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Parenting Orders for Brethren Families in Australia: The Religious Perspective of Children

Mitchell Landrigan
University of Technology Sydney, Faculty of Law
mitchell.landrigan@gmail.com

ABSTRACT: This article draws a distinction between a child's possible *right* to freedom of religion under the Convention on the Rights of the Child (CRC) and *recognition* of a child's religious beliefs and religious experiences as may be relevant to the child's best interests under the Australian Family Law Act (FLA). It does so by reviewing some of the key family law jurisprudence relating to the Exclusive Brethren (Brethren) in Australia. It is proposed that, despite the incorporation of the CRC in the FLA, the FLA does not confer any *rights* on a child to freedom of religion. As a result, the Family Court of Australia may consider a child's religious beliefs as these are relevant to the child's best interests under the FLA, but the Family Court cannot rely on the child having any religious *rights* per se under the FLA.

KEYWORDS: Exclusive Brethren, Plymouth Brethren Christian Church, Family Law Act, Convention on the Rights of the Child, Doctrine of Separation from Evil.

Introduction

The cases in this article are about parenting orders for children whose parents were members of the Plymouth Brethren Christian Church ("Exclusive Brethren" or "Brethren") in Australia. The country has been a relatively fertile field for Brethren family law jurisprudence. Several Brethren cases have been the subject of litigation in the Family Court of Australia ("Family Court") lasting many years.

Amongst the legal questions the various Brethren family law decisions have touched on but have not answered is a complex one: what if any religious rights does the child of separated Brethren parents have, to decide whether a parent should have custody? This article furthers the research in this field of religion and

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family law by analyzing the legislative framework and body of family law jurisprudence in Australia that is relevant to the Brethren children. I look specifically at the possibility that a Brethren child, for religious reasons, may not wish to remain in contact with a parent who has left the faith community.

It is useful to provide comments about the terminology used in this article and to provide an outline of the research. This article refers to decisions of the Family Court and its appellate level jurisdiction, the Full Court of the Family Court of Australia ("Full Court"). The article also cites decisions of Australia's highest court, the High Court of Australia ("High Court"), and state courts. Where the italicized case citations referred to in this article include a number in parentheses in addition to the year of the judgment, this number is a reference to the paragraph or page of the relevant judgment. The full case citations appear at the end of this article. The majority of cases cited in this article are Brethren family law decisions of the Australian courts.

The decisions of the Federal Circuit Court (which generally tends to hear less complex matters than the Family Court) are not discussed. There are references to the provisions of the Family Law Act 1975 (Cth) ("FLA") and to the Convention on the Rights of the Child (1989) ("CRC"), but the article does not look in detail at Australian state or territory legislation. This work is exclusively about parenting orders for Brethren children. This review does not consider the implications of the analysis for other religious communities except to note that other researchers may critique and/or expand upon the research in this article in respect of other faith groups. This article does not review any of the jurisprudence in Australia relating to the best interests of the child under, say, child protection legislation in Australian states and/or territories. Nor does this work review human rights charters (to the extent these exist) in any Australian states and/or territories.

The structure of this article is as follows. It first addresses the cornerstone legal principle—the best interests of the child—in the FLA, Australia's key piece of Commonwealth family law legislation. The significance of the Brethren doctrine of "separation from evil" for parenting orders is considered. This work analyses the legal protections under the FLA for children's religious beliefs, including with respect to the rights of children to freedom of religion under the CRC. In reviewing the FLA and its connection with the CRC, this article draws a distinction between a child's right to freedom of religion under the CRC and the

recognition of a child's religious beliefs and religious experiences as may be relevant to the child's best interests under the FLA. It is proposed that, despite the incorporation of the CRC in the FLA, the FLA does not confer any *right* of a child to freedom of religion (Adhar and Leigh 2005, 203).

In subsequent sections, this article looks at the methods the Family Court employs to hear and receive evidence from children, before the work considers in detail two Australian cases (the latter is actually a series of related cases) involving custody disputes about Brethren children. Some observations are offered about these judgments before the work briefly considers, in the final section, the possible implications for other faith communities of the legal analysis undertaken in this article.

The Paramount Consideration

Under the FLA, the Family Court must regard the best interests of the child as the paramount consideration when making a parenting order (FLA, s.60CA). Under the FLA (section 3, Definitions), a child is defined as a person under 18 years of age only for the purpose of parenting orders (Shackel 2016, 40). While the FLA includes no definition of parent, the High Court has held that the

> ordinary, accepted English meaning of the word "parent" is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word "parent" and the relevant facts and circumstances of the case at hand (*Masson v Parsons* 2019, Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ [857]).

The Family Court may deny custodial access to a parent if it considers that granting the parent access to their child would not be in the child's best interests (*Cooper v Cooper* 1977).

When determining what is in a child's best interests, a primary consideration for the Family Court is that of the child having a meaningful relationship with their parents (FLA, s.60CC[2]). The Family Court will presume (where there is more than one parent) that it is in the best interests of the child for the parents to have equal shared parental responsibility for their child (FLA, s.61DA[1]). This presumption does not, however, necessarily mean equal parental time (FLA, note to s.61DA[1]). The presumption about equal shared responsibility being in the child's best interests is rebuttable (FLA, s.61DA[4]).

The Family Court must assess the best interests of the child by reference to contemporary standards and not from the point of view of only one parent (*Horman, in Marriage of* 1976). If a court is asked to address religious questions in a custody matter, the paramount consideration is the children's welfare ("best interests" in the FLA's terminology) and not whether one religion is inherently preferable to another (*Ex Parte Paul; Re Paul* 1963). It has long been established in Australian family law that there is no presumption in favor of the mother over the father of a child in custody orders (*Gronow v Gronow* 1979).

The Significance of Brethren Religious Practices

Brethren religious practices can pose complexities for the Family Court when it is assessing applications for parenting orders for the children of separated Brethren parents. There are two reasons for this. First, the Brethren faith community has a strict approach towards what the Brethren community considers to be "sin." A Brethren member who is alleged to have engaged in what their faith community regards as serious sin (e.g., adultery) will be temporarily shut out of the group's religious life ("shutting up") or may be permanently expelled and "withdrawn from" (Doherty 2013, 29). Being withdrawn from involves the total removal of social contact from the Brethren member.

The practice of being withdrawn from reflects the Brethren belief in "separation from evil" (Doherty 2012, 165). A core Brethren value, this practice demonstrates to the former member, and all others who are associated with the accused person, the group's condemnation of that person's sinfulness. The resultant abandoning of social contact from the (former) member typically includes everyone who is connected with, and/or is or related to, the person, and the disassociation extends to meetings of the Brethren faith outside the person's immediate community. This is an outgrowth of the connexional nature of Brethren ecclesiology.

Secondly, whether as a result of their having experienced shunning, or for other reasons relating to their separation or exclusion from the Brethren group, an ex-Brethren parent may come to hold different views about the suitability of the faith community for their child's upbringing than the perspective the parent held while they were still in the group. The ex-Brethren parent may come to believe that their child's experience of, say, sport, education, cultural awareness,

or sexuality, would be more beneficial for their child by the child being part of the secular community than by their remaining in, or being in contact with, the Brethren group. The changed opinions of the ex-Brethren parent can lead to potentially irreconcilably different testimonies about what each parent considers to be in their child's interests. In addition, the child and the parent who has left the faith community may come to hold different views about whether the child's contact with that ex-Brethren parent is consistent with the child's Brethren beliefs. These differences (i.e., between parent and parent; and between parent and child) can contribute to delays in resolving the parenting orders for the child.

These two features of Brethren religious practice—the first doctrinal, and the second, a practical outworking of doctrine—have important implications for custody arrangements for the children of separated Brethren parents. If the faith community withdraws from a Brethren child's parent, then the child who is still in the faith community may find it troubling to be in contact with their (now) ex-Brethren parent. Specifically, due to the Brethren child's adherence to the doctrine of separation from evil, perhaps influenced by some within their own faith community (including siblings), the Brethren child may prefer to avoid contact with that ex-Brethren parent. Even more specifically, a Brethren child may believe, for religious reasons—like the faith community to which they belong—that they should have no contact with a "sinning' former member, even if that ex-member is their parent. What is more, any ongoing involvement with the Brethren faith community may tend to exacerbate any reservations or negative perspectives a child has about their relationship with their ex-Brethren parent. For example, the child may perceive that the quality of the child's religious experience in the faith group diminishes if the child's own Brethren community tends, as a result of the child's contact with the ex-Brethren parent, to be less inclusive of the child in matters of worship.

These aspects of Brethren community life can, as suggested, present difficulties for the Family Court in its weighing the interests of the parents in custody matters and, most importantly, in its determining, as the Family Court must do, what *is* in the child's best interests. In the case of a Brethren child, the Family Court may have to balance the child's potential perception of their *betrayal* of the norms of the faith community with the competing desires of the parents to be part of the child's life, while one parent is inside the faith community and the other is outside it. In doing so, the Family Court must,

however, adhere to a presumption that shared parental responsibility is in the best interests of the child (FLA, s.61DA[1]).

Legal Protection for a Brethren Child's Religious Beliefs and Practices

As noted in the previous section, the statutory principles in the FLA require the Family Court to presume—the presumption is rebuttable—that it is the best interests of the child for the child's parents to have equal shared responsibility. This raises a critical evidential question in custody disputes about Brethren children. Under the FLA, can a Brethren child's preference for not having any contact with their own ex-Brethren parent for religious reasons, plausibly be characterized as an exercise of the child's right to freedom of religion?

The Australian courts have considered Brethren religious practices in several custody cases without defining the legal "rights" of Brethren children in respect of freedom of religion. In an early decision in the Supreme Court of NSW, Selby J awarded custody to the father of four children after the children's mother joined the Brethren. Selby J cautioned that it was not for a court to determine whether one religion is inherently preferable to another, but his Honor decided in that case that the benefits to the children of remaining in the care of their mother were offset by the mother's unbalanced and extravagant beliefs (*Ex Parte Paul; Re Paul* 1963).

In *Mauger v Mauger* (1966) in the Supreme Court of Queensland, Hart J decided that the Brethren father of three children was unfit to have their custody. Hart J awarded custody of the children to the mother, finding that it was "very much against the children's interests to allow them to be brought up in the tenets of the sect" (487). On appeal to the Full Court of the Supreme Court of Queensland, the Full Court upheld Hart J's decision despite Skerman J's notable dissent. Skerman J considered that the evidence before the Family Court did not justify a departure from what his Honor described as "the accepted presumption" that contact with both parents was in the interests of the children (313). Skerman J proposed that a form of access could be devised whereby the father would have limited opportunity to exercise any religious influence on the children (Bates 1974, 344).

In another Brethren custody case, the Full Court of the Family Court held that the trial judge had placed undue significance on one Brethren parent's beliefs and had not adequately addressed the interests of the children (*In the Marriage of PLOWS [No 2]* 1979). The Full Court in that case accordingly made an order for joint custody with the father to have care and control of the children on weekends so as to potentially to limit the mother's religious influences (Bates 1983, 349). In another Brethren custody matter (*In the Marriage of Grimshaw; Arkcoll [Intervener]* 1981), the Full Court of the Family Court criticized a trial judge for his allowing the case to become a trial of the Brethren religion rather than ensuring that the welfare of the children was the paramount consideration. In a 1998 judgment relating to Brethren (*In the Marriage of Firth; Firth and Firth, Boyer [Intervener]* 1988), the Full Court of the Family Court held that it is legitimate for the Family Court to consider the tenets of the parents' faith in determining questions of parental access because this can be relevant to determining what is in the best interests of the child; the Full Court in that case linked the question of faith to the cornerstone principle in the FLA. Similarly, in 1998, in *H v H*, the Full Court of the Family Court held that judges are obliged to consider the views and practices of the Brethren not to judge their value but to determine the effects of those views and practices on the children (Thornthwaite 2011, 67).

The FLA has, since 2012, included in it, an "additional object" of giving effect to the Convention on the Rights of the Child (1989) ("CRC"). Coming into effect on 7 June 2012, the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) ("Family Law Amendment Act") amended the FLA to include in Pt VII of the FLA (which governs parenting arrangements for children) an additional object of giving effect to the CRC (section 60B[4] FLA). Like the FLA, the CRC recognizes that the best interests of the child are a (cfr. the use of the word *the*, in the FLA) primary consideration (Article 3.1). The CRC also, relevantly, comprises Article 14.1 which states that "States Parties (such as Australia) shall respect the *right* of the child to freedom of thought, conscience and religion" (emphasis added).

As a result of the incorporation of the CRC into the FLA, it is theoretically possible for the Family Court to recognize the right of a child to freedom of religion under Article 14.1 of the CRC. As noted, however, section 60B(4) describes giving effect to the CRC as an "additional object." There is an

argument that, being only an additional object, this object lacks the statutory gravitas of the statutory objects in section 60B(1) of the FLA (Parkinson 2012). Aside from this point, under Australian law, a Convention (such as the CRC) is not legally binding unless the Convention is incorporated into Australian law via domestic legislation (*Minister of State for Immigration and Ethnic Affairs v Teoh* 1995 [*Teoh*]) (Jones 1999, 136). The Explanatory Memorandum to the legislation which introduced the "additional object" of giving effect to the CRC makes it clear that the CRC was not intended to be incorporated into the FLA. It provides that: the CRC is *not* incorporated into Australian domestic law; the Family Court can rely upon giving effect to the CRC as an object of the FLA only if there is some legislative ambiguity in the FLA; and the CRC prevails over the FLA only to the extent of any inconsistency between the terms of the FLA and the CRC (Ex Memo para 23, 7).

There is on the face of the laws no obvious inconsistency between the FLA and the CRC in respect of the religious beliefs of a child (Brethren or otherwise) who is the subject of an application for a parenting order. It is possible that, in a specific case, there might be a legal inconsistency. Perhaps some ambiguity in the terms of the FLA may emerge. Yet, in general terms, there appears to be no overlap (inconsistency) or ambiguity for the CRC to address in respect of the FLA and parenting orders for children. As a result, it is my view that section 60B(4) of the FLA confers no obvious right to freedom of religion on a child under the CRC. This reasoning in turn suggests that the Family Court might commit an error of law if it were to base a parenting order decision on a child's right to freedom of religion. It follows that, without more specific information as may arise in evidence in a particular custody case, there is a theoretical possibility that the Family Court would consider the best interests of a child by reference to the child having a right to freedom of religion under Article 14.1 of the CRC. It is, however, no more likely than a theoretical possibility.

By way of recap, the legal analysis at this point is about the relationship between the FLA and the CRC and specifically whether the Family Court can consider the right of a child to freedom of religion in respect of a parenting order. I have suggested that the Family Court could not specifically rely on the CRC to find that a Brethren child has a right to freedom of religion because the CRC is not part of Australian domestic law.

This reasoning is not intended to understate the significance of the CRC in Australia. The High Court, Australia's highest court, has commented on the significance of the CRC. For example, Mason CJ and Deane J wrote in *Teoh* that Australia's ratification of the CRC gave rise to a

> legitimate expectation .... [t]hat administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a "primary consideration."

Their Honors' opinion may be contrasted with the judgment of Callinan J in *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) who stated that the CRC was merely "aspirational." Clearly, the CRC is an important touchstone for administrative decision-making. There may also be grounds for the Family Court to use the CRC as a guide to respect a child's rights to freedom of religion for, as the High Court advised in *Teoh*, administrative decision makers can be expected to make decisions that conform with the terms of the CRC.

It does not, however, follow from this brief review of the status of the CRC in Australian law that the Family Court is unable to take a child's religious beliefs into account in relation to assessing and making parenting orders. The significant number of Brethren family law cases in which the Family Court and other Australian courts have grappled with testimony about Brethren religious practices is itself testimony to the fact that Brethren religious matters are an important part of even the existing body of family law jurisprudence in Australia. Further, as will shortly be contended, although there is no reference to religion in the FLA, the FLA itself can and does clearly allow the Family Court to consider questions about the relevance of a child's religious beliefs in respect of parenting orders.

To expand upon this analysis, section 60B(1)(a) of the FLA states that an object of the FLA is to ensure that the best interests of a child are met by both their parents having a meaningful role in the child's life to the maximum extent this is consistent with the child's best interests. The legislative tenets in the FLA supporting the objective in section 60B(1)(a) include the principle that: children have the *right* to know and be cared for by both their parents (FLA, s.60B[2][a] [emphasis added]); children have the *right* to spend time on a regular basis with, and communicate on a regular basis with, both parents and other people significant to their care, welfare and development (e.g., grandparents) (FLA, s.60B[2][b] [emphasis added]); and children have the *right* to enjoy their culture

(FLA, s.60B[2][e] [emphasis added]). These legislative principles do not, however, apply where shared parental responsibility would *not* be in the child's best interests (FLA, s.60B[2]).

These above-mentioned provisions expressly recognized that rights of children are framed as some of the key principles of Pt VII of the FLA (Young 2017, 385) but do not include any right to freedom of religion. This point notwithstanding, section 60B(1)(a) of the FLA states that an object of the FLA is to ensure that the best interests of a child are met by both their parents having a meaningful role in the child's life to the maximum extent this is consistent with the child's best interests. By referring to the *maximum extent the custody arrangement is consistent with the child's best interests*, section 60B(1)(a) of the FLA implicitly recognizes that there are, or may be, limitations on the desirability of parents having a role—equal or otherwise—in their child's life. This view of the scope of section 60B(1)(a) is also consistent with there being a *rebuttable* presumption in the FLA about joint parental responsibility being in the child's best interests (FLA, s.61DA[4]).

In the context of a custody dispute about a Brethren child, the evidence before the Family Court could establish that an order for the ex-Brethren parent to have custody of the child could create mental anguish for the child if the child believes it is "wrong"—for religious reasons—for them to spend time with the parent who has left the Brethren community. The child may feel that their ability to worship as a full member of the faith community is diminished as a result of them having any ongoing contact with their ex-Brethren parent. If the Family Court is satisfied that a shared parenting arrangement is not consistent with the child's best interests because the child would experience guilt by being with an ex-Brethren parent or that such ongoing contact may diminish the quality of the child's religious life (say, their worship), then the Family Court may decide against awarding a shared parenting order. Importantly, the Family could do so within the legislative framework of the FLA (without reliance upon the CRC) and without the Family Court concluding that such an order would undermine the child's *right* to freedom of religion.

Other provisions of the FLA support the view that the Family Court can take into account a child's religious freedoms under the FLA when the Family Court is making a parenting order and that the Family Court can do so without reliance on the CRC. For example, section 60B(1)(a) requires that the involvement of

parents in their child's life is "meaningful." If an ex-Brethren parent's involvement in their child's life could trouble the child's conscience because the child believes for religious reasons that they should have no contact with that ex-Brethren parent, then a joint custody arrangement could be described as less "meaningful" for the child than is required by the statutory connotation of that term. The Family Court could, in such a case, conclude that a joint custody arrangement would not be in the child's best interests because the child's religious experience is more beneficial for the child by that child having contact only with their *Brethren* parent.

It must be said that any sole-parenting order awarded only to a Brethren parent is not a decision that the Family Court could ever reach lightly, for the Family Court must be satisfied that there is enough evidence before the Family Court to rebut the statutory presumption that shared parenting responsibility is in the child's best interests. The Family Court would need to be convinced on the evidence before it that the child's circumstances were exceptional (*Cooper v Cooper* 1977). An additional consideration is that such an order by the Family Court could be hurtful for the parent who has left the faith community. This is not itself a reason for the Family Court to deny making an order for sole parenting in favor of a Brethren parent, for the legislative reference point is the best interests of the *child*. Yet, a parent from whom the Brethren faith community has permanently "withdrawn" itself will have already lost all bonds with their former faith community. As one author puts it,

> excommunication has profound consequences for individuals and families, as community members have no friends outside the movement, but intense mutual reliance and affection within it (Thornthwaite 2011, 55).

An order for sole parenting in favor of the Brethren parent would remove the possibility of the ex-Brethren parent having any connection with their child as a child. The emotional suffering of an ex-Brethren parent who loses all contact with their offspring could, if the child knows of this, also greatly distress the child.

To conclude the reasoning in this section, the absence of any specific reference in the FLA to a child's religious rights would not prevent the Family Court from taking a Brethren child's religious beliefs into account when the Family Court is assessing the best interests of the child. The Family Court could, under the FLA, conclude, based on the evidence before it, that it is more beneficial than not for a Brethren child to *not* spend time with an ex-Brethren parent based on the child's

religious beliefs and, possibly, there being greater religious benefits for the child as a result of the child being able to experience Brethren religious life without any contact with their ex-Brethren parent. This could be because contact with the ex-Brethren parent would cause guilt for the child or because such an order would diminish the quality of the Brethren child's religious experiences as a member of the faith community. Crucially, the Family Court could make such a finding without relying upon Article 14.1 of the CRC and without the Family Court needing to assert that an order of this kind is based on the Brethren child having a *right* to freedom of religion.

Hearing Evidence from Brethren Children

The Family Court is not an inquisitorial body. It must distil evidence based on submissions presented to it by parties presenting potentially contested views. It must also find a way to hear evidence from children—including Brethren children—that is as unthreatening as possible for the children given the litigious context of the proceedings.

The FLA endeavors to ensure that the Family Court can hear the evidence of children with as little inconvenience as is possible for the children in the circumstances and in order to not cause the children unnecessary distress (Shackel 2016, 47). While the Family Court can inform itself of a child's views by reference to a conference ordered pursuant to 11F of the Act, a more common method of the Family Court ascertaining a child's evidence is under a Family Report ordered pursuant to section 62G of the FLA. It is possible for the Family Court to obtain evidence from a child by affidavit, video conference, closed circuit television, or by other electronic means of communication (Rule 15.02, FLA). The giving of evidence by children in oral evidence in court or in the judge's chambers is typically not encouraged (*In the Marriage of Joannou* 1985).

The maturity of a Brethren child is an important consideration in relation to the perspective of that child. Section 60CC(3)(a) of the FLA requires the Family Court to take into account any views expressed by the child and any other factors (e.g., the child's maturity) that the Family Court thinks are relevant to the weight it should give to the child's perspective. The nature of the child's relationship with their parents is relevant (section 60CC[3][b]), as is, for example, the extent

to which the child's parents have been involved in the making of, or in failing to make, long term decisions about the child (section 60CC[3][c]).

As described in section 60CC(3)(a) referred to above, a key factor in the Family Court weighing the evidence of a Brethren child about their religious beliefs would be the child's maturity. The FLA (section 64[1]) previously drew a distinction between children aged 14 years and over, and children under 14. Section 64(1) presumptively required the Family Court to make a decision which was consistent with the wishes of a child who was, due to their age, presumed to be mature. By 1983, however, this legislative principle was abolished because it came to be recognized that rather than empowering children of such an age, the rule placed an undue burden on the children. The Family Court now considers a child's maturity without presuming that the child is mature (or immature) by reference to the age of 14. A child's age (including whether the child is over 14) is not a determinative consideration in respect of the Family Court's assessment of the level of the child's maturity.

Two Key Australian Cases

The cases reviewed in this section are two Family Court decisions (the latter is more accurately described as a series of decisions relating to the one family dispute) about Brethren custody disputes. The first decision reviewed—a case decided by the Full Court of the Family Court—tested an important *constitutional* question about the possible religious freedoms of Brethren children. By contrast, as will be seen, the second case posed seemingly insurmountable evidential and legal challenges for the Family Court about the religious freedoms of Brethren children. The matters the latter case touched on include the kinds of considerations that the Family Court may need to address in future cases about parenting orders for children of Brethren parents (or possibly children in other faith communities) by reference to the legislative framework described in the earlier sections of this article.

The first case to be reviewed in this section—*In the Marriage of Firth; Firth and Firth, Boyer [Intervener]* 1988—involved a custody application for Brethren children. The Full Court of the Family Court heard legal arguments about the possible religious freedoms of two Brethren children to continue to have contact with members of their Brethren faith community. The children who were the

subject of the custody dispute were a girl and a boy, the youngest children of four siblings of Brethren parents. Their parents married in 1965 and separated in 1983 when the mother left the matrimonial home with the couple's eldest child, her daughter. At the relevant times, the family lived in Tamworth, in New South Wales, Australia. The second eldest child—a boy—remained with his father, then lived with his Brethren maternal grandparents and with other relatives, before returning to live with his father. The two youngest children of the marriage (the girl and boy) went into the care of their maternal grandparents and continued in their care and in the Brethren community.

The mother filed an application in the Family Court for custody of her eldest daughter as well as for custody of the two youngest children. By the time the proceedings commenced in the Family Court, the eldest daughter was 18 years old (and living with her mother); as a result, the eldest daughter was by then no longer the subject of any custody application. The mother's application for custody instead then concerned only the two younger children who remained in the care of their maternal grandparents. Upon the husband being served with writs for custody, the husband brought the proceedings to the attention of the maternal grandparents. They then intervened in the legal proceedings and sought orders for themselves to have custody of the two youngest children, with access to the children to also be available to the husband and the wife.

At first instance, Cook J in the Family Court dismissed the grandparents' applications and granted sole guardianship of the two youngest children to the mother. Cook J decided *inter alia* that, for at least 12 months, the father, maternal grandparents, and members of the Brethren community could have no access to the children without the mother's written consent. The grandparents lodged an appeal with the Full Court and sought an order for joint access to the two children with reasonable access to be granted to the children's mother. The father responded by filing a cross-appeal, pleading that the grandparents should have custody of the children with reasonable access to himself or, in the alternative, that he should have sole guardianship of the children with reasonable access to the grandparents. The father later conceded that, if the grandparents had custody of the children, then their mother should also have access to the children.

Before the Full Court of the Family Court, the appellants (the maternal grandparents) contended that Cook J's decision in the first instance to suspend access between the children and the Brethren faith community prevented the

children from pursuing the children's religious beliefs. The grandparents submitted that the trial judge had given insufficient weight to the children's desire to continue in their faith and that his Honor had not adequately considered the disruptive effects of change upon the children as a result of his Honor's orders.

The grandparents couched their submissions before the Full Court in terms of the religious freedoms of the children, and they sought to make out their case on constitutional grounds. Section 116 of the Constitution of the Commonwealth of Australia ("Constitution") prohibits the Commonwealth from making laws for proscribed purposes, including for prohibiting the free exercise of religion. In order to make this constitutional argument, the appellants had to persuade the Full Court that Cook J's orders at first instance were a law of the Commonwealth and were for prohibiting the children's free exercise of religion. They contended in this regard that Cook J's order to suspend access between the children and members of the Brethren faith community contravened section 116 of the Constitution by preventing the children from freely pursuing their religious beliefs. The grandparents also pleaded that the courts must adopt a neutral position with respect to religion (not preferring one religion against the other) and that Cook J, had *not* been neutral in his Honor's decision-making.

If these constitutional arguments were to be successful, then the Full Court of the Family Court would have had to accept the appellants' contention that Cook J's judgment amounted to a law made by the Commonwealth and that his Honor's orders were for prohibiting the children from freely exercising their religion. The Full Court of the Family Court rejected these arguments. It held that Cook J's orders did not breach section 116 of the Constitution. Its reasoning in rejecting the appellants' section 116 claim was consistent with the High Court's interpretations of section 116 of the Constitution (see, e.g., *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* 1943), including judgments that section 116 applies only to the making of Commonwealth legislation (*Attorney General [Vic]; Ex rel Black v Commonwealth* 1981 [Barwick CJ]), and therefore would not constitutionally govern a judicial decision. According to this reasoning of the High Court, judicial orders could not amount to the making of a Commonwealth law as contemplated by section 116. Accordingly, there would be no scope for any applicant for a parenting order under the FLA to successfully argue that a parenting order of the Family Court infringes a constitutional freedom by limiting a child's free exercise of religion.

The decision of the Full Court in *In the Marriage of Firth; Firth and Firth, Boyer [Intervener]* (1988) may be contrasted with the proceedings in the Family Court in *Peter & Elspeth* (2009), a protracted custody dispute also involving Brethren children. Such is the significance of *Peter & Elspeth* in Australian family law that it is necessary to trace this decision to its roots.

The review of this case therefore begins with the earlier case of *Elspeth & Peter* (2006) involving the same disputing parents as in *Peter & Elspeth*. Elspeth and Peter married in May 1977 and separated in February 2003. Both were members of the Brethren community in Tasmania. Over the course of their 25-year marriage, the two parents had eight children, all raised as Brethren. The father came to want to leave the Brethren community for the less restrictive Open Brethren group. In early 2003, the father left the Brethren community to live in a *de facto* relationship, and he chose to no longer follow the Brethren tenets. The father's decision to leave the Brethren precipitated the parties' separation and divorce, which led to the protracted custody litigation in the Family Court in respect of three (L, J and C), and, as time passed, and the children grew older, only the two (J and C) youngest children of the marriage.

Benjamin J in the Family Court of Australia in 2006 in *Elspeth & Peter* adjudged that it was in the three youngest children's best interests to continue living with their mother while spending time separately with their father. His Honor observed that the lives of the children were steeped in the Brethren religious beliefs and attitudes (361). Despite his awarding joint custody, Benjamin J accepted the evidence of a sociologist (whose qualifications, including as a counsellor and mediator were not challenged) that the behavior of certain family members and other members of the group in counselling the children to only *tolerate* spending time with their father amounted to psychologically cruel and abusive *behavior* towards the children (239). This finding by his Honor was not overturned in the later court cases.

Three years after Benjamin J's decision, Brown J in the Family Court decided the case of *Peter & Elspeth*. By this time, there were only two children of the former marriage below the age of 18 who were then the subject of the custody proceedings: J (aged 15) and C (aged 10). In the time since the original decision of Benjamin J, the father had commenced proceedings against the mother and others whom he alleged facilitated contraventions of the Family Court's orders. Benjamin J found these claims proven; however, the Full Court of the Family

Court later quashed the convictions except in respect of the mother, whose conviction stood. By the time the Full Court of the Family Court made these decisions, the children's mother had been diagnosed with a recurrence of breast cancer and she was critically ill. The Full Court of the Family Court required the mother to pay costs, but it imposed no other sanction on her.

In contrast to Benjamin J's judgment in 2006, Brown J in 2009 awarded *sole custody* to the mother of the two youngest children. A consideration central to her Honor's reasoning in the 2009 decision was that, if the children were to live with their father, they would be exposed to influences and practices that were contrary to the children's beliefs and those of their mother, siblings, extended family, and friends (211). Brown J considered that exposing the children to such influences would be distressing for them (213). Her Honor also held that the continuation of litigation after the mother's diagnosis of breast cancer in 2007 had driven the two youngest children further from their father (213). Brown J could find no benefit to the children in her Honor making orders which required them to spend time with their father, and her Honor could conceive of no prospect of the children having a meaningful relationship with him in the foreseeable future (221).

A critical issue to emerge from the judgment of Brown J was the weight to be given to the intentions of an ex-Brethren parent (in this case, the father) who wishes to instruct their child/children about the possible alternatives to life within the Brethren community. Related to this question was the relevance of the children's religious freedoms and the nature of these freedoms. The father in *Peter & Elspeth* was candid about his wanting to show his children other ways of life and of his intention to release them from what he described as the Brethren community's "clutches" (209). The father was, nevertheless, prepared to accommodate the children's Brethren beliefs and practices, at least to an extent. For example, the father said he would encourage the children to continue with their Sunday Bible readings and potentially that he would let them go to Sunday School (141). Yet, the father would not countenance his children attending Brethren meetings (although he was happy for the children to enjoy social interactions before and after the meetings) because, he said, he was concerned that the children would listen to messages of indoctrination against him (141).

To further complicate matters, it appears that the father had understood, correctly, that his children would probably not want to see him if they had a choice

(161). The next eldest sibling of J and C (their sister L) made L's views clear about *not* wanting to see her father in a note she gave to her mother on 1 June 2007 which referred to the father's "itchy, bitchy, witchy, fitchy house" (111). While conceding that his children would not choose to see him if they had a choice, the father nevertheless contended that no weight should be put on the views expressed by his children as, he said, the views were a product of Brethren indoctrination (157).

The father's contention about his children's "brainwashing" belied the father's suspicions about the Brethren community's potentially covert methods, a claim seemingly difficult for Brown J to accept given the father *had been* with the group for 40 years (17). Her Honor accepted that the two younger Brethren children were "heavily influenced" by their older siblings and that it was not realistic to expect the children to oppose the views of the older siblings and the teachings of their church (159). Brown J also adjudged that, unless the views of the older siblings changed, it was unlikely that J and C's views would alter "at least in the foreseeable future" (159).

Brown J appeared to describe a contest between the choices of the father to restrict C's activities in the Brethren faith (i.e., to impose *his* choices on *her*) and the 10-year-old C's competing choice to maintain her commitment to her faith, that is to exercise her religious freedom (159). The evidence before Benjamin J in the earlier Family Court hearings had suggested that, if the children left the group to be with the father, then it was unlikely that they would be "withdrawn from," *but* they would not be able to fully partake in Brethren fellowship (93). Brown J acknowledged the Brethren group's aspiration that children in the faith not be exposed to worldly influences and that the children not become friends with non-Brethren children (160). The father pressed the Family Court to recognize the benefits to the children of their experiencing ways of life other than those in the Brethren community. Her Honor, however, rejected the father's submissions about the benefits for the children of their experiencing another way of life.

The circumstances of the children's tragically ill mother made Brown J's task of adjudicating this matter particularly difficult for the Family Court. Denying the children exclusive contact with their mother during the final stages of her life could have caused great distress for the children irrespective of the children's religious beliefs. Yet, the earlier evidential finding by Benjamin J stood unrefuted: there was evidence of psychologically abusive behavior towards the

children by some family members and other members of the Brethren community (*Elspeth & Peter* 239). Brown J's decision seemed to not to take that behavior into consideration.

Central to the Family Court's assessment of the best interests of the children in *Peter & Elspeth* was the Family Court's concern about the children being exposed to influences outside the Brethren faith community that would conflict with their religious beliefs. Brown J appeared to be specifically concerned that the children's contact with their father could lead to the children having less than full participation in the practice of religious worship. The father was concerned that the children's experience of life would be less rich by their remaining in the faith community than if the children experienced life outside the group. Brown J did not expressly reject the father's contentions in the following terms, but the father's argument did the children something of a disservice. Adults who voluntarily leave a faith community and then claim to fear their children will be "brainwashed" if the children remain in the faith group, likely have a weak case. Children are rarely entirely passive agents; they grow up into adults and may then have an opportunity, or experience the right circumstances, to test the group's doctrines just as the parent did themselves. The parent in such a case has proved to their children that it is possible for their children to exercise their own religious freedom (however that concept is described) as an adult. These freedoms include the freedom to make choices, to leave the religion, to choose another religion, or invent a new one. The parent is living proof of how their children can, as adults, make free choices.

Implications for the Brethren and Other Faith Communities

This article has focused on parenting orders in respect of the children of Brethren parents. It has not reviewed family law cases about children in other religious communities, nor has this research examined family law decisions other than in Australia. The analysis in this article may nevertheless have implications for other faith groups, whether these communities be in Australia or elsewhere. An exclusive religious community that shuns a person for what the group believes to be that members' sinfulness may lead to the child of that person not wanting contact with their parent. The child may believe that it is sinful/wrong to have contact with anyone from whom their faith community has withdrawn itself. The

child (and their faith community) may believe that the child's contact with such an outsider (albeit their parent) will diminish the quality of the child's religious experience in the group.

More generally, children in any exclusive faith community, whether the Brethren or otherwise, emblematize renewal. Their very presence in such a group implies that the faith community has rejuvenating foundations, the kind of growth that can withstand a schism in a specific household. Retaining children in a faith community may be seen as countering the implication of the community's declining relevance and, potentially, its dwindling numbers. These considerations may, in turn, make a specific family law dispute more significant for the faith community than is apparent from the sum of the parts in the dispute. The faith community may fight hard to retain its children. It may fund the costs of a protracted, difficult, and expensive legal dispute. It may be difficult for courts to distinguish the religious interests of a child from those of the members of the group that perceives there to be a need for the child to remain in it.

Future cases in Australia and elsewhere may challenge, or distinguish, the arguments in this article that the FLA (or the CRC) does not confer upon a child any right freedom of religion in respect of parenting orders under the FLA. So, too, may scholars. There may be greater latitude for courts outside Australia, where other laws apply, to recognize legal *rights* of children to freedom of religion. Different jurisdictions or distinguishable circumstances may allow courts to give greater weight to legal contentions about the religious rights of children. Faith communities such as the Brethren may agitate for courts to recognize children's rights in family law matters. These groups' concerns may, over time, result in the faiths engaging in even more aggressive efforts to recognize children's rights to freedom of religion in family law cases.

References

Adhar, Rex, and Ian Leigh. 2005. *Religious Freedom in the Liberal State*. Oxford and New York: Oxford University Press.

Bates, Frank. 1974. "The Problem of Access." *The Australian Law Journal* 48:339–45.

Bates, Frank. 1983. "The Problem of Access." *The Australian Law Journal* 57:343–53.

Doherty, Bernard. 2012. "Quirky Neighbors or the Cult Next-Door? An Analysis of Public Perceptions of the Exclusive Brethren in Australia." *International Journal for the Study of New Religions* 3(2):163–211.

Doherty, Bernard. 2013. "The 'Brethren Cult Controversy': Dissecting a Contemporary Australian 'Social Problem.'" *Alternative Spirituality and Religion Review* 4(1):25–48.

Jones, Melinda. 1999. "Myths and Facts Concerning the Convention on the Rights of the Child in Australia." *Australian Journal of Human Rights* 5(2):126–49.

Parkinson, Patrick. 2012. "The Family Law Act and the UN Convention on Children's Rights: A New Focus on Children?" Right Now: Human Rights in Australia. Accessed February 9, 2021. https://bit.ly/3q3YAFw.

Shackel, Rita. 2016. "The UN Convention on the Rights of the Child: Tracing Australia's Implementation of Provisions Relating to Family Relations." In *The Rights of the Child in a Changing World: 25 Years after The UN Convention on the Rights of the Child*, edited by Olga Cvejić Jančić, 37–60. Cham: Springer.

Thornthwaite, Louise. 2011. "Separatist Religious Sects, the Family Law Act and Shared Parenting: An Examination of Eases involving the Exclusive Brethren." *Australian Journal of Family Law* 25:54–72.

Young, Lisa. 2017. "Children and Family Law." In *Children and the Law in Australia*, 2nd edition, edited by Lisa Young, Mary Anne Kenny, and Geoffrey Monahan, 379–405. Chatswood, NSW: Lexis-Nexis Butterworths.

Court Cases

Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth [1943] 67 CLR 116.

Attorney General [Vic]; Ex rel Black v Commonwealth [1981] 146 CLR 559.

Cooper v Cooper [1977] FLC 90–234.

Elspeth & Peter [2006] FamCA 1385.

Ex Parte Paul; Re Paul [1963] NSWR 14.

Gronow v Gronow [1979] 144 CLR 513.

H v H [1998] FamCA 7.

Horman, in Marriage of [1976] 5 FamLR 796.

In the Marriage of Firth; Firth and Firth, Boyer [Intervener] [1988] 12 FLR 547.

In the Marriage of Grimshaw; Arkcoll (Intervener) [1981] 8 Fam LR 346.

In the Marriage of Joannou [1985] FLC 91–642.
In the Marriage of PLOWS [1979] 5 Fam LR 590.
Masson v Parsons [2019] 93 ALJR 848.
Mauger v Mauger [1966], 7 FLR 485; on appeal (1966) 10 FLR 285.
Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] 78 ALJR 737.
Minister of State for Immigration and Ethnic Affairs v Teoh [1995] 183 CLR 273.
Peter & Elspeth [2009] FamCA 551.