COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0790

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE INTEREST OF JONATHAN S., A PERSON UNDER THE AGE OF 18:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

THOMAS B. M.,

RESPONDENT-APPELLANT,

JACQUELINE S.,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed.*

ROGGENSACK, J.[1] Thomas B.M. appeals an order of the circuit court removing his son, Jonathan S., from his home, which the circuit court determined was the least drastic response to Thomas's refusal to comply with the provisions of a court order forbidding the use of corporal punishment and maintaining Jonathan's medication program. Thomas argues that the court's order violated his constitutional right to freedom of religion because Thomas, as a practicing Muslim, believes in the use of corporal punishment to discipline Jonathan. We conclude that Thomas's First Amendment argument is without merit. We also conclude that the circuit court properly exercised its discretion in removing Jonathan from Thomas's home because there was no less drastic alternative available to protect Jonathan's physical safety, health, and well-being. Therefore, we affirm.

BACKGROUND

On June 21, 1993, Jonathan was adjudged to be a child in need of protection or services, and he was placed under the supervision of the Dane County Department of Human Services. He resided in foster care from March 5, 1993 until August 22, 1997. While in foster care, Jonathan was diagnosed with attention deficit disorder and hyperactivity, for which medication was prescribed. Jonathan's father, Thomas, a practicing Muslim, was in prison in Michigan, until February 1997. After his release, he contacted Jonathan regularly and worked toward securing Jonathan's placement in his home.

On July 22, 1997, the Dane County social worker assigned to Jonathan's case petitioned for a change of Jonathan's placement to a parental

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

home because both Thomas and Jonathan's mother, Jacqueline S., had made sufficient progress in meeting the conditions necessary to his return. At an August 22, 1997 hearing, the court determined that placement outside the home was no longer in Jonathan's best interest. The court ordered that Jonathan be placed with Thomas, in Zion, Illinois. The court also ordered that Jonathan continue to see a psychiatrist, follow treatment recommendations and that neither parent use corporal punishment when disciplining Jonathan.

On December 8, 1997, the social worker filed a petition for review, alleging that Thomas had violated the court's order by employing physical punishment as discipline and by discontinuing Jonathan's medication. On January 2, 1998, Jacqueline S. filed a motion for change of placement, asking the court to remove Jonathan from Thomas's home and on January 22, 1998, Jonathan's guardian ad litem filed a motion for contempt, alleging Thomas had violated the court's order.

On January 23, 1998, at a hearing on the motions, the social worker testified that Jonathan was more hyperactive and unfocused and that he had reported being whipped and smacked in the head by his father. She noted that his behavior, as observed by his school, his mother, and his previous foster parents, had become more problematic since his placement with Thomas. Thomas admitted that he used spanking as a form of discipline and that he had discontinued Jonathan's medication. Thomas asserted that he could not follow the court's order because his religion favored using corporal punishment for discipline. At the conclusion of the hearing, the court found that it was in Jonathan's best interest to be removed from Thomas's home because Jonathan was in danger living with Thomas and because Thomas had not been truthful in reporting Jonathan's or his own behavior.

On March 17, 1998, Thomas moved for reconsideration. On June 5, 1998, the court affirmed its earlier findings that Jonathan was a child in need of protection or services and continued Jonathan's out-of-home placement. This appeal followed.

DISCUSSION

Standard of Review.

In considering whether Thomas's constitutional rights were violated by the circuit court, no deference is due. ***State v. Smith***, 215 Wis.2d 84, 90, 572 N.W.2d 496, 497 (Ct. App. 1997). However, when we review whether the circuit court erroneously exercised its discretion in removing Jonathan from Thomas's home, we examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis.2d 61, 68-69, 573 N.W.2d 888, 892-93 (Ct. App. 1997).

First Amendment.

Thomas claims that the circuit court's order requiring him to refrain from using physical punishment to discipline Jonathan violates his right to religious freedom under the Free Exercise Clause of the First Amendment of the United States Constitution because Thomas's religion favors disciplining by corporal punishment. Where First Amendment freedoms are involved, the State must show a compelling interest before it may infringe upon practices rooted in religious belief. ***State v. Kasuboski***, 87 Wis.2d 407, 416, 275 N.W.2d 101, 105 (Ct. App. 1978). However, before Thomas can claim First Amendment protection, Thomas must establish that spanking Jonathan and discontinuing his medications

are rooted in the practice of religion. ***Id.*** at 417, 275 N.W.2d at 105; ***State v. Peck***, 143 Wis.2d 624, 632, 422 N.W.2d 160, 163 (Ct. App. 1988).

The determination of whether a belief is actually rooted in religion is difficult because the line between a religious belief and a philosophical belief may be a fine one. A philosophical belief, however virtuous or admirable, is not a barrier to state regulation, if it is based on purely secular considerations, because the concept of ordered liberty precludes a person from following his or her own standards on matters of conduct in which society as a whole has an important interest. ***Kasuboski***, 87 Wis.2d at 417, 275 N.W.2d at 105. "A personal, philosophical choice by parents, rather than a religious choice, does not rise to the level of a first amendment claim of religious expression." ***Id.***

For example, in ***Kasuboski***, the Kasuboskis argued that application of the compulsory school attendance statute to them violated their constitutional right to freedom of religion because the public school curriculum conflicted with the religious teachings of their church. ***Id.*** at 411, 275 N.W.2d at 103. The Kasuboskis were members of the Life Science Church, which did not oppose public school attendance. However, they had created an "auxiliary church" which did prohibit public school attendance. The Kasuboskis operated the auxiliary church out of their home. No other members of the auxiliary church were identified. ***Id.*** at 412-13, 275 N.W.2d at 103.

We concluded that the Kasuboskis' choice to withdraw their children from public school did not rise to the level of the exercise of a religious belief entitled to First Amendment protection because the record established that their decision was based on ideological or philosophical beliefs, rather than on religious beliefs. ***Id.*** at 417-18, 275 N.W.2d at 106.

Thomas argues that ***Kasuboski*** does not apply because Thomas is a member of an established religion, not an auxiliary church of his own creation. Therefore, his claim is controlled by ***Wisconsin v. Yoder***, 406 U.S. 205 (1972), in which the United States Supreme Court upheld an Amish couple's decision to disobey compulsory school attendance laws. However, here, as in ***Kasuboski***, Thomas did not establish the necessary factual connection between his religion and his beliefs about corporal punishment. At the hearing, Thomas testified that in his opinion physical discipline was an effective parenting technique. He also suggested, for the first time, that his beliefs about corporal punishment were based in his religion when he responded, "I've got to do as I'm commanded by my God."

Thomas testified that his beliefs regarding the use of physical punishment for discipline came from many influences, including religion. Specifically, in response to the question of how he developed his opinions about physical punishment, he answered, " Number one, as I had stated, that I'm commanded in that way through the scriptures, through my own life and my own circumstances, and through the circumstances of others that have been in contact with me and seen how we're raised and how we respond to certain things." Furthermore, Thomas did not bring any witnesses from his mosque to testify that the use of corporal punishment when disciplining a child was a necessary part of the Muslim religion, nor did he establish that other members of the Nation of Islam believed they were required to discipline children through the use of physical punishment. Instead, he testified that although the Bible instructed members to use corporal punishment, some members of the religion did not follow those instructions. Thomas's assertions fall short of establishing that the Muslim religion requires the use of corporal punishment for discipline.

Because he failed to establish a factual record sufficient for the circuit court to find that disciplining children by corporal punishment is necessary to the Muslim religion, Thomas did not establish that his beliefs are rooted in his religion. Instead, the record reflects Thomas's views on physical discipline, like the Kasuboskis' views on public school, are based on ideological or philosophical beliefs, not religious tenets. Therefore, his belief about using corporal punishment for the discipline of children is not entitled to First Amendment protection.[2]

Removing Jonathan from Thomas's Home.

Thomas also challenges the circuit court's order, contending that it did not properly exercise its discretion in removing Jonathan from his home. Physical placement of a child is addressed in § 48.355(1), STATS., which states:

> In any order under s. 48.345 the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the child's well-being which are the least restrictive of the rights of the parent or child and which assure the care, treatment or rehabilitation of the child and the family, consistent with the protection of the public. Whenever appropriate, and, in cases of child abuse and neglect, when it is consistent with the child's best interest in terms of physical safety and physical health the family unit shall be preserved and there shall be a policy of transferring custody from the parent only where there is no less drastic alternative. If there is no less drastic alternative than transferring custody from the parent, the judge shall consider transferring custody to a relative whenever possible.

This section allows the court to determine the appropriate placement for a child; however, it also requires the court to balance several interests: (1) maintaining

[2] Because we conclude that Thomas's beliefs are not rooted in religion, we do not reach the question of whether the State has a compelling interest which could lawfully interfere with those beliefs.

and protecting the child's well-being, (2) employing means which are the least restrictive of parental rights, while assuring care and treatment of the child, and (3) preserving family unity when consistent with the child's physical safety and health.

At the hearing on January 23, 1998, Thomas admitted that, contrary to the court's order, he had physically punished Jonathan and had discontinued Jonathan's medication. Although he was truthful about violating the court's order, the circuit court noted that Thomas lied to Jonathan's psychiatrist about Jonathan's behavior after his medication was discontinued and about his use of physical punishment as discipline. The court concluded that Jonathan was in danger in Thomas's home because: (1) Thomas used physical discipline which may have been more severe than just spanking; (2) Thomas discontinued Jonathan's medication, even though Jonathan's teachers and others had observed inappropriate behavior; (3) Thomas lied to Jonathan's psychiatrist about Jonathan's behavior; and (4) Thomas lied about his own response to Jonathan's behavior. Based on these facts, the court correctly concluded that to protect Jonathan's physical safety and health there was no less drastic alternative than removing Jonathan from the source of danger. Therefore, because the circuit court rationally applied the facts to § 48.355(1), STATS., it did not erroneously exercise its discretion by removing Jonathan from Thomas's home.

CONCLUSION

Thomas's beliefs about the use of corporal punishment when disciplining a child are not protected by the First Amendment because he failed to establish that his beliefs are rooted in the Muslim religion. Because Thomas physically disciplined Jonathan, discontinued his medication, lied about

Jonathan's behavior problems and his own responses to them, the circuit court properly exercised its discretion by removing Jonathan from Thomas's home to protect Jonathan's physical safety, health, and well-being.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.