[J-97-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, NIGRO, SAYLOR, EAKIN, BAER, JJ.

STANLEY M. SHEPP,	:	No. 242 MAP 2003
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered April 7, 2003 at
v.	:	No. 937 MDA 2002, which affirmed the
	:	Order of the Court of Common Pleas of
TRACEY L. SHEPP	:	York County, Civil Division, entered May
A/K/A TRACEY L. ROBERTS,	:	14, 2002, at No. 2002SU0012102C.
	:	
Appellee	:	ARGUED: May 13, 2004

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: September 27, 2006**

I agree with the majority that the Superior Court improperly substituted its judgment for that of the trial court when it concluded the teaching of plural marriage was a grave threat, when the trial court found such teaching was not a grave threat. See Majority Slip Op., at 14. The Superior Court's error is a sufficient basis for this Court to reverse the Superior Court's order. Botek v. Mine Safety Appliance Corp., 611 A.2d 1174, 1176-77 (Pa. 1992) (Superior Court not free to substitute its judgment for that of trial court). However, I do not join the majority's constitutional analysis.

If a constitutional analysis were necessary, I have misgivings about the application of the strict scrutiny test here. This is not a case where the government, as a party, is alleged to have infringed upon another party's fundamental constitutional right. The government is not a party; the parties are the biological parents of their

daughter. Each parent has a fundamental constitutional right to make decisions concerning the care, custody, and control of their daughter. See Troxel v. Granville, 530 U.S. 57, 66 (2000). Presumably, any government infringement upon either parent's fundamental right to raise daughter would require strict scrutiny be employed to evaluate such an infringement. See id., at 80 (Thomas, J., concurring). Father wants to teach daughter about plural marriage; mother does not want daughter to be so taught. With the parents in conflict concerning how daughter should be raised in this regard and with each having an equivalent fundamental right to direct daughter's upbringing, I would conclude the fundamental rights of one parent are not superior to the fundamental rights of the other. For analytical purposes, they "cross-out" one another, leaving us with an analysis based on the best interests of the child--the hallmark of every custody matter--without applying strict scrutiny.

Applying strict scrutiny to the trial court's order based upon father's First Amendment rights gives him a tremendous advantage in the custody dispute over whether daughter should be taught about plural marriage, since the strict scrutiny test is rarely met. Burson v. Freeman, 504 U.S. 191, 200 (1992) (noting "a law rarely survives [strict] scrutiny"). However, applying strict scrutiny to the trial court order makes mother's fundamental right to raise daughter without learning about plural marriage substantially less valuable than father's fundamental right to teach her about plural marriage. To ensure that neither parent's fundamental rights are improperly devalued, I would apply a "cross-out" analysis that would not strictly scrutinize the trial court order, thus providing the trial court's decision appropriate deference after it applied the traditional test in custody disputes between two biological parents--determining the best interests of the child by a preponderance of the evidence. See Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000) (in custody disputes, fundamental issue is child's best

interest; burden of proof shared equally in custody dispute between two biological parents).