to remedy [**25] only "injury of the type the antitrust laws were intended to prevent," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 1977, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701* so, too, § 1964(c) addresses only a specific sort of injury arising out of racketeering. *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., supra; North Barrington Development, Inc. v. Richard Fanslow, 547 F. Supp. 207 (1980)* (available on LEXIS, Genfed library, Dist. file). Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of § 1962, the remedy which § 1964(c) prescribes extends only to persons who suffer a specific injury, viz., to their business or property.

Since, as the Court observed in Turkette, "the primary purpose of RICO is to cope with the infiltration of legitimate businesses, supra *101 S. Ct. at 2533,* Congress designed a treble damage provision to protect those whose businesses had been infiltrated and damaged by the offenses § 1962 proscribes. Although § 1962 reaches other types of offenses, see, e.g., *United States v. Turkette, supra,* to which RICO's other remedies were addressed, § 1964(c) confers standing to bring a civil [**26] action only on those within a smaller class. Salisbury v. Chapman, supra at n. 4. The cases in which courts have held that plaintiffs have, or but for some other defect could have, stated a claim under § 1964(c) have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury. For instance, in *Hellenic Lines Ltd. v. O'Hearn, S.D.N.Y.1981, 523 F. Supp. 244,* a shipping firm whose employees had paid and received bribes in connection with a scheme to bill it excessive amounts for the purchase of business related materials and services was held to state a RICO claim. Similarly, a teleprompter company that sued various defendants, including the city council and a business rival, alleging that the rival had received a cable television franchise by exercising [*1137] corrupt influence on the council clearly suffered the type of business injury RICO addresses. *Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6 (W.D.Pa. 1981)* Erie (available on LEXIS, Genfed library, Dist. file) (RICO count dismissed on other grounds). Judge Skinner recently held that a complaint stated a civil RICO cause of action where a company alleged that [**27] it suffered business injury through defendants' acquisition of an interest in it through racketeering activity. *Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., D.Mass., November 17, 1981, Fed. Sec. L. Rep. (CCH) P98,361,* Civil Action 81-2097-S. See also *Parnes v. Heinold Commodities, Inc., N.D.Ill., 1980, 487 F. Supp. 645* (RICO civil claim stated where plaintiff alleges defendant's racketeering acts caused him loss through commodities trading). We conclude that these cases reflect proper applications of § 1964(c) to situations in which a defendant's racketeering caused injury to plaintiff in a business activity. n11 The injuries plaintiff alleges here are plainly of a different nature. Count I apparently seeks damages for money the plaintiff class spent in purchasing literature and auditing. Such a claim goes beyond the theory of § 1964(c). Count II alleges no injury to business or property but rather that plaintiff had to flee about the United States and suffered emotional distress. Claims can be brought for such damages, but not under RICO. Finally, the various types of damages Count III alleges do not constitute commercial injury.

n11. Judge Duffy's opinion in *Hellenic Lines, Ltd. v. O'Hearn, supra,* is not to the contrary. He rejected as "specious" the argument that a company that had paid allegedly reasonable prices, though ones inflated by bribes and kickbacks, had not suffered an injury which § 1964(c) addresses since it was "not hurt competitively by the RICO violation." Ibid. at 248. We subscribe to Judge Duffy's conclusion that a RICO violation does not depend upon the existence of a competitive injury. Although antitrust law proscribes and remedies certain injuries to competition, RICO does not so directly seek to protect competition. As Judge Churchill observed, "competitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same." *Landmark Savings v. Loeb Rhoades, Hornblower & Co., supra.* Section 1964(c) does not require a "competitive injury" but rather, in part, a "racketeering enterprise injury" and a plaintiff who has experienced commercial harm resulting from it.

[**28]

To be sure, RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose-to protect legitimate businesses from infiltration by racketeers-in mind. Thus, in construing "property" courts should be sensitive to the statute's commercial orientation and to Congress' obvious intention to restrict the plaintiff class. We do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962. See *Salisbury v. Chapman, supra; North Barrington Development, Inc. v. Fanslow, supra.* Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum. Yet the legislative history contains no hint that Congress intended RICO as a remedy for private plaintiffs alleging consumer fraud.

Cf. *Adair v. Hunt International Resources Corp., supra at 747* (s 1964 not intended as remedy for private plaintiffs alleging securities fraud or misrepresentations [**29] in real estate transactions). Absent a clear statement that Congress intended such a result, we believe courts should confine § 1964(c) to business loss from racketeering injuries. Under this analysis, the RICO claims before us here clearly cannot survive. n12

n12. We do not reach defendants' contention that civil liability under § 1962(c) and § 1964(c) must be preceded by prior criminal convictions of two criminal acts, except to note that the opposing citations relied on by plaintiff, *United States v. Malatesta, 5 Cir. 1978, 583 F.2d 748,* cert. den., 1979, *440 U.S. 962, 99 S. Ct. 1508, 59 L. Ed. 2d 777,* and *United States v. Frumento, 3 Cir. 1977, 563 F.2d 1083,* cert. den., 1978, *434 U.S. 1072, 98 S. Ct. 1256, 55 L. Ed. 2d 775,* are distinguishable in their factual situations and holdings. While it is difficult for us to conclude that Congress, in using the words "indictable" and "punishable" contemplated that civil liability could result without involvement of the criminal process, other courts have done so.

[**30]

[*1138] Further, two of plaintiff's three RICO counts are deficient in additional respects. Count I, which is based on alleged violations of the mail fraud statute, *18 U.S.C. 1341,* apparently intends to claim a violation of all sections of *18 U.S.C. § 1962.* Although plaintiff's complaint is not entirely clear on this point, plaintiff predicates her class action solely on Count I, which alleges that defendants violated RICO by failing to conform to the requirements of the decree in *United States v. Article or Device, D.D.C.1971, 333 F. Supp. 357,* ("Affidavit of Michael J. Flynn in Opposition to Affidavit of Nancy Gertner and in Support of Plaintiff's Motion for Protective Order," filed December 8, 1981, p. 6). Plaintiff relies on defendants' alleged non-compliance with orders entered against the Washington, D.C. Church in the Articles or Device case to establish both the fraudulent nature of the materials which were "disseminated" and to show an intent to defraud. Given the factual differences between that case and the instant suit, and considering the different legal standards applicable under the criminal mail fraud statute at issue here and the civil Food, Drug & Cosmetic [**31] Act, at issue there, we find Van Schaick's reliance on that litigation misplaced.

Contrary to plaintiff's assertion, the "representations made to plaintiffs in paragraphs 46 and 47" n13 (Plaintiff's Second Amended Complaint, p. 28, P 52) were not adjudged to be fraudulent in *United States v. Article or Device, Etc., D.D.C.1971, 333 F. Supp. 357.* Judge Gesell did use the word "fraud" in the opinion, but the case held only that the representations about the E-meter there at issue violated the Food, Drug and Cosmetic Act for mislabelling, a holding that did not require a finding of "fraud" but only of "falsity."

n13. Plaintiff's complaint does not contain a paragraph 47.

It is unclear from the face of plaintiff's complaint what RICO violation Count III intends to allege. Plaintiff alleges that defendants have committed various criminal acts within the purview of *18 U.S.C. § 1961*(1), the section that defines racketeering activity. Commission of these criminal acts, the complaint alleges, contradicted representations [**32] defendants made, and plaintiff relied upon, concerning the nature of Scientology, viz., that it was "a non-profit, educational, scientific, religious, law-abiding organization." (Plaintiff's Seconded Amended Complaint, p. 34, P 65). Although Count III alleges in conclusory language that various criminal acts were committed against opponents of Scientology, it fails to identify any specific predicate acts or to establish that they were committed within the time period set out in *18 U.S.C. § 1961*(5). Even ignoring these deficiencies and assuming for purposes of argument only that Count III does properly allege a pattern of racketeering activity and a violation of § 1962, Count III still fails to suggest any way in which plaintiff was injured in her business or property by these alleged violations of *18 U.S.C. § 1962*(c), as *18 U.S.C. § 1964*(c) requires. Plaintiff does not claim that the alleged acts-obstruction of justice and criminal investigations, burglary, infiltration of offices, etc. caused her any harm. Rather, she, in effect, attempts to recast her fraud and contract actions, which are discussed below, as a RICO claim and thus gain the benefit of RICO's treble damage provisions. [**33] Yet RICO is not broad enough to embrace every fraud action, *Adair v. Hunt International Resources Corp., supra at 747; Waterman Steamship Corp. v. Avondale Shipyards, Inc., et al., supra; Salisbury et al. v. Chapman et al., supra; North Barrington Development, Inc. v. Fanslow, supra,* and surely this is one that is beyond its reach. n14

n14. For the reasons stated above, we dismiss plaintiff's three RICO counts for failure to state a claim upon which relief can be granted. Since plaintiff predicates her class action on one or more of these RICO counts, our ruling eliminates the class claims from this case.

Although we dismiss plaintiff's RICO counts on the grounds stated above, we add that these counts would encounter further [*1139] objection if the court should

find Scientology entitled to protection as a religion. In order not to risk abridging rights which the First Amendment protects, courts generally interpret regulatory statutes narrowly to prevent their application to religious organizations. [**34] At times, they will require "a clear expression of Congress' intent" before subjecting religious organizations to regulatory laws pertaining to other entities, *N.L.R.B. v. Catholic Bishop of Chicago, 1979, 440 U.S. 490, 507, 99 S. Ct. 1313, 1322, 59 L. Ed. 2d 533.* Even where clear proof of such intent exists, courts have sometimes construed statutes to exclude religious groups from coverage to avoid "an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *McClure v. Salvation Army, 5 Cir. 1972, 460 F.2d 553, 560,* cert. den. 1972, *409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153.*

Intentional Infliction of Emotional Distress

(Counts X and XII)

Two of plaintiff's counts alleging intentional infliction of emotional distress fail to state a claim. Plaintiff alleges that, contrary to assurances that auditing would remain confidential, the corporate defendants systematically disclosed the auditing information obtained from subjects to control and manipulate them and that the contents of her own auditing file were disclosed (Count X). She alleges further that the defendants intentionally [**35] subjected her to emotional distress through the policy of Disconnect (Count XII).

A cause of action for intentional infliction of emotional distress consists of four elements: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct, ... (2) that the conduct was "extreme and outrageous,' was "beyond all possible bounds of decency' and was "utterly intolerable in a civilized community,' ... (3) that the actions of the defendant were the cause of the plaintiff's distress, ... and (4) that the emotional distress sustained by the plaintiff was "severe' and of a nature "that no reasonable man could be expected to endure it.' " *Agis v. Howard Johnson Co., 1976, 371 Mass. 140, 144-145, 355 N.E.2d 315,* citing Restatement (Second of Torts) § 46, comments (d), (i), (j).

Plaintiff does not state facts sufficient to support her claim with respect to Counts X and XII of her complaint. Count X alleges that defendants have engaged in a "systematic course of conduct" to disclose information received through auditing, and that such a scheme has caused plaintiff severe emotional distress. Yet Count [**36] X alleges no specific disclosures, and the only one the complaint specifies is a letter to plaintiff's attorney.

With respect to Count XII, plaintiff alleges only that the Church exhorted her to sever family and marital ties and to depend solely on the Church for emotional support. Neither of these alleged courses of conduct constitutes the kind of extreme and outrageous action which will support a claim for intentional infliction of emotional distress. Cf. *Agis, supra* (irrational firing of employee with overt implication of unjustified accusation of theft); *Boyle v. Wenk, 1979, 378 Mass. 592, 392 N.E.2d 1053* (private investigator's harassing phone calls and visits to woman recently released from hospital); *George v. Jordan Marsh Co., 1971, 359 Mass. 244, 268 N.E.2d 915* (harassing debt collection practices). They are similar to the demands for single-minded loyalty and purpose that have characterized numerous religious, political, military and social movements over the ages.

Contract and Fair Labor Standards Act

(Counts XIII and XIV)

Plaintiff fails to state a claim for common law breach of contract and for violation of the Fair Labor Standards Act, *29 U.S.C. §§ 201,* 206. Her contract [**37] claim essentially recasts her fraud allegations, discussed below, in contract terms. The terms of the alleged contract are entirely too [*1140] vague to constitute an enforceable agreement. The time of the alleged agreement is not stated, and the parties are unspecified. The only objectively determinable promise alleged is that plaintiff would receive auditing, which she did, in fact, receive. Although we would imply a common law contract if suitable allegations were before us, we will not invent one out of the imprecise and conclusory allegations in this complaint.

Similarly, the complaint fails to state a claim under the Fair Labor Standards Act (Count XIV). Count XIV is stated in words that defy deciphering. It alleges that defendants "fraudulently induced plaintiff to work for defendants through the fraudulent representations contained in preceding paragraph." Yet "preceding paragraph" contains no representations. Count XIV further rests plaintiff's claim on "said violations set forth in paragraph 121," a paragraph that merely realleges the complaint's preceding paragraphs. We conclude, from plaintiff's unclear statement of her Fair Labor Standards Act claim and from the [**38] other allegations in her complaint, that her services were provided primarily in exchange for auditing, rather than monetary compensation. Even considering the allegations,

scattered through her pleading, that she was promised some compensation for her services, her complaint, read as a whole, fails to allege facts sufficient to show that she was a "person whose employment contemplated compensation," *Walling v. Portland Terminal Co., 1947, 330 U.S. 148, 152, 67 S. Ct. 639, 641, 91 L. Ed. 809,* that an employer-employee relationship was ever established between her and the California Church, see *Huntley v. Gunn Furniture Co., W.D.Mich., 1948, 79 F. Supp. 110, 111,* or that the labor she provided related to commerce or the production of goods for commerce.

Even if plaintiff properly stated a claim under the Fair Labor Standards Act, the bulk of it would be time-barred. A court may dismiss an action owing to the running of a statute of limitation if the defect appears on the face of the complaint. Title 29, § 255(a) prescribes a three-year limitation for willful violations of FLSA, and a two-year limitation otherwise. Under either limitation, the bulk of plaintiff's claim would be barred. [**39] Moreover, although plaintiff provides a summary of dates in paragraph 128, her complaint contains no allegations regarding work performed for defendant other than from March 1972 to January 1974.

Because this count of plaintiff's complaint fails to state a claim upon which relief can be granted, we need not defer decision on it until resolution of whether Scientology is entitled to protection as a religion under the First Amendment. n15

n15. The extent to which the Fair Labor Standards Act applies to religious organizations is unclear. Although the Seventh Circuit did hold that the FLSA covered employees of a church corporation who worked in a church-owned printing establishment, *Mitchell v. Pilgrim Holiness Church Corp., 7 Cir. 1954, 210 F.2d 879,* cert. den. 1954, *347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136,* the Supreme Court has not addressed this issue and the legislative history and regulations suggest that religious activities of non-profit organizations were to be exempt.

Claims Not Barred by First [**40] Amendment

Some counts of plaintiff's complaint state proper claims the adjudication of which would not be barred by the First Amendment.

Count VI sets forth several purely secular representations allegedly made to Van Schaick by defendant's agents. In essence, this count alleges that defendant promised that Van Schaick would receive benefits, including training, room and board, and various work and research opportunities, after undergoing a period of auditing. These representations, the complaint alleges, were fraudulent. Even if Scientology were entitled to protection as a religion, adjudicating the claims this count asserts would not force this court to consider the truth or falsity of religious doctrine, the sort of inquiry Ballard forecloses.

With respect to this claim, however, the complaint presently falls short of [*1141] the specificity F.R.C.P. 9(b) clearly requires of a claim for fraud. The time, place, manner and content of the alleged misrepresentations are not alleged with sufficient particularity to meet the requirements of the rule. Moreover, plaintiff charges a civil conspiracy to defraud, and it is necessary to plead fraudulent conspiracy with enough specificity [**41] to inform multiple defendants of facts forming the basis of the conspiracy charge. National Egg Co. v. Bank Leumi le- *Israel B.M., N.D. Georgia, 1980, 504 F. Supp. 305, 308.* Such allegations must "delineate among the defendants (as to) their participation or responsibilities" in making the statements which are the subject of the suit, *Lerman v. ITB Management Corp., D.Mass., 1973, 58 F.R.D. 153, 155 n.2.* Conspiracies described in sweeping and general terms cannot serve as the basis for a cause of action, and may be dismissed. *Kadar Corp. v. Milbury, 1 Cir., 1977, 549 F.2d 230, 233.* But because at least some of the misrepresentations alleged in Count VI do appear to be secular on their face, and because plaintiff's pleading burden is extraordinarily heavy due to the First Amendment implications of this litigation, she shall be given an opportunity to amend this count of her complaint, provided that any such amendments be filed within 15 days of the date of this Memorandum of Decision and Orders on Various Motions.

It is less clear that Count V of plaintiff's complaint can be decided independently of First Amendment considerations. It alleges that defendants fraudulently represented [**42] that auditing was scientifically guaranteed to provide an array of benefits, including a higher I.Q. for Van Schaick and her children, immunity from various illnesses, cures for various ailments and better eyesight.

Plaintiff's earlier complaint used the word "would" instead of "scientifically guaranteed." The prior wording would quite clearly have raised First Amendment objections if Scientology was, in fact, entitled to protection as a religion. By replacing "would" with "scientifically guaranteed" plaintiff seeks to avoid that problem. Words are not always adequate, however, to divide precisely that which relates to the sacred and that which is purely secular. As Judge Gesell wrote in *United States v. Article or Device, D.C.1971, 333 F. Supp. 357, 363:*

What the layman reads as straight science fiction becomes to the believer a bit of early imperfect scripture. The result of all this is that what may appear to the layman as a factual scientific representation (clearly false) is not necessarily this at all when read by one who has embraced the doctrine of the Church.

Although the distinction is not always clear, we believe that even if Scientology is entitled to protection [**43] as religion Count V may stand. The First Amendment protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification. Statements citing science as their source may provide the basis for a fraud action even though the same contention would not support such an action if it relied on religious belief for its authority. Although the process of sifting secular from religious claims may not be easy, *Founding Church of Scientology v. United States, 1967, 133 U.S.App.D.C. 229, 409 F.2d 1146, 1165 n. 3,* found that endeavor possible. Should this court find that Scientology is entitled to protection under the religion clauses of the First Amendment, plaintiff would be restricted in proving her claim for relief under Count V, to evidence which did not trench upon constitutionally protected areas.

Like Count VI, Count V presently fails to meet the specificity requirements of F.R.C.P. 9(b); again, the time, place and manner of the alleged misrepresentations are not stated in the precise and particular fashion the rule requires. Moreover, the deficiencies in stating a civil conspiracy to defraud which plague Count [**44] VI afflict its predecessor as well. Plaintiff will be given an opportunity to amend this count within the same time limit as set with respect to Count VI.

Finally, taking plaintiff's complaint as a whole, Count XI, which alleges intentional [*1142] infliction of emotional distress through the Fair Game doctrine, does state a claim upon which relief can be granted. Van Schaick alleges that, pursuant to the Fair Game doctrine, agents of the Church engaged in a course of conduct, including slanderous telephone calls to her neighbors and employer, physical threats, and assault with an automobile, which was designed to dissuade her from pursuing her legal rights. The conduct alleged constitutes "an attempt to intentionally shock and harm a person's "peace of mind' by invading the person's mental or emotional tranquility," *Wenk, supra 378 Mass. at 595, 392 N.E.2d 1053,* and is therefore actionable. We have noted, however, that the Fair Game doctrine has allegedly been repealed as a matter of Scientology doctrine, and remind plaintiff that it remains her burden to show that the actions taken against her by individual Church members were taken pursuant to some Church policy, practice [**45] or directive. With this understanding of plaintiff's allegations, we conclude that Count XI does state a claim upon which relief can be granted.

Applicability of First Amendment

Our decision regarding defendant's motion to dismiss other counts of plaintiff's complaint turns on whether the Church of Scientology is entitled to First Amendment protections. The remaining counts of plaintiff's complaint allege assorted fraudulent conduct by the Church. A claim for relief based upon fraud must include proof that defendant knowingly made a false statement. Proof of those elements-that the statement was false and that defendant knew of its falsity-becomes problematic when the statement relates to religious belief or doctrine. In *United States v. Ballard, supra,* the Supreme Court held that the truth or falsity of religious beliefs were beyond the proper scope of judicial inquiry. Writing for the Court, Justice Douglas explained:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals [**46] does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations.... *(322 U.S. at pp. 86-87, 64 S. Ct. at pp. 886-87).*

Plaintiff alleges that she was fraudulently induced to become a scientologist by false representations concerning the nature of the Scientology movement (Count IV) and the content of Scientology doctrine (Counts VII-IX). If the representations involved in plaintiff's fraud counts are entitled to the protection of the First Amendment, Ballard would prevent us from examining their veracity. Since an essential element of a cause of action for fraud is the falsity of the representation in question, plaintiff would accordingly fail to state a claim upon which relief could be granted. n16

n16. We do not construe Ballard to hold that, although courts may not examine the truth or falsity of statements of a religious nature, these statements may be the bases of a fraud action if made in bad faith. The Court in Ballard never addressed that issue. Rather, it held only that the verity of religious beliefs or doctrines should not be submitted to the jury.

[**47]

Whether the First Amendment immunizes those statements from judicial scrutiny depends, however, on whether the statements relate to religion or religious belief. "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board of the Indiana Employment Security Division, supra 450 U.S. at 713, 101 S. Ct. at 1430.* Before we can determine whether the First Amendment mandates dismissal of any of the fraud counts alleged in this complaint, we must first determine whether defendant is entitled to the constitutional protections reserved for religious institutions and beliefs.

[*1143] Although courts once interpreted the word "religion" as used in the First Amendment to require belief in a deity, see *Davis v. Beason, 1890, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637,* they have long since abandoned so restrictive a definition. In *Torcaso v. Watkins, 1961, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982,* the Court held that "religion" as used in the First Amendment applied to nontheistic faiths, too, and explicitly recognized as religions *Buddhism, Taoism, Ethical Culture [**48] and Secular Humanism, 367 U.S. at 495 n. 11, 81 S. Ct. at 1684 n. 11.* More recently, the Second Circuit held that Krishna Consciousness is a religion for free exercise purposes. *International Society for Krishna Consciousness, Inc. v. Barber, 2 Cir. 1981, 650 F.2d 430, 440.* n17 Torcaso and International Society show that the concept of religion is more capacious than early cases suggested, but they do not, of course, resolve whether the representations at issue here should receive the protection the First Amendment confers.

n17. In International Society for Krishna Consciousness, Inc. v. Barber, the Second Circuit held that, absent a showing that no less restrictive alternative existed which would not have interfered with the Krishna ritual of "sankirtan", the practice by which those devoted to Krishna approach non-members, tell them of their religion's tenets and seek contributions, a regulation restricting solicitation at a state fair to a booth unconstitutionally interfered with free exercise rights of members of Krishna Consciousness.

In *Heffron v. International Society for Krishna Consciousness, supra,* the Supreme Court upheld a similar regulation restricting solicitation at the Minnesota State Fair as a reasonable time, place and manner restriction on First Amendment rights. The Court reached that decision through a different analysis than that employed by the Second Circuit and one which did not involve an inquiry regarding whether Krishna Consciousness had religious aspects entitling it to the protection of the First Amendment. Judge Kaufman's opinion for the Second Circuit is cited here not for its holding, which the Supreme Court rejected in Heffron, but for whatever light it sheds on the separate problem regarding the criteria a court uses to determine when the protection of the Free Exercise clause is properly invoked.

[**49]

In evaluating defendant's claim to First Amendment protection, we begin with prior litigation involving the Scientology movement. In *Founding Church of Scientology of Washington, D.C. v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d 1146,* Judge Wright found that Scientology had established a prima facie case that it was a religion, *409 F.2d at 1160.* This finding was based upon evidence that the church maintained the formal, external appearance of a religion-it was incorporated as a religion; maintained ministers with the authority to marry and bury; and its writings were found to contain a general account of man and his nature.

Significantly, however, in the Founding Church litigation, there was no attempt to contest the bona fides of the Church's religious status. Thus, Judge Wright carefully limited his holding, stating:

We do not hold that the Founding Church is for all purposes a religion. Any prima facie case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organization were erected for the sole purpose of cloaking a secular [**50] enterprise with the legal protections of religion. *409 F.2d at 1162.*

The determination in Founding Church that Scientology had made a prima facie case for religious status is obviously relevant to, but not conclusive for, our purposes. As Judge Wright pointed out, the government did not contest the issue. Moreover, the determination was made 12 years ago; at the least defendants would have to satisfy this court that the factors Judge Wright found persuasive still exist. Although plaintiff appeared to concede in oral argument that Scientology had made a prima facie case for First Amendment protection, she withdrew that concession in her post-argument brief. Scientology thus might be entitled to protection as a religion, but that entitlement is not clear.

If this case involved an established religion, the court could, of course, accord it treatment as such without

further inquiry. [*1144] Defendants have contended, in oral argument and brief, that the court "may not favor one religion over another" by taking judicial notice of the fact that an established religion is a bona fide religion while refusing to give similar treatment to a less established religion. Although we agree [**51] that the Free Exercise Clause protects all religions, old and new, alike once its protection attaches, in determining whether that protection applies courts may require a newer faith to demonstrate that it is, in fact, entitled to protection as a religion. See, e.g., *International Society for Krishna Consciousness, Inc. v. Barber, supra at 433; Theriault v. Carlson, 5 Cir. 1974, 495 F.2d 390,* cert. den. 1974, *419 U.S. 1003, 95 S. Ct. 323, 42 L. Ed. 2d 279; United States v. Kuch, D.D.C.1968, 288 F. Supp. 439.* "Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status." *Founding Church of Scientology v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d at 1160.* In such cases, the bare assertion of a religious nature has not been sufficient to establish First Amendment protection and neither is it here.

A motion to dismiss, as a vehicle for determining whether defendant's statements are entitled to the protection of the First Amendment, presents this court with an intractable dilemma. Scientology is not an established religion whose tenets, doctrines, and policies are generally known. The court may not, therefore, [**52] by judicial notice identify it as a religion. To take all of plaintiff's allegations as true could strip defendant of all First Amendment protection without any factual showing by plaintiff. To treat Scientology as a religion entitled to the full panoply of First Amendment rights would be to ignore the allegations of the complaint. Ascertaining defendant's status-whether religious or secular-requires reference to extrinsic materials. We therefore conclude that the question whether Counts IV, VII, VIII and IX state a claim upon which relief can be granted cannot be resolved on a motion to dismiss. Therefore, as to those counts we shall treat defendant's motion to dismiss as a motion for summary judgment and direct the parties to submit materials regarding whether defendant is entitled to protection as a religion under the First Amendment.

In making that determination, the Founding Church criteria will provide a useful starting point. See *409 F.2d at 1160.* We note, too, the similar guidelines Judge Adams enunciated in his concurring opinion in *Malnak v. Yogi, 3 Cir. 1979, 592 F.2d 197, 208-209;* whether the candidate religion addresses matters of ultimate concern, whether its doctrine [**53] and practices are comprehensive, and whether it includes certain formal, external characteristics of religious organizations. Most recently, Judge Kaufman, writing for the Second Circuit, has used comparable criteria. *International Society for Krishna Consciousness, Inc. v. Barber, supra at 440-41.* Presentation of proof sufficient to make a prima facie case would entitle defendant to the protections of the First Amendment free exercise clause unless plaintiff effectively rebuts that case. The Supreme Court's recent decision in *Thomas v. Review Board, supra,* makes clear, however, that certain types of inquiry are impermissible in determining whether the First Amendment protects a particular belief as religious. First, courts may not inquire into the truth or falsity of a belief in question. Whether a belief is religious "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *450 U.S. at 714, 101 S. Ct. at 1430.* Moreover, Thomas suggests the difficulty of challenging the good faith of an entire organization and [**54] states that courts may not ordinarily consider intrafaith differences among adherents in determining whether a religious belief is sincerely held. Although there may be ways in which a party could rebut a prima facie showing by proving that "forms of religious organizations were created for the sole purpose of cloaking a secular enterprise with the legal protection of a religion," Founding Church of Scientology of Washington, D. C. v. United States, [*1145] supra at 1162, a general inquiry into whether individual members of a religion hold in good faith the belief they assert is not one of them. Rather, testing sincerity of religious belief involves a somewhat truncated inquiry which must focus on extrinsic evidence. See, e.g., *International Society for Krishna Consciousness, Inc. v. Barber, supra at 441-42.*

ORDERS

In accordance with this Memorandum of Decision the court orders that (1) plaintiff's motion to file a second amended complaint is granted; (2) the Church of Scientology of Nevada's motion to dismiss for lack of personal jurisdiction and venue is granted; (3) defendant's motion to dismiss Counts I, II, III, X, XII, XIII and XIV is granted; (4) defendant's motion to [**55] dismiss Count XI is denied, and its motion to dismiss Counts V and VI is denied on the condition that plaintiff file an amended complaint which brings those counts into compliance with Rule 9(b), Fed.R.Civ.P. within 15 days; and (5) defendant's motion to dismiss Counts IV, VII, VIII and IX will be treated pursuant to Rule 12(b), Fed.R.Civ.P., as a motion for summary judgment.

It is further ordered that the parties submit memoranda of law, affidavits and other submissions by May 7, 1982

on said constructive motion for summary judgment; and reply memoranda by May 24, 1982.

No. 89-3796

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

938 F.2d 1226; 1991 U.S. App. LEXIS 18118; 19 Media L. Rep. 1308

August 12, 1991

PRIOR HISTORY:
[**1] Appeal from the United States District Court for the Middle District of Florida. No. 82-1313-CIV-T-10; Kovachevich, Judge

DISPOSITION: Dismissed.

CORE TERMS: newspaper, church, contempt, contempt hearing, moot, settlement agreement, reporters, closure, addressing, oral argument, common law, repetition, settlement, expedited, intervene, evading, reasonable expectation, mootness, criminal contempt, recommendation, lawsuit, grant relief, in camera, suspicions, stay pending appeal, civil proceedings, first amendment, reasonable time, civil contempt, short duration

COUNSEL: Attorneys For Appellant: Patricia F. Anderson, George Rahdert and David S. Bralow, St. Petersburg, Florida, Gregg Thomas, Tampa, Florida, Margery Wakefield, Pro Se, Tampa, Florida.

Attorneys For Appellee: Michael Lee Hertzberg, New York, New York, Paul B. Johnson, Tampa, Florida.

JUDGES: Hatchett and Cox Circuit Judges, and Henderson, Senior Circuit Judge.

OPINIONBY: HATCHETT

OPINION: [*1227] HATCHETT, Circuit Judge.

We dismiss this case, which at one time touched upon important first amendment issues, because the case has been rendered moot.

FACTS

Margery Wakefield and three other plaintiffs alleged that the Church of Scientology of California (the Church) committed various wrongful acts against them. On August 14, 1986, Wakefield, the other plaintiffs, and the Church entered into a settlement agreement which included provisions enjoining Wakefield and the other plaintiffs from discussing, with other than immediate family members, (1) the substance of their complaints against the Church, (2) the substance of their claims against the Church, (3) alleged wrongs the Church committed, and (4) the contents of documents returned to the Church. The district court approved the settlement agreement, sealed the court files, and dismissed the case with prejudice. The dismissal order specifically gave the court jurisdiction to enforce the settlement terms. Nonetheless, Wakefield publicly violated the settlement agreement's confidentiality [**2] provisions.

In 1987, both the Church and Wakefield filed motions to enforce the settlement agreement. The district court requested that a magistrate judge address whether either party had violated the settlement agreement. On September 9, 1988, the magistrate judge issued a report and recommendation which concluded that Wakefield had violated the settlement agreement, and the Church had fully complied with the agreement's terms and conditions. On November 3, 1988, the Times Publishing Company (the Times), which publishes the St. Petersburg Times, moved to intervene in this lawsuit, to unseal the court files, and to gain access to any contempt hearings. In its motions, the Times alleged that the sealed court records and closed proceedings violated its and the public's constitutional and common law rights of access to judicial proceedings and records. In opposing the motions, the Church argued that they were untimely and barred by laches. On May 16, 1989, the district court adopted the magistrate judge's report, issued a preliminary and permanent injunction against Wakefield, and referred the Times's motion to intervene to the magistrate judge.

Notwithstanding the court's injunction, [**3] Wakefield continued to publicize the lawsuit. Thus, on July 18, 1989, the Church sought orders to show cause why Wakefield should not be held in civil and criminal contempt. The Church also sought damages, costs, and attorney's fees. To support its requests, the Church submitted excerpts of newspaper, television, and radio interviews attributed to Wakefield.

On August 15, 1989, the magistrate judge submitted a report and recommendation addressing Times's motion to intervene. He recommended that absent a compelling reason, all future proceedings and the court files, except

for documents pertaining to the settlement, should be open and that Times be allowed to intervene. Due to events discussed later in this opinion, the district court has not issued a final order on these issues.

The district court scheduled an evidentiary hearing to address the Church's contempt motion. As witnesses at the hearing, the Church subpoenaed reporters for the St. Petersburg Times and the Tampa Tribune. Consequently, the Times, and the Tribune Company, which publishes the Tampa Tribune (the newspapers), filed motions for access to hearings, pleadings, proceedings, and records related to the [**4] contempt hearings in order to determine if [*1228] their reporters' qualified privilege prevented them from being compelled to testify.

PROCEDURAL HISTORY

On September 11, 1989, the district court held an in camera proceeding to rule on the newspapers' motions. The district court denied the newspapers' motions for access to the hearings because the Church subpoenaed the reporters only to establish the source and accuracy of the statements attributed to Wakefield. The district court also held that the reporters waived any privilege by publicly attributing the statements to Wakefield.

In considering the newspapers' motions, the district court stated, "due to the plaintiff's complete and utter disregard of prior orders of this court, the court concludes that any restriction short of complete closure would be ineffective." It further held that "publicity of a private crusade has become her end, not the fair adjudication of the parties' dispute. In doing so, plaintiff is stealing the court's resources from other meritorious cases." Thus, the district court closed the contempt proceedings to the public and the press referring further proceedings to a United States Magistrate Judge. The magistrate [**5] judge began contempt hearings on September 11, 1989.

On September 18, 1989, the newspapers filed a Notice of Appeal, a Motion for Expedited Appeal, and a Motion for Stay Pending Appeal. On September 29, 1989, this court granted expedited appeal, but denied the newspapers' emergency motion for a stay of the contempt proceedings pending resolution of the expedited appeal.

On appeal, the newspapers argued that the closure violated their first amendment and common law rights of access to judicial proceedings. They contended that the public's right of access outweighs the rationale for keeping the settlement agreement confidential. The Church contended that Wakefield's "open and defiant contumacious conduct" mandated closure and that the newspapers did not enjoy an absolute constitutional or common law right of access to civil proceedings.

During our first oral argument, we learned that the newspapers had never requested the district court to allow access to the contempt hearing transcripts. Since the hearings had been completed before oral argument, we issued a November 17, 1989, order which temporarily remanded the case to the district court for the limited purpose of allowing the newspapers [**6] to seek access to the contempt hearing transcripts. The order further instructed the district court to rule on such a request "within a reasonable time."

On June 25, 1990, eight months after the last contempt hearing, the magistrate judge submitted a report and recommendation which concluded that Wakefield had willfully violated the court's injunction. He further held that while a civil contempt finding could be appropriate, he suggested the case be referred to the United States Attorney's office for prosecution on the criminal contempt charges. The district court has not issued a final order addressing whether Wakefield is in civil or criminal contempt.

Furthermore, almost a year after our temporary remand, the district court had not ruled on the newspapers' requests for access to the contempt hearing transcripts. Thus, the newspapers filed a motion requesting that this court clarify the "reasonable time" language in the November 17, 1989, order. In order to speed finalization of this matter, this court denied the clarification motion, but issued an order stating, "after December 3, 1990, this court will entertain a request for relief addressing the delay that has occurred since [**7] our remand to the district court provided that relief has been sought." After this clear signal for action, the district court issued a November 21, 1990, order unsealing the civil contempt proceeding transcripts, except for those portions which disclosed the settlement agreement terms.

On March 21, 1991, the newspapers filed a motion requesting a second oral argument, which the Church opposed. On April 18, 1991, we granted the newspapers' motions for a second oral argument, instructing the parties to address (1) whether the [*1229] case was moot, (2) whether a case or controversy remained, and (3) whether a reasonable possibility of settlement existed.

ISSUE

The sole issue we discuss is whether this case is moot.

CONTENTIONS

The newspapers argue that this case is not moot because the court can grant relief which will affect the parties by ordering release of all the judicial documents relating to the contempt hearing and the unreleased transcript pages.

The Church contends that this case is moot and does not present a case or controversy which this court may address. It emphasizes that the newspapers initially sought access to the proceedings to represent their reporters, then under subpoena. [**8] It argues that this aspect of the case is absolutely moot because the Church released the reporters from their subpoenas.

DISCUSSION

This case, at its beginning, presented an interesting and important issue: under what circumstances may civil judicial proceedings be closed to the public and the press? Unfortunately, the newspapers did not prevail in their efforts to halt the proceedings; this court denied their motions to stay the proceedings pending the expedited appeal. The newspapers argue that we should address whether a constitutional right of access to civil proceedings exists. To do so, however, would constitute an advisory opinion. The hearing that is the subject of this case terminated almost two years ago. Although the newspapers have an interest in the constitutional question, perhaps for future cases, no "live" case or controversy remains in this case. The hearings have been completed, and the newspapers have been given the hearing transcripts. n1

n1 It is also noteworthy that the newspapers have changed their claims as the case has progressed. They first sought access on constitutional and common law grounds, then they sought access to protect their reporters from compelled testimony. Finally, with full knowledge that the hearings had been completed, the newspapers never sought the hearing transcripts until prompted to do so by this court. Now, with all but eleven pages of the hearing transcript, the newspapers seek the eleven pages on constitutional and common law grounds. Many of the theories presented to this court were never presented to the district court. Parties may make alternative claims, may change claims, may sometimes file inconsistent claims, but parties may not do so in the appellate court. This court reviews the case tried in the district court; it does not try ever-changing theories parties fashion during the appellate process.

[**9]

When addressing mootness, we determine whether judicial activity remains necessary. *Warth v. Seldin, 422 U.S. 490, 499 n.10, 95 S. Ct. 2197, 2205 n.10, 45 L. Ed. 2d 343 (1975).* "A case becomes moot, and therefore, nonjusticiable, as involving a case or controversy, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *B & B Chemical Co. v. United States E.P.A., 806 F.2d 987, 989 (11th Cir. 1986)* (quoting *United States v. Geraghty, 445 U.S. 388, 396, 100 S. Ct. 1202, 1208, 63 L. Ed. 2d 479 (1980)).*

Three exceptions to the mootness doctrine exist: (1) the issues are capable of repetition, yet evading review; (2) an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo; and (3) the trial court's order will have possible collateral legal consequences. *B & B Chemical Co., 806 F.2d at 990.*

The newspapers argue that this case falls within the "capable of repetition yet evading review" mootness exception. They argue that a case is not moot if this court can grant relief that [**10] affects the interested parties. *Airline Pilots Association v. U.A.L. Corp., 897 F.2d 1394 (7th Cir. 1990); Wilson v. U.S. Department of Interior, 799 F.2d 591 (9th Cir. 1986).* Thus, they assert that we should order the release of all the judicial documents related to the contempt hearing and the unreleased transcript pages. In their view, these documents are essential so that the public can understand what happened to Wakefield.

[*1230] The newspapers do not meet the exceptions' two conditions in order for the capable of repetition, yet evading review exception to apply: (1) the challenged action must be of too short a duration to be fully litigated prior to its cessation, and (2) a reasonable expectation must exist that the same complaining party will be subject to the same action again. *Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 348, 46 L. Ed. 2d 350 (1975).*

As an example of the action's short duration, the newspapers assert that they acted promptly by filing during the contempt proceeding's adjournment a motion for a stay pending the appeal of the district court's closure. The record refutes this [**11] assertion. The underlying case has been in the federal court system since November 29, 1982. Even prior to the 1986 closure, the Times reported on the Wakefield case, but not until 1988, did Times seek to intervene. Additionally, the newspapers did not appeal the closure order until the contempt hearing had been adjourned for a continuance. These facts refute the newspapers' assertions of the action's short duration.

Likewise, the newspapers cannot satisfy the second condition. In addressing the second condition, the newspapers argue that if this court does not offer judicial guidance, a "reasonable expectation" exists that this controversy will occur again. They specifically state that they "continue to expect and suspect that secret church proceedings are being or will be held," and suspect that the Church will bring contempt proceedings against the other plaintiffs. The record does not support these suspicions.

This case involves unique circumstances which are not easily repeated. Wakefield's constant disregard and misuse of the judicial process mandated partial closure. Since Wakefield's contempt hearing concluded, the Church has not instituted nor has the district court conducted [**12] any additional contempt hearings, show cause hearings, or in camera proceedings. Furthermore, nothing indicates that the Church contemplates these actions. Although the newspapers' suspicions that secret church and contempt proceedings will occur constitute a theoretical possibility, a mere hypothesis or theoretical possibility is insufficient to satisfy the test stated in *Weinstein. Morgan v. Roberts, 702 F.2d 945, 947 (11th Cir. 1983).* Thus, no "reasonable expectation" exists that this controversy will occur again. n2

n2 As earlier noted, the hearings were not halted because the newspapers did not prevail on their motions for stay pending appeal. We must assume that in the proper cases stays will be granted.

The newspapers' interest in the important constitutional issue which was once alive in this case is understandable. Nevertheless, we must wait for another case with a current controversy, and with a well-developed record to address the issue. The fact that much of the delay in this case [**13] is attributable to a busy and overburdened federal district court is unfortunate.

Because the newspapers cannot satisfy the capable of repetition, yet evading review requirements, this case is moot. Accordingly, this case is dismissed. n3

n3 We express no opinion on whether the remaining eleven pages of the transcripts may properly be sought in another federal lawsuit.

DISMISSED.

**********05837**********

Tonja BURDEN, Plaintiff, v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al., Defendants

No. 80-501 Civ. T-K

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

526 F. Supp. 44; 1981 U.S. Dist. LEXIS 15805; 33 Fed. R. Serv. 2d (Callaghan) 194; 9 Fed. R. Evid. Serv. (Callaghan) 967

July 14, 1981

COUNSEL: [**1]

Walt Logan, St. Petersburg, Fla., Tony Cunningham, Tampa, Fla., Michael J. Flynn, Boston, Mass., for plaintiff.

Alan Goldfarb, Miami, Fla., for Hubbards.

A. Thomas Hunt, Los Angeles, Cal., Howard J. Stechel, Beverly Hills, Cal., Gary S. Brooks, Miami, Fla., Lawrence E. Fuentes, Tampa, Fla., for Church of Scientology of California.

OPINIONBY: KRENTZMAN

OPINION: [*45]

ORDER

For the Court's consideration is plaintiff's motion to compel answers to deposition questions and for imposition of an award of expenses, filed May 29, 1981, supplemented by authority filed on June 9, 1981.

Defendants L. Ron and Mary Sue Hubbard and defendant, Church of Scientology of California, each filed responses to the motion on June 12, 1981.

The motion concerns questions asked of Clyde H. Wilson, Jr., at deposition, who appeared as attorney for L. Ron and Mary Sue Hubbard in this case from May, 1980, to January, 1981. Plaintiff has been unable to locate the Hubbards to serve the complaint, to date.

The questions asked of Mr. Wilson at deposition, which are the subject of this motion, concern not only the address of his former clients, the Hubbards, but the identity of his clients, i. e. who in fact [**2] he represented, took compensation from, and instructions from. One or more of the defendants objected to questions at deposition on the ground of attorney-client privilege.

The attorney-client privilege, like any privilege, is not absolute. It may not, for example, be invoked to perpetrate a fraud upon the Court. *Anderson v. State, 297 So.2d 871, 875 (Fla. 2DCA 1974).*

The decision of whether to uphold the privilege is a balancing process. "In the end, the result in an individual case must turn on a balancing of society's interest in full disclosure against the policies which underlie the privilege." *In re Grand Jury Proceedings, 517 F.2d 666, 671* (fn2) (5th Cir. 1975).

An excellent expression of the considerations to be balanced can be found in *People v. Warden, 150 Misc. 714, 270 N.Y.S. 362, 371 (1934):*

The identity of an employer or client who retains a lawyer to act for him or for others in a civil or criminal proceeding should not be veiled in mystery. The dangers of disclosure are shadowy and remote; the evils of concealment are patent and overwhelming. As between the social policies competing for supremacy, the choice is clear. Disclosure should be made if we are [**3] to maintain confidence in the bar and in the administration of justice.

Because it impedes the search for truth, the privilege must not be lightly created nor expansively construed. *United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974).*

The privilege protects confidential communications, not the attorney-client relationship as a whole. *Matter of Walsh, 623 F.2d 489, 493 (7th Cir. 1980).*

The privilege is inappropriately invoked, as a general rule, to protect a client's identity, or the components thereof, i. e. fact of employment, compensation, address. McCormick, Evidence, § 90 at 185-7 (1972).

In civil actions and proceedings the privilege of a witness is determined by State law. Rule 501, Federal Rules of Evidence. Florida law follows the general rule cited above.

The Florida Rules of Judicial Administration, issued by the *Supreme Court of Florida [*46] at 360 So.2d 1076 (Fla.1978),* Rule 2.060(d) provide:

(An attorney) may be required by the court to give the address of, and to vouch for his authority, to represent, the party.

Florida case law is similar:

The Court may compel an attorney, during the pendency of [**4] a cause, and perhaps thereafter should the occasion arise, to identify his client. The court has a right to know that the client whose secret is treasured is actual flesh and blood, and to demand his identification, for the purpose, at least, of testing the statement which has been made by the attorney who places before him the shield of this privilege.

Silverman v. Turner, 188 So.2d 354, 355 (Fla. 3 DCA 1966), 58 Am.Jur. Witnesses § 507.

The Court finds that the questions asked of Mr. Wilson at deposition, which are the subject of the motion to compel, concern his client(s) identity, address, compensation; in sum they concern the fact of his employment by them and his authority to represent them. As such, they are proper questions and are not protected by the attorney-client privilege under the case law and principles cited above.

Accordingly, plaintiff's motion to compel is GRANTED. The following questions are among those cited in plaintiff's motion, all objected to by one or more defendants. The objections are overruled as inappropriately invoking the attorney-client privilege. Answers to these and similar questions are compelled:

Have you at any time known (the [**5] Hubbards') whereabouts? (page 1 of the motion)

(Did you represent them) under the Burden file? (page 2)

By whom were you retained? (page 2)

Were you compensated for representing the Hubbards? (page 3)

Assuming that you were compensated for representing the Hubbards, who made the payment, where did the money come from? (page 3)

From whom did you receive those communications? (i. e., during the course of your representation of the Hubbards in the Burden file, communications which you received that you believed originated from the Hubbards) (page 4)

Did Mr. Park give you any instruction to render representation on behalf of Mr. and Mrs. Hubbard? (page 6)

Is there any individual that to your information and belief knows the whereabouts of Mr. and Mrs. Hubbard? (page 13)

Mr. Wilson, would it be a correct statement that you undertook the representation of two clients, Mary Sue Hubbard and L. Ron Hubbard, without knowing, number one, their location or address, or, number three, anybody who could communicate with the clients; is that a correct statement? (page 14)

In view of the previous history of this case, it is [**6] reasonable that the renewed discovery deposition be in the presence of the Court.

The deponent is directed to be present on July 28, 1981, at 1:30 p.m. in this Court. These questions may be asked of deponent at that time, and further questions may be asked and ruled on if necessary.

Ruling on the motion with regard to award of expenses is deferred at this time.

TRUST CO., Defendants

Civ. A. No. 81-681-MC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

92 F.R.D. 783; 1982 U.S. Dist. LEXIS 10616

January 27, 1982

CORE TERMS: notice, service of process, telex, messages, personal jurisdiction, reasonably likely, First Amendment, standing to challenge, substituted service, manner prescribed, actual notice, real estate, reputation, successive, calculated, attachment, tortious, terminals, sending, serving, summons

COUNSEL: [**1]

Michael J. Flynn, Thomas M. Greene, Boston, Mass., for plaintiff.

Roger Geller, Geller & Weinberg, Boston, Mass., for Church of Scientology of Boston, Inc., L. Ron Hubbard and Mary Sue Hubbard.

Norman S. Zalkind, Elizabeth A. Lunt, Robert Sheketoff, Zalkind & Zalkind, Boston, Mass., for Church of Scientology of Calif.

Michael Lee Hertzberg, New York City, for defendant pro hac vice.

OPINIONBY: McNAUGHT

OPINION: [*784]

MEMORANDUM AND ORDER

This matter came on to be heard on the objections of the Church of Scientology of Boston, Inc. (Church-Boston) to two of the orders of Magistrate Princi issued on July 31, 1981. n1 One of those orders allowed a motion by the plaintiff for approval of a real estate attachment and the other granted a motion approving substitute service on L. Ron Hubbard (Hubbard). At the hearing on these two objections, this court denied plaintiff's motion for a real estate attachment without prejudice to its renewal at a later time.

n1. The other objections of Church-Boston were disposed of in an order issued by this court on September 1, 1981.

[**2]

Magistrate Princi's order regarding substitute service was as follows:

It appears that L. Ron Hubbard has continuously attempted to avoid service of process and pursuant to *M.G.L.A. C. 227 Sec. 7* and pursuant to M.G.L.A. C. 223A, Sec. 6, service may be made on the defendant outside the Commonwealth as directed by the Court.

Therefore, the following Order is issued, namely that service of process may be made on L. Ron Hubbard in the following manner:

1. Service of a summons and a copy of the complaint on the Secretary of State for the Commonwealth of Massachusetts;

2. Service on the Church of Scientology of Boston, Inc. as an agent of Hubbard transacting his affairs, and conducting his business and holding 10% of its gross revenues for him;

3. Service by publication in the Boston Globe, for three successive weeks the following notice:

Notice is hereby published and made that a Complaint has been filed by Paulette Cooper of New York City against Lafayette Ronald Hubbard, a. k. a. L. Ron Hubbard, and others in the United States District Court for the District of Massachusetts, Civil Docket No. 81-681-MC. The said Lafayette Ronald Hubbard [**3] is hereby directed pursuant to Federal Rules of Civil Procedure, to file an Answer or other responsive pleading to said Complaint on or before twenty (20) days following the third successive publication of this Notice.

4. Service by ordering the Church of Scientology of Boston, Inc. to send via its telex system the Notice set forth in Item 3 to all telex terminals of the Church of Scientology throughout the world, and to all telex terminals through which it may communicate with Lafayette Ronald Hubbard, a/k/a L. Ronald Hubbard.

5. The Church of Scientology of Boston shall send, pursuant to its Standing Order No. 1, a copy of the Summons and a copy of the Complaint in Civil Action 81-681-MC to Lafayette Ronald Hubbard, a/k/a L. Ronald Hubbard.

Non-dispositive pretrial orders of a magistrate are reviewable under the "clearly erroneous or contrary to law standard". *28 U.S.C. § 636*(b)(1)(A); Rule 2(b) of Rules for the United States Magistrates for the District of Massachusetts. Since I find, as set forth hereinafter, that the order allowing substitute service is not clearly erroneous or contrary to law, that order must be affirmed.

In a federal diversity action, [**4] which this action purports to be, service of process is [*785] accomplished according to the law of the state in which the federal district court sits. See Rule 4(e) F.R.C.P. The applicable state law in this case is the Massachusetts Long-Arm Statute, M.G.L. c. 223A. That statute provides in part:

§ 3. Transactions or conduct for personal jurisdiction

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(c) causing tortious injury by an act or omission in this commonwealth;

§ 4. Service outside commonwealth

When the exercise of personal jurisdiction is authorized by this chapter, service may be made outside this commonwealth.

§ 6. Mode of service outside commonwealth; proof of service

(a) When the law of this commonwealth authorizes service outside this commonwealth, the service, when reasonably calculated to give actual notice, may be made:

(1) by personal delivery in the manner prescribed for service within this commonwealth;

(2) in the manner prescribed by the law of the place in which the [**5] service is made for service in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requiring a signed receipt;

(4) as directed by the foreign authority in response to a letter rogatory; or

(5) as directed by the court.

Accordingly, if personal jurisdiction over Hubbard is authorized by § 3, service may be made upon him by order of this court in any manner reasonably likely to provide notice of this suit to him. In this regard, two issues must be resolved: (1) Is personal jurisdiction over Hubbard authorized by M.G.L. c. 223A, § 3 and (2) Is the manner of service provided in the July 31, 1981 order by the magistrate reasonably likely to provide to Hubbard notice of this suit?

Plaintiff's allegations regarding Hubbard sufficiently state claims of tortious acts committed by Church-Boston and others at the direction of Hubbard to allow this court to assert its jurisdiction over him and to permit service on him outside of Massachusetts.

I recognize that the burden of proving jurisdiction over a defendant rests with the plaintiff; however, at this point in the proceedings, [**6] in determining whether or not service can be made upon Hubbard outside of Massachusetts, I accept as true the allegations contained in the complaint and find them sufficient to permit the exercise of jurisdiction over Hubbard.

The second question, the efficacy of the substituted service in providing notice, is more difficult. I accept plaintiff counsel's representations regarding the practical impossibility of serving Hubbard by any of the manners usually employed in effecting service. There is conflict among the affidavits provided by both parties concerning the alleged service-dodging techniques employed by Hubbard and others on his behalf. I do not rely on those affidavits in reaching my determination to allow substituted service. For support for the conclusion that regularly employed methods of service of process would be ineffective here, I need only point to the efforts of Judge Krentzman, of the Middle District of Florida, to arrive at a means of serving the Hubbards in proceedings in that district. After extensive hearings on the issue, Judge Krentzman has decided n2 that constructive service may be made upon the Hubbards by service of process upon the Secretary of State [**7] of Florida.

n2. This information was provided by plaintiff's counsel in the form of an order issued by Judge Krentzman on January 8, 1982 in the case of *Burden v. Church of Scientology of California, 526 F. Supp. 44.* I have relied also on excerpts from a deposition taken before Judge Krentzman and provided to the court by plaintiff's counsel.

The method of service ordered by Magistrate Princi does appear to be "reasonably calculated to give actual notice" to Hubbard. Again, I note the opposing contentions [*786] concerning the likelihood of Hubbard's receiving the proposed service of process which are contained in the affidavits provided by both parties and propounded by counsel at the hearing on this matter. I find that procedures ordered by Magistrate Princi, while extraordinary, are reasonably likely to provide notice to Hubbard.

Church-Boston has objected to the order on a number of grounds. I find, however, that unless Church-Boston is acting as an authorized agent for Hubbard, it has no standing [**8] to object to those portions of the order which do not require action by Church-Boston. Church-Boston's argument that its interest in protecting its reputation which is derivatively impugned by the allegations of the plaintiff and that, therefore, it has standing to challenge the order is without merit. Such injury is merely speculative and cannot provide the defendant with standing to challenge the order. Whatever impact this case has on the reputations of Hubbard or Church-Boston will not be the result of the act of service of process but will be due to the charges brought by the plaintiff.

The arguments of Church-Boston that requiring it to perform service of process violates the First Amendment and would unduly burden Church-Boston lack merit.

The plaintiff has stated that she is willing to pay the cost of sending out the telex messages. Indeed, she says she will send the messages herself if she is provided with the telex addresses of the various Churches of Scientology. Since that is so, there is no burden placed on the Church by requiring it to send the messages or to provide plaintiff with the telex addresses.

The order of Magistrate Princi does not impinge upon the religious [**9] beliefs of the members of the Church of Scientology. There is no issue of religion whatsoever involved in the service of process in a civil case. Such service will not interfere with nor burden the relationship between the members of the Church and those who provide spiritual guidance. The order merely requires Church-Boston to send notice through channels established by the Church of Scientology to provide access to Hubbard. As such, the ordered mode of service does not constitute an infringement of any rights guaranteed by the First Amendment.

For the foregoing reasons, the order allowing substitute service on L. Ron Hubbard is affirmed in the form issued by Magistrate Princi. Additionally, plaintiff must bear the cost of the sending of telex messages to the Churches of Scientology throughout the world.

Intervenors-Appellants

CA No. A30844

COURT OF APPEALS OF OREGON

71 Ore. App. 481; 692 P.2d 700; 1984 Ore. App. LEXIS 4684

December 19, 1984, Filed; Argued and submitted October 10, 1984

SUBSEQUENT HISTORY: [***1]

Reconsideration Denied February 8, 1985. *Petition for Review Denied April 30, 1985 (299 Or 118).*

PRIOR HISTORY:
Appeal from Circuit Court, Multnomah County. Charles S. Crookham, Judge. No. A8311-07227.

DISPOSITION: Affirmed.

CORE TERMS: intervenor, intervene, permissive, appealable, motion to intervene, right to intervene, practical matter, church, indemnitor, joined, indemnitee, conclusive, indemnity, ability to protect, mission, immediately appealable, person indemnified, complete relief, main action, indemnification, indemnify, complains, satisfy a judgment, substantial risk, federal rule, ecclesiastical, indemnifying, speculative, discipline, conversion

COUNSEL: Marc D. Blackman, Portland, and Eric M. Lieberman, New York, New York, argued the cause for intervenors-appellants. On the briefs were Marc D. Blackman, Diane L. Alessi, and Ransom, Blackman & Simson, Portland.

Garry P. McMurry, Portland, argued the cause for respondent. With him on the brief were Ronald L. Wade, and Rankin, McMurry, VavRosky & Doherty, Portland.

JUDGES: Richardson, Presiding Judge, and Van Hoomissen and Young, Judges.

OPINIONBY: VAN HOOMISSEN

OPINION: [*483] [**701] Plaintiff filed this civil action against Hubbard, the founder of Scientology, alleging that Hubbard had committed torts against him. Plaintiff does not allege that Hubbard personally committed the alleged torts, which include conversion, outrageous conduct, defamation and fraud. Rather, he alleges that he directed and controlled others who did so and that they were Hubbard's agents. They include intervenors Church of Scientology of California, Inc., and Church of Scientology, Mission [***2] of Davis. Plaintiff is a former minister of the California church and a former president of the Davis mission. Plaintiff served Hubbard by substituted service pursuant to an ex parte court order, but Hubbard has not appeared. After the service, the California church and the Davis mission moved to intervene as defendants. The trial court denied their motions, and they appeal. We affirm.

Plaintiff moves to dismiss on the ground that an order denying a motion to intervene is not appealable. ORS 19.010(2)(a) provides that appealable orders include "[a]n order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein." (Emphasis supplied.) Other states with similar appeal statutes have [**702] held that an order denying intervention is final as to the party seeking to intervene, because it prohibits a judgment in the main action on that party's claim. They therefore treat such orders as immediately appealable. *Henry v. Travelers' Ins. Co., 16 Colo 179, 26 P 318 (1891); Ousley v. Osage City, 95 Kan 254, 147 P 1110 (1915); Likover v. Cleveland, 60 Ohio App 2d 154, 396 NE 2d 491 (1978);* [***3] *James S. Jackson Co. v. Horseshoe Creek Ltd., 650 P2d 281 (Wyo 1982);* see also *Thorpe v. North Moneta, etc. Water Co., 12 Cal App 187, 106 P 1106 (1909)* (intervenor could not appeal from final judgment in the case; the time for an appeal was when petition to intervene was denied).

Federal courts take a slightly different position. *28 USC § 1291* provides for appeals "from all final decisions" of the district courts. Final decisions generally include orders that, as a practical matter, end the litigation. *Catlin v. United States, 324 U.S. 229, 233, 65 S Ct 631, 89 L Ed 911 (1945); Weston v. The City Council of Charleston, 27 U.S. (2 Pet.) 449, 464-65, 7 L Ed 481 (1829); Matter of Glover, Inc., 697 F2d 907, [*484] 909 (10th Cir 1983).* An order denying a petition to intervene is appealable under the federal statute if the petitioner had a right to intervene or if the denial was an abuse of the trial court's discretion. If the

decision was discretionary and the trial court did not abuse its discretion, federal courts take either of two positions. The traditional approach is to dismiss the appeal. *Wheeler v. American Home Products Corp., 582 F2d 891, [***4] 896 (5th Cir 1977); State of N.M. v. Aamodt, 537 F2d 1102, 1106 (10th Cir 1976),* cert den *429 U.S. 1121 (1977).* However, deciding whether to dismiss the appeal requires the appellate court to determine the merits of the trial court's denial of intervention, just as it would do if it had jurisdiction. Some commentators and other federal courts have suggested that it is simpler to treat all denials of intervention as appealable and to affirm those where the trial court properly exercised its discretion. *Reedsburg Bank v. Apollo, 508 F2d 995, 997 (7th Cir 1975); Levin v. Ruby Trading Corp., 333 F2d 592, 594 (2nd Cir 1964);* 3B Moore's Federal Practice para. 24.15. State courts whose appeal provisions are similar to the federal generally take this latter position. *Citibank, N.A., v. Blackhawk Heating, Etc., 398 So 2d 984, 986 (Fla App 1981); Mayflower Development Corp. v. Dennis, 11 Mass App 630, 633-35, 418 NE 2d 349 (1981); Apodaca v. Town of Tome Land Grant, 86 NM 132, 520 P2d 552 (1974).*

In short, in most other jurisdictions, either some or all denials of intervention are immediately appealable. If not all denials are immediately appealable, the court [***5] must first decide the merits of the denial in order to determine whether a particular order is appealable. Oregon has not yet clearly decided the issue. In *State Highway Com. v. Superbilt Mfg. Co., 200 Or 478, 481-83, 266 P2d 1072 (1954),* the Supreme Court noted that a denial of intervention of right may be final and therefore appealable. However, the intervention at issue was premature, and denial of the motion to intervene was without prejudice to a renewed motion later in the case. The court, therefore, dismissed the appeal. In *General Const. v. Fish Comm., 19 Or App 485, 490-92, 528 P2d 122 (1974),* we dismissed an appeal from a denial of a motion to intervene on the ground that the intervenor could assert its claim in a separate action. In *Brown v. Brown/Brown, 10 Or App 80, 82-83, 497 P2d 671,* rev den (1972), we dismissed an appeal because the trial court did not abuse its discretion in denying [*485] the motion to intervene. These cases can best be seen as applications of the majority federal rule that, when the decision on intervention is within the trial court's discretion and the trial court did not abuse its discretion, the appellate court should [***6] dismiss the appeal. In each case the court determined the merits of the appeal in order to dismiss it; the Superbilt court indicated that it would not have dismissed the appeal if it had been meritorious.

Although Oregon cases may apply the majority federal rule, they do not constitute [**703] a reasoned adoption of it. Other states have held, and we agree, that a decision to deny a motion to intervene affects a substantial right of the intervenor and, as a practical matter, determines the action so as to prevent a judgment in that action on the intervenor's claim or defense. It, therefore, comes within the language of ORS 19.010(2)(a). We also agree with those courts which hold that it makes little sense to distinguish procedurally between motions for intervention which are properly or improperly denied. We must address the merits of the trial court's decision in either situation, and it is less confusing simply to affirm a denial that was within the court's discretion. We deny plaintiff's motion to dismiss the appeal.

ORCP 33 provides, in relevant part:

"B. At any time before trial, any person shall be permitted to intervene in an action when a statute [***7] of this state, these rules, or the common law, confers an unconditional right to intervene.

"C. At any time before trial, any person who has an interest in the matter in litigation may, by leave of court, intervene. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

ORCP 33 is the first clear recognition in Oregon of a distinction between intervention of right and permissive intervention. Some cases considering intervention under former ORS 13.130 (repealed by Or Laws 1979, ch 284, § 199) suggested that a party that met the requirements of that statute had a right to intervene. See *Barendrecht v. Clark, 244 Or 524, 528, 419 P2d 603 (1966); Duke v. Franklin, 177 Or 297, 304-05, 162 P2d 141 (1945).* The present rule, however, clearly limits intervention of right to the few circumstances described in [*486] ORCP 33B. We review decisions on motions based on those circumstances as matters of law. Other motions for intervention must meet the requirements of ORCP 33C and, even if they do, the trial court has discretion whether to [***8] grant them. We review these latter decisions only to determine whether they are within the court's discretion. Intervenors assert both that they have a right to intervene under ORCP 33B and that they are permissive intervenors under ORCP 33C.

The underlying assumption of many of intervenor's arguments is that a default judgment against Hubbard would seriously prejudice them. n1 We do not agree. Plaintiff's complaint alleges that Hubbard, through

intervenors and other of his agents, committed a number of torts. A judgment against him would be conclusive between plaintiff and Hubbard, but it would not bind intervenors. If, as they insist, they are independent entities over whom Hubbard has influence only as the founder of their faith, the effect of a judgment would at best be indirect and speculative. None of the allegations proved against Hubbard would be deemed proved against intervenors. They would remain free to deny that they are his agents or that he controls them. Plaintiff could not use the judgment to hold intervenors liable in another case.

n1 Intervenors assert that Hubbard will not appear. The record shows only that he has not yet appeared.

[***9]

Plaintiff may try to satisfy a judgment against Hubbard by executing on intervenors' property. To do so successfully, he would have to prove that some property that intervenors hold is in fact Hubbard's property. That would require a full trial of those issues, and the judgment would not aid plaintiff in that regard. He may attempt to reach intervenors' property by showing that Hubbard so dominates intervenors that they are his alter-egos. If he succeeds, not only would intervenors' property be Hubbard's property, but intervenors would have no interest in this proceeding different from Hubbard's, because they would have no existence separate from Hubbard's. In those circumstances, it would not be inappropriate to bind them to [**704] the result of plaintiff's action against Hubbard.

If plaintiff cannot show that Hubbard dominates intervenors, plaintiff will be unable to use a judgment against [*487] Hubbard to acquire their property. Plaintiff may also try to show that Hubbard, although he does not control intervenors, has an interest in their property. If so, plaintiff could reach that retained interest to satisfy a judgment against Hubbard. Such an action would [***10] not harm intervenors, because the interest plaintiff receives would not be theirs in the first place. They would be in the same position as any other garnishee. Thus, intervenors have not shown direct prejudice to themselves from a judgment against Hubbard. n2

n2 If Hubbard appears and obtains a judgment in his favor, intervenors would benefit because of the judgment's collateral estoppel effects. See *Bahler v. Fletcher, 257 Or 1, 474 P2d 329 (1970).*

We turn to the specific bases on which intervenors claim the court erred in denying their motions to intervene. They first assert that they are entitled to intervene as of right under ORCP 33B because they are persons to be joined, if feasible, under ORCP 29A. n3 We need not decide whether a person who should be joined under ORCP 29A is also entitled to intervene as of right under ORCP 33B, because intervenors are not persons who must be joined. Their presence is not necessary for complete relief between plaintiff and Hubbard. To the extent that the issues [***11] relate to intervenors' activities, plaintiff and Hubbard may need their evidence, but that evidence is available without joining them as parties. There is no danger that intervenors, plaintiff or Hubbard would be exposed to a substantial risk of double liability or inconsistent obligations as a result of proceedings in intervenors' absence. Neither is this a case in which intervenors would be bound by challenged rules or would be deprived of money from a challenged fund if plaintiff's action is successful. See *New York Pub. I.R.G., Inc., v. Regents of Univ. of St. of N.Y., 516 F2d 350 (2nd Cir 1975); Decker v. United States Dept. of Labor, 473 F Supp 770 (ED Wis 1979),* aff'd *661 F2d 598 (7th Cir 1980).* Therefore, intervenors are not entitled to intervene as [*488] of right under ORCP 33B.

n3 ORCP 29A provides in part:

"A person who is subject to service of process shall be joined as a party in the action if (1) in that person's absence complete relief cannot be accorded among those already parties, or (2) that person claims an interest relating to the subject of the action and is so situated that the disposition in that person's absence may (a) as a practical matter impair or impede the person's ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest."

[***12]

Intervenors' other arguments in support of intervention are in fact for permissive intervention, although they label some of them as seeking intervention as of right. They assert that the adoption of ORCP 33C expanded the bases for permissive intervention in Oregon from what they were under former ORS 13.130. n4 They are incorrect. The first sentence of ORCP 33C is simply a repetition of the standard for intervention found in former ORS 13.130. Although the second sentence of ORCP 33C is derived from FRCP 24(b), it merely states criteria that courts have traditionally used in deciding whether to permit intervention. It does not adopt the broad federal standard for permissive intervention. n5

n4 Those bases were strict. "[T]he right or interest which will allow a third person to intervene must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation of the judgment[.]" *Brune v. McDonald, 158 Or 364, 370, 75 P2d 10 (1938).*

n5 FRCP 24(b)(2) permits intervention whenever the intervenor's claim or defense and the main action have an issue of law or fact in common. The bases for permissive intervention in ORCP 33C, rather than being comparable to those in FRCP 24(b)(2), are closer to those for intervention of right in FRCP 24(a)(2). The numerous federal cases which intervenors cite are therefore of limited assistance in resolving this case. Even those federal cases which hold that a party had a right to intervene do little more than indicate that a similarly situated party would qualify for permissive intervention under Oregon law. That determination is of little assistance in deciding whether a denial of permissive intervention exceeded the trial court's discretion. Intervenors would have been better advised to seek authorities applying intervention provisions similar to Oregon's rather than assuming that there is a federal answer for every state problem.

[***13]

[**705] Intervenors assert that disposition of the case in their absence may, as a practical matter, impede their ability to protect their religious and reputational interests. Assuming that those concerns give intervenors an "interest in the matter in litigation," they are not significant enough that the trial court's action was outside its discretion. Although there may be extensive litigation between various Scientology organizations and their opponents, we do not see how the exclusion of intervenors from this case would damage their interests in others. There would be no res judicata as to them. Despite their arguments to the contrary, there would also be no stare decisis effect. The effect of a judgment against Hubbard on intervenors' reputation is highly speculative.

Intervenors allege that the actions of which plaintiff complains, to the extent that they occurred at all, were part of [*489] intra-church religious discipline and that the secular authorities may not interfere with that discipline. A judgment against Hubbard in this case neither decides this point nor impairs intervenors' ability to raise it in another proceeding. Plaintiff's complaint [***14] alleges a number of intentional torts. It does not by its terms implicate intervenors' ecclesiastical concerns. Those concerns are matters of defense. If Hubbard does not control intervenors, his failure to raise these defenses cannot affect intervenors. If intervenors are his alter-egos, it is not improper for them to bear the results of his decision not to appear (if he does not) or not to raise those issues (if he does not). n6 To the degree that intervenors are in fact separate entities from Hubbard, failure to join them would not as a practical matter affect their ability to protect their separate interests. n7

n6 As we discuss below, intervenors as Hubbard's indemnitors may be able to insist that he raise those defenses.

n7 Intervenors' assertion that certain property which plaintiff alleges Hubbard converted actually belonged to them does not meet the requirements of ORCP 33C. Plaintiff seeks damages for conversion, not replevin of the property, and therefore intervenors do not have an interest in the subject matter of that claim.

[***15]

Intervenors' strongest argument is that their position as Hubbard's indemnitors makes intervention necessary. The indemnity obligation arises from contracts between intervenors and the Church of Scientology International and Scientology Missions International. Under those contracts intervenors must indemnify Hubbard from all claims against him which arise from their practice of Scientology. The contracts were executed in July and September, 1982, after many of the events of which plaintiff complains had occurred. However, each claim for relief refers to events in October, 1982, or later, so we will assume that intervenors may be required to indemnify Hubbard for at least some of plaintiff's alleged damages. The indemnity agreements give intervenors a sufficient interest in the matter in litigation that the court would not have erred by permitting them to intervene. See *Barendrecht v. Clark, supra.* Whether the court's denial of intervention was beyond its discretion depends on whether intervenors would be prejudiced in defending against Hubbard's demand for indemnity if they are not allowed to intervene. If they would not, the court's action was permissible.

[*490] [***16] If intervenors are not permitted to intervene, Hubbard may refuse to defend the case or may do so inadequately. Intervenors express particular concern that he may not raise their ecclesiastical defenses. However, under California law, which governs the interpretation of the agreements according to their express terms, intervenors can control Hubbard's defense to the extent that the issues involve their indemnity liability. If they do not, they will have [**706] a defense to any indemnity claim Hubbard may bring

against them. Cal Civ Code § 2778 provides in relevant part:

"In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

"* * *

"6. If the person indemnifying, whether he is a principal or a surety in the agreement, has no reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former;

"7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which [***17] by want of ordinary care he failed to establish in the action."

Subsection 7 apparently applies to all situations in which an indemnitee may claim that a judgment is conclusive. See *Nicholson-Brown, Inc. v. City of San Jose, 62 Cal App 3d 526, 133 Cal Rptr 159 (1976)*. California courts have gone beyond the statute to hold that an action against an indemnitee is in substance an action against the indemnitor. The indemnitor, they hold, is the real party in interest and has an opportunity in defending the indemnitee to make any defense which may exist. *Dutil v. Pacheco, 21 Cal 438 (1863); Sunlight Elec. Supply Co. v. McKee, 226 Cal App 2d 47, 37 Cal Rptr 782 (1964);* see also 14 Cal Jur 3d 734-38, Contribution and Indemnification §§ 70-71; Restatement (Second) Judgments, § 57(1)(b)(ii).

If Hubbard appears in this case, intervenors on his behalf may raise all the defenses that they could raise if they were parties. If he does not appear and does not permit intervenors to appear for him, they may have a defense to his [*491] indemnification claim. Although the trial court could have allowed intervention, its refusal to do so does not so damage intervenors [***18] that it was an abuse of the court's discretion.

Affirmed.

Church of Scientology of California v Miller & Another

Court of Appeal (Civil Division)

The Times 23 October 1987, The Independent 23 October 1987,
(Transcript:Association)

HEARING-DATES: 22 October 1987

22 October 1987

COUNSEL:

A Newman and J Algazy for the Appellant; G Lightman QC, M Briggs and P Jones for the Respondents

PANEL: Fox LJ, Sir George Waller

JUDGMENTBY-1: FOX LJ

JUDGMENT-1:

FOX LJ: Before giving judgment I would say for the convenience of the parties that this appeal will be dismissed.

This is an appeal by the plaintiffs from a decision of Vinelott J refusing to grant an interlocutory injunction. The plaintiffs are the Church of Scientology of California. The Church is registered under Californian law as a religious organisation. It has subsidiary or associated organisations in countries other than the United States, including the United Kingdom. Those subsidiaries and associations, together with the plaintiffs, can for convenience be referred to as the "Church".

The Church was founded by L Ron Hubbard. Mr Hubbard died in January 1986.

The defendant, Mr Russell Miller, has written a biography of Mr Hubbard called "Bare-Faced Messiah". The second defendant, Penguin Books, is the intended publisher through their subsidiary Michael Joseph Limited. The intended publication date is 26th October -- that is to say, Monday next.

Pursuant to an order of Nicholls LJ, (after the decision of Vinelott J had been given) pending this appeal, Penguin Books were at liberty to distribute copies of the book to their wholesalers and retailers upon terms that the book should not be published or sold before 26th October. As I understand it, Penguin Books have distributed accordingly.

The plaintiffs seek, in effect, an injunction restraining publication of the book in its present form. The grounds upon which the injunction is sought are as follows:

(1) It is claimed that the plaintiffs are the owners of copyright in two photographs, one of which, of Mr Hubbard alone, appears on the dust cover of the book, and the other is in the body of the book. Breach of copyright is asserted.

(2) That the book contains quotations from and material derived from diaries and letters of a confidential character which were communicated in confidence by the plaintiffs to an employee of theirs, a Mr Gerald Armstrong and that the plaintiffs are entitled to prevent the disclosure of such documents or their contents by a person who becomes aware of their confidential nature.

(3) That the documents were obtained by Mr Miller in breach of certain orders of the court of the State of California.

As regards the dust cover photograph, Mr Miller's case is that this is what one might call "publicity material" handed out at the Church's College at East Grinstead to a publicity agency from which he obtained it. The Church says that the

photograph handed out (lawfully they admit) as publicity at East Grinstead, was a different photograph. The two photographs are very similar. The photograph on the dust cover of "Bare-Faced Messiah" is not an exact reproduction of the one in which the plaintiffs claim copyright. It has been reproduced in such a way as to make it a striking photograph.

The photograph supplied to Mr Miller by the publicity agency could be reproduced in the same way as that on the dust cover so as to be virtually indistinguishable from it.

The judge concluded (rightly, I think) that there was no likelihood that the Church could be damaged by any breach of copyright resulting from the publication of that photograph.

The other photograph seems to be merely a snapshot. The plaintiffs say that it was taken by an official photographer employed by them. The defendants say that it was taken by an employee of the Church for their own purposes, and was merely a snapshot and nothing more. I agree with the judge that whichever version is true, the publication of the photograph could not damage the plaintiffs.

In those circumstances, the judge refused interlocutory relief regarding the photographs. I should say that I accept that there are triable issues as to the actual existence of copyright.

I come then to the documents with which this case is concerned. They consist of the following:

(1) The diaries between the years 1927 and 1929 of Mr Hubbard (the "diaries").

(2) A letter to Mr Hubbard from his mother (the "mother's letter").

(3) A letter from Mr Hubbard to his wife Polly (the "letter to Polly").

(4) Three letters written by Mr Hubbard to a lady called Helen O'Brien (the "letters to Helen").

It would appear that Mr Armstrong was a senior employee of the plaintiffs. He was employed, so far as is relevant to this case, to compile and preserve Mr Hubbard's personal papers. At that time Mr Hubbard was alive. The plaintiffs say that Mr Armstrong's employment was on the footing that he would preserve the confidentiality of all documents given into his keeping for the purposes of his duties. Later on a Mr Garrison was appointed as official biographer of Mr Hubbard by the Church. Mr Armstrong then became, in effect, his research assistant.

Mr Armstrong eventually left the employ of the Church, and when he did so he took with him a substantial number of the documents relating to Mr Hubbard. They are referred to as the "archival documents". They included the documents in issue in this case to which I have already referred.

The plaintiffs and Mr Hubbard took proceedings in the courts of California to recover the archival documents. That claim was heard by Judge Breckenridge. In June 1984 the judge gave a Memorandum of intended decision. Mr Armstrong had pleaded that he was entitled to remove the material and lodge it with his attorney for his own protection. He said he feared unlawful harrassment by the Church; he relied on what is called the "fair game" doctrine.

Judge Breckenridge held that Mr Armstrong had been guilty of conversion but he upheld the defence. He ordered that the documents were to remain with the court pending a further hearing. He found that neither the Church nor Mr Hubbard had "clean hands" and held that at that moment in time they were not entitled to the immediate return of the documents, or other material retained by the court Clerk. He said that all exhibits received in evidence in the suit marked for identification, unless specifically ordered sealed, were matters of public record and should be available for public inspection or use to the same extent that any such exhibits would be available in any other law suit.

There then followed a series of orders of the superior courts in California, in which in effect the judgment of Judge Breckenridge was stayed, or stays were temporarily removed for short periods. It is a somewhat complex issue, but it is said on behalf of the defendants that these stays opened a number of "windows" which enabled public inspection of the documents. There are, however, disputes between the parties as to when the orders lifting the stays were actually given effect to. The defendants say that that does not matter because there was nothing to prevent Mr Armstrong's attorney,

Mr Flynn, releasing copies of exhibits which he had in his possession in accordance with the original order of Judge Breckenridge as soon as the order raising the stay had actually been made and was perfected by the court making it.

It is the defendants' case that Mr Miller obtained copies of the diaries and the mother's letter from Mr Attack who, in turn, obtained them from a photocopying agency employed by Mr Flynn; and that they were supplied during a period when the order of Judge Breckenridge that exhibits (which these were) should be made available to the public, was in force -- during what I may call a "window" period.

Vinelott J accepted (and I agree) that there is a triable issue whether there was a period during which Mr Flynn was entitled to release to others copies of the exhibits in the Californian action. He also held (and I agree) that the suggestion that there was never the faintest chink in the "window" was flimsy.

The letter to Polly and the letters to Helen were not exhibits. The defendants' claimed before the judge that upon the true construction of Judge Breckenridge's order, they were free to deal with them. The judge thought that that construction was strained -- and it is not necessary for me to pursue that matter.

However, the defendants further say that Mr Miller did not obtain these letter documents from Mr Armstrong or Mr Flynn. It is said that the letter to Polly was obtained from a source which Mr Miller is reluctant to disclose; but that Mr Miller obtained the letters to Helen from a Mr Newman.

The conclusions of the judge were as follows:

(1) The plaintiffs' claim that the defendants could not properly have obtained the Court documents in the course of the Californian proceedings, while they were available to the public, is flimsy.

(2) There is a triable issue as to whether the defendants obtained the remaining documents (the letter to Polly and the letters to Helen) from a source unaffected by any duty of confidence. The judge went on to consider the question of confidentiality and public interest. He held that the public interest in maintaining the bond of confidentiality must be weighted against the legitimate public interest in the affairs of the Church and its history, and the life of its founder. He concluded that the public interest far outweighed any duty of confidence that could possibly be owed to Mr Hubbard or the Church -- even assuming (which was in fact contrary to the judge's finding) that Mr Armstrong owed the same duty of confidence to the Church as he would have owed to Mr Hubbard, had Mr Hubbard been living.

Further, the judge was of the opinion that the plaintiffs were in any event disentitled to relief because of delay and in the circumstances his conclusion was that the application for an interlocutory injunction should be dismissed. The plaintiffs appeal.

In my judgment Vinelott J was right in holding that the plaintiffs are disentitled by reason of delay from obtaining the interlocutory relief sought. The Writ and Notice of Motion in this action was served on 29th September of this year. The notice of Motion in effect seeks an injunction preventing the publication of the book in its present form. The proceedings were launched without any letter before action, less than a week before the planned distribution of the book to retailers, and less than a month before the planned publication date.

In February 1986 Mr Miller informed the Church that he was planning a book about Mr Hubbard. At some date, also in February 1986, Mr Miller met Mr Armstrong, but asserts he then received no documents from Mr Armstrong other than a transcript of the trial before Judge Breckenridge.

On 21st May 1986 Messrs Lubell and Lubell, attorneys acting on behalf of the Church, wrote to Michael Joseph Ltd. The first paragraph of that letter is as follows:

"This letter places you on formal notice regarding the rights of the Church of Scientology, International, and your legal obligations and liabilities relating to your proposed publication of a biography of L Ron Hubbard by Mr Russell Miller.

"Publication of this book is not authorised by the Chury of Scientology, International, a holder of distinct legal rights in and to the use and propagation of the various Scientology teachings and religious items associated with Mr Hubbard

and Scientology. Your failure to obtain such authorition violates the rights of the Church of Scientology, International, under the laws of the State of California, the laws pertaining to registered trade and property rights and under common law."

In August 1986 Mr Armstrong informed the Church that Mr Miller had some of the archival documents. In December 1986 the Church settled its dispute with Mr Armstrong and recovered the archival documents held by him. In May 1987 the publication of "Bare-Faced Messiah" was announced in advance in the Michael Joseph catalogue. As I have already mentioned, Michael Joseph Ltd is controlled by Penguin Books. Publication was announced for October 1987 in a full-page description of the book.

The plaintiffs' evidence in this case is based upon a copy of a typed proof of the book which came into existence on 5th August 1987. The plaintiffs obtained this material without the knowledge or consent of the defendants. On 4th July 1987, Lubell and Lubell, on behalf of the Church, communicated again to Michael Joseph Ltd saying: "From the information available to us, Mr Miller's investigation and the book which no doubt will result therefrom, will constitute in regard to certain documents and information an invasion of privacy and deprivation of the literary property rights of the various Church entities and individuals associated with Mr Hubbard and Scientology".

Neither in their evidence, nor in the course of the hearing before the judge, did the plaintiffs identify the date on which or (except in a very general manner) the manner in which they obtained a copy of the proof manuscript of the book. What is known is that, without warning on 29th September 1987, when the defendants' preparations were far advanced and when any interference with those preparations was likely to cause the defendants maximum embarrassment and difficulty, these proceedings were launched.

If -- as may well be the case -- the proof came into the plaintiffs' possession soon after 5th August 1987, there could be no justification for the delay until 29th September. It is duty of a person seeking injunctive interlocutory relief to act with speed. That must more particularly be so in a case of this kind where time would obviously be of crucial importance to the author and publisher who are sought to be restrained.

It is said that the delay was inevitable because of the heavy task of relating the material in the book to the mass of the archival material. As to that, I agree with the judge that a cursory reading of the book shows that substantial use is made of Mr Hubbard's diaries, which it must have been known were part of the archival material.

In my view the judge was fully entitled to reach the conclusion which he did, namely that the delay iteself was a bar to any claim for an interlocutory injunction.

At the end of the first day of the hearing of this appeal, an application was made to the court on behalf of the plaintiffs to adduce further evidence as to delay. That application was refused. It was the duty of the plaintiffs to make full disclosure in the evidence before the judge of all material relating to the date when the proof of the manuscript was obtained. As I have said, time was a highly material factor in relation to the grant of relief in the circumstances of this case. To tender evidence at the appellate stage was too late and would inevitably place severe restrictions upon the defendants' ability to investigate its truth.

In my judgment that is enough to dispose of this appeal. However, there are certain further considerations to which I will refer. Let it be supposed, for present purposes, that the plaintiffs have an arguable case of breach of copyright and of confidentiality, and that damages would not be an adequate remedy for the plaintiffs. The court has then to consider the other side of the coin. Would the plaintiffs be able to meet their implied undertaking in damages if an interlocutory injunction were granted, but that the defendants won at the trial?

In American Cyanamid v Ethican [1975] AC 396, [1975] 1 All ER 504 at page 408 of the former report Lord Diplock said that when there is doubt as to the adequacy of the respective remedies in damages (or both) the question of the balance of convenience arises.

The evidence on behalf of the defendants in this appeal is to be found in the affidavit of Mr Brooke who, in paragraph 3 of his affidavit, says:

"Seven thousand five hundred copies of the book have been printed, and subject to these proceedings, we confidently expect that the book could run to several editions. Since this is a book enormous topical interest there has been a considerable advance publicity for it. It was first announced in advance in the Michael Joseph catalogue for May 1987, in a full page description on page 9, a copy of which is now produced and shown to me marked 'JAdLB 2'. A large full page colour advertisement for it was also featured in the Bookseller issue 17th July 1987, now produced and shown to me marked 'JAdLB 3'. In addition the author has sold serial rights to the Sunday Times, such serialisation being timed to coincide with the publication date of 26 October 1987 to stimulate sales. It is essential that this book is published to coincide with the three-part serialisation in the Sunday Times which commences either on the 18th or 25th October".

I interpose at this point to say that in view of these proceedings, the first serialisation in the Sunday Times will be on 1st November.

"The Sunday Times, by reason of its circulation and its influence, provides a uniquely powerful launch platform for this book and in our experience always strongly stimulates sales of books serialised in it always provided the book is published at the time of serialisation. The whole campaign strategy of Michael Joseph is built round the Sunday Times serialisation which we expect to lead to massive feature and interview coverage for the author. Michael Joseph has already received numberous calls about the book from the media, which encourages us to believe that our strategy will be a success. A successful launch of the book, besides leading to rapid reprints and 'bestsellerdom' will also encourage paperback publishers to bid keenly for the paperback rights in the book; these could realise revenue of £50,000 or more to the publisher and author. In addition in a work of this nature which is a hardback the three months period before Christmas is crucial for sales since that is when the majority of hardback sales are made."

Then in paragraph 6 of his affidavit Mr Brooke says:

"By the time of swearing this affidavit orders have been received from bookshops which amounted to over 5,000 copies. The procedure regarding books is that Michael Joseph salesmen visit bookshops to subscribe new titles. To ensure that books are not sold before publication date when copies are supplied to bookshops, the publication date is printed on the invoice. Review copies would normally be sent out to a large number of peridicals and in the normal practice reviews would appear on or shortly after publication date. If Michael Joseph were ordered not to release review copies nor to supply orders received from bookshops, we will suffer an irrecoverable loss of sales and there is of course no way of determining the amount of sales lost this way. Moreover, Michael Joseph's high reputation as a publisher would be damaged if Michael Joseph is unable to respond to orders which have been stimulated by advance publication or serialisation because it is under a Court order not to do so. Not only will sales be lost but also some taint will attach to the reputation of both Penguin and Michael Joseph in the minds of both the bookseller and the ultimate customer if Penguin and Michael Joseph are unable to supply copies ordered by bookshops. This will cause considerable damage to their relations with bookshops which are essential to their publishing and marketing operations.

"7. There has been a substantial investment in this book. A non-returnable advance of £13,250 has been paid to Russell Miller, and a further £5,250 is due to the author on publication of the book. In addition, I am informed and understand from our publicity department that the sum of £2,290 has already been expended on advance advertising. I believe that it is universally recognised that publicity of all forms is entirely wasted if the produce, be it goods or groceries, is unavailable when the publicity appears.

"Therefore, if Michael Joseph is ordered not to distribute this book, the advance publicity will be entirely wasted. Quite apart from the loss of sales this represents, it is annoying and frustrating for book buyers to ask for the book that they had seen advertised to be told they cannot purchase it. This seriously damages our goodwill and the reputation which we have worked so hard to create as one of the best, most efficient and reliable hardback publishers in the British Commonwealth. The taint upon Michael Joseph and Penguin if publication is halted is serious, immediate and long lasting. The implications are quite undesireable and extend far beyond our relationships with the bookshop, the reader and the book buff".

In my view it follows from that evidence that if the publication of the book is restrained until trial that there is a risk that the defendant publishers will be exposed to substantial and in part possibly unquantifiable losses in respect both of sales and their reputation as reliable publishers. For publishers of repute to have the publication of one of their books stopped by an order of the court prior to the announced publication date is obviously a very serious matter for them. Therefore here we are dealing with a case in which the damages, if an injunction were granted and such injunction was

discharged at the trial, would very likely be substantial and might to a degree be unquantifiable. I come then to the undertaking in damages which would have to be given by the plaintiffs. The evidence of Mr Long for the plaintiffs is this:

"The Church can and will make good any such undertaking of nonetary damages that might be required. The last published accounts of the Church show a net worth of approximately 14 million dollars. There is now produced and shown to me . . . a copy of the balance sheet as at November 30th 1986."

So far as the balance sheet is concerned, on 8th December 1986 Messrs Greenberg & Jackson, auditors to the Church, wrote the following:

"We have compiled the accompanying balance sheet of the Church of Scientology of California as of November 30, 1986, and the related statement of Church operations for the period September 16, 1986 to November 30, 1986, in accordance with standards established by the American Institute of Certified Public Accountants.

"A compilation is limited to presenting in the form of financial statements information that is furnished by management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.

"As is described in Note 5 and 6, the Church has various gain and loss contingencies. It is not possible at this time to evaluate the possible effects of such contingencies on its financial position"."

Turning to the Notes referred to in that letter, Note 5 reads as follows:

"Loss Contingencies. The Internal Revenue Service has made assertions that the Church of Scientology of California owes employment taxes penalties, and interest of $4,187,529 for the years subsequent to 1975. Also it has assessed income taxes, penalties, and interest of $8,282,159 for the years 1973 and 1974. Payment of the income tax assessment is contingent on the result of pending litigation. The Church has pledged the land and building which secures the Mortgage Receivable and the Certificate of Deposit as collateral for possible payment of income taxes for 1973 and 1974. It is not possible at this time to evaluate the likelihood of the Internal Revenue Service prevailing in its claims.

"Additionally, the Church is the defendant in certain litigation. It is not possible at this time to evaluate the likelihood of recovery against the Church in the litigation, nor the potential liability to the Church resulting from the claims asserted in the litigation."

Note 6 reads:

"Gain Contingencies. The Church is appealing the payment of $2,946,920 income taxes, penalties and interest to the Internal Revenue Service for the years 1970-1972. It is not possible at this time to evaluate the likelihood of the Church prevailing in its appeal."

Against that background the value of any undertaking in damages by the Church must, in my opinion, be conjectural.

Where, then, does the balance of convenience lie? I draw attention to the following considerations in general terms:

(1) If an injunction is granted and the defendants succeed at the trial, they are exposed to the risk of losses which, insofar as they can be quantified at all, may exceed the available assets of the plaintiffs.

In the course of the plaintiffs' reply on this appeal yesterday, it was suggested that they would give security.

It seems to me there are great difficulties in a case of this kind involving, as it does, damages of undertain and possibly unquantifiable amounts, in fixing the amount of any satisfactory security for the protection of the defendants. I do not think the suggestion of security is acceptable.

(2) The documents with which we are concerned, with the exception of the mother's letter, are all compiled from the hand of Mr Hubbard himself, the founder of the Church. It is not suggested that the documents contain anything which is untrue or scandalous, or that their content is in any way misleading.

(3) The photographs are harmless, and it is difficult to imagine that any significant damage could result from the use of them by the defendants.

It was suggested that the Church would lose what it called "first publication rights" in respect of those photographs. However, I find it difficult to accept, from an inspection of those photographs, that any such loss (if one existed at all) could be other than small. There is, I might add, no question as to the ability of the defendants in this case to meet recoverable damages.

(4) It is suggested that the publication of the book in the United Kingdom might prejudice the Church's prospects of success in its appeal in the Armstrong litigation in California.

As to that matter, the Armstrong litigation is concerned with a large number of documents; whereas the present case is concerned only with a few, which I have already specified.

Further, the court has no up-to-date information regarding the course of the Californian proceedings, or as to how far the appeal is being actively pursued. It would appear that by agreement with Mr Armstrong the Church has already recovered the archival material in his possession.

(5) The plaintiffs do not contend that the publication of the material in issue in the present case will harm the reputation of either of Mr Hubbard or the Church. There has been no allegation that the book itself is defamatory of anybody.

Against those considerations, in effect the plaintiffs' assert:

(1) The Church is not seeking to stop publication of the book in general. It is merely requiring the excision of references to, or reliance upon, the diaries and the letters.

But in my judgment the references to the diaries and the letters are an essential part of the fabric of the book itself. Thus one of the purposes of the book is to contrast the image of Mr Hubbard's life, as is said to be portrayed by the Church (and by Mr Hubbard himself) with the reality of the situation. Thus, for example, in Chapter 1 of the book, Mr Miller examines the version put forward by the Church of Mr Hubbard's family history and his life up to the age of 12 or 13. Mr Miller concludes that it is not true that Mr Hubbard came from a distinguished naval family, or that he was born into a wealthy family. The mother's letter is used in relation to that latter question. Mr Miller places reliance on the diaries written by Mr Hubbard himself between 15 and 17 years of age in order to question accounts of Mr Hubbard's life during those years. Mr Miller's assertions may be good or bad, but this is the book which he has written and I do not consider that a "blue pencil" can be used as a solution to the matter.

(2) It is said that this material was confidential and that the Church can, and should, protect the privacy of Mr Hubbard, although he is now dead.

The duty of confidentially, if any, must be balanced by a due consideration for the public interest. See, for example, Lion Laboratories Ltd v Evans & Ors [1985] 1 QB, 526, [1984] 2 All ER 417.

The Church is an active proselytizing Church with, we are told, several million members. It is desirable in the public interest that its doctrines and assertions of fact -- whether in relation to Mr Hubbard or otherwise -- should be exposed to public criticism. Mr Hubbard is dead and, as I have already mentioned, the material in the disputed documents is mostly written by Mr Hubbard himself. None of it is said to be untrue or to damage either the reputation of Mr Hubbard or of the Church itself.

(3) There was a suggestion that the Court should not take any step which would interfere with decisions of the United States' courts. As to that matter, the long-standing respect which the courts of this country extend to the decisions of courts in the United States of America is in no way in issue.

This case is concerned with the propriety of granting interlocutory relief in the particular circumstances now existing in relation to this case and which necessarily were not before the United States courts.

Looking at the whole matter it seems to me, as I think it did to the judge (although he did not express himself in terms of the balance of convenience) that the balance of convenience is decisively in favour of refusing an injunction.

Accordingly, for the reasons which I have given, I would dismiss this appeal.

JUDGMENTBY-2: SIR GEORGE WALLER

JUDGMENT-2:

SIR GEORGE WALLER: I entirely agree with my Lord's judgment.

If I added anything on any part of the case, I would only be repeating, in less adequate words, that which has already falled from my Lord.

DISPOSITION:

Appeal dismissed with costs of the appeal and Respondents' Notice to be taxed forthwith.

Leave to appeal to the House of Lords refused.

SOLICITORS:

Hamida Jafferji; Peter Carter-Ruck & Partners

RE B AND G (MINORS) (CUSTODY)

Court of Appeal

Dunn and Purchas L JJ

19 September 1984

Children – Custody – Parents members of cult of scientology – Divorce – Mother agreeing that father should have custody of children – Mother subsequently leaving scientology and seeking custody after 5½ years – Father and step-mother committed scientologists – Nature of cult of scientology – Both parents loving and able to offer good home – Whether nature of scientology justified taking children from the care of the father

The parents, who were then both scientologists, separated in 1978 and were divorced in 1979. There were two children of the marriage and when the parents separated in 1978 the children remained with the father. The mother had wanted custody of the children but as a result of pressure from scientologists reluctantly agreed that the father should have custody. In the divorce proceedings an agreed order was made to this effect; it was also agreed that the mother should have liberal access. Both parents remarried and their new partners were also scientologists. In 1981, however, the mother and the step-father ceased to be scientologists.

In September 1982 the mother indicated through solicitors that she wished to have custody of the children. The father would not agree to this and the matter came before Latey J in wardship proceedings in June 1984. The judge found that the children were happy and well looked after by the father and that he and the step-mother provided a warm, close family circle in which the children were thriving. He also found that the children loved their mother and were fond of their step-father and that they too had a close family circle. However, the judge heard evidence as to the nature of scientology and found that it was immoral and socially obnoxious, that it indulged in infamous practices to its adherents who did not comply unquestioningly to its doctrines, and that it was dangerous because it set out to capture children and impressionable young people and indoctrinate and brainwash them so that they became the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others. He refused to accept the father's assurances that he would not involve the children in scientology until they were old enough to decide for themselves and that he and the step-mother would stand back from scientology while the children were growing up. The judge further found that, even if they wanted to, the father and the step-mother would not be able to escape the influence of the 'church' of scientology whilst remaining committed scientologists. He was of opinion that were it not for the issue of scientology it would be in the interests of the children to remain in the care of the father, but that the scientology factor was such that the children would be gravely at risk if they remained in the father's care. Therefore he ordered that the children be committed to the care and control of the mother.

The father appealed.

Held – dismissing the appeal –

(1) In wardship proceedings the interest and welfare of the child was paramount both in the practice and procedure to be adopted as well as the substantive law. In this case it was in the interests of the children that the judge should hear evidence about scientology and should make definitive findings upon it, otherwise he could not assess the risk to the children. The judge was obliged to make findings of fact on the nature of scientology, even though the 'church' of scientology was not a party and did not have an opportunity of being heard; and he was justified in his findings

as to the dangers to the children if they were brought up under the aegis of scientology. Although the judge had expressed strong disapproval of scientology in general, he had carried out the essential balancing exercise and exercised his discretion judicially having regard to those aspects of scientology essentially relevant to the welfare of the children.

(2) There was ample material on which the judge was entitled to take the view that he could not rely on the father to fulfil his assurances about bringing up the children and removing them from the evil influences of scientology. This involved establishing not only that the father was a truthful and reliable person but also that he could make good his promises notwithstanding the proven climate of scientology. The evidence demonstrated that the father was an unreliable witness and that where convenient mendacity was an integral part of scientology and justified the judge's finding that, whilst the father remained totally committed to scientology, he would be powerless against the pressures of the 'church'.

Decision of Latey J [1985] FLR 134 affirmed.

Cases referred to in judgment

H (A Minor) (Custody: Religious Upbringing), Re (1981) 2 FLR 253
J v C [1970] AC 668; [1969] 2 WLR 540; [1969] 1 All ER 788
K (Infants), Re [1965] AC 201; [1963] 3 WLR 403; [1963] 3 All ER 191
L (Minors) (Wardship: Jurisdiction), Re [1974] 1 WLR 250; [1974] 1 All ER 913
T (Minors) (Custody: Religious Upbringing), Re (1981) 2 FLR 239

Robert Johnson QC and *Michael Russell* for the father;
Michael Kennedy QC and *David Hart* for the mother.

DUNN LJ: This is an appeal from an order of Latey J which he made on 23 July 1984 whereby he granted the care and control of two wards of court to the mother and also gave her leave to take the children out of the jurisdiction permanently to a commonwealth country. The decisive factor in the judgment was that the father and step-mother are both scientologists. The judge formed the view that it would not be in the interests of the children to be brought up as scientologists.

The basis of the appeal is that the judge attached too much weight to the issue of scientology and, in any event, should have accepted certain assurances given by the father in the witness-box limiting the connection of the children with scientology. The background history of the case is set out in detail in the judgment and I do not propose to repeat it. The following facts, however, are material and may be stated shortly.

The children are a boy of 10 and a girl of 8. Both the parents were originally scientologists. After they separated in November 1978 they both acquired partners who themselves were scientologists. The mother and the step-father ceased to be scientologists in about 1981. The mother and the step-father and their 4-year-old child live in a commonwealth country, although since January 1984 the mother has lived in this country, but she and the step-father intend to return to the commonwealth country after the conclusion of this case.

The father and the step-mother and a 10-year-old boy by the step-mother's previous marriage, together with their child of 3 all live in East Grinstead which is near the headquarters in this country of scientology. They expect another child very shortly.

Following the separation the mother agreed that the father should have custody of both the children and it was also agreed that there should be liberal access to the mother. A consent order to that effect was made

following a decree nisi in September 1979. In 1980 there were proceedings before what is called the 'chaplain's court', which is a tribunal set up by the scientologists and which, in effect, confirmed the custody order which had been made in the court of law, and an agreement was drawn up under the auspices of the chaplain's court which provided for generous defined access to the mother in the commonwealth country.

It is right to say that the access terms have been loyally observed by the father. The evidence, including the evidence contained in the welfare officer's report is that the children are happy and well looked after by the father. They get on well with the other two children, especially the older boy who is very close in age to the elder ward. They have been described – and this was accepted by the judge – as a warm, close family circle in which the children are well cared for and thriving. They are presently at a local school at East Grinstead, the governing body and all the teachers of which (apart from some temporary staff) are scientologists. Although the school provides a conventional education it is under the aegis of scientologists and almost all the children are scientologists.

Apart from a period in 1982 when the mother kept the children after a period of access and took them to the United States in circumstances to which I shall refer later in this judgment, the children have been continually in the care of the father since the separation in 1978, that is to say for a period of $5\frac{1}{2}$ years. It is not surprising from the recital of those facts that the judge held that were it not for the issue of scientology it would be in the interests of the children for them to remain in the care of the father, but he held that the scientology factor – as he called it – tipped the scales the other way in favour of the mother.

The hearing lasted for 3 working weeks approximately. It was mostly occupied with evidence about scientology, both in general and in relation to the circumstances of the family at East Grinstead. The judge had before him numerous documents from the 'church' of scientology itself and he also heard the evidence of a number of witnesses on all aspects of the case, including a Dr Clark and a Mr Armstrong on the general aspect of scientology. He accepted the evidence of those two witnesses.

The judge reserved his judgment for nearly 3 weeks, and of the judgment of 52 pages, 35 were taken up with a review of the evidence to which I have just referred in answer to the question which he posed: 'What is scientology?' He reached his conclusion and expressed himself at p. 157B *ante* in the following way:

> 'Scientology is both immoral and socially obnoxious. Mr Kennedy did not exaggerate when he termed it "pernicious". In my judgment it is corrupt, sinister and dangerous.'

He then gave his reasons for using those three words.

While he was in the witness-box the father offered certain assurances or undertakings if the children were allowed to remain with him. In general terms, without using the precise language of the father, they were, first, that he would, if required, move the children from their present school and send them to a conventional school locally; secondly, he would not involve the children in scientology until they were old enough to decide for themselves; thirdly, he and the step-mother would (as he put it) stand back from

scientology while the children were growing up.

The judge refused to accept these assurances. He found that the father and step-mother, though in all other respects perfectly decent people and good parents, were both afflicted by what he called 'scientology blindness'. He found, effectively, that even if they wanted to they could do nothing against the power of the 'church' and that:

> 'The baleful influence of the "church" would in reality still be there and the children would remain gravely at risk. . . .'

if they were allowed to remain with the father and step-mother. He found that the children loved their mother and were fond of their step-father; that she too had a close family circle waiting for them in the commonwealth country; and, while recognizing that there would be an upheaval which would be distressing for a time, he concluded that the scales came down decisively in favour of moving them to the mother in the commonwealth country.

In this court Mr Johnson made a primary submission that the judge failed to exercise his discretion judicially. He gave judgment in open court, although this was opposed by counsel for the father. He made findings of general application about the practices of scientology, which he said were of general public moment, for the express purpose of protecting the public in general from being gulled and duped by scientology, and he made those findings without the 'church' of scientology being given an opportunity to be heard.

Mr Johnson submitted that the judge became, or appeared to become, so preoccupied with the issue of scientology in the abstract that he failed to apply, or appeared to fail to apply, his mind to the relevant issue. That is to say what was in the best interests of these particular children taking into account all the circumstances of the case including the circumstance that the father and step-mother were scientologists and, on the father's primary proposal, that the children would remain at their present school and be brought up as scientologists.

Alternatively, said Mr Johnson, in so far as the judge did apply his mind to that issue, his feelings against scientology were, or appeared to be, so strong that he was, or appeared to be, unable to perform the proper balancing exercise judicially.

Finally, Mr Johnson submitted that the judge should have accepted the father's assurances and allowed the children to remain with him subject to limitations as to the impact of scientology on their lives on similar lines to limitations imposed in the Jehovah's Witnesses cases such as *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239 and *Re H (A Minor) (Custody: Religious Upbringing)* (1981) 2 FLR 253.

Before I consider these submissions, I turn to another criticism of the judgment made by Mr Johnson. In the summer of 1982 the children were with their mother in the commonwealth country pursuant to the agreed provision for access. By that time the mother and the step-father were no longer scientologists. On 2 September 1982 the mother's solicitors wrote to the father in the context that the children were due back with the father on 13 September. The mother's solicitor said this:

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'Upon their recent arrival both children expressed to our client a strong desire to remain with her. The children have expressed similar wishes on previous visits, however their persistence in expressing their wish on this occasion has greatly concerned our client. This and other considerations caused our client to approach us to seek a change in the present custody order affecting the children. To enable the position to be fully considered we have obtained the advice of (local) leading counsel and we have given to counsel for their consideration all relevant material including copies of the submissions made to the scientology chaplain's court in 1979. It is the considered view of the counsel and of ourselves that an application for custody by our client would have considerable merit. The following matters lend weight to the merit of the children remaining with our client.'

They then set out six matters, including the wish of the children and the fact that the mother had resiled from scientology and was extremely bitter that the scientology organization had coerced her into allowing the father to obtain a custody order. The letter ends:

'Our client has been advised that, but for her own involvement with scientology and her then acceptance of that organization's dictates, she would have received custody of the children had that issue been considered by the proper authority in 1979. There are now cogent reasons why the position should be reconsidered. While our client is prepared to use all means at her disposal to alter the present custody arrangement, she is desirous of avoiding emotional strain upon the children which would be an inevitable consequence of a contested custody hearing. For that purpose she has asked us to seek your consent to her having custody of the children.'

On receipt of that letter the father applied to Anthony Lincoln J in the Family Division and on 17 September he made an order that the children should be returned forthwith to the jurisdiction and the father himself went to the commonwealth country, arriving on 6 October. On 8 October the commonwealth court made an interlocutory order ordering the return of the children to the father. The father went round to the mother's house. He saw the children, but 2 days later – on 10 October – while the father was still in the commonwealth country, the mother, without telling him, took the children to the United States, of which the step-father was a citizen.

There were further court hearings in the commonwealth country and further orders to the same effect were obtained. The father followed the mother and the children to the United States. He ultimately located them. He consulted lawyers there and, as a result of the action of those lawyers, the children were returned to the father and returned to this country on 14 November 1982. They have been here ever since and, happily, that incident does not appear to have affected the access arrangements, because the mother came over to this country, as I said, in January 1984 and there has been regular access since then.

The judge dealt with those events in this way. Having shortly recited the

facts, he said at p. 138C *ante* that the mother took the children to the United States:

> '...because she was in fear of losing them. She was cross-examined at some length about whether she did this knowing that an interim order had been made' [in the Commonwealth country] 'restraining her from removing the children. It does not affect the question I have to decide. It goes to credibility. On the balance of probabilities she was told. Whether and to what extent she grasped it is another matter. As a result of the father's arrival she was in a state of shock. She knew that he had come to get the children if he could and was in great fear that he would succeed. It is understandable that she did not absorb the niceties. She impressed me throughout as a wholly honest person. Nonetheless, she should not have done what she did do. It was done in panic. It was not in the better interest of the children. Nor was it right not to keep the father informed of the children's well-being. Apart from this one matter, so far as I can recall, her credibility has not been impugned.'

Mr Johnson submitted that the judge, in that passage, applied the wrong test and that he minimized the conduct of the mother in taking the unilateral action which she did contrary to the orders of the court and the knowledge of the interim order which had been made in the Commonwealth country, and failed to balance her conduct on that occasion with the conduct of the father, who had loyally followed the agreement with regard to access and had taken proper legal steps to recover the children when they were removed in that way by the mother. Mr Johnson also submitted that this incident vitiated one of the judge's criticisms of the father that he had no regard for the law and only obeyed the directions of the chaplain's court.

The principles to be applied in what are sometimes known as 'kidnapping cases' or cases where unilateral action is taken are well established and stated by this court in the case of *Re L (Minors)* [1974] 1 WLR 250. Buckley LJ, having referred to the case of *J* v *C* [1970] AC 668, which confirmed and explained that in wardship and custody cases the welfare of the child is the first and paramount consideration, went on at p. 264C to say:

> 'How then do the kidnapping cases fit these principles? Where the court has embarked upon a full-scale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping a child is doubtless one of the circumstances to be taken into account and may be a circumstance of great weight; the weight to be attributed to it must depend upon the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the "kidnapper" the child should remain in his or her care ... or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed. ...'

In so far as the judge regarded the action of the mother in removing the children in the way in which she did – clandestinely and taking them to

A America – merely as a matter of credibility, with respect to him he was wrong. It was a circumstance to be taken into account in considering where the true interests of the children lay. It was relevant, as it always is, to the sense of responsibility of the parent concerned. The judge must have had this in mind because he found in terms that the action of the mother was not in the best interests of the children, but he went on to consider the circumstances of the case including the state of mind of the mother at the B time, and in the end he attached little weight to the incident. For myself I cannot say that he erred in so doing, or that his failure to direct himself in accordance with the test laid down in *Re L* (above) constituted an error of law which, standing by itself, entitles this court to interfere with the general exercise of his discretion.

I turn now to deal with Mr Johnson's alternative submission, namely C that the judge should have accepted the father's assurances about the bringing up of the children and removing them from the influences of scientology. The judge found that the father had lied about scientology when it suited himself. He gave a number of examples of inconsistencies between the evidence which he gave in the witness-box and, in particular, his submissions to the chaplain's court. He found that he could not rely on the father's evidence and, hence, he could not rely on him to fulfil the D various assurances which he had given. He pointed out that in any event they would be extremely difficult to carry out in practice unless the other two children of the family were also involved.

Mr Johnson referred us to numerous passages in the transcripts of the evidence of the father, where he said in effect that he had never been subjected to pressure from the 'church' and sought to distance himself from E the undesirable practices which had been disclosed in the evidence, saying he knew nothing about them and, in any event, they did not apply to East Grinstead. Mr Johnson submitted that the judge gave insufficient weight to this evidence.

The assessment of the reliability of a witness in a matter of this kind is peculiarly for the judge who has seen and heard the witness. The judge saw this father in the witness-box for about 3 days. This was an issue not of F capacity as a parent, which is often difficult for a judge to determine simply by observing the demeanour of the parent in the witness-box, but a straight issue of credibility. We have read most of the transcripts of the father's evidence and, in addition to the specific matters referred to by the judge, there were numerous occasions when the father avoided the issue or was evasive and, in some cases, gave inconsistent evidence.

G The question of auditing, which is an important matter, was one of the most striking. Auditing has been variously described as being equivalent to psychotherapy; equivalent to a Christian confessional; and, by the judge, as brainwashing. In his evidence-in-chief the father was asked by Mr Johnson whether the children had ever been audited. He said they had not in any sense of the word that had been used in the court. He went on to H say:

> 'I did a 20-minute exercise with them to help them at school. I remember it distinctly. I had them both with me in my bedroom. It was not a formal auditing session in any sense of the word and we did this exercise which was more like a game than anything else.'

When he was cross-examined 2 days later his submission to the chaplain's court was put to him. It was pointed out to him that in his submission he had said: 'I have audited the boys' to which he replied 'Yes'. Then counsel said:

> 'Per child scientology section of VMH. What is VMH?'
> A. 'Voluntary minister's handbook.'
> Q. 'On self analysis process with good results.' [This is quoting from the submission. The question went on:] 'Is that the little 20-minute or 10-minute session that you were talking about?'
> A. 'It is'.
> Q. 'You gave the boy two, didn't you, two sessions?'
> A. 'I thought it was just one.'

It is perfectly plain from that answer that his original answer to Mr Johnson that it was just a game was wrong, and that what he had done was to audit the child in accordance with the scientology handbook. He also prevaricated about his knowledge of the allegations against Mr Ron Hubbard, the founder of scientology, in 1980, maintaining at first that he did not know there was anything wrong with scientology until he saw the mother's evidence in 1984 and eventually being forced to admit that, at any rate by 1983, he knew that Mrs Hubbard and other top members of the 'church' of scientology had been convicted and sent to prison in the United States.

He also gave inconsistent evidence about the definition of 'suppressive acts' which is an important tenet in the teachings of scientology. He also, as Mr Kennedy put it, lied to the court about his involvement with the chaplain's court in persuading the court to rescind a permission which the mother had obtained to take custody proceedings in the ordinary courts of law.

It is significant that, although the father described some of the practices of scientology revealed in the evidence as horrendous, and said he would now have to reassess scientology in the light of that evidence, he nowhere suggested in his evidence that he would give it up. The furthest he would go was to say that if he found that the evidence which had been given in the court was true, then he might consider giving it up. In my judgment, there was ample material in this case upon which the judge was entitled to take the view that he could not rely on the father to fulfil his assurances and this court could not possibly interfere with the judge's findings on that issue.

It remains to consider Mr Johnson's primary submission, namely that the judge's mind was so affected – or appeared to be so affected – by his strong disapproval of scientology that he was unable to exercise his discretion judicially. The judge was concerned, as are all judges in this jurisdiction, with the balancing of risks. One of the judge's primary tasks was to assess the nature and extent of the risk to the children if they were brought up as scientologists. The mother deployed a large body of evidence which was highly critical of scientology. It consisted partly of the 'church's' own documents, as I have said, and partly of the oral evidence of witnesses which the judge accepted.

A The father gave evidence to the effect that the undesirable elements of scientology never impinged on his family, but he called no general evidence and no evidence from any officer of the 'church' of scientology as to its practices, although the mother's affidavit evidence had been available to the father long before the hearing. The judge dealt with this, at p. 135H *ante*, early in his judgment. He said:

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> 'It is important, indeed essential, to stress from the start that this is neither an action against scientology nor a prosecution of it. But willy-nilly scientology is at the centre of the dispute of what is best for the children. The father and his counsel have stressed that they are not here to defend scientology. That is true in the strict sense that the "church" of scientology is not a party to the proceedings. But they have known from the start what the mother's case is. It is plainly set out in the affidavits. If there remained any doubt it was dispelled by Mr Kennedy for the mother at a hearing for directions in January 1984. The father's solicitor is a scientologist. He has been in communication with the solicitors who act for scientology. There has been ample time and opportunity to assemble and adduce documents and evidence in refutation of the mother's allegations. None had been adduced. Why? Because the mother's case is based largely on scientology's own documents and as the father's counsel, Mr Johnson, candidly, albeit plaintively, said:
>
> "What can we do to refute what is stated in scientology's own documents?"'

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E Mr Johnson criticized that passage. He submitted that there had been a breach of natural justice in so far as the judge had made definitive findings on the practices of the 'church' of scientology without the 'church' being a party or without it having any opportunity to be heard. He relied on this as one of the matters which would justify this court as interfering with the discretion of the judge.

F It is important always to remember that wardship proceedings are different from ordinary civil proceedings *inter partes*. In wardship proceedings the interest and welfare of the child is paramount, both in the practice and procedure to be adopted as well as the substantive law. This was made plain by the House of Lords in the case of *Re K* [1965] AC 201. I do no more than refer to the headnote:

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> 'The paramount consideration of the Chancery Division in exercising its jurisdiction over wards of court was the welfare of the infants; that this jurisdiction was of its nature a paternal jurisdiction, and that, therefore, a ward of court case partook of an administrative character and was not a mere conflict between parties.'

H That was a case in which there had been a complaint that a confidential report by the Official Solicitor was not shown to the parents who were parties to the case. It was said that although the parents were parties and although if it had been an ordinary *lis inter partes* they would have been entitled to see the document, because it was not in the interest of the child

that they should see the document the document was witheld. In this case it was in the interests of the children that the judge should not only hear evidence about scientology but should make definitive findings upon it, otherwise he could not assess the risk to the children if they continued to be brought into contact with the father. In any event, no application was made to the judge for the 'church' to be joined as a party and there has been no appeal against the refusal of the registrar to allow an application for the 'church' to be joined in this court.

We were told by Mr Johnson that a deliberate decision was taken on the father's side that the case should be run on the basis that scientology had little to do with the welfare of the children and that the evidence to be called by the father should be confined to the impact of scientology on the children's lives without going into detail as to the theory and the various beliefs of scientology in the abstract. It is not for this court to make any comment upon that decision, but the effect of it is that the evidence was all one way. The judge was obliged to make findings of fact upon the evidence; it was his duty to do so and he did so. Mr Johnson complains that he did so in unnecessarily trenchant and, in some places, emotive terms. He complains particularly about a passage in the judgment at pp. 140E to 141B *ante* which concludes with the sentence that Mr Hubbard is a charlatan and worse. The evidence for that is set out by the judge on the basis of various lies told by Mr Hubbard about his war service and his qualifications and other matters.

Mr Johnson submits those were matters which the judge should not have taken into account and that is a classic reason for questioning his discretion. It seems to me, with respect, that it was unnecessary for the judge to have gone into the detail which he did, but when one is considering a set of beliefs, it is, I should have thought, relevant to know the sort of person who is the original proponent of those beliefs. It is perfectly true that the judge expressed himself in strong and forthright terms, but that is no ground for challenging his decision. Indeed, the notice of appeal contains no challenge to his findings of fact.

I would like to emphasize that those findings are binding only between these parties in this case. They form no precedent and create no estoppel in any other proceedings of whatever nature involving different parties and different issues, but the question remains whether the judge allowed himself to be so carried away by what he described as an immoral and socially obnoxious set of beliefs that he failed to exercise his discretion judicially.

It was, of course, a matter for the discretion of the judge whether or not he gave judgment in open court. It was not necessary for him to have done so and it was unfortunate that he gave as one of his reasons for doing so the protection of the public as well as the other reason, that is to say the importance of the reasons for his decision being publicly known so as to avoid rumour and speculation. I cannot say that he was wrong to do so.

Those matters added colour to the suggestion that what the judge primarily had in mind was the exposure of scientology rather than the interests of the children which was in fact and in law all he was concerned with. However, towards the end of the judgment the judge did relate the practices of scientology to the circumstances of these particular children. He did carry out the balancing exercise. Although he plainly felt strongly that these children were at risk from exposure to scientology, I find no reason to

A suppose that in carrying out that essential balancing exercise he did not do so judicially.

At the end of his judgment at p. 159B *ante* he said this:

> 'If they were to remain with the father and step-mother without conditions the process would go on with all the consequences to the children earlier described, including inevitably and ultimately alienation from their mother. It would be nothing short of disastrous for them.'

B

That is an important finding which was challenged by Mr Johnson. He said that there was no evidence that the children had been alienated from their mother. On the contrary, the father had done all in his power to maintain contact between the mother and the children. This is true up to date, but until 1982 the mother was herself also a scientologist and proceedings have been pending since June 1983. What the judge was concerned with was the future. It is plain from his findings that since the mother has, in the view of the 'church', reneged from scientology the father is likely to be under pressure to 'disconnect' – to use the scientology jargon – from her and would be likely to be disciplined if he did not. No doubt it was in recognition of this, having heard all the mother's evidence, that the father gave the assurance which he did, but for the reasons that I have already given this court cannot interfere with the judge's refusal to accept those assurances. As Mr Kennedy submitted at the end of his submissions, that must be conclusive in this appeal.

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The judge having made the findings which he did about the practices of scientology, which were not challenged in this appeal, and the judge having refused to accept the father's assurances, I can find no ground on which this court could interfere with the judgment and the appeal is dismissed.

E

I desire only to refer to one other matter, and that is that following the judgment the mother granted an interview to a representative either of the Press or one of the media. We have a transcript of what occurred at that interview. She did it on advice and there was no reference to the children or to the case. What she was asked about was her experiences of scientology. It was an unwise course for her to take and she would be well advised never to do it again. It does not, in my judgment, constitute a breach of s. 12 of the Adminstration of Justice Act 1960. The terms of that section are sometimes forgotten by people who should know better and I will refer to them for the avoidance of any doubt. Section 12 is headed:

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> '*Publication of information relating to proceedings in private*
> (1) The publication of information relating to proceedings before any court sitting in private' [which Latey J was] 'shall not of itself be contempt of court except in the following cases, that is to say where the proceedings relate to the wardship or adoption of an infant. . . .'

H

So any publication of any information which relates to the proceedings before Latey J would constitute a contempt of court.

PURCHAS LJ: I agree that this appeal fails. In recognition of the able arguments of Mr Robert Johnson and in view of the important issues raised I add some words of my own.

The historical context of the appeal has been fully set out, both in the judgment of Dunn LJ, just delivered and in the full judgment of Latey J and need not be repeated here. The judge was presented with a satisfactory status quo of some years standing which had only been disturbed by the unilateral action on the part of the mother during proceedings in the courts of the commonwealth country where she was presently living with the children, enjoying access. The judge recognized this in his judgment at p. 138C *ante* in these terms:

> 'On the Saturday the mother took the children to the United States. She did so because she was in fear of losing them. She was cross-examined at some length about whether she did this knowing that an interim order had been made restraining her from removing the children. It does not affect the question I have to decide. It goes to credibility.'

That passage has been heavily attacked by Mr Johnson. The judge goes on:

> 'On the balance of probabilities she was told.' [That refers to the court proceedings.] 'Whether and to what extent she grasped it is another matter. As a result of the father's arrival she was in a state of shock. She knew that he had come to get the children if he could and was in great fear that he would succeed. It is understandable that she did not absorb the niceties. She impressed me throughout as a wholly honest person. Nonetheless, she should not have done what she did do. It was done in panic. It was not in the better interest of the children. Nor was it right not to keep the father informed of the children's well-being. Apart from this one matter, so far as I can recall, her credibility has not been impugned.'

As Mr Johnson has submitted, read as it stands, there would appear to be an error in the judge's approach at this point of his judgment. That having been said, it is clear from the passage which I have just quoted that he was considering not only her credibility but also the effect of this behaviour on his assessment of the mother as a custodian.

Mr Johnson accepts that the judge posed the correct question to be considered by him at an early stage in his judgment, at p. 138G *ante*. Referring to the status quo and the welfare report to which Dunn LJ has referred, the judge said this:

> 'If those alone were the factors, I think that the scales would probably come down in favour of not disturbing the status quo. Indeed, were it not for the scientology factor the mother painfully recognizes that she would not now attempt to disturb the status quo and she herself and her counsel have made that plain from the start.
>
> What then is the scientology factor and what weight should be attached to it?'

Mr Johnson further concedes that the solution is a matter for the exercise of discretion on the judge's assessment of the evidence and that he, Mr Johnson, can only succeed if he can establish that in exercising that discretion he can show that the judge erred in principle or was plainly wrong.

In developing these submissions, Mr Johnson submitted that in directing his attention to the extensive and heavy attack upon scientology in general, which formed the basis of the mother's case, he allowed the delicate and careful balancing process to become coloured and distorted. Mr Johnson further submitted that this is demonstrated by his making definitive findings about scientology in general rather than restricting his judgment to those aspects essentially relevant to the welfare of the children; and by his decision to deliver his judgment in open court notwithstanding the objection raised on behalf of the father.

Mr Johnson submitted that the judge's motivation was the public condemnation of scientology when that body had not had an opportunity of being heard, and that that amounted to a denial of natural justice from which the judge's exercise of discretion in deciding the question of custody could not be severed. If the court came to this decision, it was submitted, it had a duty to intervene.

A related but separate submission made by Mr Johnson was that the judge should have accepted the father's assurances that if the court required him so to do he would undertake to bring up the children unaffected by scientology and would himself withdraw from its practices. This involves establishing two separate points. Namely (1) that the father was a truthful and reliable person, and (2) that the father could make good his promises notwithstanding the proven climate of scientology. Only if each of these questions are answered in the affirmative can Mr Johnson's submission succeed. They are both questions essentially for the discretion of the judge and, therefore, the success of the submission on appeal must again depend on Mr Johnson being able to attack the judge's findings.

I now consider Mr Johnson's submissions in turn. In order to assess the danger, if any, to the children arising now and in the future from the father and step-mother's continued adherence to scientology, it was obviously necessary for the judge to consider in depth the vast amount of evidence on the topic of scientology which was made available and, in weighing that evidence, to draw inferences from the absence of contradictory evidence which might reasonably have been expected to be adduced if it existed. Mr Johnson submitted that the judge's approach was one-sided and that he should have placed greater weight on the evidence of the father that the objectionable practices described by the mother's witnesses and apparent from the written literature of scientology itself were unknown to him and or were no longer practised in England in any event. Mr Johnson also criticized the judge's dismissive approach to the evidence of Mr Karle, a consultant educational psychiatrist attached to Guy's Hospital who was called on behalf of the father, and his approach to the evidence of a young scientologist called Wakley who had had a successful training and career in engineering.

With respect to Mr Johnson, I cannot accept his submissions on this part of the case. Of course, not every part of the record of scientology and its teachings directly impinge on the points immediately at issue, but the judge was entitled to construct the complete background against which the particular questions could be considered. It may not have been strictly necessary for him to have made definitive findings on collateral matters in the way that he did and in the terms that he did, but this does not, in my judgment, vitiate of itself the subsequent findings and decisions which he

made in relation to the dangers to the children of being brought up under the aegis of scientology. That he was justified, on the evidence before him, in reaching his central findings on the latter question I have no doubt.

I wish only to refer to two short passages in the judgment. The first is at p. 154B *ante*:

> '*Scientology's indoctrination of children*
> The objective of scientology is to capture the child and its mind.
> The auditing – the processing – begins at an early age.'

The judgment continues with a substantial extract from the scientology literature which was incapable in practice of being refuted in the case. The importance of that extract is in relation to the indoctrination of children. At p. 159B *ante* one finds the passages already referred to by Dunn LJ, in which the judge forms a conclusion on the evidence before him which, in my judgment, he was fully entitled to reach, that if the children were to remain with the father and step-mother:

> '... without conditions, the process would go on with all the consequences to the children earlier described including, inevitably and ultimately, alienation from their mother. It would be nothing short of disastrous for them.'

With respect to the judge, I cannot wholly follow his judgment in relation to the witness Wakley, whose account he describes as a sad episode and an example of a man whose brain has been so affected as to be unable of objective assessment of scientology. However, the present case is different because Wakley was not exposed to parental conflict as will be the children in this case. If it were relevant to decide whether the judge was entitled to disregard a part of the evidence of a willing and 'successful slave' in a case such as this, I would hold the view that he could. It goes not merely to the credit of the witness but also to the question whether the door should be left open to a growing and developing child to choose at the appropriate time the pattern which his life is to follow, an opportunity which clearly, on the evidence, was denied to Wakley, notwithstanding his successful development.

On the main point, as to whether the judge was entitled to take the view that the evidence of the father demonstrated he was an unreliable witness, I have no hesitation in reaching the conclusion that the judge had ample justification for reaching this. The matter has already been fully considered by Dunn LJ, and there is nothing I can usefully add to what he has already said. A careful study of the transcript and the details of scientology which have already been summarized by Dunn LJ, demonstrate, on the evidence, that, where convenient, mendacity is an integral part of scientology.

The judge referred to this in his judgment at p. 157C *ante*. He is referring to the criticisms of scientology in general, to which Dunn LJ has already referred. I only wish to quote from the third aspect cited by the judge in these terms:

> 'It is dangerous because it is out to capture people, especially children and impressionable young people, and indoctrinate and brainwash them

A

so that they become the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others.'

The judge, subject to a final point to which I shall come in a moment, clearly had evidence upon which he could reach these conclusions and, for my part, I find it difficult to see how anyone could have concluded otherwise.

B As to the future of the father and the undertakings offered which, it is submitted by Mr Johnson, should have been received by the judge and accepted, I come to look at the two limbs to which I have already referred. The first limb, that is whether or not the father was a reliable witness, has already been determined adversely to him by the matters to which I have already referred. The second limb is also determined adversely to the

C father by the evidence found by the judge at p. 159E *ante*:

'The father and step-mother remain totally committed to scientology. After much of the evidence had been given and they had read the written material ... I hoped that their eyes might be opened and said that if that happened they should feel free to tell their advisers and the court. They did not. They did say that they "might stand back" from

D scientology while the children are growing up. I am afraid that that did not carry conviction. They remain afflicted by "scientology blindness". The father said he would seek to correct the evils disclosed during the hearing, but what could he do against the power of the "church"? Nothing. The result would be that he would be declared a suppressive person with all that that would entail for him and his family. Apart from the upheaval, new environment, new home, new school and new

E friends, the pressures of the "church" and of their own beliefs and consciences would be far too much for them. And to cut themselves and all the children off from scientology would have traumatic and emotional consequences on them and, through them, on the children.'

Those findings by the judge, in my judgment, conclusively establish that

F the second limb of the submission also fails. In the end Mr Johnson accepted that, in the event, all his submissions depend on his being able to establish his main point which, for want of a better expression, I will call 'the failure to exercise discretion judicially'. The submission that it would be a breach of natural justice to pass a definitive judgment about the merits or demerits of a religious sect, cult or any other body adhering to a code of behaviour or beliefs without giving a right of audience to that group, may

G well have considerable force in normal cases *inter partes*. It has, however, long been recognized that 'where the court is exercising its powers in relation to children, the paramount importance of ensuring the welfare of the children overrides any right of audience or reply even where a parent is concerned, let alone a person or persons outside the immediate context. The authority to which Dunn LJ has already referred – *Re K* [1965] AC

H 201 – there applies.

In discharge of his duty to consider the dangers inherent in exposure to scientology in relation to the questions of custody, the judge had to make definitive findings and the only possible criticism must relate to his decision to announce these publicly. Mr Johnson recognized this, but based his submissions on the ground already referred to, namely the alleged intem-

perate use of language by the judge in his judgment; his delivery in open court, to support his contention that the judge's concentration in the judgment was one of public condemnation of scientology itself and, in so doing, he disqualified himself from exercising the delicate discretionary balance with which he was charged.

In order to succeed, in my view, Mr Johnson has further to establish that the judge's exercise of that discretion had become coloured or distorted. At this second stage, in my judgment, this appeal fails. It would be unnecessary for me to express any view about the phraseology of the judgment or the manner of its delivery. I do, however, agree with the submission by Mr Kennedy that at least the judge was justified in deciding to give the judgment in open court so that the reasons for his decision relating to the children should be generally appreciated.

I have carefully considered all the points so ably and forcefully made by Mr Johnson, but I cannot find any ground for saying that the judge's execution of the balancing duty, to which I have already referred, was either coloured or distorted. Mr Kennedy has reminded us that the judgment was reserved and delivered after 18 days. He has described it – and I cannot find any reason to object to his description – as a cool and deliberately damning analysis of mainline scientology; an analysis which the judge was under a duty to make.

In my judgment, neither the terms used by the judge – which, in my view, he was entitled to use – nor the fact that he decided to deliver that judgment in open court can be relied upon as an indicator that the judge was not applying the balanced unclouded mind which Mr Johnson emphasizes is required for this exercise.

I have not overlooked the other complaints made by Mr Johnson of the judgment, that is the passage indicating that the mother' unilateral action was irrelevant as being a matter which should have been taken into account but which was ignored on the one hand, or the exposition of the shortcomings of Mr Hubbard as being an example, on the other hand, of matters which should not have been taken into account. As I have said, I do 'not think the judge did ignore the effect of the mother's unilateral action in practice. The weight to be attached to that matter was one entirely within his discretion, and the weight that he applied to it was clearly minimal. The behaviour of Mr Hubbard was an integral part of the whole context of mainline scientology, an examination of which the judge had a duty to make and which he was entitled to announce as part of the background justification for his findings.

For these reasons and those given by Dunn LJ, I agree that this appeal must fail. I also agree with what Dunn LJ has said in relation to the conduct of the mother immediately after the hearing before the judge in relation to interviews that she had given to the media.

Care and control of children to mother; reasonable access to father. No order for costs save legal aid taxation. Leave to appeal to the House of Lords refused.

Solicitors: *Stephen Bird & Co.* for the father;
Tweedie & Prideaux for the mother.

B.C.

Re F (a Minor)

Court of Appeal (Civil Division)

[1992] Fam Law 484, (Transcript:Association)

HEARING-DATES: 13 August 1991

13 August 1991

COUNSEL:

J Rogers for the Appellant; The Respondent appeared in Person

PANEL: Purchas, Dillon LJJ

JUDGMENTBY-1: PURCHAS LJ.

JUDGMENT-1:

PURCHAS LJ: This is an appeal by Stephanie Jane Findley, to whom I shall refer as the mother, against an order of Mrs Recorder Corkhill of 16th April 1991, which provided for three periods of supervised access to Mark John McKenna, the father, in respect of their son, to whom I shall refer as George. George was born on 17th November 1986. The parties first met in 1985. They are not married nor have they ever cohabited. But the father maintained intermittent visiting contact with George until his second birthday in November 1988.

In November 1988 the parties separated permanently. The father's version suggests it was a separation by agreement as the mother was showing interest in someone else. The mother said it was because of his refusal to leave her alone when asked to do so, and because of his violence to her and his oppressive behaviour particularly in relation to George. It had in any event become undeniably clear that the parties were totally incompatible.

It appears that in November 1988 the father instructed solicitors to seek access to George after the separation and that, although a letter was written by such solicitors it was ignored by the mother. Certainly it was not pursued by the father, and it was not until April 1989 that the father applied to the Domestic Court for access under the Guardianship of Minors Act 1971.

A welfare report was prepared in relation to those proceedings by a Miss C Farrelly. It is dated 12th June 1989. It is not within our papers, although its contents are referred to from time to time, and there are some indications and hints as to what Miss Farrelly's views were.

On 14th June 1989 the Oxford Magistrates Domestic Court heard the application. The father was in person and the mother represented by Mr Mitchell. Both parties gave evidence at length. The Magistrates announced their decision and gave reasons for it. The application was dismissed and the reasons read as follows:

"The court saw no benefit to the child by having contact with the applicant owing to the differences of opinion between the applicant and respondent over a whole range of important matters affecting the child and his upbringing, ie education, religion and medical care, which if access were allowed might adversely affect the stability and well being of the child."

Here is a reference to the report from Miss Farrelly.

"The Court was also mindful of the fact that the officer preparing the welfare report found no basis for conciliation and no common ground between the parties."

Nearly a year passed. On 14th May 1990 the father then made a further application under Guardianship of Minors Act 1971 and under the Family Law Reform Act 1987, seeking parental rights under that provision. He also sought an order for defined access to George.

He supported his application by an affidavit dated 14th May 1990. The basis of his case is to be found in paragraph 11 in one sentence.

"I consider it to be very much in George's interests to maintain contact with me so that I can [play] an important part in his development and growing up."

He had earlier, it is to be noted, said that he considered the mother to be a good mother and had no intention of taking George away from her.

The mother swore an affidavit in reply on 3rd August 1990 and again it is necessary only to read one short paragraph.

I came to the conclusion that it would not be in George's best interests for him to have any further contact with his father. Quite apart from his violence and harrassment of me, I was alarmed by the Applicants beliefs and his ideas about bringing up children, which only gradually became apparent to me. The applicant was opposed to George having any half-brothers or sisters. He was involved with Scientology, informed me that he disagreed with general anaesthetic, and stated that he wanted to educate George at home himself."

There were the seeds of the dissension and incompatibility demonstrated in those affidavits.

The welfare officer's report was prepared by Mrs Gilkes and is dated 24th September 1990. It would be convenient to refer to a few extracts of that report at this stage. (Paragraphs 8-13). Mrs Gilkes refers to what she describes as bizarre reactions shown by the father in the course of an interview of considerable length. There were two interviews: one about 20 minutes and a second one lasted for about an hour and a half.

"Mr McKenna called to my office, prior to the interview for this case. I saw him for about twenty minutes, during which time he said he had my room and various other places in Oxford, 'wired up'. He seemed strange in his manner. At the second interview, I saw him for about one and a half hours."

There was then a reference to a deformity to George's feet which had required medical treatment.

"I [that is Mrs Gilkes] referred to George's club feet but he did not agree with this description and said it was just 'a soft bone'; the medical opinion was wrong. He then proceeded to say that 'Life is an Ultimate Truth' and referred to the 'Tri-unity of man'; 'the individual is a spirit'; 'Christ is a spirit in a state of God'."

We discussed George's past relationship with him which he described as having been very good. He does not, however, like to be referred to as 'dad', because he said that he does not 'think in concept of words': 'he knows beforehand': 'he is well informed'. He continued to refer to 'The Kingdom's age' and that when the River Jordan is crossed (he considers that his [is] about to happen) a prophesy for disaster is fulfilled.

Mr McKenna did not like me taking notes and, at one stage, considered walking out of the office. Some of my note-taking had to be done immediately after he left. When I asked him about his 'work' (to which he alluded several times), he described it as 'information gathering'. He frequently referred to 'family' but the impression I had was that it was a secret organisation in which he operated some power. When I asked him to explain 'family' to me, he described what seemed to be a nucleus of family members, which I took to mean blood relations; around this nucleus was an outer sphere which contained his 'brothers and others'; in the outer sphere was the 'legal and bureaucratic bodies'. My description is that of 'spheres' around a 'nucleus' but he referred to is as 'systems' through which he links.

Throughout the interview, Mr McKenna went through phases when he seemed to be thinking in, what I would call, a 'normal pattern' but, for much of the time, he was talking in such terms as I have described above.

I talked to Mr McKenna about his unusual thinking processes and I suggested that, in order for the Court to know what to do about access, a psychiatric report would be important. He said, however, that he would not submit himself to examination by a Psychiatrist."

I have read that at some length because it is the beginning and basis of a view that the court welfare officer clearly formed about the father. The father put in issue a number of those matters in an affidavit, which he subsequently swore, when he presented his case before us, which he has done in person. He emphasised again, first of all, that he has now nothing to do with Scientology and he said also that it was at the outset of his interview with Mrs Gilkes that she, Mrs Gilkes, started talking about psychiatric examination. He said this unsettled him and caused him to lose confidence and that explained, he would say, many of the impressions that Mrs Gilkes formed -- again he would say, unfairly, about him. Again in his affidavit he denied saying anything sinister about his family but merely reiterated that he has a large supportive and co-ordinated family.

In her interview with the mother, I should refer to the mother's reference to Scientology:

"Miss Findley said that Mr McKenna is a follower of Scientology and he was always convinced that this cult was 'under siege from the world'. His beliefs also embraced the concept of black magic and he would threaten her with this and with the castings of spells on her."

I skip one paragraph.

"Eventually, she said she stopped associating with him but, in doing so, she could not let him see George. She said, however, that even though she would not let him in the house, he would cause a disturbance outside. As an example, she describes Mr McKenna as having knocked continuously on the front door for twenty minutes and would then repeat this on the back door. He would telephone the house about twenty times a week but, by this time, she was having support from other people in the house and they would not answer the door when he came . . ."

In her conclusions Mrs Gilkes said this:

"This is a report on a three year old child (4 years in November, 1990) who lives with his mother in rented rooms in Oxford. Although her relationship with the child's father lasted from 1985 to 1988, it was fraught (according to the mother's account), with his violence, intimidating, and extraordinary thinking, in term of the supernatural, so as to cause her distress. During much of this time, however, her distress was also accompanied by a dependence upon him, brought about mainly by her feeling of isolation from friends and acquaintances who distanced themselves from her, because of Mr McKenna's presence.

From my interview with Mr McKenna, I know that his thinking is unusual and is dominated by religion and of his own power and links with certain forces.

I am unable to put into effect any trial access visits, because of the unusual circumstances of this case. Before the Court makes any decision on access, I would adivse that a full psychiatric report on Mr McKenna is made available to the court."

The first time that the application made by the father came before the court was on 6th March 1991. On that occasion there was a comparatively short hearing. Both parties were represnted by counsel and the order records as follows:

"UPON the Applicant [that is the father] undertaking

1. to undergo a psychiatric examination as soon as possible and to present to the Court at the adjourned hearing a report as to the Applicant's suitability for access to the said child . . .

IT IS ORDERED THAT:-

1. there be 3 periods of access be arranged and supervised by the Court Welfare Officer . . .

2. the Welfare Officer do have leave to seek directions at short notice.

3. the matter be adjourned and set down for hearing on the first open date after 1st June 1991."

There were other orders to which I need not refer, except that Mrs Gilkes should file a supplementary or addendum report.

On the very next day Miss Rogers, who has appeared for the appellant, tells us, and there has been no dispute about it, that the father tried to achieve an ex parte hearing at the court, notwithstanding that he had solicitors on record and had been represented by counsel the previous day. He has told us in his submissions this morning that he had been told, or had realised, that whatever happened the mother was going to appeal against the order for access, and that therefore he saw no reason to expose himself to a psychiatric examination which was something that he would resist in any event, and was only persuaded by his counsel to accept on the previous day.

The court, rightly, would not hear him or allow him to come before the judge, but on short notice the matter came before Mrs Recorder Corkhill on 8th March. The father was then seeking, and successfully so, to be discharged from his undertaking to have a psychiatric examination. The order also however discharged that part of the order of 6th March providing for supervised access. From the mother's point of view that was what she was seeking to achieve. So there was no further area immediately apparent which would cause her to appeal against the order. However looking back at this stage, it could be said that the next provision in the order would not be wholly acceptable to her; that is that, instead of giving the undertaking to have a psychiatric examination, the father should be given leave to file an affidavit from his medical practitioner as to his mental and emotional stability and his suitability for access to the child, George. A yet further welfare officer's report or addendum was ordered and the hearing date for the full hearing retained at 15th April 1991.

The general practitioner's affidavit was duly filed and he gave evidence before the Recorder on the adjourned full hearing. It is not necessary for me to refer to the contents of the affidavit. I should however explain that Mr McKenna, in his submissions to us today, emphasised that not only did the doctor give evidence but he produced the records held in the partnership's surgery relating to Mr McKenna from 1980 onwards. The affidavit sworn by the doctor demonstrated that he had really only a limited experience personally of the father -- a matter of a few years only.

The third report or addendum is dated 11th April 1991, and I would wish to refer to one or two paragraphs from that report. Mrs Gilkes had mailing reference to social workers at the City Chambers in view of the wider matters that had arisen and in particular because she was concerned with the interests of a young child. She was shown the McKenna family file. I do not propose in this judgment to read all the references to that. In paragraph 9 however, Mrs Gilkes says this:

"In August 1988 Mr McKenna had already moved into a flat and asked Social Services for help in obtaining furniture. He was described as a very tense man, very obsessed and angry about a system which will not help him; he also said he would commit a crime in his desperation to get money."

Her conclusions, as is Mrs Gilke's conclusion as a result of her further consideration of the matter, are contained in paragraphs 11 to 13:

"11. When I had my first interview with Mr McKenna in the summer of 1990, his thought processes were quite strange. In the recent interview I had with him, this was not the case. It would appear, however, that in the summer of 1990 his mother was expressing concern over his mental health so it may have been that, at that time, he was manifesting an abnormal mental state.

12. Although I cannot report that Mr McKenna was disturbed during the recent interview I had with him (April, 1991), a Social Worker is saying that she and her colleagues thought he was quite disturbed when he was visiting them earlier this year. The Social Worker thought it would be an appropriate request to have a psychiatric report on him before any decision is made on the matter of access.

13. If the Court decides to allow access I think it should take place under supervision in the Divorce Court Welfare Unit, if it is to be as an interim step for an adjourned Court hearing: if it is for a long-term period, Supervision could take place under the Supervision of Oxfordshire Social Services. This may not be satisfying for Mr McKenna but,

given the doubts around about his mental state, I cannot make any firm recommendation on access without a psychiatric assessment. I am wondering, however, if Mr McKenna displays unusual mental states when he is under stress and that, when stress is reduced, he functions in a normal manner. This, however, is only an opinion I have and in no way replaces the type of expert opinion that I think is required in this case."

The affidavit from the doctor certainly deposed to his opinion that, firstly, "it would be most unlikely that Mr McKenna would achieve any benefit from seeing a Psychiatrist, partly for the reasons he gives and partly because I do not believe he has any sort of treatable psychiatric disorder".

That was the state of the documentary evidence before the parties came finally to give their evidence before the Recorder. There is however one qualification to that statement. The notes of the evidence start in fact before much of the last welfare report and it was, as one can tell from the notes, a running investigation of the application which was adjourned from time to time. Thus on 6th March 1991, the father was represented by Mr Baker and the mother by Miss Rogers. There are notes of evidence, the first witness being the father himself who gave evidence at considerable length. He was cross-examined by Miss Rogers and it is not necessary for me to do more than to mention in passing that the father accepted to this extent that he had had what are known as mailshots from Hari Krishna and Scientology,.. he had books from Blackwells on Scientology and Dianetetics and refers to someone that is almost judicial knowledge, a Mr Ron Hubbard.

So although he may very well now be divorced from any involvement with Scientology, there is certainly no doubt from his own admissions that he has been considerably involved and interested in that, and so he told us this morning that he had been researching Scientology. I have to confess that my own impression from the documents is that his involvement, certainly if the mother's evidence is to be accepted, was a good deal more than detached, abstract research. But that is not important for the purposes of this appeal.

He was cross-examined on these matters at considerable length and the hearing went on. It was obviously a very substantial hearing. He called in support of his application a Miss Griffin. She was a lady who saw the father on his visits to the local authority, I think on the question of housing, and there is no real dispute or differnce in her evidence because her recollection is that she saw him essentially between August 1987 and when he was re-housed at the beginning of 1989. The bulk therefore of that period was still before the final breakdown of the association before which it is common ground that the father had intermittent visiting access to George.

Then there are other witnesses: the doctor, and evidence from a Reverend Hugh Malcolm Wybrew; he testified to his contacts with the father and his discussions as regards his involvement in Christianity. The father has told us that he is now embracing a high Anglican approach to Christianity. Then the mother gave evidence and was cross-examined. I do not think it would forward this judgment if I gave any details of that evidence, but it is important to see what the court welfare officer, Mrs Gilkes, said in the witness box. She said first of all that she would have attempted an access visit if she had not been worried about his thought patterns. In the one and a half hour interview "his delivery seems bizarre some of his words are not reproduced by me". She accepted that she had not noticed any bizarre thought patterns whilst the father was giving evidence, and accepted that if there was to be supervised access in the unit, it really ought to be her rather than anyone else because it needed the supervision of an experienced person. In answer to Miss Rogers she said: "I still feel rather uncomfortable about supervised access; his reactions [were] cold and distant today." Then having dealt with some of the details about access she said this: "[The] safety of [the] child is what concerns me; concern over father removing [the] child." Then "[I] would be happier if I spoke to a psychiatrist before a period of agreed access, and it was at that point that the matter was adjourned. That brought the evidence to the end of 6th March when the order, to which I have already referred in this judgment, was made.

Miss Rogers has submitted, as one of the grounds of her appeal, that in making this order at that stage the Recorder was in fact pre-judging the matter. With deference to that submission, I cannot accept it in the form in which it was proposed. For my part, although it is not important to the determination of this appeal, I would be prepared to hold that to make an order specifying periods of access upon a future undertaking to undergo a psychiatric examination without knowing what the result of that examination was, was giving a hostage to fortune which should not have been part of the order. For my part I would have said it would be better merely to adjourn for the psychiatric report and then to consider whether or not any exercise in supervised access should be undertaken. But that in a way is now water under the bridge because the parties were back before the Recorder on 8th March with the result which I have already announced.

But the adjourned hearings, particularly the hearing on 16th April 1991, were fixed at a time when Miss Rogers was unfortunately not available and this brings me to the next ground of appeal which Miss Rogers has put before the court, namely that, as it were, in mid-flight of this kind, an application should not be adjourned to a date when it is known, and I assume, because Miss Rogers has said so, that it was known to the court, that this date was inconvenient. I am unable to accept that as a ground for appeal in this case. It is obviously desirable that litigants should have the same counsel throughout the hearing of any matter but unless it can be demonstrated that the party has been substantially prejudiced by the change, then clearly it should not be acceptable as a ground of appeal however else it might be a reason for trying to adjust the court arragements.

In this case, gratefully, in my judgment, the mother has not been prejudiced by the absence of Miss Rogers. I say that without in any way wishing to be offensive to her. She has said that with her greater experience and knowledge of the case she would, for instance, have asked for a reasoned judgment. One of the shortcomings with which the court is now faced is that there is no reasoned judgment as will be apparent when I come in a moment to refer to the reasons given by the Recorder for her decision under appeal. But I am grateful to have had my attention drawn by Lord Justice Dillon to the submission made by Miss Judd (on page 90 of the bundle). It is clear that she made the crucial submission that there should be no order for access because whatever happened trial access could be of no benefit. This is a laconic note of her submission, but quite clearly she was submitting that to consider experimental access under supervision was not the correct course if, whatever happened on that experiment, the long-term result would be the same. For that reason I hope that the mother, although I understand the anxiety that the absence of Miss Rogers caused her, will feel that she has in no way been prejudiced by the substitution of Miss Judd for Miss Rogers.

The evidence of Mrs Gilkes however continued on 16th April when she was apparently recalled. She also, apparently -- I do not think it matters at all -- was given an opportunity of asking questions of the doctor. I do not consider that his evidence really advances the matter much further in this particular case. But she then is recorded as saying this. Having asked her questions of the doctor, she said: "I am not against supervising access [as a matter of principle]", I am adding "as a matter of principle" because I feel that that is what it means; and the important answer is, "My concerns are not eased by Dr Hammunsley; [it] does not put my mind at rest." Examined again by Miss Judd, she accepts that the mother sees the unpredictable thinking of the father as a danger: "there may still be a niggle. Fathers are important to children sooner or later. I take what she says very seriously." It was at that stage that the order, against which this appeal is made, was made.

The three periods of access under supervision were restored and it is against that provision that this appeal is brought. There is a further addendum ordered and a date fixed for the adjourned hearing as 12th July 1991. That date has of course now passed and is lost. If there were an adjourned hearing rather, it would not be likely to come before the court for a matter of two months or so. Again the welfare officer was granted liberty to apply indicating that if after one period or two periods of access the welfare officer felt it was not being successful, then she could come back to the court and be relieved of the responsibility of having the third period of access.

Miss Roger's further ground which, if I may so say so, is the substantial ground, is that in deciding to order the periods of supervised access for the purposes she disclosed in her reasons, the Recorder failed to balance on the one hand the acknowledged significance, and sometimes importance, of retaining what has been referred to as the blood tie, that is that the child should know its natural parents, against the damage likely to be caused to the child and to the relationship between the child and the mother by ordering such experimental access, in the context of the possible benefit, if any, that could accrue if that experimental access were successful and the damage which would be caused if it failed. Miss Rogers submits that the Recorder failed to carry out that balancing exercise which she should have done before deciding whether or not any kind of further investigation as to access was justifiable.

I now turn to the reasons for the order which were, I think, dated some date in May, although it refers to the order of 16th April, and reads as follows:

"Evidence having been given to the Court by the Divorce Court Welfare Officer, it became clear that she would be able to arrange some periods of access, supervised by herself, and thereby be given the opportunity of seeing the Applicant and his son together and assessing their reactions and behaviour towards each other. The Welfare Officers Report to the Court on those meetings would be of value to me when making my decision at the conclusion of the case."

That does not -- I hope I may say this without disrespect to the Recorder -- even pretend to be a judgment. So Miss Rogers is right in saying there is no reasoned judgment for this court to consider, and therefore Miss Rogers, going the further steps, says that the Recorder did not consider the balance or weigh up the relevant factors. If she had she should have said why she had not followed the advice of the court welfare officer and why she had come to the conclusion that the supervised access was a worthwhile experiment. I have little doubt -- I hope I am right -- that of course the Recorder was not contemplating giving a judgment until after she had heard the totality of the evidence and that of course involved the results of the experimental access and any further evidence, psychiatric or otherwise, which might become available. On the other hand she had heard a vast body of evidence and had very nearly everything to hand before she came to the decision of embarking upon this last leg of investigation and it is as short an issue as that upon which, in my judgment, this appeal can be resolved.

We have been referred to two authorities by Miss Rogers. I need only refer to one of them, and that is a case of Starling v Starling, reported in [1983] 4 FLR 135. The other case, which I refer to for record purposes only, was M v J [1982] 3 FLR 19, a judgment of Sir George Baker, President. Both cases are directed to the same point. I can, for the purposes of this case, summarise the effect by reading the judgment of Lord Justice Ormrod at page 138:

"The judge, in my judgment, did not put to himself the crucial question in the case which is: Will starting access now, after this long lapse of time, be of any positive benefit to the child . . . except the more or less theoretical one that it is good that children should know their fathers, and that was the reason really why the judge made his order.

I can see no benefit to this child whatever in attempting to start access to a person who is a total stranger to him and who is equally a total stranger to the child, not having seen him since the age of 3 months. Three-and-a-half years of age is a very difficult age to start making fundamental changes in a child's life, and I am quite satisfied that this is a case in which there should be no order as to access at all."

In this case the facts are not quite so dramatic as they were in Starling v Starling. There the contact in the initial stages was merely a matter of months; here it was two years. That having been said however, regardless of the evidence of what I have called the "Mark incident" which occurred in 1988 shortly after the separation and, with respect to Mr McKenna, disregarding as I must disregard what he said this morning, namely, that he had over the years, and not infrequently, seen George riding on a pillion on his mother's bicycle, and that George would turn and wave to him, I have very great sympathy for the father in this case. I do not subscribe to the views that have been hinted at -- that there is anything psychiatrically wrong with him -- but it is his own nature and, if I may say so, lack of insight into the broader problems that have caused him to have adopted an attitude which is quite unsustainable. I have no doubt that he genuinely believes that he has seen George and that George has waved back, but if that had happened it would have been in the forefront of his affidavit and also his evidence when this matter has been ventilated over and over again. So the drive that very genuinely brings the father before the court seeking access is one that has, in its turn, distorted his own recollection and, I regret to say, his own judgment of where the best interest of the child, George, lie. They certainly do not lie in becoming the focal point of disputation, whether it be on education, whether it be on religion, or whether it be on any other matter between himself and the mother.

The mother is acknowledged as being a perfectly satisfactory mother and indeed the father does not challenge that. That being so, it would introduce into George's life at this stage a disruptive feature arising from a person, an adult whom George will almost certainly have wholly forgotten. That may be very hurtful to the father but small children's memories are very short and I have no reason to believe that the mother has in the intervening period, between November 1988 and today, done anything positive to keep alive in George's mind any memory of his natural father. It would be very strange if she had and I do not criticise her if she has not.

The evidence of the welfare officer is really overwhelming here, that unless there was firm re-assurance about the fathers attitude in the future -- not his psychiatric condition but his general conduct and attitude in relation to George and in relation to George's mother -- there is bound to be disturbance and stress which will have only one result, and that is that it will damage, or be a source of potential damage to, George himself. So I ask myself what course this court should take.

In my view the Recorder did not properly address the problem in deciding whether or not to set in motion the three periods of supervised access -- whether there was any reasonable prospect of any benefit accruing from resintating access to George in the foreseeable future. There is simply no evidence upon which it can be said that there would be

any possible benefit. The only benefit is that referred by by Lord Justice Ormrod as "the more or less theoretical one that it is good that children should know their fathers". That has been put in different ways in this court during the intervening years. It is sometimes said, and I subscribe to this view, that if it can be done without any serious risk of harm, then it is usually in the interest of young children that they should know their natural fathers or their natural mothers for that case, and that should be one of the features to be borne in mind. But in this case the future holds only distress and disruption if the mother and the father are brought into contact with George as the focus between them and that is more than sufficient, in my judgment, to displace any basic or, as Lord Justice Ormrod said, "more or less theoretical benefit accruing from the natural blood tie".

In those circumstances, the Recorder having manifestly failed to ask herself the correct question or to deal with it, I consider that it is open to this court to substitute its own judgment and discretion for that which would normally be exercised by the trial judge, and I would exercise that discretion in favour of the mother and dismiss the father's application under both Acts, the 1971 and the 1987 Act.

JUDGMENTBY-2: DILLON LJ.

JUDGMENT-2:

DILLON LJ: I agree. I would accept for the purposes of this appeal Dr Hammersley's evidence that he, the doctor, did not believe that the father, Mr McKenna, has any sort of treatable psychiatric disorder. But it is plain from the welfare officer's report and indeed from the manner in which the father presented his submissions in this court this morning, that he has a difficult temperament, intense and withdrawn, obviously, and as I would deem in the light of the welfare officer's report, prone to see things from his own side only. In view of this and as there has been this complete break of any access between the father and George for two and a half years plus, I would find a close parallel in Starling v Starling. My Lord has referred to the judgment of Lord Justice Ormrod. I would refer to that of Lord Justice Templeman at 137 F:

"What good can the father do this child? The answer is none. What harm can he do him? The answer is possibly a great deal. To take this child . . . to see a stranger in the office of the welfare officer fills me with horror. Any suggestions as to what might follow after that is simply to delve into the mists of uncertainty."

And then in the final paragraph of 138 B:

"As far as this child is concerned, I would leave things entirely to the mother without any restraint. No one knows what is going to happen; how this child will grow up; whether he will want to see his father; whether he will be curious about him; no one knows what will happen. I would leave it to the mother to make up her mind as the years go by what is in the best interest of this child. The father, who has been out of the child's life, should remain out unless and until it is thought desirable he should come back into it."

I agree that this appeal should be allowed and that the order my Lord has indicated should be made.

DISPOSITION:

Appeal allowed; no order as to costs save for legal aid taxation for appellant and legal aid taxation for respondent up to 29th July 1991.

SOLICITORS:

Ferguson Bricknell, Oxford

REPUBLIC OF AUSTRIA

SUPREME COURT

The Supreme Court, has, through the president of the senate of the Supreme Court, Dr. Melber as presiding judge and through justices of the Supreme Court Dr. Graf, Dr Schinke, Dr. Tittel and Dr. Baumann as additional Judge in the custody matter concerning Fabio Rasp born on 29 November 1990. This is following the Appeal for Review of the mother, Hedda Rasp, D-81637 Munich, Schueleinplatz 8 2nd Floor, represented by Dr. Andrea Wukowitz, attorney in Vienna, against the decision of the County Court for ZRS Vienna as the appeals court of June 5th, 1996. GZ 45 R 498/96k - 135, by which the decision of the District Court of Doebling of 26 April 1996 (GZ 8 P 1286/95h-109, was changed, made the following

DECISION

The Appeal for Review is granted.

The decision of the Appeals Court, which with regard to the decision on the appeal of the father remains as it is, is otherwise cancelled and the Appeals Court is given instruction to issue a new decision.

The "document presentation" and "request" which is in fact the response to the appeal for review, of the parental grandparents, Hermine and Wolfgang Koetzle, is denied.

REASONING

Fabio Rasp, born on 29 November 1990 is the extramarital child of Hedda Anne-Marie Rasp and Berthold Koetzle.

On 9 June 1995 the paternal grandparents, Hermine and Wolfgang Koetzle, proposed to have the custody by the mother for Fabio withdrawn and to assign the custody to them. They argued, that this minor since he was born had been looked after by them, that the mother had lost her house, that she was homeless, and furthermore was a member of a sect. As Fabio in the last year had seen his mother only twice, he did not have a relationship with her. Fabio would be used to his grandparents and would also go to a

kindergarten in Vienna. If the mother would pull him out of his usual environment, his well-being would be put in danger.

With the decision of 9 June 1996 the custody was temporarily assigned to the paternal grandparents.

The mother objected against the claims of the paternal grandparents and brought forward that Fabio had only been taken care of by them since 1994; the minor had always regular contact, minimally by phone, with her; she is only a regular member of Scientology, but this membership has certainly no negative influence on the development and the well-being of Fabio.

With the brief of 4 December 1995 the father, Berthold Koetzle, also applied for sole custody.

The first instance court denied the application of the parental grandparents to have the custody withdrawn from the mother, Hedda Rasp, and assigned to them. Also the application of the father to have sole custody assigned to him was denied. The parental grandparents were ordered to immediately turn over the minor, Fabio Rasp, to his mother and the mother was given the order to not let Fabio participate in any Scientology activities until he would be of age. According to Article 12 that decision was immediately executed.

The first instance court, on the basis of the agreement of the parents and the grandparents, took the viewpoint of the Office for Youth and Family of District 19, also based on a psychological viewpoint of Dr. Wolf, and the viewpoint of the General Social Service in Munich, and the expertise of the expert Dr. Angelika Goettling and the documents submitted, and stated the following:

The parents of the minor Fabio lived with him at Greingergasse 18/2/35, 1190 Vienna. The house of the parental grandparents is in the same house on the same floor. After he was born the child was being taken care of mostly by the mother. Fabio was well nursed, taken care of and handled by his mother. Because of a drug problem the father was not capable to financially contribute to the support of his spouse and child. Therefore, the mother repeatedly had financial problems and had to partly attend to odd jobs. In February 1994 the parents ended their relationship.

Due to the father's drug problem, the parents went with their child to Germany for a therapy, where they stayed until March 1994 when the father discontinued the therapy. In April 1994 the mother went with Fabio to her parents in Bregenz and looked for a house in Munich, where she moved with Fabio in the beginning of May 1994. They lived with a

family who are members of Scientology. During the day Fabio was in Kindergarten and the mother started studying in the Scientology Academy, a study which focuses on helping people in life.

In July 1994, Fabio went on vacation in Burgenland with his parental grandparents and stayed with them after this. After she had secured a place in a kindergarten in Munich for Fabio starting in October 1994, Hedda Rasp wanted to have her son with her again; conversations with the grandparents and the father concerning this did not lead to a result. From November 1994 Fabio was in kindergarten during the day, as the parental grandmother, Hermine Koetzle, was still working. In December 1994 the mother was in Vienna for three weeks and spent Fabio's birthday and Christmas with him. She agreed with the grandparents and the father that Fabio would stay with his grandparents until she would have completed her study in the Scientology Academy.

Since January 1995 Hedda Rasp lived with Johannes Kirtzler. She has often has phone contact with Fabio. In March 1995 the mother was again in Vienna for three weeks to help the father with withdrawal from drugs being done in his house. During the mother's stay in Vienna Fabio was mainly with her, and once in a while slept over at his grandparents.

The mother did not want to continue her study and take Fabio with her. On that basis she informed the grandparents that she would come to Vienna on 10 June 1995 to discuss that with them. The grandparents thereupon obtained temporary custody.

No agreement was reached as to whom Fabio should live with in the future.

On the occasion of a visit of the mother together with the father on 21 August 1995 at the house of the parental grandparents, the mother went with Fabio "to go and buy cigarettes." She, however, did not return, but instead met up with her partner and they drove to Munich that same evening.

On 26 August 1995 Hermine and Wolfgang Koetzle drove to Munich. After intervention from the police the child was handed over back to the grandparents on 28 August 1995 who took him to Vienna.

Since that time the child has been in the care of and has been being brought up by the parental grandparents. Although Hermine Koetzle does no longer work, Fabio is in kindergarten during the entire day.

The house of the grandparents is a type of one room apartment where the room serves as living room and bedroom.

During the weekends and holidays the parental grandparents and Fabio stay at their house in Burgenland.

The parental grandfather, who presently can deal properly with the needs of Fabio, has an important meaning in everyday relations as someone to play games with, however, he tends to display an overprotective attitude toward the child. The relationship towards the parental grandmother is in the background of that she is - compared to the grandfather - essentially less in the position to meet the needs of the child in a flexible manner.

On the basis of the old-age structure of the parental grandparents, one may fear that, come the time of development of Fabio into puberty and maturity, the burden that comes with the demands in bringing someone up will be too heavy.

Fabio would wish to have a better contact with his actual father. It could not be established whether the father is no longer addicted to drugs.

In November 1995, the mother married her partner Johannes Kitzler. She is pregnant (predicted birth - 4 July 1996), it is a pregnancy with complications. She is therefore no longer working. She lives with her husband in Munich in a three room apartment, and one room is ready for Fabio.

With the decision of 17 November 1994, the mother was given visitation rights for each Tuesday from 14:00 till 18:00 hrs and each Friday from 9:00 till 18:00 hrs.

As the mother had problems with her advance pregnancy, the visitation right was changed by the decision of 21 February 1996 to the right for her to have Fabio with her every two weeks from Friday 12:00 hrs till Monday morning when kindergarten opens. She picks up the child from kindergarten on Friday and brings him back in the morning on Monday, so as to avoid contact between herself and the parental grandparents.

Fabio, his mother and her husband spend these weekends at the parents of Johannes Rasp in the Wald quarter.

On 1 March 1996, the parental grandparents denied to mother the ability to exert her visitation rights on that day they had agreed to an appointment with an expert. When the mother on 11 March 1996, the Monday after the first weekend after the visitation arrangement had been changed, brought Fabio back to the kindergarten, she was awaited by Hermine Koetzle, although such was supposed to be avoided.

Fabio is emotionally strongly attracted to his mother,

in fearful situations help and emotional support is sought from her.

Hedda Rasp is a simple member of Scientology, i.e. she is not a staff member. She does use in Fabio's presence elements of educational principles of Scientology. Those principles are partially oriented toward behavioral psychology and in itself cannot be considered negative. They can be considered questionable, when they try to suppress emotional impulses.

On 17 April 1996, the mother stated that she would not let her son participate in any Scientology activity until he would be of age. For Johannes Rasp the upbringing of Fabio is rather ambivalent.

Moving Fabio back to the mother means an interruption of the continuity of the environment and also clearly reduced possibilities of contact with the parental grandfather, but from a psychological viewpoint Fabio is in the position to deal with that.

From a legal viewpoint, the first instance court laid out that according to para 166 ABGB the custody of an extramarital child only goes to the mother. It can only be withdrawn, when through her actions the well-being of the child is endangered, for which strict criteria need to be follows. There are no indications that the mother did not meet her obligations. On the contrary, it is prefered that the care be given to her, even if that means an interruption in the continuity of the environment. Also the membership of Scientology would not be a barrier to grant guardianship as the mother of the child has given a declaration that her child would not participate in Scientology activities, she herself had received instructions in this respect and the German Youth office had also been instructed to do their own verification.

If the mother were to disregard this order, she would endanger Fabio's well-being and would have to count on possible withdrawal of custody. That Hedda Rasp in August 1995 drove Fabio to Munich without knowledge of the grandparents, constitutes a one time error, which has to be viewed as an act of desperation; this does not create a danger for the well-being of the child, and anyhow there is no danger that such an act would be repeated, when the child lives with the mother. That Fabio in the future will have to share the attention of his mother with another child certainly does not mean that the well-being of the child will be endangered.

The appeal filed against this decision by the father was not granted, but the appeal of the grandparents was; the

decision being contested was changed in that the custody was fully withdrawn from the mother, Hedda Rasp, and given to the parental grandparents, Wolfgang and Hermine Koetzle.

The regular appeal was declared admissible.

The appeals court established the following on the basis of a brochure of the German Federal Ministry of Family, Seniors, Women and Youth:

Scientology is neither in Germany nor in Austria recognized as a Church, religious community or community of believers. In Austria the organization operates as a membership association. The the purpose of the organization is unquestionably to make maximum profit. Their ideology has totalitarian characteristics. In a decision of the Federal Labour Court in the Federal Republic of Germany Scientology is characterized and being contemptuous of Man. The aim of the organization is the creation of new Scientological people and a world that solely operates along Scientology guidelines. Hubbard, the founder of Scientology, qualifies every form of democracy as useless. According to his teaching a true democracy can only then develop when all people are Scientologists. The methods of the organization consists of using the fear of people, in order to sell them courses and training developed by Scientology, and bring them thereby into a financial and mental dependency. Someone who sees the indoctrination being done and wants to leave the organization has to pay back the considerable course and training fees, which exceed normal economical possibilities. There is also an offer for services to children, in order to influence their thoughts and actions when they are as young as possible. There is, for example, a peculiar method "word clearing." With this sort of method of learning language children are indoctrinated with definitions of words in the Scientology system of values. This method is specifically dangerous with regard to immaterial concepts such as freedom or morale, the Scientological meaning of which is different from the usual meaning. According to the Federal Ministry of Family, Senior, Women and Youth of the Federal Republic of Germany, Scientology is one of the most aggressive groups in society, which under the cloak of a religious community unites elements of economical crimes and psycho-terror against its members with economical operations and sectarian elements.

From a legal point of view, the appeals court stated with regard to the appeal from the grandparents, that in their opinion, it would be incompatible with the well-being of the child, if the minor would get in contact with Scientology. Even though it must be conceded that the mother is truly interested in the child and does have his well-being at heart, and also does have the intention to keep the child

away from the Scientology organization, it is highly unlikely that she will factually manage to do so. The mother has been in contact with Scientology for years and currently is also a member. Based on the ambitions of this organization and the methods used by them, it must be assumed that it is very likely that the mother is under their dominant influence and in the long run will not be able to effectively resists the efforts of Scientology to also bring the child under the influence of Scientology. Neither her assertion nor the instructions of the court are adequate to remove the potential danger for the child. Also investigations by the German Youth Office would not be a guarantee, that the child could be kept away from the damaging influence, while a cover up of the Organization is relatively simple. Once the child would be under the influence of the organization it would be too late. Furthermore, such an influence could also be created by the mother alone; the first instance court has established that she has used educational suggestions from Scientology with Fabio.

Therefore the mother's membership of Scientology alone is such a danger for the well-being of the child that the care and raising by her has to be ruled out, so that the prerequisites of para 176 ABGD for a withdrawal of custody exist.

The parental grandparents are fit to have custody, as they have taken care of the child for a fairly long time and have a good relationship with him. The well-being of the child, under the given circumstances, is best ensured by him staying in the current environment with the grandparents. The argument that the demands on the grandparents would be to great during the time of puberty is not relevant in present time.

The appeal to the Supreme Court was declared admissible, as there is no jurisprudence from the Supreme Court with regard to the question whether membership of the mother in Scientology, by itself, would constitute such a danger for the well-being of the child so as to result in withdrawal of custody.

The Appeal for Review from the mother targets this decision and demands to change the decision being appealed to re-instate the first instance decision and to give her sole custody; a subsidiary claim is to change the decision being appealed to have temporary custody transferred to the mother and remand the matter otherwise to the first instance court or the appeals court for a new decision; the subsidiary claim is for cancellation.

The Appeal for Review of the mother is admissible and is justified in the sense of her possible claim for

cancellation.

The mother considers there is a nullity in the fact that the parental grandparents for the first time on appeal of the first instance decision, have submitted a brochure which formed the basis for the entire findings of the appeals court. She was not offered any possibility to provide her viewpoint on this documentation. That also means there is a shortcoming in the proceedings, as she would have been in a position to counter the allegations in this brochure. She would have been able to specifically prove that the Church of Scientology is non-profit and does not in fact make a profit. It could have been pointed out that the Church of Scientology is a religious community that meets the qualifications for recognition.

The appeals court in a one-sided fashion took the conclusions of the German federal government and made that into the basis for its decision, which also constitutes a procedural deficiency. That the Church of Scientology itself is organized hierachically and not democratically, corresponds with the character of all important religious communities and specifically the Roman Catholic Church.

Besides, the appeals court has omitted to consider the question whether the parental grandparents were fit at all to take custody. After all there is still the suspicion of sexual abuse by the parental grandfather, a claim which is being investigated by the state attorney in Vienna.

The mother also considers that there is a false report in the statement of the appeals court, that whoever wants to leave the organization has to pay back considerable amounts of course and training fees which are far beyond ordinary economical means. How the apeals court came to that conslusion remains entirely unfathomable.

As a basis for appeal of unjust juridical judgment, the mother argues that the decision of the appeals court constitutes a gross violation of freedom of opinion and freedom of religion. Also the European Court of Human Rights has clearly and unequivocally stated, that a distinction, which is essentially only based on a different religious affiliation as such, cannot be accepted. Even if the general opinions and statements of the appeals court with regard to the Church of Scientology would be true, one could not conclude that there is a concrete danger for the well-being of the child.

It would also be incorrect that the instructions given by the first instance court could not be monitored.

These statements are partially true.

The statement that the parental grandfather may have committed sexual abuse violates the principle that no new evidence is allowed in a procedure for Appeal for Review, and therefore is not taken into consideration. (EFslg 67.459)

As already properly laid out by the first instance court, taking away custody assumes a danger for the well-being of the child (EFslg 75.117), where the examination as to whether the assumption is justified requires strict criteria to be used. (EFslg 75.119)

According to Article 8 Para 1 of the European Convention on Human Rights everyone has the right to be respected with regard to his private and family life, his domicile and his mail, and describes a decision about assignment of custody over children as an example of infringement of the right to family life. In the frame of executing the rights and freedoms which the Convention guarantees, Article 14 of the European Convention on Human Rights also guarantees protection against discrimination, on any grounds such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status; also persons in similar situations without factual and reasonable justification, may not be treated differently. Different treatment is discriminatory when it is not justified by a "legitimate purpose" and when there is "no reasonable relationship between the means employed and the purposes being strived for." On that basis a decision, which in essence is only based on a different religious affiliation as such, cannot be accepted (European Court of Human Rights case Hoffmann vs Austria, Decision from 23 June 1993, JB 1994, 465). The opinion of the appeals court, that custody has to be taken away from the mother solely on the basis of her membership in Scientology, is contrary to the European Convention on Human Rights and is therefore in violation of the law.

It would be superfluous to go into the explanations in the Appeal for Review, which refer to the statements of the appeals court with regard to Scientology, because the circumstance, that the mother is a (regular) member of this organization, by itself does not justify taking away her custody over the minor Fabio.

Following rather the statements of the first instance court, there is no ground, as already correctly stated by the first instance court, to take away custody from the mother, to which per para 166 ABGB she has a constitutional right to, and assign it to someone else (the parental grandparents).

Admittedly in the appeal of the parental grandparents

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against the first instance court decision these facts are contested without the appeals court having taken these up (based on another view of the law). Therefore a final decision regarding the question of custody is not currently possible. The appeals court in the continuing proceedings will have to deal with the appeal of the parental grandparents, as long as that does not only concern membership in Scientology.

The "document presentation" and "request" which is in fact the brief of the parental grandparents, which constitutes as far as contests is concerned an answer to the Appeal for Review, has been denied, because the legal remedy in custody cases is only one-sided.

Supreme Court

Vienna, on 13 August 1996

Dr. Melber

Scientology vs the IRS: Legal archive

An essential element of the Church of Scientology's campaign for tax exemption was the huge number of lawsuits which it (and individual members) launched against the IRS. According to Scientology's *de facto* leader, David Miscavige, at the time of the tax-exemption agreement in 1993, there were over 2,500 lawsuits in progress [Miscavige, speech to International Association of Scientologists meeting, 8 Oct 1993]. This represented a huge burden on the US taxpayer and on Scientology itself - figures released to the IRS show that Scientology was spending a tenth of its income, some $30m, each year on lawyers' fees ["Scientologists Report Assets of $400 Million", *New York Times*, 22 Oct 1993]. It's probable that the two sides together spent several hundred million dollars on the litigation, which was almost continual for 26 years.

One of the key conditions of the secret tax-exemption agreement between Scientology and the IRS was that Scientology would not only drop all of its own lawsuits against the Service but also "use its best efforts to secure the voluntary dismissal with prejudice" of litigation brought by "Scientology-related individuals" - the clear implication being that Scientology was directing and had some degree of control over lawsuits brought by its members [Closing agreement on final determination covering specific matters, 1 Oct 1993].

It would obviously be impossible to archive the details of *all* of the litigation. What follows is a list of perhaps the more significant:

DATE DECIDED	CASE NAME AND CITATION
July 16, 1969	FOUNDING CHURCH OF SCIENTOLOGY v. UNITED STATES
November 15, 1973	UNITED STATES v. CHURCH OF SCIENTOLOGY OF CALIFORNIA and HENNING HELDT
December 12, 1974	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. INTERNAL REVENUE SERVICE
June 26, 1975	UNITED STATES v. CHURCH OF SCIENTOLOGY OF CALIFORNIA and HENNING HELDT
February 8, 1978	MISSOURI CHURCH OF SCIENTOLOGY v. STATE TAX COMMISSION OF MISSOURI
October 2, 1978	MISSOURI CHURCH OF SCIENTOLOGY v. STATE TAX COMMISSION OF MISSOURI
June 24, 1983	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. INTERNAL REVENUE SERVICE
May 14, 1984	CHURCH OF SCIENTOLOGY OF NEW YORK v. TAX COMMISSION OF THE CITY OF NEW YORK
September 24, 1984	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. COMMISSIONER OF INTERNAL REVENUE
May 13, 1986	CHURCH OF SCIENTOLOGY OF NEW YORK v. TAX COMMISSION OF THE CITY OF NEW YORK
May 27, 1986	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. INTERNAL REVENUE SERVICE (1)
May 27, 1986	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. INTERNAL REVENUE SERVICE (2)
September 18, 1986	CHURCH OF SCIENTOLOGY OF NEW YORK v. TAX COMMISSION OF THE CITY OF NEW YORK
December 16, 1986	CHURCH OF SCIENTOLOGY OF NEW YORK v. TAX COMMISSION OF THE CITY OF NEW YORK
January 27, 1987	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. INTERNAL REVENUE SERVICE

February 9, 1987	UNITED STATES v. ZOLIN
July 28, 1987	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. COMMISSIONER OF INTERNAL REVENUE
November 6, 1987	UNITED STATES v. ZOLIN
November 10, 1987	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. IRS, 484 U.S. 9 (1987)
March 28, 1988	UNITED STATES v. ZOLIN
May 16, 1988	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. COMMISSIONER OF INTERNAL REVENUE
July 5, 1988	UNITED STATES v. ZOLIN
June 5, 1989	HERNANDEZ v. COMMISSIONER, 490 U.S. 680 (1989)
June 21, 1989	UNITED STATES v. ZOLIN, 491 U.S. 554 (1989)
October 2, 1989	CHURCH OF SPIRITUAL TECHNOLOGY v. UNITED STATES
December 15, 1989	UNITED STATES v. CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.
June 18, 1990	UNITED STATES v. CHURCH OF SCIENTOLOGY OF BOSTON, INC.
June 20, 1990	U.S. v. ZOLIN, 905 F.2d 1344 (9th Cir. 1990)
July 13, 1990	CHURCH OF SPIRITUAL TECHNOLOGY v. UNITED STATES
November 16, 1990	CHURCH OF SCIENTOLOGY OF BOSTON v. INTERNAL REVENUE SERVICE
December 12, 1990	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. U.S., 920 F.2d 1481 (9th Cir. 1990)
March 18, 1991	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. UNITED STATES
May 24, 1991	CHURCH OF SCIENTOLOGY WESTERN UNITED STATES v. INTERNAL REVENUE SERVICE
May 29, 1991	UNITED STATES v. CHURCH OF SCIENTOLOGY OF BOSTON, INC.
July 16, 1991	CHURCH OF SCIENTOLOGY OF BOSTON v. INTERNAL REVENUE SERVICE
October 18, 1991	CHURCH OF SCIENTOLOGY CELEBRITY CENTER INTERNATIONAL v. INTERNAL REVENUE SERVICE
April 15, 1992	CHURCH OF SCIENTOLOGY INTERNATIONAL v. INTERNAL REVENUE SERVICE
May 27, 1992	FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC. v. UNITED STATES
June 29, 1992	CHURCH OF SPIRITUAL TECHNOLOGY v. UNITED STATES
August 17, 1992	SMITH v. BRADY, 972 F.2d 1095 (9th Cir. 1992)
August 19, 1992	U.S. v. CHURCH OF SCIENTOLOGY WESTERN U.S., 973 F.2d 715 (9th Cir. 1992)
October 15, 1992	CHURCH OF SCIENTOLOGY WESTERN UNITED STATES v. UNITED STATES
November 16, 1992	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. UNITED STATES, 506 U.S. 9 (1992)
November 30, 1992	CHURCH OF SCIENTOLOGY OF CALIFORNIA v. UNITED STATES and FRANK S. ZOLIN
January 21, 1993	UNITED STATES v. ZOLIN, 984 F.2d 988 (9th Cir. 1993)
March 9, 1993	CHURCH OF SCIENTOLOGY OF TEXAS v. INTERNAL REVENUE SERVICE
March 18, 1993	UNITED STATES v. CHURCH OF SCIENTOLOGY OF BOSTON, INC.
March 29, 1993	CHURCH OF SPIRITUAL TECHNOLOGY v. UNITED STATES
April 16, 1993	CHURCH OF SCIENTOLOGY v. I.R.S., 991 F.2d 560 (9th Cir. 1993)

June 9, 1993	CHURCH OF SCIENTOLOGY INTERNATIONAL v. U.S. I.R.S., 995 F.2d 916 (9th Cir. 1993)
June 9, 1993	CHURCH OF SCIENTOLOGY WESTERN UNITED STATES v. UNITED STATES
August 26, 1993	CHURCH OF SCIENTOLOGY INTERNATIONAL v. U.S. I.R.S
October 4, 1993	CHURCH OF SPIRITUAL TECHNOLOGY v. UNITED STATES
July 14, 1994	CHURCH OF SCIENTOLOGY OF SAN FRANCISCO v. I.R.S, 30 F.3d 101 (9th Cir. 1994)

Scientology versus the IRS

Last updated 7 February 1998
by **Chris Owen** (chriso@lutefisk.demon.co.uk)

Scientology versus the IRS

On 1 October 1993, the Church of Scientology obtained tax exemption from the United States Internal Revenue Service (IRS). This ended 26 years of what the Church itself has described as a "war" against the IRS, in which it used extraordinary and in many cases illegal tactics - bugging of government offices, theft of mountains of classified files, private detectives pursuing senior government officials, thousands of lawsuits, full-page attack adverts in US daily newspapers, and so on.

So perhaps it is not such a great surprise that the settlement itself came about in some very unusual circumstances, raising questions about the actions of both the Church of Scientology and the IRS. Neither party has been willing to provide answers, with the IRS refusing to disclose the terms of the exemption agreement in defiance of a court order and US taxation law. But with the leak in December 1997 of the secret agreement, the relationship between Scientology and the IRS is under greater scrutiny now than ever before.

These pages, whilst not making a judgement on whether the Church legitimately earned its tax exemption, are intended to be a clearing house for reports and court records on the Scientology vs IRS controversy.

- *Key documents are highlighted with a* icon.
- *Items added in the most recent update of these pages are highlighted with a* NEW! *icon.*

Background

- **Scientology's attitude towards taxation and government**
- **The battle for tax exemption, 1952-1980**
- **Why is the Scientology-IRS battle such a big deal? - a personal view**
- **Timeline of Scientology vs the IRS**
- **Scientology vs the IRS: Legal archive** NEW!

1993: Scientology gets tax exemption

- **David Miscavige announces the end of the "war" with the IRS**
  8 October 1993
- **Excerpts from Church of Scientology IRS 1023 Tax Exempt Application**
- **Scientologists Report Assets of $400 Million**
  22 October 1993 (*New York Times*)
- **IRS-Scientology Pact Prompts Withdrawal Of 45 FOIA Lawsuits**
  26 October 1993 (*Privacy Times*)
- **A letter from the IRS "promoting" Scientology**
  16 August 1994 (*sent to the German Government*)

1994-97: the secret agreement unravels

- **What We Know About The Scientology Closing Agreement**
  10 January 1994 (*The Cult Observer*)
- **Details Of Scientology Closing Agreement Slowly Coming Out**
  26 June 1995 (*Tax Analysts*)
- **Tax Analysts uncovers IRS's privileged treatment of Scientology**
  29 June 1995
- **Tax Analysts v. IRS: Undisputed Material Facts**
  13 July 1995 (*Tax Analysts*)
- **The IRS is ordered to disclose the secret agreement**
  15 March 1996
- **District Court Orders IRS To Release Field Service Advice**
  21 March 1996 (*Tax Analysts*)
- **The Shadowy Story Behind Scientology's Tax-Exempt Status**
  9 March 1997 (*New York Times*)
- **Scientology issues contradictory statements on its tax exemption**
  19 March 1997
- **Scientology Denies an Account of an Impromptu IRS Meeting**
  19 March 1997 (*New York Times*)
- **Scientologist Exemption Back in the News**
  4 April 1997 (*Tax Analysts*)

1997-98: the agreement is leaked, but raises many new questions

- **The text of the secret CoS-IRS agreement**
  (*from the Wall Street Journal*)

- **Scientologists and IRS settled for $12.5 million**
  30 Dec 1997 (*Wall Street Journal*)
- **Scientologists Settled With IRS**
  30 Dec 1997 (*Associated Press*)
- **Scientology Paid Government $12.5 Million Under Terms Of Agreement**
  31 Dec 1997 (*Tax Notes Today*)
- **Church of Scientology Reached Agreement With I.R.S.**
  31 Dec 1997 (*New York Times*)
- **I.R.S. Eyes Probe After Disclosure of Confidential Scientology Pact**
  1 Jan 1998 (*New York Times*)
- **Sellout to Scientology**
  6 Jan 1998 (*St Petersburg Times*)

- **Deana's Co$-IRS Agreement Analysis** (*Deana Holmes*)
- **Unanswered questions about the agreement** (*Deana Holmes*)
- **Scientology has already violated the agreement** (*Tilman Hausherr*)
- **The agreement violates the public's rights of inspection** (*Jeff Jacobsen*)

The strange links between the CoS-IRS agreement and the Snow White Program

Critical
Essays on
Scientology

Last updated 7 February 1998
by **Chris Owen** (chriso@lutefisk.demon.co.uk)

Enquiry into the Practice and Effects of Scientology

Report by
Sir John Foster, K.B.E., Q.C., M.P.

Published by Her Majesty's Stationery Office, London
December 1971

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Last updated 21 February 1997

Page maintained by **Martin Poulter** (plmlp@mail.bris.ac.uk)

Scientology practices questioned in the House of Lords - Dec 1996

House of Lords, United Kingdom

Oral Questions to the Minister of State for the Home Office, 17 December 1996

Church of Scientology

2.56 pm

Baroness Sharples asked Her Majesty's Government:

> Whether they have any objections to the way in which the Church of Scientology conducts its operations in this country.

Baroness Blatch: My Lords, the Church of Scientology may follow its own doctrines and practices provided that it remains within the law. But the Government recognise that serious allegations have been made about some of its activities.

Baroness Sharples: My Lords, I thank my noble friend for that reply. Is she aware that entrants to the church have to undergo a so-called "purification" process? Is it under qualified medical supervision? Is my noble friend further aware that a number of those who have left the cult have been both threatened and harassed and many have been made bankrupt by the church?

Baroness Blatch: My Lords, I am not in a position to help my noble friend or to comment on the detailed practices of the Church of Scientology. It is something which she may care to raise with the scientologists themselves because it must be for them to respond. Any evidence of the unethical or unlawful practise of medicine would be a matter of serious concern and could be in breach of the law. Therefore, it would require action.

As to my noble friend's second point. I know that serious allegations have been made and it is right that people should be warned of the potential dangers of becoming involved in organisations of that kind. Any evidence of harassment or threats which could amount to criminal activity should be reported to the police.

Lord McNair: My Lords, in asking this question I have to tell the House that I have an interest in it. I am a member of the Church of Scientology. If the noble Baroness has any problems or questions about scientology, I should be happy for her to come and ask me.

Will the Minister accept that I am pleased that the Government's policy remains as laid down by the noble Earl, Lord Ferrers, at the CESNUR Conference in 1993? Does she also agree that those who fail to meet and talk to members of such organisations are liable to form a biased or incomplete picture of the organisation?

Baroness Blatch: My Lords, I know how seriously the noble Lord feels on the issue. But if someone comes to me as a Minister, or to anyone else, and makes allegations and we simply refer the matter to a member of the Church of Scientology, or any other cult, it is unlikely that they will say: "Yes of course we harass people and extort money from them", or whatever it is. Their natural reaction will simply be denial. I am not in a position to answer for that. But it seems to me to be important to persuade people so far as possible to produce evidence so that it can be properly responded to by the Scientology movement. In the meantime, I can say that sometimes it is fear that prevents people from doing that and sometimes it is sheer distress, not only on the part of the individual but on the part of the individual's family.

Lord McIntosh of Haringey: My Lords, the Minister used the word "cult". The Church of Scientology calls itself a church. Is there a definition of the words "church" and "cult"? If so, does the Church of Scientology meet either of those definitions?

Baroness Blatch: My Lords, my understanding is that the Church of Scientology chapels do not conform to the legal definitions of a church and certainly not a religion. I believe it was in 1969 that the scientologists appealed before the courts and were not regarded as a religion.

Baroness Sharples: My Lords, can my noble friend tell me the status of the Americans working at the Church of Scientology headquarters? Can she say whether the church has applied for charitable status?

Baroness Blatch: My Lords, I am sorry but I cannot help my noble friend about the status of the Americans. Coming to this country to work, they would of course need a work permit. They could not simply arrive and work in the scientology movement. In answer to the second question, my understanding is that the scientologists presented informally a hypothetical case to the Charity Commission; namely, should they apply for charitable status, would it be granted? The Charity Commission - it is a matter for the Charity Commission - investigated the matter thoroughly, came back to the scientologists and said that on the basis of the information provided to it, it would not have granted charitable status. I also understand that the scientologists have now submitted a formal application to the Charity Commission. It must be for the Charity Commission to consider that application afresh.

Lord Avebury: My Lords, is the Minister aware that when the application was made to the Charity Commission it ruled that, in order to qualify as a religion, an organisation had to be theistic in character but that Buddhists, having existed for 2,500 years, were an exception to that principle? Does she feel that it would be appropriate for Parliament to frame a sensible definition of "religion" and "church", instead of leaving the matter to be determined by the Charity Commission and the courts?

Baroness Blatch: My Lords, wiser counsels than I have tried that one. We have set our face against a definition of religion. We have settled for there being no legal definition of religion. I have now found the date in my brief: it was 1969 when the Scientologists appealed to be considered a religion and it was decided at that time that their chapels did not constitute a church and were not a religion.

Hansard, vol. 760, cols. 1392-1394

Last updated 21 February 1997

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