeed, must inquire into religious and associational practices, such as alleged brainwashing of members, in order to insure that the physical and psychological health and welfare of a child is protected.\textsuperscript{176}

Any discussion of brainwashing in cults must of necessity address the question whether the children of cults are themselves subjected to brainwashing. The currently available literature and case law concerning cults discloses no express analysis of this issue. A determination that a child has been brainwashed

\textsuperscript{173} 73 Cal. App. 3d at 979, 141 Cal. Rptr. at 250.
\textsuperscript{174} Id. at 980, 141 Cal. Rptr. at 250.
\textsuperscript{175} Id. at 988, 141 Cal. Rptr. at 256. The court also held that the disposition of the issue would stand even if the petitioners' organization was of an associational nature. Id. See supra notes 21-26 and accompanying text.
\textsuperscript{176} See supra notes 2, 6, 7, 34-36 and accompanying text.
must, however, be premised upon the same findings as those required regarding adult members: that coercive methods have been employed to such an extent that all capacity for autonomous thought or reflection has been extinguished. It is submitted, however, that a determination of this nature is unnecessary if not impossible.

The inquiry into the brainwashing of children need not focus upon the manifestation of complete want of autonomous thought, but rather upon the coercive means which must necessarily be invoked in order to realize this end. The utilization of any one or combination of such means may amount to abuse in and of itself, thereby mandating placement of a child outside the cult. This method of inquiry thus short-circuits the extremely burdensome task of qualifying the mental state of a child regarding her capacity for critical thought—a task even more onerous than in the case of an adult due to a child's incomplete social and psychological development.

Many children in light of their age simply do not yet possess significant capacity for autonomous thought regardless of subjection to mind control techniques. Many children, no matter their age or intelligence, simply do as they are instructed based upon various sociological reasons. A judicial determination whether a child is in fact brainwashed is fraught with uncertainty and thereby provides an inadequate basis upon which to fashion a custody decision. Fortunately, the interests of a child may be protected through an alternate finding of physically and/or psychologically harmful cult practices.

VI. Cults and Case Law

A sampling of case law involving religious groups which may very well be considered cults reveals a strong judicial predisposition towards protection of members' first amendment rights.

In *Burnham v. Burnham*, the Supreme Court of Nebraska maintained that sufficient evidence indicated: (1) that

177. See supra notes 134-137 and accompanying text.
178. This mental condition may, of course, be considered a threat to the health and welfare of the child, justifying placement away from a cult member.
179. See supra notes 135-37, 143 and accompanying text.
180. See supra notes 10, 17, 22.
the cult member would “cut [her child] out of her life if she disobeys the rules of the Tridentine Church,” 182 (2) that she planned to send the child to a church school which engaged in corporal punishment; 183 (3) that she believed her child to be illegitimate because she and her husband were not married in the Tridentine Church; 184 and (4) that she would separate the child from her father. 185 The court determined that such a state of affairs posed a hazard to both the physical and psychological health and welfare of the child, thereby awarding custody to the nonmember parent. 186 The Burnham decision vindicated the best interest of the child by placing her away from the very real potential for psychological harm and, therefore, justified the apparent imposition upon the first amendment rights of the noncustodian viz. a custody order founded upon an unfavorable evaluation of the impact of her religious beliefs upon her child. 187

In Harris v. Harris, 188 the Supreme Court of Mississippi held that although the Free Will Holiness Pentecostal Church believed in snake handling, custody should not be denied the member parent. The opinion stated that because no substantial evidence existed indicating that the cult member herself engaged in snake handling nor that the child would be exposed to the practice, the Constitution guaranteed the member parent’s freedom to attend the church of her choice and raise her child as she saw fit. 189 The court’s determination that there existed a lack of substantial evidence indicating a likelihood of harm to the child supported the finding that the best interests of the child were served through the custody order. Moreover, it illustrated the court’s ability to avoid being swayed by the unorthodox beliefs of the cult member in its attempt to delicately bal-

182. Id. at 501, 304 N.W.2d at 61.
183. Id. at 500, 304 N.W.2d at 60.
184. Id. at 501, 304 N.W.2d at 61.
185. Id. at 502, 304 N.W.2d at 62.
186. Id.
187. But see Mangrum, Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases, 15 CREIGHTON L. REV. 25,26-30 (1981), in which the author maintains that the court’s order in Burnham entailed mere speculation as to the threat of harm to the child and, therefore, constituted an unconstitutional infringement of the non-custodian’s first amendment rights.
188. 343 So. 2d 762 (1977).
189. Id. at 764; see also Smith v. Smith, 90 Ariz. 190, 167 P.2d 230 (1961).
ance her first amendment freedom with a concern for the health and welfare of the child.

In *In re Marriage of Hadeen*, the Court of Appeals of Washington found "substantial evidence to support the finding that Mrs. Hadeen's first fidelity was to the [First Community Church of America], even to the extent of rejecting her children." There was also evidence that Mrs. Hadeen would completely separate her children from their father if she were given custody. In addition, the records indicated that First Community Church doctrine prescribed, and Mrs. Hadeen engaged in, beatings, withholding of food, and forced isolation as disciplinary measures designed to combat the children's rebellious behavior. Despite these findings and the adoption of the rule "that the requirement of a reasonable and substantial likelihood of immediate or future impairment best accommodates the general welfare of a child and the free exercise of religion by the parents," the court remanded the case for a new trial because the mother's church membership did not "pose a threat to the mental or physical welfare of the children."

The appellate court's decision in *Hadeen* represents a troubling scenario: that of a court apparently lax in its duty to promote the best interest of the children due to an apprehension toward contravening the free exercise rights of a prospective custodian. Such solicitude, however, may serve to compromise not only the establishment clause of the first amendment, but the ultimate concern of all child custody disputes—preservation of the physical and psychological health and welfare of the children.

---

192. *Id.*
193. 27 Wash. App. at 568, 619 P.2d at 375.
195. See *supra* note 11 and accompanying text.
196. *Id.*
197. See Quiner v. Quiner, 59 Cal Rptr. 503, where the facts indicated a likelihood of psychological harm to a child at the hands of a cult member parent whose beliefs included reading only the Bible, dissociation of the child from his father, and casting out her son in the event he became disobedient; nevertheless, the court of appeals adopted an "actual impairment" standard and since no physical or psychological damage had yet
VII. Conclusion

Child custody determinations involving a cult-member parent are preeminently difficult because they encompass the extremely delicate issues of fundamental constitutional rights; rupturing the bond between parent and child; protecting the health and welfare of a child; and, to a rather great extent, an evaluation of cults—a topic that evokes fear and hostility in many. This note has examined the theoretical and rather convoluted analysis in which a court must engage in order to accommodate these various interests. Only one concept emerges as absolute, however, and that is the need to insure the safety of our children. If substantial evidence indicates a likelihood that placing a child with a particular parent would impair the health and welfare of that child, a court must deny custody to that parent no matter what additional interests hang in the balance. Such judicial action vindicates the compelling public interest of protecting the well-being of the child. Though a full understanding of the cult phenomenon is elusive, many commentators paint a grim picture. It can only be urged that the judiciary not succumb to accusations not supported in fact. Though members of certain cults do exhibit changes of personality and lifestyle, changes which may, indeed, justifiably elicit concern on the part of family, associates, and society at large, it must be remembered that “society does not always get the type of person it wants,” and mere disapproval or prejudice is never a sufficient substitute for findings of actual danger to a child’s safety, nor a sound basis for a judicial determination to sever the relationship of parent and child.

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only unanimity of the graveyard.

. . . But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of free-

---

198. See supra note 152 and accompanying text.
199. Shapiro, supra note 153, at 1318.
dom. The test of its substance is the right to differ as to things that touch the heart of the existing order. 200

Finally, neither may a court be overly solicitous toward a parent's first amendment rights if it is to realize the objective of socially and constitutionally responsible child placement.

Richard Barnes Montana