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WITNESSES ON TRIAL: JUDICIAL INTRUSION UPON THE PRACTICES OF JEHOVAH'S WITNESS PARENTS

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I. INTRODUCTION

RELIGION is at the heart of many basic attitudes and values. Recognizing this, the United States Constitution guarantees that American citizens shall be free to pursue their chosen religion.\(^1\) Additionally, in Florida, there is a fundamental right of privacy in article I, section 23 of the state constitution, which appears to further strengthen a citizen's right to adhere to his or her preferred faith.\(^2\) This section provides "an explicit textual foundation for those privacy interests inherent in the concept of liberty,"\(^3\) of which religion is an integral part. The Florida Supreme Court has recognized that "the term '[p]rivacy' has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interests."\(^4\) This qualification indicates that free exercise rights are not unlimited. Courts have often drawn a distinction between the right to hold religious beliefs and the right to act upon them. The United States Supreme Court first expressed this belief-action dichotomy in Reynolds v. United States.\(^5\) In Reynolds, the Court affirmed a Mormon's conviction for polygamy despite his contention that his actions were compelled by religious beliefs.\(^6\) The Court reasoned that "'[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.'"\(^7\)

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2. Article I, section 23 provides, inter alia, that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life . . . ." FLA. CONST. art. I, § 23.
4. In re Guardianship of Browning, 568 So. 2d 4, 9-10 (Fla. 1990).
5. 98 U.S. 145 (1878).
6. Id. at 166-67.
7. Id. at 166. This doctrine is still utilized today. See, e.g., Bowen v. Roy, 476 U.S. 693, 702 (1986)(holding that the statutory requirement that applicants obtain and provide a Social Security number as a condition for receiving food stamps and welfare benefits does not violate
Courts have often recognized the belief-action dichotomy in cases involving children. For example, in *Kirchner v. Caughey*, the Maryland Court of Appeal held that:

> When the welfare of a child is threatened . . . the task of [governmental] intervention cannot be avoided, and under some circumstances actions based upon the sincerely held religious beliefs of one parent or both parents must give way to the safety and welfare of the child. When the life or physical safety of a child is threatened, a tenuous balancing between religious freedoms and the exercise of state authority is necessarily made. As the threat to the child diminishes, this balancing of interests becomes more difficult.

Religion and the numerous practices dictated or motivated by religion permeate issues concerning the welfare of children and their upbringing by religious parents. Religious beliefs held by some parents may appear unusual or foreign to many others outside of that religion. Indeed, numerous cases regarding the impact of a parent’s religion on a child have involved Jehovah’s Witnesses. The courts and much of the general population have found it difficult to accept or ignore the religious practices of Jehovah’s Witnesses, even when the effect of such practices on Jehovah’s Witnesses’ children is too speculative or insufficient to allow an impairment of religious freedom by the courts.

Although there are many issues surrounding the Jehovah’s Witness faith, the scope of this article will be limited to a discussion of the judicial interference Jehovah’s Witnesses face in maintaining their religious objections to blood transfusions and in exercising their right to raise their children in the faith. This Comment will first set forth some basic tenets of the Jehovah’s Witness faith. Second, it will examine how courts treat adult Witnesses when they refuse blood transfusions for themselves as well as how courts evaluate their status as parents in determining whether a transfusion should be ordered. Third, this Comment will look at how courts evaluate a parent’s status as a Jehovah’s Witness.
vah's Witness when settling child custody disputes. Finally, this Comment will propose several guidelines for future decisions involving Jehovah's Witnesses, concluding that they should be able to adhere to the principles of their chosen faith and raise their children accordingly without interference from courts, which appear to view Witnesses with skepticism.

II. TENETS OF THE FAITH

Since 1876, Jehovah's Witnesses have believed that they are living in the "last days," which will culminate in the Battle of Armageddon, when Christ will return to set up his earthly kingdom. Jehovah's Witnesses typically refuse blood transfusions based upon what they believe to be the Bible's prohibition against "eating blood." Witnesses reason that because a blood transfusion is an intravenous feeding, it is identical to "eating blood," a practice they strongly believe the Bible forbids. Other beliefs of Jehovah's Witnesses include:

a) One should not salute the flag;
b) Birthdays, Christmas and national holidays should not be celebrated;
c) All governments are under the control of Satan;
d) All other religions are false religions;
e) All governments and false religions stand in the way of world peace;
f) All military bodies are instruments of the devil; and

13. Id. at 212 n.11.
14. See Genesis 9:4 ("But flesh with the life thereof, which is the blood thereof, shall ye not eat"); Leviticus 3:17 ("By a perpetual law for your generation, and all your habitations, neither blood nor fat shall you eat at all"); Acts 15:29 ("That you abstain from things sacrificed to idols, and blood"). Jehovah's Witnesses reject the argument that these passages are dietary laws, and discuss their opposition to blood transfusions in their religious publications. For example: Is It Cannibalism?

Today people in "civilized" lands shudder in horror at reports of cannibals drinking human blood in various parts of the world, but they take it as altogether different for themselves to receive transfusions of human blood into their physical systems . . . .

His [Jesus Christ's] followers get the benefit of his shed blood, not by a blood transfusion, but by exercising faith in the value of his blood.

g) No life-threatening physical force should ever be used.\textsuperscript{13} Additionally, members are strongly counseled against allowing their children to participate in sports or other extracurricular activities with people outside of the congregation, including organizations such as Boy Scouts or Girl Scouts.\textsuperscript{16} Jehovah’s Witnesses also are taught that higher education is only for purely vocational purposes; that there is only one true holiday, that being the memorial of the death of Christ; and that patriotism is divisive.\textsuperscript{17} These are some of the fundamental tenets of the Jehovah’s Witness faith and the ones most likely to be raised against them in a legal battle.

III. The Jehovah’s Witness Patients’ Right to Self-Determination Regarding the Receipt of Blood Transfusions

Although the state clearly has a substantial interest in preserving the life of its citizens, that interest is not an unswerving mandate.\textsuperscript{18} This limitation follows from the fundamental premise that everyone has the inherent right to control their own person.\textsuperscript{19} An integral part of this individual autonomy is “the right to make choices pertaining to one’s health, including the right to refuse unwanted medical treatment.”\textsuperscript{20} This right of refusal encompasses all medical choices.\textsuperscript{21} A competent individual has a constitutionally protected right to refuse medical treatment regardless of his or her medical condition.\textsuperscript{22} Courts

\textsuperscript{15} Waites, 567 S.W.2d at 328-29. In the past, Jehovah’s Witnesses have been involved in notable court cases to defend their religious beliefs and practices. See West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)(Jehovah’s Witnesses objecting on religious grounds to a requirement that their children salute the flag in public school); Wooley v. Maynard, 430 U.S. 705 (1977)(Jehovah’s Witnesses objecting on religious grounds to required display of phrase “Live Free or Die” on New Hampshire license plate).


\textsuperscript{17} Id.

\textsuperscript{18} St. Mary’s Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. 4th DCA 1985).

\textsuperscript{19} See In re Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990)(“Every human being of adult years and sound mind has a right to determine what shall be done with his . . . own body.” (citing Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914))).

\textsuperscript{20} Id. at 10.

\textsuperscript{21} Id. Traditionally, the law has preserved a patient’s right to self-determination, even in life or death situations. See In re C.A., 603 N.E.2d 1171, 1177 (Ill. App. Ct. 1992). Courts have long recognized the right of a patient to determine what medical procedures they will undergo. See, e.g., Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 277 (1990); Schloendorff, 105 N.E. at 93.

\textsuperscript{22} See Public Health Trust v. Wons, 541 So. 2d 96, 97-8 (Fla. 1989); see also Cruzan, 497 U.S. at 279 (“If for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”). Furthermore, a competent adult patient, who is suffering from a terminal illness
have generally regarded the subjective desires of competent adults to forego medical treatment as dispositive. As previously noted, however, an individual’s express religion-based wishes may be strictly evaluated and sometimes overridden if the court is concerned about the welfare of innocent third parties, such as minor or unborn children.

A. Prevented from Keeping the Faith in Florida: Jehovah’s Witnesses Being Transfused Against Their Will

Members of the Jehovah’s Witness faith have endured numerous intrusions by the Florida judicial system in their struggle to refuse blood transfusions on religious grounds. In Wons v. Public Health Trust, a married Jehovah’s Witness woman with three children was admitted to the hospital with a uterine condition from which she would have likely died without a blood transfusion. Wons refused the transfusion on the grounds that it violated her religious principle against receiving blood from outside her body. When Wons refused to give consent, she was conscious and, according to her doctor, able to make an informed decision. Wons’ husband supported her decision, and was prepared, in the event of her death, to care for their children with the assistance of other family members. Nonetheless, and has no minor dependents, has a constitutionally protected right to refuse or discontinue extraordinary medical treatment where all affected family members consent. Satz v. Perlmutter, 379 So. 2d 359, 360 (Fla. 1980). The landmark case concerning the right to refuse medical treatment is In re Quinlan, 355 A.2d 647 (N.J.), cert. denied sub nom., Garger v. New Jersey, 429 U.S. 922 (1976). There is a difference, however, between asserting a right to die, as in In re Quinlan, and refusing life-saving medical treatment, as in the case of In re E.G., 549 N.E.2d 322 (Ill. 1989), where death was not a desired outcome, but rather a consequence. The issue presented in In re E.G. was whether a mature minor, approaching her eighteenth birthday, had a constitutionally protected right to refuse life-saving medical treatment. Id. at 324. For a detailed description and analysis of this case, see William D. Brewster, Note, In re E.G., A Minor: Death Over Life: A Judicial Trend Continues as the Illinois Supreme Court Grants Minors the Right to Refuse Life-Saving Medical Treatment, 23 J. MARSHALL L. REV. 771 (1990).

23. Browning, 568 So. 2d at 11 ("[A] competent person has the constitutional right to chose or refuse medical treatment, and that right extends to all relevant decisions concerning one’s health."). The Florida Supreme Court found no reason to qualify this right based on the type of treatment being refused by the patient. Id. at 11 n.6.

24. See In re Application of Jamaica Hosp., 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985), concerning a pregnant patient’s refusal to consent to a blood transfusion based on her religious beliefs. The patient, whose condition was critical from loss of blood, was eighteen weeks pregnant and the mother of ten children. Id. at 899. Her only next-of-kin, a sister, could not be contacted. Id. In authorizing the transfusion, the judge based his decision primarily on the state’s interest in protecting the welfare of the fetus and the woman’s minor children. Id. at 900.

25. 500 So. 2d 679 (Fla. 3d DCA 1987), aff’d, 541 So. 2d 96 (Fla. 1989).


27. Id.

28. Id.

29. Id.
the circuit court granted the Health Trust’s petition to force Wons to undergo a blood transfusion while she was unconscious.\textsuperscript{30} When Wons regained consciousness after the transfusion, she appealed to the Third District Court of Appeal, which reversed the order.\textsuperscript{31} After holding that the issue was not moot, as Wons’ condition might recur, the district court held that Wons’ constitutional rights of freedom of religion and privacy could not be overridden by the state’s purported interests.\textsuperscript{32}

The Florida Supreme Court affirmed the district court’s ruling,\textsuperscript{33} and in so doing adhered to the terms of their decision in \textit{Satz v. Perlmutter}.\textsuperscript{34} In \textit{Satz}, the court adopted four criteria established by the Fourth District Court of Appeal for determining when the right to refuse medical treatment may be overridden by a compelling state interest.\textsuperscript{35} These factors are:

1) preservation of life;
2) protection of innocent third parties;
3) prevention of suicide; and
4) maintenance of the ethical integrity of the medical profession.\textsuperscript{36}

The \textit{Wons} court evaluated these factors in light of the competing interests of Wons’ fundamental right to practice her religion, her constitutionally protected right of privacy,\textsuperscript{37} and the state’s substantial

\textsuperscript{30} \textit{Id.} The circuit judge reasoned as follows:
I’m going to now take judicial notice of another fact which has not been expressed. I’ll take judicial notice of the fact that, in my opinion, the two children here, one 12 and one 14, would be denied an intangible right they have to be reared by two loving parents, and not one, and I’ll take judicial notice of the fact that for the most part the love and the parentage of two parents is far better than one, and that we would end up therefore with better citizens.

I recognize the law, and I know what the law says. You have a competent adult. She has refused to take blood and she has a right to do so. The only way that we can obviate that right that’s guaranteed to her by the privacy of the right of the Constitution of this state is to find an overriding interest, or overriding reason. I’m going to tell you straight out, and it may not be a popular decision, but I think that the right of these two children to be reared by two parents is an overriding reason.

\textit{Wons}, 500 So. 2d 679, 683 (Fla. 3d DCA 1987). Thus, the circuit judge appeared to base his ruling on personal distaste for both Wons’ decision and the religion which mandated it.

\textsuperscript{31} \textit{Id.} at 679.
\textsuperscript{32} \textit{Id.} at 683.
\textsuperscript{33} Public Health Trust v. Wons, 541 So. 2d at 96.
\textsuperscript{34} 379 So. 2d 359 (Fla. 1980).
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. 4th DCA 1978). In \textit{Wons}, the Florida Supreme Court was careful to point out that the \textit{Satz} factors are not a bright-line test, but rather mere evaluative criteria. \textit{Wons}, 541 So. 2d at 97. For another example of how the \textit{Satz} factors have been applied, see St. Mary’s Hosp. v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985).
\textsuperscript{37} See \textit{FLA. CONST.} art. I, § 23.
interest in maintaining both Wons' life and protecting innocent third parties, in this case her children, aged twelve and fourteen. In making its determination, the court stated that "[w]hile . . . the nurturing and support by two parents is important in the development of any child, it is not sufficient to override fundamental constitutional rights," and found that "the state's interest in maintaining a home with two parents for the minor children does not override Wons' constitutional rights of privacy and religion."

Despite the Wons decision, in situations where an individual has not clearly expressed his or her belief against blood transfusions and the individual's family refuses to consent, judges often will authorize an emergency blood transfusion based on the state's interest in preserving life. For example, in In re Dubreuil, Patricia Dubreuil, a Jehovah's Witness, was admitted to the hospital for an emergency cesarean section. Dubreuil had a severe condition that prevented her blood from clotting, and transfusions were required to save her life during the surgical procedure. At the time of the emergency, Dubreuil was separated from her husband, who was not a Jehovah's Witness and who did not accompany his wife to the hospital. In addition to the newborn baby, the Dubreuils had three other children, aged twelve, six, and four. Dubreuil, her mother, and a spiritual advisor from the church were strongly opposed to any blood transfusions. Given this

38. Wons, 541 So. 2d at 96.
39. Id. at 97.
40. Id. at 98. In so holding, the Florida Supreme Court adopted the district court's logic and restated its reasoning for overturning the order:

Central [to cases such as this] is a delicate balancing analysis in which the courts weigh, on the one hand, the patient's constitutional right of privacy and right to practice one's religion, as against certain basic societal interests. Obviously, there are no preordained answers to such problematic questions and the results reached in these cases are highly debatable. Running through all of these decisions, however, is the courts' deeply imbedded belief, rooted in our constitutional traditions, that an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable governmental interference. Surely nothing, in the last analysis, is more private or more sacred than one's religion or view of life, and here the courts, quite properly, have given great deference to the individual's right to make decisions vitally affecting his private life according to his own conscience. It is difficult to overstate this right because it is, without exaggeration, the very bedrock on which this country was founded.

Id. (quoting Wons v. Public Health Trust, 500 So. 2d 679, 687-88 (Fla. 3d DCA 1987)).

41. 603 So. 2d 538 (Fla. 4th DCA 1992), cert. granted, 613 So. 2d 3 (Fla. 1993).
42. Id. at 539.
43. Id.
44. Id. When contacted, Mr. Dubreuil signed the consent forms for the transfusions. Id. Mrs. Dubreuil's brothers also favored the transfusions. Id.
45. Id.
46. Id.
opposition, the hospital petitioned the circuit court for an emergency declaratory judgment authorizing it to perform the necessary transfusions.47 The court granted the hospital’s request, and Dubreuil was immediately given a blood transfusion.48

What appears to distinguish Dubreuil from Wons is that neither Dubreuil, her estranged husband, nor her mother offered any testimony regarding what would become of the minor children upon Dubreuil’s imminent death.49 Without a satisfactory demonstration that the children would be adequately cared for, the court found that the state’s interests in preserving the welfare of innocent third parties — here the four minor children — outweighed Dubreuil’s desire to control the course of her medical treatment.50 This case is currently on appeal to the Florida Supreme Court.51

B. Judicial Determinations of When, if Ever, a Blood Transfusion to an Adult Jehovah’s Witness Should Be Required

The underlying problem in most cases involving Jehovah’s Witnesses is that “[n]o blanket rule is feasible which could sufficiently cover all occasions in which this situation will arise.”52 Thus, hospitals that wish to contest a patient’s refusal of treatment will have “to commence court proceedings and sustain the heavy burden of proof that the state’s interest outweighs the patient’s constitutional rights . . . .”53 By the same token, hospitalized Jehovah’s Witnesses

47. Id.
48. Id. at 540.
49. Id. at 540-41. The court in Dubreuil did not interpret Wons as placing an insurmountable burden of proof in the way of the court’s ability to exercise its discretion in overriding the wishes of a devoutly religious individual, especially in an emergency situation. Id. at 541.
50. Id.
51. In re Dubreuil, 613 So. 2d 3 (Fla. 1993). The court should take this opportunity to decisively state whether a Jehovah’s Witness parent can lawfully refuse blood transfusions regardless of whether the parent can demonstrate that their minor children will be cared for in the event the parent dies. A case similar to Dubreuil, in that it was an emergency proceeding, is St. Mary’s Hosp. v. Ramsey, 465 So. 2d 666 (Fla. 4th DCA 1985). In that case, a circuit judge upheld a patient’s right to refuse a blood transfusion even though the patient might have died within a few hours without it. Id. at 667. The patient, a Jehovah’s Witness, was twenty-seven years old, had kidney disease, and believed that ingestion of whole blood products would deny him both resurrection and eternal salvation. Id. at 668. The decision was affirmed by the Fourth District Court of Appeal. Id. at 669. See also In re Estate of Dorone, 502 A.2d 1271 (Pa. Super. Ct. 1985), aff’d, 534 A.2d 452 (Pa. 1987); University of Cincinnati Hosp. v. Edmond, 506 N.E.2d 299 (Ohio Com. Pl. 1986). In both Dorone and Edmond, Jehovah’s Witnesses arrived at the hospital unable to express their objections to receiving blood transfusions. The courts in both cases declined to honor the individuals’ beliefs, as expressed by their families, based on the state’s overriding concern in preserving life.
52. Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989).
53. Id.
cannot be certain that their wishes will be followed in the event they lose consciousness or approach death. Moreover, the chance that they will receive blood transfusions against their will increases significantly if they are parents of minor children. Such a result is unacceptable. All patients of sound mind should have the freedom to refuse undesired medical treatment, regardless of their reasons for doing so. Courts should not evaluate what constitutes a justifiable reason for refusing treatment. That determination must be left to the individual.

It is, no doubt, a truism that the doctrine of *parens patriae* properly seeks to prevent the abandonment of minor children. Courts, however, should not use this doctrine to override the wishes of a devoutly religious parent whose decision to refuse medical treatment is potentially life-threatening. Additionally, courts should not underestimate the value to children of knowing their parent stands behind his or her religious or moral convictions, even when such action might result in death. What is most disturbing about these cases is that trial court judges appear to base their opinions upon their own personal dislike of the Jehovah’s Witnesses’ decision to refuse life-saving medical treatment. This type of bias must be eliminated, and the patient’s will regarding his or her own body should be respected.

The courts’ readiness to impose blood transfusions upon Jehovah’s Witness parents against their will in order to ostensibly further the best interests of their children is not the only judicial intrusion Witnesses are forced to endure. These parents are often required to vigorously defend their faith in court in order to maintain custody of their children and raise them according to their chosen religion.

IV. THE JEHOVAH’S WITNESS PARENTS’ UPHILL CLimb TO GAIN CUSTODY OF THEIR CHILDREN AND RAISE THEM IN THE FAITH

As a general principle, parents have the freedom to raise their children as they see fit. This freedom includes the right to educate and

54. Clearly, in cases involving patients who are suicidal or otherwise mentally ill, steps often must be taken to ensure the individual’s safety and the safety of others around them, even if the patient resists treatment or assistance. However, a distinction must be drawn between these types of situations and ones involving the deliberate, conscious exercise of an adult individual’s religious or other deeply-held beliefs.

55. This principle holds that the state must care for those who cannot properly care for themselves, such as minors or the insane. *BLACK’S LAW DICTIONARY* 1114 (6th ed. 1990).

56. *Wons*, 541 So. 2d at 98 (Ehrlich, C.J., concurring) (stressing the importance that there would be no abandonment since other members of the family were available to care for the children in the event of Mrs. Wons’ death).

57. *Wons* v. Public Health Trust, 500 So. 2d 679, 688 (Fla. 3d DCA 1987), aff’d, 541 So. 2d 96 (Fla. 1989).

58. See *e.g.*, *id.* at 679.

59. See *infra* notes 58-70 and accompanying text.
expose children to religion in accordance with the parents' own beliefs.60 The hesitancy of courts to interfere with the free exercise rights of families is exemplified in Wisconsin v. Yoder,61 in which the United States Supreme Court upheld the rights of Amish parents to keep their children out of school in derogation of a state statute.62 The Court accepted the Amish parents' contention that compelling school attendance until their children reached age sixteen violated their free exercise rights.63 Thus, Yoder illustrates the limits of the doctrine of parens patriae regarding the religious upbringing of children.

In custody disputes, however, the ability of a parent to direct the child's religious upbringing appears to be abrogated because, ostensibly, a court’s paramount concern is for the best interests of the child, rather than the rights of the parents.64 It has been judicially noted that "[f]ew areas of dispute in child custody and visitation cases are more fraught with difficulty than those involving differences in the religious beliefs of the divorced parents."65 Furthermore, these types of disputes are exacerbated by the judiciary's lack of moral and legal authority to prefer or choose one religion over another.66

When considering custody or visitation disputes, courts should require a clear showing that a parent's religious beliefs have been or are likely to be harmful to the child before judicially interfering with those religious practices.67 At least one court has held that "[w]hen the evidence is sufficient to demonstrate the need for intervention, the remedy should be that which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the

60. See Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); see also West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)(holding that parents have the right to ensure that their children are not forced to violate their religion's tenets while at school); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)(affirming the parental right to direct the upbringing and education of children).
61. 406 U.S. at 205.
62. Id. at 234.
63. Id.
65. Hanson v. Hanson, 404 N.W.2d 460, 463 (N.D. 1987).
66. See Waites v. Waites, 567 S.W.2d 326, 332 (Mo. 1978) ("We can not, under the system of law which we are appointed to administer, look at that [and choose one religion over the other]. The state of which we are citizens and officers, does not regard herself as having any competency in spiritual matters . . . . The law does not profess to know what is a right belief." (quoting In re Laura Doyle, 16 Mo. App. 159, 166 (Mo. Ct. App. 1884))); see also id. ("The state shall prefer no faith but must favor the best interests of those children whose parental custody it determines.").
67. This is the legal standard that courts generally apply. See Kirchner v. Caughey, 606 A.2d 257, 261-62 (Md. 1992). However, in spite of the existence of this standard, Jehovah's Witness parents are often subjected to intense and unjustified scrutiny in their attempts to gain custody of their children. See text accompanying notes 62-87.
WITNESSES ON TRIAL

child." 68 Such a remedy "should be narrowly tailor[ed] . . . so as to result in the least possible intrusion upon the constitutionally protected interests of the parent." 69

Accordingly, the majority of appellate courts that have reviewed custody disputes between a Jehovah’s Witness parent and a parent of another faith have held that a court may not base its decision on whether the custodial parent will allow the child to exhibit national pride, participate in extracurricular activities, or celebrate holidays. 70 Unfortunately, this type of analysis is often precisely what transpires at the trial court level, 71 as these courts are frequently influenced by subjective considerations when determining custody issues. 72 Faith, especially that of Jehovah’s Witnesses, seems to be constantly scrutinized by courts, and religious adherents are repeatedly compelled to defend their beliefs. Even if Jehovah’s Witness parents are ultimately awarded custody of their children, they should not have to overcome the apparent presumption at the lower court level that their children will suffer by being in the custody of a member of the Witnesses. 73

A. Tracing the Uphill Climb

In the Florida case of Mendez v. Mendez, 74 the father was designated as the primary residential parent in a custody dispute. The mother appealed this award, and argued that the trial court based its decision solely on the fact that she was a practicing Jehovah’s Witness. 75 During the hearing, expert witnesses testified that there was “a

68. Kirchner, 606 A.2d at 262 (quoting Felton v. Felton, 418 N.E.2d 606, 608 (Mass. 1981)).
69. Id. (quoting LeDoux v. LeDoux, 452 N.W.2d 1, 5 (Neb. 1990)).
70. See, e.g., Clift v. Clift, 346 So. 2d 429, 435 (Ala. Civ. App.), cert. denied, 346 So. 2d 439 (Ala. 1977); Johnson v. Johnson, 564 P.2d 71, 76 (Alaska 1977), cert. denied, 434 U.S. 1048 (1978); In re Deierling, 421 N.W.2d 168, 170 (Iowa Ct. App. 1988); Waites v. Waites, 567 S.W.2d 326, 333 (Mo. 1978). These courts reasoned that the tenets of the Jehovah’s Witness faith are not relevant in determining a parent’s ability to care for their child, and that the United States Constitution mandates that the courts do not examine a parent’s religious beliefs unless those beliefs result in practices that are detrimental to the best interests of the child.
71. See notes 62-87 and text accompanying.
72. This occurs in spite of appellate court decisions holding that courts should not adhere to these unconstitutional practices. See Palmore v. Sidoti, 466 U.S. 429 (1984); see also Waites, 567 S.W.2d at 326, 333 ("[N]o judicial officer may determine child custody based on approval or disapproval of the beliefs, doctrine, or tenets of the religion of either parent or their interpretation thereof.").
73. See Clift, 346 So. 2d at 431 (after losing custody of her son at the trial level, the mother contended on appeal that the court had impermissibly allowed introduction of testimony regarding her religious beliefs as a Jehovah’s Witness).
74. 527 So. 2d 820 (Fla. 3d DCA 1987) (per curiam), cert. denied, 485 U.S. 942 (1988).
75. Id.
very safe, a very lovable [sic], healthy attachment” between the child and mother, but that the mother's religious beliefs were potentially not in the best interests of the child, who would need “to adapt herself to the mainstream of culture.” The Third District Court of Appeal affirmed the trial court’s ruling, even though the mother testified that she would be willing to comply with a court order permitting the father to make all decisions regarding the child’s religious education and medical welfare. The district court found that the record did not support the mother's contentions and that the trial court had based its decision on the effect that the conflicting religious beliefs of the parents had on the child. In his dissent, however, Judge Baskin stated that the grant of custody to the father was an abuse of discretion because all of the expert witnesses concurred that the child belonged with the mother. Judge Baskin warned that “[t]o be forced to choose between one’s religion and one’s child is repugnant to a society based on constitutional principles.”

Jehovah’s Witness parents have received similar treatment in other states. For example, in the Ohio case of Pater v. Pater, the couple filed for divorce and the father petitioned for custody of their son. The child was three years old when the court awarded custody to the father. At trial, there had been no dispute that both parents were conscientious and loving. Instead, the primary issue was the effect the mother’s religious practices would have on the child. The mother had recently become a Jehovah’s Witness, and the father was Catholic. Early in the hearing, the judge claimed that he “would not make a decision based purely on the religious [sic] aspects of this case.” However, on the second day of the hearing, the judge stated that the

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76. Id. at 821 (Baskin, J., dissenting).
77. Id.
78. Id.
79. Id.
80. Id. at 820. Both the trial court and the court of appeals apparently failed to consider the possibility that the judge could have awarded custody to the mother and ordered the parents to concur on the religious upbringing of the child. Apparently, the mother was amenable to this arrangement. See also infra note 97 and accompanying text.
81. Mendez, 527 So. 2d at 820-22.
82. Id. at 824 (Baskin, J., dissenting, on motion for rehearing en banc and motion to certify question).
84. Id. at 795-96.
85. Id. at 796.
86. Id.
87. Id.
88. Id.
89. Id.
issue was whether the mother would indoctrinate her child in her religion, and whether such indoctrination was "going to in some way adversely affect the moral, mental, and physical health and judgement of this child adversely, so as not to be in the child's best interests." 

Given this judicial cue, the father's counsel called the mother as a hostile witness and questioned her extensively about whether Jehovah's Witnesses celebrate holidays, associate with non-members, participate in extracurricular activities and social organizations, salute the flag, and sing the national anthem.91

The father's counsel also called two expert witnesses to argue that the child would be harmed if he were raised as a Jehovah's Witness.92 One expert testified about his own experiences growing up as a Jehovah's Witness, and concluded that mental illness occurs more frequently among Jehovah's Witnesses than in the general population.93 After the court awarded custody to the father, the mother requested visitation.94 At the visitation hearing, the judge told her that he would not grant her visitation if she was going to teach the child her religion or take the child to her church.95 After being assured that the mother would follow the court's instructions, the judge set a visitation schedule which included the restriction that the mother "shall not teach or expose the child to the Jehovah[']s Witnesses' beliefs in any form."96

The appellate court affirmed the domestic court's custody and visitation orders, and found no abuse of discretion because "the child would be less likely to receive proper medical attention, obtain a college education, or participate in social activities" if the mother were granted custody.97 On review, the Ohio Supreme Court reversed.98 Although the court agreed that a domestic relations court may consider the religious practices of parents in order to protect the best interests of a child, it also emphatically stated that to evaluate the merits of a particular religious doctrine in a judicial proceeding is both improper and an abuse of discretion.99 Additionally, the court stressed that cus-

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90. Id.
91. Id.
92. Id.
93. Id. One can argue, however, that incidents of mental illness of the religious in general exceed that of the population in general, since adherence to any faith may generate feelings of inadequacy, guilt, and unworthiness. Furthermore, attempting to live religiously in a society that is becoming increasingly non-religious may also produce heightened anxiety.
94. Id. at 797.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 801.
 custody may not be denied to a parent solely because that parent "will not encourage her child to salute the flag, celebrate holidays, or participate in extracurricular activities." 100

Another example of the uphill climb Jehovah's Witnesses face in obtaining custody of their children is found in Waites v. Waites, 101 in which the mother had been a Baptist but changed her faith to become a Jehovah's Witness. 102 This religious conversion caused problems in the marriage, including physical violence between the parties. 103 The wife testified that if she retained custody of the couple's two children, "she would encourage them to love and respect their father and would do nothing to poison their minds against him." 104 The wife further testified that she would raise the children as Jehovah's Witnesses, 105 and stated that she would require them to attend Jehovah's Witness meetings and functions until they were approximately sixteen years of age. 106 The trial court awarded custody of the children to the father, 107 and the mother argued on appeal that the trial court decree contravened her free exercise rights. 108 The appellate court reversed and awarded custody to the mother, finding that the trial court had impermissibly focused on the mother's religious beliefs. 109 The court went on to state:

[w]e do not believe that the rights of parents to worship as they please are at issue in a child custody dispute; what is rather jeopardized by the expression of a judge's religious preference is the right of each citizen that the state not make determinations of any kind which respects, prefers, or favors one religious persuasion over another, flowing from the "establishment" clause of the First Amendment and article 1, section 7 of the Missouri Constitution. 110

The preceding cases illustrate that even if a Jehovah's Witness parent is awarded custody of his or her children, it is often after a long,
expensive, and arduous court battle. Arguably, such an ordeal is detrimental to the children's best interests, as it only serves to increase the animosity between the divorcing parents and places additional stress upon their children. The decisions referenced in the next section represent outcomes that appear to be less intrusive upon Jehovah's Witness parents, and more desirable for all concerned.

B. An Even Playing Field for Parents and Their Respective Religions

Some courts have sought to minimize the relevance of religious beliefs and differences in custody disputes between two equally fit parents. In *In re Deierling*, \textsuperscript{111} the father, who had lost custody of his children in a dissolution action, argued that he was better able to provide the children with a stable environment than was the mother who had recently converted to Jehovah's Witnesses.\textsuperscript{112} The parties' differing religious views had been a major stumbling block in the marriage.\textsuperscript{113} The court reasoned that "an individual has the right to choose his or her own religion, and parents together have the freedom of religious expression and practice which enters into their liberty to manage the familial relationships."\textsuperscript{114} The court believed it "improper" to label the mother unstable because she had chosen to become a Jehovah's Witness.\textsuperscript{115}

Another example of a court honoring the mandates of the First Amendment is *Johnson v. Johnson*.\textsuperscript{116} There, a husband and wife had both been Jehovah's Witnesses, but the husband had been excommunicated, or "disfellowshipped," from the congregation.\textsuperscript{117} The wife remained in the religion against the wishes of her husband.\textsuperscript{118} The husband argued that if he was denied custody of the children, he would have virtually no input in their lives because of his disfellowshipped status.\textsuperscript{119} Testimony was adduced at trial that since "a disfellowshipped member of the Jehovah's Witnesses is believed to be

\textsuperscript{111} 421 N.W.2d 168 (Iowa Ct. App. 1988).
\textsuperscript{112} Id. at 169.
\textsuperscript{113} Id. at 170.
\textsuperscript{114} Id. See also Deininger v. Deininger, 835 P.2d 449, 451 (Alaska 1992)(The Alaska Supreme Court praised the innovative award of shared physical custody to be implemented gradually over a two-year period in a case involving a mother who was a Jehovah's Witness and a father who was not. The parents in this case demonstrated their ability to make joint decisions regarding the children despite their religious differences).
\textsuperscript{115} Deierling, 421 N.W.2d at 170.
\textsuperscript{117} Id. at 72.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 73.
under, or in danger of coming under, satanic control, members of the congregation will not associate with him.' The husband opposed the wife's plans to raise the children in strict accordance with the religion's rules, which he argued did not serve the children's best interests. The trial court, however, found that both parents were fit and awarded physical custody to the mother. On appeal, the Alaska Supreme Court affirmed, stating that "certainly, we cannot use [the mother's] continued membership in the Jehovah's Witnesses as a basis for directing the trial court to award the children to [the father]. To do so would be violative of her right to freedom of religion under the First Amendment to the United States Constitution . . . ." As the above cases illustrate, it is possible for courts deciding cases involving the children of Jehovah's Witnesses to successfully further the best interests of the children without subjecting the Witness parents to unjustified and intrusive inquisitions regarding their faith.

C. Honoring the First Amendment: Suggested Guidelines for Future Decisions

Trial courts should be required to rest their determinations on evidence of harm rather than on mere speculation of harm to the child of a Jehovah's Witness parent. Furthermore, "[c]ourts should not rule on the comparative merits of particular religions." A parent should not be denied physical custody simply because he or she holds religious beliefs in opposition to the other parent or to the American mainstream. Accordingly, "a judgement supported only by the tenuous threads of a possible neuroses derived from deviation in normal activities [should not and] will not withstand the thrust of constitutional guarantees." Harm to the child from conflicting religious instructions or practices should not simply be assumed or surmised—it must be specifically demonstrated.

120. Id.
121. Id.
122. Id.
123. Id. at 76.
126. See also Johnson, 564 P.2d at 76; Gould v. Gould, 342 N.W.2d 426, 432 (Wis. 1984).
128. See Felton, 418 N.E.2d at 607, 610 (mother's testimony deemed deficient by the court because there was a "failure of proof about [the child's] physical and emotional condition or about any causal connections between her visits with her father and that condition, such as it may have been"); see also In re Marriage of Hadeen, 619 P.2d 374, 382 (Wash. 1980), rev.
If a trial court refuses to follow the general rule dictating noninterference with religious beliefs in child custody cases absent an affirmative showing of compelling reasons for such action, it should be viewed as “tantamount to a manifest abuse of discretion.” Furthermore, “[a]ny suggestion that a state judicial officer [was] favoring or tending to favor one religious persuasion over another in a child custody dispute [should] be intolerable to our organic law. Judges should not even give the appearance of such preference or favor.” Additionally, beliefs regarding the celebration of birthdays or Christmas, or relating to military service or to the democratic process, are not within the ambit of religious views that may be reasonably construed as endangering the child’s mental or physical health. The nebulous, vague, and indeterminate theory of “the child’s best interests” should not serve as a subterfuge for judges to exercise their personal religious preferences. Some commentators have stated that the “best interests of the child” doctrine has become “a phrase ready-made to justify the court’s delving into virtually any area of the parents’ lives, and to support any conclusion it finally draws.”

Undeniably, the need to find a suitable home for a child whose life has been thrown into turmoil by a divorce constitutes a compelling state interest that provides ample justification for applying the United States Supreme Court’s standards for evaluating a parent’s religious beliefs in the overall context of a custody proceeding. However, once a suitable home is found, courts must be required to employ a separate and more stringent analysis to justify any further infringement upon the custodial parent’s free exercise rights and his or her right to raise the child in a particular faith.

V. CONCLUSION

The judiciary should tread lightly when evaluating and intruding upon an individual’s religious beliefs. Although courts must neces-
sarily examine the religious nature of certain beliefs and actions when presented with a free exercise claim, such as in the context of compelling medical treatment or awarding child custody, they must not evaluate the correctness of either the belief or the religion that holds the belief. The United States Supreme Court has recognized that “controlling a person’s private thoughts” is beyond a court’s authority. Accordingly, individuals have the right to be free of governmental intrusion into their minds, as “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.” In Thomas v. Review Board of the Indiana Employment Security Division, the United States Supreme Court stated that “[t]he determination of what is a ‘religious’ belief or practice is not to turn upon a judicial perception of the particular belief or practice in question . . . .” As such, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”

Freedom of religion is one of the most sacred American constitutional protections. As Justice Jackson once noted, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” The faith of Jehovah’s Witnesses should be recognized as one such star in this diverse constellation.

135. Id. at 565.
137. Id. at 714.
138. Id.