

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001373-MR

ABRA MOORE

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEFF MOSS, JUDGE
ACTION NO. 12-CI-00346

DONOVAN MOORE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: This case involves a dispute between divorced parents concerning whether Father (Appellee) may discuss his religious beliefs with his children. Appellant, Abra Moore (Mother), custodial parent of the parties' two minor children, appeals from an Order of the Jessamine Family Court denying her motion to prohibit Appellee, Donovan Moore (Father), from communicating with

children about his religious beliefs. Mother contends that the trial court erred by misapplying the law and by impermissibly shifting the burden of proof to her.

After our review, we affirm.

The parties were married in 2002. Two minor children were born of the marriage, Daughter in 2005 and Son in 2008. The Decree of Dissolution was entered on December 28, 2011, and it reflects that the parties agreed that Mother have sole custody.

On April 8, 2015, Mother filed a Motion asking the trial court to admonish Father that he should not influence Mother's choices of religious beliefs for the children. Specifically, she asked that Father "cease communication with the children regarding their religious beliefs as same has made the children uncomfortable and anxious." Mother is raising the children in the Christian faith. Father is a Jehovah's Witness.

The matter was heard on May 18, 2015. The parties submitted briefs following the hearing. By Order of August 4, 2015, the trial court denied Mother's Motion. The trial court explained that Mother's ability as sole custodian to determine the religion in which the children will be raised is not compromised or controverted by its order. In recognizing Father's right to express his religious views, the court noted that any restriction on his discussion of his religious beliefs with his children would require "an understandably high threshold due to the First Amendment Freedom of Religion Protections of the Constitution. KRS 403.330 cannot overrule Father's right to express his religion."

KRS¹ 403.330(1) provides:

Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

Citing *Wireman v. Perkins*, 229 S.W.3d 919 (Ky. 2007), the trial court held that Father may expose the children to his religious beliefs, provided that such exposure is not substantially likely to result in physical or emotional harm to them. Additionally, the court held that there was insufficient proof in the record of such harm or of any substantial likelihood that such harm would occur.

On August 12, 2015, Mother filed a Motion for Relief pursuant to CR² 60.02, which the trial court denied by Order of August 25, 2015. Mother then filed a timely Notice of Appeal to this Court.

Mother contends that the trial court abused its discretion and erred as a matter of law by applying a “‘serious endangerment’ standard as if it were deciding a visitation issue and not a custodial matter” in issuing its Order of August 4, 2015. She argues that the trial court erred in relying on *Wireman*,

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

characterizing it as “essentially a timesharing case, not a case involving the children’s ‘religious upbringing.’”

However, *Wireman* clearly involved the issue of religious upbringing. The father, David Wireman, was sole custodian. The mother, Lori, had visitation privileges which included alternate weekends. David Wireman filed a motion to modify the visitation schedule in order to compel Lori to take the child to Wiseman’s church on her visitation weekends. Wireman relied on KRS 403.330 – as does Mother in the case before us -- and contended that Lori’s refusal to take the child to his chosen Sunday services threatened “to usurp his rights as custodian.” *Id.* at 921. This Court disagreed that Lori had to take the children to David’s church, holding instead that each individual parent retained his or her right to express religious views:

Most 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. (Citations omitted.) *Both* parents, in other words, retain rights to convey religious or other fundamental beliefs to their children.

Id.

Mother relies on KRS 403.330 and *Wilhelm v. Wilhem*, 504 S.W.2d 699 (Ky. 1973), *overruled on other grounds by Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001), arguing that she is clothed with the decision-making authority as to the children's religious orientation. She contends that Father's efforts to expose the children to his religion are essentially circumventing or contradicting Kentucky law as well as undermining her rights as sole custodian. She also contends that the trial court placed an impermissible burden on her. We disagree.

Wilhelm is distinguishable on its facts. In *Wilhelm*, a supplemental decree awarded the mother sole custody but granted the father the right to enroll the children in a religious school. On appeal, the court struck down the provision as to the school as violative of KRS 403.330(1). *Id.* at 700. The mother was sole custodian, and there had been no agreement that the father would determine the children's education or religious training. The father had not moved for a hearing, nor was there any finding that the mother's determining their education and religious training would endanger the children's physical health or significantly impair their emotional development.

In the case before us, Father did not file a motion seeking to limit Mother's clear authority under KRS 403.330. However, mother filed a motion that Father be prohibited **from communicating** with the children about religion. Thus, mother has assumed and bears the burden to demonstrate sufficient grounds for her own motion. As Father notes, Mother errs in claiming that she should not bear the

burden of her own motion. Black-letter, hornbook law clearly holds otherwise.

“The burden of proof in a civil proceeding generally rests on the party requesting relief or the moving party.” 31A C.J.S. *Evidence* § 195 (footnotes omitted).

Additionally, our own civil rule clearly reiterates this same proposition: “The party holding the affirmative of an issue must produce the evidence to prove it.” CR 43.01(1).

The trial court did not limit Mother’s authority to determine the children’s religious training in any way. In balancing the respective rights of the parents, the trial court correctly determined that Mother’s statutory right does not pre-empt or abrogate Father’s constitutional right to express his religion. Again, he may do so provided that “the exposure is not substantially likely to result in physical or emotional harm to the child.” *Wireman*, at 921. We find no abuse of discretion in the trial court’s denial of Mother’s motion.

Therefore, we affirm the Order of the Jessamine Circuit Court.

ALL CONCUR

BRIEF FOR APPELLANT:

John E. Reynolds
Nicholasville, Kentucky

BRIEF FOR APPELLEE:

Alecia Gamm Norman
Lexington, Kentucky