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

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

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

DISSENTING OPINION

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

Because I agree with the Superior Court that the facts of record in this case furnish a showing adequate under the law to support the narrow restrictions attached to Stanley Shepp's (Father's) otherwise unrestricted partial custody of Kaylynne (Child), I would affirm the Superior Court's order upholding those restrictions. Accordingly, I respectfully dissent.

Tracey Roberts (Mother) and Father converted to Mormonism before their June 1992 marriage. Child was born February of 1993, and was seven years old when the parties separated in April of 2000. Mother testified that the reason for the separation was Father's conversion to what is commonly referred to as fundamentalist Mormonism,

which differs from traditional Mormonism principally in its tenet that the Church of Jesus Christ of Latter-day Saints improperly strayed from the teachings of its founder, Joseph Smith, when it renounced polygamy.[1] From separation, Child lived with Mother and Mother's three other daughters from previous marriages. After a February 2001 divorce, Father filed a petition seeking shared legal and physical custody of child.

On May 6, 2002, the trial court held a hearing to consider Father's petition. Father's belief in fundamentalist Mormonism, including its principal tenet of religiously mandated polygamy, was undisputed. Father testified that he had not set a limit on the number of wives he would like, and that his new and current wife supported him in his faith. Further, Father acknowledged that he had told Child of the possibility that she would have additional mothers. Father testified that he wishes to teach Child about polygamy because, as he sees things, her happiness depends on having choices in life and it is a father's responsibility to teach children alternatives.

Mother testified that the reason for the separation was Father's belief in polygamy, and that he had indicated his desire to take five wives. Mother expressed concern that Father would introduce Child to polygamy at her then current age of nine years so that she would be ready to marry into a polygamist relationship at age fourteen. Accordingly, Mother sought an order prohibiting Father from teaching polygamy.

Importantly, Manda Lee (Manda), one of Mother's daughters from a previous marriage and Child's half-sister, testified that when she was fourteen Father told her

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[1] The Church of Jesus Christ of Latter-day Saints, consistently with its repudiation of polygamy and rejection of fundamentalist Mormonism as a legitimate religion, excommunicated Father for his embrace of polygamy shortly before the parties' February 2001 divorce.

that if she failed to practice polygamy she would go to hell. He suggested that because he and Manda were already living under the same roof, it only made sense for them to marry. While Father denied that he had suggested marriage to Manda, he did not deny her other factual averments.

The trial court found Manda's version of what occurred credible.[2] Acknowledging an important distinction between Father's right to express opinions regarding illegal and immoral activities, see 18 Pa.C.S.§ 430 (criminalizing polygamy), and his willingness to commit, and coerce Child to commit, such activities, the court specifically found that Father's conduct *vis-à-vis* Manda indicated that Father "clearly would" seek to act and use his parental control to convince Child to act illegally and immorally. Tr. Ct. Op., 5/6/02, at 5. With this glaring exception, the trial court found father to be an appropriate parent to Child. Accordingly, it fashioned an order granting Father partial custody subject to the sole restriction that "Father is specifically prohibited while the child is a minor from teaching her about polygamy, plural marriages, or multiple wives." Notes of Testimony, 5/6/02, at 181.[3]

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[2] As I must, I defer to the trial court on all credibility determinations. See Robinson v. Robinson, 645 A.2d 836, 838 (Pa. 1994).

[3] The Majority's account of the case, see, e.g., Maj. Slip Op. at 3 n.3, is not without basis in the record, but Father's testimony and the trial court's findings of fact based upon Father's testimony are to be distinguished. Notably, the trial court's general inclination toward crediting testimony that contradicted Father's is evident in its opinion as well as in the order it ultimately issued, which speaks volumes regarding the trial court's in-person assessment of Father's intentions. The Majority relies upon the trial court's statement that "there has been no evidence of a grave threat to the child in this case." Tr. Ct. Op., 5/6/02, at 6. For this reason, it granted Father partial custody, a ruling I would not overturn. Nevertheless, its other observations emphasize the seriousness of Father's intention regarding inculcating the young women in his family, Child included, into a polygamist lifestyle. In sum, I believe the trial court's opinion indicates that it found a sufficiently grave threat to warrant restricting Father's ability to indoctrinate Child into criminal conduct; that it ordered the restriction in the first place, (continued…)

The Superior Court accepted the trial court's factual findings, as the law requires. Further, the court agreed with the trial court's interpretation of Pennsylvania law as permitting substantial curtailment of contact by a parent with his child only when such contact presents a grave threat of harm to Child, see, e.g., In re Damon B., 460 A.2d 1196 (Pa. Super. 1983); Com. ex rex. Lotz v. Lotz, 146 A.2d 362 (Pa. Super. 1959); cf. Zummo v. Zummo, 574 A.2d 1130, 1157 (Pa. Super. 1990) (opinion announcing the judgment of the court) (requiring, in support of restrictions of a parent's right to instruct his child in his religious faith, a demonstration that the "belief or practice . . . to be restricted actually presents a substantial threat of present or future physical or emotional harm to the [child], and that the restriction is the least intrusive means adequate to prevent the specified harm"), an interpretation I find flawed for reasons I explain, *infra*.[4] The Superior Court read the trial court's opinion as ruling that, notwithstanding its supported factual findings, Father's conduct in espousing and urging Child toward a polygamist lifestyle presented no grave threat of harm to Child. Shepp v. Shepp, 821 A.2d 635, 638 (Pa. Super. 2003); see Tr. Ct. Op., 5/6/02, at 6. The Superior Court disagreed, however, that this conclusion was supported by the facts of record. Rather, it found that Father's discussions with then-fourteen-year-old Manda constituted "a vigorous attempt at moral suasion and recruitment by threats of future punishment [i.e. going to hell]," Shepp, 821 A.2d at 638, tantamount to the sort of threat it ruled necessary to support the entry of restrictions on conduct in the context of a

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after articulating the "grave threat of harm" standard, implies as much. In addition, this reading honors the trial court's broad discretion to act in Child's best interests.

[4] In Zummo, the non-precedential opinion announcing the judgment of the court was authored by Judge Kelly, and Judge Rowley concurred in the result. Judge Johnson authored a dissenting opinion.

custody case. It noted as well that Father's intent to "inculcate in his child a belief" in polygamy did not materially diverge from his intent toward Manda. Id.

The Majority Opinion treats this case as presenting fundamental challenges to Father's expressive rights under the First Amendment to the United States Constitution and to his fundamental right, coequal to Mother's, to direct the education and upbringing of Child. It is imperative, however, to distinguish matters of free expression from matters of immoral and criminal conduct. Where the former amounts to indoctrination into the latter, constitutional rights begin to yield to society's interests in regulating such conduct. Compare Davis v. Beason, 133 U.S. 333, 344 (1890) ("[W]hile [laws] cannot interfere with mere religious belief and opinions, they may with practices.") with Romer v. Evans, 517 U.S. 620, 649 (1996) (noting that Davis has been overruled "to the extent, if any, that it permits the imposition of adverse consequences upon mere abstract advocacy of polygamy"). The state also has an unquestionable *parens patriae* obligation to protect its children and serve their best interests.

Accordingly, the First Amendment permits a parent to espouse to his or her child principles consistent with his or her values. Thus, a parent may discuss conduct seen by society as immoral or criminal; nothing in the law prevents a parent from extolling the abstract virtues of conduct widely perceived as odious, such as racial bias, drug use, underage drinking, or the like, so long as the discussion does not amount to an active attempt to urge the child into that conduct.[5] However, where speech of this sort crosses the line that separates it from conduct, a threshold not unlike that between the more ordinary phenomenon of discussing a crime ("I wish you would kill my boss")

[5] But see Shepp, 821 A.2d at 638 ("The question whether we would find . . . benign advocacy of drug abuse or child prostitution were they presented as foundational religious beliefs is no question at all.").

and taking a substantial step in that direction ("Here's a gun and $20,000; kill my boss."), constitutional protections pertaining to expression without a coercive element fall away and the state may intervene.

In the case at hand, relying on Manda's testimony and Father's statements toward Child, the trial court found, as a matter of fact -- and in isolation from its restatement of what it took to be the governing standard -- that Father had crossed the line between expression and conduct, finding that Father had every intention of "follow[ing] through" on his beliefs and, unchecked, would do whatever he could, in his position of considerable authority as Child's parent, to lead Child into a life of polygamy while still of tender years. In light of this factual finding, one entirely supported by the evidence of record, the trial court's remedy granting father partial custody and restricting him only from teaching his daughter about polygamy is not only constitutionally tolerable, but indeed laudably restrained. The trial court's order was narrowly tailored to hedge against Father's coercive conduct in seeking to induct Child into a repugnant and criminal activity in adolescence at a time when Child's lack of autonomy and worldly sophistication would make it difficult for her to protect herself and make an informed decision. On this basis alone, I would rule that the trial court's order was constitutionally permissible and appropriate to protect Child in light of the facts of record.

Moreover, even assuming *arguendo* that the trial court's order infringes Father's free expression or intrudes upon his fundamental right as a parent to direct the education and upbringing of Child, thus incurring constitutional protection, I would still find the trial court's order constitutional. The trial court, the Superior Court, and now a majority of this Court, adopted and applied the rule that only a "grave threat of harm" may justify such an intrusion, relying upon the United States Supreme Court's decision in Wisconsin v. Yoder, 406 U.S. 205 (1972). This is only half of the Yoder test. Yoder

provided that "parental authority in matters of religious upbringing may be encroached upon only upon a showing of a 'substantial threat' of 'physical or mental harm to the child, or to the public safety, peace, order, or welfare.'" Id. at 230 (emphasis added).

Although the one-judge opinion announcing the judgment of the Superior Court in Zummo, 574 A.2d at 1138-39, quoted the full Yoder test as set forth above, it then abandoned further discussion of the second half of the test because it was not pertinent to the facts of that case. Unfortunately, Zummo restated the incomplete Yoder test numerous times, reinforcing its silence regarding the test's second component. Thus, Zummo appears to limit when the state can infringe on a parent's constitutional right to circumstances presenting "a substantial risk of harm to the child in [the] absence of intervention," id. at 1140, see also id. at 1141; a "substantial threat of physical or mental harm to the child," id. at 1141 (internal quotation marks omitted); "a substantial threat of harm to the child arising from [differences between competing faiths] in [the] absence of the proposed restrictions," id. at 1154; and "a substantial threat of present or future, physical or emotional harm to the child," id. at 1155. Zummo culminated in the following language:

> We hold that in order to justify restrictions upon parent[s'] rights to inculcate religious beliefs in their children, the party seeking the restriction must demonstrate by competent evidence that the belief or practice of the party to be restricted actually presents a substantial threat of present or future physical or emotional harm to the particular child or children involved in absence of the proposed restriction, and that the restriction is the least intrusive means adequate to prevent the specified harm.

Id. at 1157 (emphasis added).[6] Gone was any mention of the second prong of Yoder's disjunctive test -- the question of whether permitting inculcation in a particular religious

[6] As noted previously, see supra n.3, the "we" language is misleading, as the lead opinion in Zummo failure to garner an outright joinder from either of the other judges on (continued…)

practice presents a "substantial threat . . . to the public safety, peace, order, or welfare."[7]

In Yoder, by contrast, the Court found that the restrictions imposed upon the involved parents intruded upon their free exercise of religion, freedom of expression, and the fundamental right to direct the upbringing of their children, and thus were subject to constitutional protection -- the point I assume in this case only *arguendo*. The Court noted that parental decisions are entitled to no peculiar respect if they "will jeopardize the health or safety of the child, or have a potential for significant social burdens." Id. at 233-34 (emphasis added); see also Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1262 (M.D.Pa. 1975) ("[T]he right of the parent to direct the upbringing of his children and the right to family autonomy are not absolute. When actions concerning the child have a relation to the public welfare or the well-being of the child, the state may act to promote these legitimate interests.").

The first part of this limitation, concerning the health or safety of the child, suggests the "grave" or "substantial threat of harm" standard focused upon by the

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the panel depriving Zummo of precedential effect. I discuss it here only because it accurately encapsulates the Superior Court's reasoning in other cases *sub silentio* neglecting the second half of the Yoder test, as does the Majority here. See, e.g., Damon B., 460 A.2d 1196; Lotz, 146 A.2d 362.

[7] As mentioned above, the Zummo opinion addressed circumstances unlike those in the instant case, which presented little cause for the court to consider the second part of the Yoder Court's analysis. In Zummo, the question concerned whether a divorced father could be compelled to deliver the children to synagogue for religious instruction consonant with mother's Jewish faith, and similarly compelled not to bring the children to mass and celebrations of a Catholic character. In no sense did that case present any suggestion that either Judaism or Catholicism, in the conventional forms of those traditions there at issue, might constitute a threat to public welfare and safety.

Majority and the courts below;[8] the latter aspect, concerning the "potential for significant social burdens," suggests a broader inquiry assessing whether exercise of those prerogatives will conflict with the state's legitimate interests in preserving public welfare and mitigating significant social burdens. The Superior Court, as well as the Majority, have failed to address this distinct inquiry in the context of this case,[9] which I believe is squarely presented and requires us to uphold the trial court's custody order narrowly limiting Father's right to inculcate Child into a practice long-since deemed immoral and criminal in every jurisdiction of the United States -- not only because it presents a "grave threat of harm" to the child, but also because the practice of polygamy long has been identified as a "substantial threat" to public welfare, an unsustainable burden on society, and a crime. See Maj. Slip Op. at 8-9 (enumerating cases upholding the criminalization of polygamy).

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[8] I do not read a "grave threat of harm" to be equivalent to "a substantial threat of harm to the physical or mental health" of the child in question, since one readily can imagine a "substantial threat" to a child's physical or mental health, one that courts should be free to remedy in serving that child's best interests, that nevertheless does not constitute a "grave threat" of harm under the plain meanings of the relevant terms. I need not delve deeper into the distinction, however, since I find the public welfare aspect of Yoder controlling to the extent that Father's coercive conduct is entitled to any constitutional protection at all.

[9] The Majority, like the opinion announcing the judgment of the Superior Court in Zummo, properly quotes the Yoder test but then focuses solely on the first half of that test concerning the threat to the health or safety of the child. Compare Maj. Slip Op. at 13 (noting that Yoder permits restrictions "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens" (emphasis added)), 14-15 (same) with id. at 13 ("[T]he focus of our review [under Yoder is] whether the nature of the conduct and/or speech establishes that it will not harm the child." (emphasis added)).

We would in no way depart from settled caselaw, at the state or federal level, or act contrarily to Pennsylvania law, to identify the coercion by a parent of his child into the criminal practice of plural marriage as presenting "a potential for significant social burdens" sufficient to invoke the second aspect of the Yoder test. Indeed, that plural marriage has been criminalized in Pennsylvania and virtually everywhere else demonstrates an overwhelming consensus of moral opprobrium regarding the practice and refuting the notion that the burden on society of the practice can legitimately be claimed to be ephemeral or inchoate. Indeed, this Court specifically has observed that polygamy presents "a substantial threat to society," see In re Green, 292 A.2d 387, 389 (Pa. 1972), echoing the language of Yoder.

Thus, I would adopt as part of Pennsylvania law the second half of the Yoder test recognizing government's need to protect society as a whole, and uphold the trial court's decision as affirmed by the Superior Court under either the first half of the Yoder test, which is already part of our law, or under the second half of Yoder, constraining individual action inimical to society as a whole.