

VARNUM v. VARNUM was a 1990 Vermont Supreme Court decision. The marriage of Larry James Varnum and Christine Carol Varnum was fraught with difficulty, and the parties separated twice before seeking a divorce. They last lived together in 1985, when Larry James Varnum filed for divorce. The parties were divorced in May 1987. The merits hearing took the better part of five days to conclude. The transcript runs to over eight hundred pages. The proceedings in this case were charged with emotion and anger. The trial court awarded legal and physical custody of the two minor children to Larry James Varnum. Christine Carol Varnum appealed that award.

Among Christine Carol Varnum's arguments was her assertion that the trial court's custody decision impermissibly considered her Jehovah's Witnesses religious beliefs and activities, in violation of the United States and the Vermont Constitutions.

This Supreme Court affirmed, stating in part:

"In considering religion and religious practices in child custody cases, the state and federal right to the free exercise of religion may be implicated; therefore, in balancing the relevant interests, the supreme court must minimize the degree of interference with religious liberty and use the least restrictive means to accomplish the legitimate objectives that warrant the interference. ...

...

"In order for a religious practice to be considered in determining child custody, the practice must have a direct and immediate negative impact on the physical or mental health of the child. ...

"On appeal by [Christine Carol Varnum], a strict Jehovah's Witness, from award to [Larry James Varnum] of custody of children in divorce action on basis that the trial court's consideration of her religious practices violated her right to the free exercise of religion, no miscarriage of justice requiring reversal was found where physical discipline and other practices of [Christine Carol Varnum], which may have been religiously motivated, rose to the level of "abuse" or were practices which would otherwise directly

and immediately negatively impact on the mental and physical well-being of the children and where many of the factors supporting the trial court's decision were wholly unrelated to [Christine Carol Varnum's] religious beliefs.

... ..

"The court made extensive findings relating to the ability of each parent to raise the children and serve as primary custodian. It found that both parties had secure jobs and sufficient income to raise the children. It found that [Larry James Varnum] had on one occasion slapped [Christine Carol Varnum] on the face but had otherwise not been physically or sexually abusive toward her. It rejected as not credible [Christine Carol Varnum's] other allegations that [Larry James Varnum] sexually and physically abused her.

"Each party alleged that the other physically abused the children. The court found that [Larry James Varnum] had used a belt to administer discipline to [Christine Carol Varnum's] daughter [by a previous marriage], and on one occasion used the belt on his son. It found, however, that such discipline was not occurring at the time of the hearing and that [Larry James Varnum] did not use physical discipline on a regular basis. It found that [Christine Carol Varnum] physically abused the two children and that she believes:

'... strict discipline is essential to install a conditioned response in the children to certain demands imposed upon them by her. When the children fail to respond to her, she believes that it is appropriate and she does administer physical punishment to the children and has done so with various implements which includes a spoon, a ladle and a paddle.

'[Christine Carol Varnum] has punished the children by striking them about the face and body using both her hands and other implements with sufficient force to leave red marks on the children's skin. The court finds that that physical discipline does amount to physical abuse.'

"[Christine Carol Varnum's] [older] daughter [by a previous marriage] alleged that [Larry James Varnum] had sexually abused her when she was living with the parties in Vermont. The court found this accusation not credible.

"Both parties have abused alcohol, and [Christine Carol Varnum] twice attempted suicide while under the influence of alcohol. Although [Christine Carol Varnum] has been told she should not consume alcohol, she continues to be a moderate drinker.

"Both parties spend a great deal of their free time with the children. The findings detail activities in which each party participates with the children to show, with respect to each parent, a supportive relationship. Each parent has a residence and can provide safe and suitable care for the children. If she obtained custody, [Christine Carol Varnum] intended to return to California with the children.

"The trial court made a number of findings that relate to [Christine Carol Varnum's] religious beliefs. [Christine Carol Varnum] is a Jehovah's Witness and is a strict disciple of her faith. Her belief in physical punishment to discipline the children was apparently related to her religion. Because of her religious belief, she forbade the children to have close relationships with children who were not members of her faith, and would not allow the children to celebrate birthdays or holidays although the children traditionally celebrated holidays and found it enjoyable. [Christine Carol Varnum] would not permit blood transfusions even if told by a doctor that the children needed the procedure. There was, however, no evidence of health problems in the children that would create the need for a transfusion. [Christine Carol Varnum] deferred to church elders for help in making decisions. The court found that allowing others to assist in decision making hampered her ability to determine the best interests of the children.

"The court ordered a psychological evaluation of the parties and the children. The psychologist's evaluation recommended that custody be awarded to [Larry James Varnum]. Although the psychologist's conclusions were based on numerous factors, the most important were that: (1) if [Christine Carol Varnum] obtained custody, she intended to severely limit [Larry James Varnum's] access to the children and move from the state as soon as possible; (2) plaintiff had "a better attitude and concept of what children need to be raised in a normal fashion"; and

(3) [Christine Carol Varnum] admitted "to hitting the children and leaving marks on their body, a sign of physical abuse." Based on the evaluation, which the court found was fair to both parties, and the extensive evidence, the court concluded that it would be in the best interests of the children to award parental rights and responsibilities primarily to [Larry James Varnum].

... ..

"[Christine Carol Varnum] ... argues that because the court made findings of fact that touched upon her religious beliefs and because the issue of religion permeated the trial [SEE PATER (1992) and MENDEZ(1987)], the court violated the free exercise clauses of the Vermont and United States Constitutions.

"... Although there was extensive evidence about the religion and religious practices of each party, with an emphasis on the religious practices of [Christine Carol Varnum], neither party objected to the introduction of the evidence or its use in arriving at a custody determination. Both parties submitted evidence pertaining to religion.

... ..

"Consideration of religion and religious practices in custody determinations may implicate the right to free exercise of religion ... It is often said, as a result, that the courts must be neutral in matters of religion. ... While neutrality is a worthy goal, it is rarely achievable in a contested custody matter where the actions of the parents bearing directly on the best interest of the children are attributed to religious beliefs. More often, the courts must engage in a form of balancing of the relevant interests, ... In such a balance, we must be careful to minimize the degree of interference with religious liberty and use the "least restrictive means" to accomplish the legitimate objectives that warrant the interference. ...

"There is no question that the societal interest in protecting and nurturing children is great. ... Thus, in appropriate cases, this interest must override the freedom of the parent to engage in religious practices. ... The challenge for the courts is to accommodate the differing interests where

possible and protect the best interest of children while minimizing the interference with religious liberty. ... To do so, the courts have developed tests that require a religious practice to have a direct and immediate negative impact on the physical or mental health of the child before the practice can be considered in determining the custody of the child. ...

"In applying these principles to this case, we are mindful that defendant's religion, and numerous practices dictated or motivated by her religion, permeated the trial. We are also mindful that defendant's beliefs may appear peculiar and foreign to many. Indeed, many of the cases involving the impact of religion of a parent on the custody determination of a child have involved Jehovah's Witnesses and the courts, and the larger society, have found it difficult to accept, or ignore, their religious practices even when the impact on the children is speculative or insufficient to allow an impairment of religious freedom. ...

"Finally, we must accept that the trial court made findings and considered aspects of defendant's religious practices even though it did not find the required impact on the well-being of the children. On this record, we place in that category findings with respect to restrictions defendant imposed on the ability of the children to associate with peers who are not Jehovah's Witnesses and her prohibition on the celebration of holidays and birthdays. We are also concerned about the use of the finding that defendant would not allow her children to have blood transfusions even if medically necessary, in the absence of any evidence that such an eventuality is likely and cannot be resolved in ways other than depriving defendant of custody. ...

"It is not surprising that the trial court's findings and conclusions do not show a careful consideration of the constitutional standard and the arguments defendant makes in this Court, since the issue was never presented to the trial court. Also, with respect to some facts, the deficiency may have been in failing to make complete

enough findings, although such findings would have been supported by the evidence. For example, the evidence may have allowed the trial court to find that the prohibition on the celebration of birthdays or holidays has a direct and immediate negative effect on the emotional health of the children, but the court was not requested to make a finding on this issue.

"Nevertheless, we cannot find that there has been a miscarriage of justice in the custody award to plaintiff. In reaching this decision, we are motivated by the following considerations.

"First, the primary reason for the psychologist's custody recommendation was the physical discipline imposed regularly by the mother. This also appears to be the primary reason for the trial court's custody determination. While defendant's practices may have had some religious motivation, the evidence clearly supported the conclusion that the physical discipline had a direct and immediate negative impact on the physical and mental well-being of the children. We do not mean to suggest that all physical discipline by parents is prohibited or that, when religiously motivated, it has no First Amendment protection. However, the discipline here was sufficiently severe for the court to characterize it as "physical abuse." The trial court could heavily weigh the use of this physical discipline against defendant.

"Second, there was extensive analysis, both by the expert and in the evidence, of all aspects of the strengths and weaknesses of the parties as prospective custodial parents. In fact, many of the factors that supported the court's decision were wholly unrelated to the religious beliefs of defendant. ... Thus, the expert found that plaintiff had a better attitude and concept of the needs of the children. An important part of the psychologist's recommendation was based on observations of the interaction between the children and each parent, and the court made findings about these interactions.

"Third, although the trial court made no findings in this area, the evidence showed also that defendant intended to minimize plaintiff's access to the children. The psychologist

recounted defendant's statements that plaintiff had little to offer the children in large part because he was not a Jehovah's Witness and thus did not possess the "truth" about life. The psychologist found that defendant's "attitude of indifference to the children's right to appreciate both parent's views will cause the children emotional harm." Even though the trial court made no findings on this subject, we believe it bears on whether there was a miscarriage of justice in this case.

"Finally, the failure of defendant to make a proper record in the trial court causes her difficulty in making out a free exercise claim for a first time in this Court. While there is a general sense that many of the defendant's practices are tied in some general way to her religion, there is no specificity on the exact nature of her religious belief and the extent to which it commands the practices. Thus, we can only evaluate in a rough way the extent to which forgoing some of the practices would burden defendant's religious expression, an essential aspect of the balancing equation for First Amendment purposes. ... Two examples will suffice. Although there was a general assertion that physical discipline is associated with the child-rearing practices of a Jehovah's Witness, there was no specific testimony that defendant's religious beliefs required defendant to hit the children with instruments like the butter paddle and spoon. Similarly, the court pointed to the fact that defendant appeared to routinely turn important decisions in her life over to church elders and concluded that her ability to determine "the best interests of the children is hampered by her need to have other people make her decisions." The evidence does not show whether the involvement of the elders in parental decision-making is required by defendant's religious beliefs.

"In conclusion, we are satisfied that the trial court's custody award was justified, even though the court did not examine specifically the aspects of defendant's religious beliefs and practices that do not directly and immediately impact on the mental and physical well-being of the children. The consideration of defendant's religion did not cause a miscarriage of justice, and we decline to reverse on that basis.