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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-002146-ME

THOMAS ANDREW SPRINKLE APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 04-CI-00157

JESSICA APRIL SMITH APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: The Domestic Relations Commissioner (the DRC) for the Powell Circuit Court recommended that the parties' continue their joint custody arrangement for their two children. However, because the parties could not agree regarding the children's religious practices, the DRC recommended giving Jessica April Smith (Smith) the "sole decision making authority in the area of religion."

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

The DRC also recommended that the parties' visitation schedule be amended to conform to the standard visitation schedule. Sprinkle objected to the findings of the DRC, but the Powell Circuit Court confirmed and adopted the DRC's recommendations. It is from the court's order doing so that Sprinkle now appeals. In his appeal, Sprinkle argues that the court erred in adopting the DRC's recommendation that Smith be given final authority to determine the children's religion. Sprinkle also argues that the standard visitation schedule has the effect of forcing him to choose between spending time with his children or practicing his religion. For the following reasons, we vacate and remand.

FACTS

Smith and Sprinkle were married on May 29, 1994, and their marriage was dissolved on August 18, 2004. Two children were born of the marriage, Dane Thomas Sprinkle (Dane), date of birth January 22, 1999, and Savannah Grace Sprinkle (Savannah), date of birth October 26, 2000. As part of the dissolution, Smith and Sprinkle agreed to joint custody of the children, with Smith as the "primary care provider." The agreement also set forth a visitation schedule, but it did not address what religious training, if any, the children would receive, or who would have any final say regarding religion if a dispute arose.

On August 29, 2006, Smith filed motions seeking sole custody and a change in the visitation schedule. In support of her motion for sole custody, Smith argued that Sprinkle is a member of the United Church of God and that "[t]his type of religion is detrimental to our children and is not in their best interests." In

support of her motion to change visitation, Smith noted that the parties had, by oral agreement, deviated from their prior agreed to visitation schedule. However, from Smith's perspective, that modified schedule was no longer viable.

On September 1, 2006, Sprinkle filed a motion to modify custody, seeking relief on a number of issues. We will only outline and address those pertinent to this appeal. In his motion, Sprinkle noted that, since the dissolution of their marriage, the parties had varied from the initial visitation schedule, with the result being that he spent more time with the children than originally allotted. Sprinkle sought additional time or, in the alternative, an order formalizing the schedule the parties had informally followed. Sprinkle also asked that the custody order be modified so that neither party was designated as "primary custodian."

The court referred these matters to the DRC, who conducted a hearing on June 26, 2007. At the hearing, Smith testified that she wanted sole custody primarily because of Sprinkle's affiliation with the Living Church of God (the LCG), "a splinter group" of the World Wide Church of God. Smith testified that she had been raised in the World Wide Church of God, an organization she characterized as a "cult." Smith testified that members of the LCG believe in and follow the Christian Bible; however, they do not celebrate traditional Christian holidays, such as Christmas and Easter. Instead, they celebrate holidays that they believe are more in keeping with a literal interpretation of the Bible. Furthermore, members of the LGC do not eat certain foods, such as pork and shellfish, they celebrate the Sabbath from dusk on Friday to dusk on Saturday, and they are

discouraged from associating with people who are not members of the LGC. During the Sabbath celebration, members of the LGC do not watch television, are only permitted to read the Bible or materials promulgated by the LGC, and may not participate in outside activities. As a child in school, Smith did not participate in Christmas, Halloween, or Easter celebrations and felt like an "outsider," and she did not want her children to experience that isolation.

Additionally, Smith testified that, as the children become more active in school, the LGC Sabbath will interfere with their extracurricular activities. She noted that she had enrolled Dane in cub scouts. However, she had to withdraw him because, during his visitation time, Sprinkle would not take Dane to any activities on Friday night or Saturday morning. Although Savannah wanted to enroll in cheerleading, Smith did not enroll her because she feared that Sprinkle would not cooperate.

Smith also testified that the children seemed confused by the differences in her beliefs and their father's, and they had questioned her about those differences. Dane has stated that he would celebrate Christmas with his mother while he was at her house; however, he would stop doing so when be "grew up." Savannah refuses to eat pork and shellfish, which Smith says puts a strain on her current family.

Finally, Smith testified that, because the parties live approximately forty minutes apart, the current visitation schedule would interfere with the children's school work.

Smith's current husband testified that Dane cried one time after returning from a visit with his father because he was confused.

Lambert Greer, a minister with the LCG, testified regarding some of the tenets of his faith. He also testified that the church is not a cult.

Sprinkle testified that he has never openly spoken against Smith's religious beliefs in the presence of the children. While he does have the children observe the Sabbath when they are with him, he has not tried to impose that practice on Smith. Furthermore, he has not objected to the children having activities on Friday night or Saturday morning. To the contrary, he testified that he would permit Smith to take the children to any such activities as long as she returned them when they were finished.

Although Sprinkle has told the children that certain foods such as pork and shellfish are not good for them, he has not told them to refrain from eating shellfish or pork when they are with Smith. He does not believe that the children are confused and, although Smith testified that she believes otherwise, he denied that he asked the children to question Smith about her beliefs. Sprinkle views the children's questions about the differences between his beliefs and Smith's as simple curiosity.

Following the hearing, the parties submitted the transcript of the deposition of Gregory D. May, a child/adolescent/family therapist. Dr. May, who was not court-appointed and appears to have been retained by Sprinkle, performed an assessment of Sprinkle, his current wife, and the children. As a result of his

assessment, Dr. May concluded that the children were well-adjusted and that they acclimated well to both of their parents' households. However, they did not want their parents to argue about visitation and they expressed a desire that visitation be fair. As to the question of religion, Dr. May suggested both parents simply be open and honest with the children and that the children be permitted to participate in both religions.

Based on that evidence, the DRC entered the following recommendations:

> 11. That the Petitioner and Respondent shall continue to share joint custody of the minor children of the parties, with the Petitioner having primary residential custody, however, *the Petitioner shall have sole decision making authority in the area of religion*. Joint custody contemplates the parents working and deciding together on major aspects of the children's lives: religion, education, medical treatment and the like. It is obvious the Petitioner and Respondent cannot agree on the matter of religion and therefore, something needs to be changed. One option would be to make the Petitioner the sole custodian. However, *Fenwick v. Fenwick*, 114 S.W.3d 767, [sic] (Ky. 2003) states that "equal decision-making power is not required for joint custody, and parties or trial courts are free to vest greater authority in one parent even under a joint custody arrangement." The Court must first find that the failure to vest greater authority in one parent would lead to significant impairment in the child's emotional development. *Id,* [sic] at 776.
>
> Religious differences are extremely difficult to reconcile and are by their very nature confusing to the children. While exposure to different faiths can be educational for the children, the potential for emotional harm is significant in this case where the differences are so vast.

> That is not to say that the Respondent is forbidden from practicing his faith with his children; however, the decision of the Petitioner in regard to religion shall be final. If there are activities that the Petitioner wants the children to participate in and the Respondent objects on religious grounds, the Petitioner may take the Respondent's objections into account, but she shall make the final decision on participation. If the children are visiting with the Respondent, the Respondent is free to prepare foods in keeping with his religious practices and the children can certainly eat what is served when they are with the Respondent.
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> Decisions on participation in religious activities are to be made by the Petitioner. The Respondent shall respect the decision of the Petitioner regarding faith and not attempt to interfere with this decision.
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> 12. It is very apparent that both parents love their children very much. While the desire to spend equal time with the children is understandable, an equal time-sharing arrangement is impractical [because of] school schedules and the distance between the parties. *The Standard Visitation Schedule for the 39th Judicial Circuit is more appropriate and the Respondent shall have visitation accordingly.* Both parties should be mindful that the standard schedule emphasizes that the parties should try to reach agreement on visitation, but if they cannot, than [sic] the specific provisions should be followed. (Emphasis in original.)

Sprinkle timely filed exceptions to the DRC's recommendations; however, the circuit court confirmed and adopted those recommendations. It is from this order that Sprinkle now appeals.

## ANALYSIS

We must vacate the trial court's order both as to its designation of Smith as the sole arbiter of religion and as to visitation. As to the first, the order is

inconsistent on its face. On the one hand, the trial court gave Smith "the sole decision making authority in the area of religion" and stated that all decisions by Smith "in regard to religion shall be final." Furthermore, the trial court stated that "[d]ecisions on participation in religious activities are to be made by [Smith]" and ordered Sprinkle to "respect the decisions of [Smith]" and not "to interfere with this decision." On the other hand, the trial court stated that Sprinkle is not "forbidden from practicing his faith with his children." As we read them, these statements are irreconcilable. If Smith has sole authority to make decisions regarding what religious services the children may attend, then Sprinkle will, in all likelihood, be forbidden from practicing his faith with his children. Therefore, we must vacate the trial court's order and remand this matter for clarification.

As to the trial court's order regarding visitation, we find it to be deficient as well. "We review the trial court's visitation orders under the abuse of discretion standard." *Wireman v. Perkins*, 229 S.W.3d 919, 920 (Ky. App. 2007). Under this standard, the trial court's imposition of the standard visitation is not, in and of itself, in error. However, taken in conjunction with the trial court's order granting Smith the sole decision making authority in the area of religion and this Court's holding in *Wireman*, we hold that the trial court's decision regarding visitation is deficient.

In *Wireman*, the father had sole custody of the couple's minor child. The trial court granted the mother "visitation during the school year on every Wednesday night and every other weekend from Friday afternoon until Monday

morning." *Id.* at 920. The father moved the trial court for an order requiring the mother to take the child to the Fern Creek Christian Church on Sundays during her visitation time. In support of his motion, the father argued that, as sole custodian, he had the right to "determine the child's upbringing, including his . . . religious training." KRS 403.330. The trial court denied the father's motion, and he appealed.

On appeal, this Court noted that there was a lack of case law on this issue in the Commonwealth. In reviewing case law from other jurisdictions, this Court discovered that:

> [m]ost of the courts that have faced similar issues have ruled that statutes like KRS 403.330 must be construed in light of the non-custodian's constitutional rights to express her religion or lack thereof, *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to be meaningfully involved in the upbringing of her child. *Id.; Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The non-custodian is free, these courts have held, to expose the child to the non-custodian's beliefs, provided that the exposure is not substantially likely to result in physical or emotional harm to the child. *Chandler v. Bishop,* 142 N.H. 404, 702 A.2d 813 (1997); *Zummo v. Zummo,* 394 Pa.Super. 30, 574 A.2d 1130 (1990); *Funk v. Ossman,* 150 Ariz. 578, 724 P.2d 1247 (1986). *See* George L. Blum, "Religion as Factor in Visitation Cases," 95 A.L.R.5th 533 (2002); Jennifer Ann Drobac, "For the Sake of the Children: Court Consideration of Religion in Child Custody Cases," 50 Stan. L.Rev. 1609 (1998). *Both* parents, in other words, retain rights to convey religious or other fundamental beliefs to their children.

*Wireman,* 229 S.W.3d at 921. With regard to the father's arguments, this Court went on to state that:

> It is true, as Wireman argues, that these potentially conflicting rights will sometimes require accommodation and that accommodation could result in the non-custodian being required to transport the child to religious classes or sacramental preparation chosen by the custodian. In *Zummo v. Zummo, supra,* for example, the court held that a Catholic parent's visitation rights were not unduly burdened by a requirement that he accommodate his children's preparation for bar mitzvah by presenting them at the synagogue for Sunday School during his visitation. As the *Zummo* Court noted, however,
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> > a parent's right to inculcate religious beliefs in his or her child would not provide a compelling reason to justify the denial of the other parent's right to maintain a meaningful parental relationship with his or her children. If the court must choose between meaningful visitation and the full benefits of a desired program of religious indoctrination, the religious indoctrination must yield to the greater interest in preserving the parent-child relationship.
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> [*Zummo v. Zummo*, 394 Pa.Super. 30, 574 A.2d 1130, 1158 (1990)].

*Wireman,* 229 S.W.3d at 921.

This Court agreed with the above cited opinions that the person with sole custody has "the right to make the major decisions affecting the child's education and religious training[;]" however, that person does not have the authority

> to interfere permanently or unduly with the non-custodian's visitation. Where, as here, there is no evidence that the child has been or is substantially likely to be injured as a result of the non-custodian's practices, or that indoctrination in the custodian's religion has been

> frustrated, the non-custodian is not required to give up visitation time to accommodate the custodian's chosen church services. The trial court did not abuse its discretion by not requiring such accommodation here.

*Id.* at 922.

As noted by this Court in *Wireman,* a trial court must consider the impact any rulings regarding religious practices will have on a parent's right to visitation. The trial court herein ordered visitation pursuant to the standard schedule, which includes weekend visitation. The trial court also granted Smith the sole decision making authority in the area of religion. Since Sprinkle will have visitation with the children during his Sabbath, the trial court should have addressed what, if any, impact the granting of the authority to make decisions regarding religion to Smith will have on Sprinkle's right to visitation.

Finally, we note that the trial court found that "exposure to different faiths can be educational for the children; [however] the potential for emotional harm is significant in this case where the differences are so vast." We can find little, if any, support for this finding by the trial court in the record. Dr. May, whose qualifications to testify as an expert witness were not challenged by Smith, testified that the children seemed well-adjusted with their situation. Smith testified that the LCG does not engage in abusive practices with regard to children. Minister Greer described a religion that appears to be a mixture of conservative Judiasm and evangelical Christianity, which may be different from more mainstream Christian faiths, but does not appear to be vastly different.

The only evidence of any negative impact that Sprinkle's religious views might have on the children is from the testimony of Smith and her husband. Smith testified, based on her experience, that the children might be ostracized as they grow older because they would not be permitted to partake in various activities. However, Sprinkle testified that he had no objection to the children's participation in such activities. His only concern appeared to be that, if he had to transport the children to such activities, it would interfere with his ability to practice his religion.

Smith testified that the children questioned her religious practices and noted that they might be confused about the differences between her religion and Sprinkle's. However, the expert testimony of Dr. May contradicted supposition on Smith's part.

Finally, Smith's husband testified that, on one occasion, Dane cried because he was confused about the parties' religious differences. In adopting the DRC's recommendation, the trial court appears to have relied on this confusion as indicative of a significant potential for emotional harm. The trial court has the duty to make such findings of fact; however, it must support those findings. Therefore, on remand, the trial court must, in keeping with *Wireman*, set forth specific findings from the record that establish that the children have "been or [are] substantially likely to be injured as a result of [Sprinkle's] practices, or that indoctrination in [Smith's] religion has been frustrated." *Wireman,* 229 S.W.3d at 922. When doing so, the trial court should keep in mind that any custody/visitation

arrangement must serve the best interests of the children involved, but should not unduly interfere with either parties' right to practice his or her religion. *See* KRS 403.340 and *Fowler v. Sowers,* 151 S.W.3d 357, 359 (Ky. App. 2004). The trial court could, perhaps, accomplish this by arranging for visitation that does not include either parties' Sabbath. However, we leave that determination to the trial court's sound discretion.

## CONCLUSION

For the reasons set forth above, the trial court's order is vacated and this matter is remanded to the trial court for additional proceedings consistent with this opinion and this Court's holding in *Wireman v. Perkins*, 229 S.W.3d 919 (Ky. App. 2007).

ALL CONCUR.

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