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CARSWELL

CASE COMMENT

Horton v. Elias and the Judicial Search for Alternatives to Absolute Custody Awards

Daniel G. Pole and *Sarah E. Mott-Trille**

Courts balance competing interests, both of which may be legitimate. Their task is all the more troublesome when adversaries marshal opposing rules of law in aid. One of the most hotly contested fields of conflict in family law today is in establishing rules of law regarding the authority of the custodial parent over the non-custodial.

Horton v. Elias[1] is the latest example of a case wherein a court has wrestled with inconsistent presumptions that the custodial parent has "all the rights" while the non-custodial parent and children are together entitled to "maximum contact." Judge Lazar concluded that custodial rights are limited.

What is the extent and quality of the "maximum contact"? Does such contact limit a custodian's power? Judge Lazar's attempt to formulate a reply to these questions is interesting.

Mrs. Elias had custody and guardianship by consent of Mr. Horton pursuant to the British Columbia *Family Relations Act*.[2] The arrangement worked more or less well for 2 years, until Mrs. Elias became concerned about supposed problems with their children's behavior. She first applied to rescind all access but later requested only restriction on Mr. Horton's religious activities with the children. Judge Lazar declined to order any religious restrictions, a decision which harmonizes with section 2(a) of the *Charter*.[3]

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1 (9 March 1990), Surrey E01656 (B.C. Prov. Ct.).

2 R.S.B.C. 1979, c. 121.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Cases attempting to restrict Jehovah's Witnesses parents, both custodial and access, in religious activities with their children abound in recent years.

Ayers v. Ayers;[4]
Barrett v. Barrett;[5]
Benoit v. Benoit;[6]
Friesen v. Friesen;[7]
Smith v. Smith;[8]
Struncova v. Guay;[9]
Sullivan v. Fox;[10]
Harvey v. Lapointe.[11]

A number have been appealed to higher courts or are under appeal, and the constitutionality of religious restrictions is challenged.

Droit de la famille – 353;[12]
Fougère v. Fougère;[13]
Hockey v. Hockey;[14]
Irmert v. Irmert;[15]
Droit de la famille – 564;[16]
Young v. Young.[17]

Other religious groups have been implicated, albeit to a lesser extent.

Brown v. Brown [Exclusive Brethren];[18]
Gallagher v. Gallagher [Pentecostal];[19]

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4 (8 April 1986), Squamish (B.C. Prov. Ct.) [unreported].
5 (1988), 18 R.F.L. (3d) 186 (Nfld. T.D.).
6 (1973), 10 R.F.L. 282 (Ont. C.A.).
7 (1988), 56 Man. R. (2d) 303 (Q.B.).
8 (1989), 92 N.S.R. (2d) 204, 237 A.P.R. 204 (T.D.).
9 (1984), 39 R.F.L. (2d) 298 (Que. S.C.).
10 (1984), 38 R.F.L. (2d) 293 (P.E.I. S.C.).
11 (1988), 13 R.F.L. (3d) 134 (Que. S.C.).
12 (1987), 8 R.F.L. (3d) 360 (C.A. Qué.).
13 (1987), 6 R.F.L. (3d) 314 (N.B. C.A.).
14 (1989), 69 O.R. (2d) 338, 21 R.F.L. (3d) 105 (Div. Ct.).
15 (1984), 64 A.R. 342 (C.A.).
16 Montréal 500-12-117651-822 (S.C. Qué.), motion to amend notice of appeal granted (1988), 19 R.F.L. (3d) 283 (C.A. Qué.).
17 (1989), 24 R.F.L. (3d) 193 (B.C. S.C.), rev'd in part (1990), 50 B.C.L.R. (2d) 1 (C.A.).
18 (1983), 39 R.F.L. (2d) 396 (Sask. C.A.).
19 (1985), 48 R.F.L. (2d) 249 at 261, 262 (N.B. Q.B.).

McNeil v. McNeil [Pentecostal];[20]
Jaillet v. Jaillet [Pentecostal].[21]

The same issue has arisen in other cases involving parents of differing political ideologies, sexual values, and language preferences. In these cases restrictions are rarely imposed.

Marchand v. Sander;[22]
Weiche v. Weiche;[23]
E. (A.) v. E. (G.) [homosexual parent].[24]

American law, in granting custodial rights to determine a child's upbringing (including education, health care, and religious training) defines this right to be a "primary" not "exclusive" control.

Robertson v. Robertson;[25]
Munoz v. Munoz.[26]

Canadian courts historically adjudicate the issue in one of two ways: (a) the rights of the custodial parent to control the access parent's activities is supported; or (b) some sort of modified protection is granted to the access parent and child. Judge Lazar took the latter course. Neither of these alternatives adopts a test which constitutionally reconciles competing interests.

FACTS

The background of the dispute is not well documented. Apparently, the parties separated about a year after Mr. Horton became one of Jehovah's Witnesses. Mrs. Elias acknowledged that the children had been instructed by Mr. Horton and accompanied him to religious meetings. The wishes of the children were not in evidence, if indeed they were at an age of discretion. Mrs. Elias received custody.

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20 (1989), 20 R.F.L. (3d) 52 (B.C. S.C.).
21 (1988), 91 N.B.R. (2d) 351 (Q.B.
22 (1989), 22 R.F.L. (3d) 177 (Ont. Dist. Ct..).
23 (15 March 1988), London 15451/86 (Ont. Dist. Ct.).
24 (1989), 77 Nfld. & P.E.I.R. 142 (Nfld. U.F.C.).
25 575 P.2d 1092 (Wash.App. 1978).
26 489 P.2d 1133 (Wash. 1971).

The motion coming before the Court originally suspended all access to Mr. Horton, alleging some sort of "behavior problems." Apparently these "problems" abated, and by the time the matter came before the Court the motion had been amended to restrain Mr. Horton from "taking the children to his services at the Kingdom Hall and from taking them on house to house service visits."

Despite Mrs. Elias's narrow demand for religious restrictions, no connection was found by the trial Judge between religion and alleged problems. Mrs. Elias's evidence was that there "might" be a relationship between religion and violent behavior in the children, but admitted there were other situational stresses also at work.

The issue then became whether or not the "custodial parents' right to determine religious education of the children is absolute and that the restrictions could be ordered in the absence of any proof of adverse effect on the children."

Binding on Judge Lazar were the decisions of Proudfoot J. in *Young v. Young*[27] and *Anson v. Anson*.[28]

The controversial *Young* decision has been appealed. Both *Young* and *Anson* maintain the custodial parent is solely vested with the right to determine religious upbringing.

This contrasts sharply with a recent line of authority establishing a threshold test to be met prior to restricting religious practices. This test had been variously articulated as "actual and immediate harm that is severe, substantial and compelling,"[29] "clear-cut evidence of harm,"[30] or "compelling evidence of harm."[31] Similar wording is used in the United States.

Felton v. Felton;[32]
Re Marriage of Murga;[33]
Waites v. Waites;[34]
Zummo v. Zummo.[35]

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27 Above, note 17.
28 (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.).
29 *Smith v. Smith*, above, note 8.
30 *Droit de la famille – 353*, above, note 16.
31 *Hockey v. Hockey*, above, note 14.
32 418 N.E.2d 606 (Mass. 1981).
33 163 Cal.Rptr 79 (Ct. App. 1980).
34 567 S.W.2d 326 at 333 (Mo. 1978).
35 574 A.2d 1130 (1990).

Such a test is consistent with the reluctance of courts, as Judge Lazar puts it, "to sit and prefer one person's religion to another."[36] Religious inquiry was discouraged by the Supreme Court in *R. v. Videoflicks Ltd.*[37] Judge Hall, in *Smith v. Smith*, suggested that such inquiry in child custody could well be unconstitutional. Evidence of religious practice was deemed inadmissible as long ago as *Saumur v. Quebec (City)*.[38] The motivation is both constitutional and practical. One U.S. decision refers to such inquiry as a "Pandora's box";[39] once opened, the evidential problems of scope and inquiry are awesome. In the end, the court is invited to rush in and make value judgments on spiritual matters, an area wherein it has neither competence nor jurisdiction to tread.

Judge Lazar adroitly sidestepped the extremes of *Young* and *Anson* by formulating her own threshold test:

> I think what it is a proposition for is that if there is conflict that is to the detriment of the children between the religious beliefs of the custodial and the access parent, that the religious beliefs of the custodial parent will prevail and if somebody must be restrained to avoid that conflict it will be the access parent who is restrained. Accordingly, I do not find that this case [Anson] results in a change of the law.[40]

There are problems in this broad test, although to Judge Lazar's credit, it worked to the right result in the present case. While her reasoning may be alluring, it is constitutionally dangerous. For example, should an access parent be limited in his constitutional right with the children based on "conflict"? Conflict requires two or more persons and could easily be initiated by the custodial parent. And what constitutes "detriment"? In *Horton* there were allegations of school performance dropping and violent behaviour. This was evidently not enough. But in *Young* "stress" was enough to impose religious restrictions.

Such general tests fail to meet constitutionally acceptable standards under section 1 of the *Canadian Charter of Rights and Freedoms*. After all, all children suffer detriment or stress from marriage break-up. Reasonable discipline may be stressful – should the

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36 See also *Chaput v. Romain*, [1955] S.C.R. 834; *Benoit v. Benoit*, above, note 6.
37 [1986] 2 S.C.R. 713.
38 [1953] 2 S.C.R. 299 at 368.
39 *Quiner v. Quiner*, 59 Cal.Rptr 503 at 517 (1967).
40 Above, note 1 at 5.

access parent be enjoined? Some courts have found the stress of exposure to more than one religion beneficial.[41]

Furthermore, focusing on the custodian's right begs the issues of the best interest of the child. It assumes an all or nothing apportioning of the incidents of custody is in the best interests of the child. In *Smith* and *Hockey*, the best interest of the children was better served by sharing certain of the incidents, such as religion.

Rather than stating a proposition which automatically defers to the custodian, Judge Lazar should have applied Huddart J.'s advice in *Anson* and used her imagination, recognizing that the religious "sticks" of the bundle of parental rights between Mr. Horton and Mrs. Elias are of a special character, one of a class of rights excluded from the *Family Relations Act* by virtue of their protection under the "supreme law" of the constitution. The practical result would have been the same, but the protected nature of religious freedom under the *Charter* would have been respected.

Parents and children, jointly and severally, possess freedom of religion, speech, and association under the "supreme law" of the country. They are therein expressed in "absolute terms."[42] It would trivialize the *Charter* to assume that these rights are somehow at the sufferance of a custodial parent. Without a careful section 1 analysis, arbitrarily subjecting a fundamental freedom to the whim of a custodial parent is unconstitutional – even if the result is acceptable, such as in *Horton*.

Any shortcomings in *Horton* can be attributed to the poor direction by higher courts. Judges such as Lazar J. must be applauded for their individual efforts to preserve access parent's relationship with their children.

The *Charter* issue merits careful analysis and direction by the Supreme Court of Canada. Until that happens, children risk loss of meaningful association with parents from whom, unconstitutionally, they are spiritually divorced.

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41 *Felton v. Felton*, above, note 32; *Gallagher v. Gallagher*, above, note 19; *Sullivan v. Fox*, above, note 10.

42 *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577.