RENDERED: JUNE 24, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000804-ME

KRISTY WRIGHT (now FISHER) APPELLANT

v.

APPEAL FROM BOONE FAMILY COURT
HONORABLE LINDA BRAMLAGE, JUDGE
ACTION NO. 00-CI-00508

TRAVIS WALTERS APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case arises from a disagreement between unwed and estranged parents over the religious upbringing of their child. D.W. was born in June 1993 to Kristy Wright (now Fisher) and Travis Walters. Travis admits having had little contact with the child for the first seven years of her life. In response to Travis's motion, however, in August 2000 the Boone Circuit/Family Court awarded custody of D.W. to Kristy and awarded reasonable visitation to Travis.

Travis attends services and teaches Sunday school at the New Hope Community Church, a nondenominational Christian church that meets at a high school in Cincinnati. Apparently, for over a year after his visitation started, Travis and his family took D.W. with them to New Hope when she was visiting. At some point, Kristy, whose background is Catholic, objected and asked Travis to take D.W. only to a Catholic church. Abiding by Kristy's wishes, Travis or another family member began staying home with D.W. on Sundays while the rest of the family went to church. Apparently that arrangement continued until February 2004, when Travis moved for an order permitting him to take D.W. to the church of his choice. By order entered on March 30, 2004, the Boone Circuit/Family Court granted Travis's motion. Kristy appeals that order. She contends that as sole custodian she has exclusive authority to determine D.W.'s religious upbringing, and that the trial court abused its discretion by failing to uphold that authority. We agree and so vacate and remand.

KRS 403.330(1) provides, in pertinent part, that

> [e]xcept as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including h[er] 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 h[er] emotional development significantly impaired.

In *Wilhelm v. Wilhelm*,[1] Kentucky's highest court interpreted KRS 403.330(1) to mean that in order to limit a custodial parent's decision-making power regarding education or religious upbringing, the noncustodial parent must prove, and the trial court must find, that the custodial parent's choice of education or religious training would either endanger the child's physical development or significantly impair her emotional development. In this instance, at a minimum, the trial court both appeared to place the burden of proof on the custodial parent, and failed to make sufficient findings of fact to support its decision.

Travis argues that the facts in *Wilhelm* are distinguishable in that Mr. Wilhelm wished to enroll his children in a religious school, whereas Travis only wishes to take his daughter to church every other weekend. Further, he notes that in *Wilhelm* both parents actively practiced their faiths, merely differing in degrees, whereas Kristy does not actively practice her religion. However, KRS 403.330(1) equally emphasizes "education" and "religious training" in describing the matters which a custodial parent may determine, and our view is that the term "religious training" not only encompasses

[1] 504 S.W.2d 699 (Ky. 1973).

formal training in an organized religious denomination, but also includes a lack of formal religious training, if so chosen by the custodial parent. Thus, the factual distinctions are not material. So, absent the requisite proof and finding of either danger to the child's physical health or significant impairment of the child's emotional development, the custodial parent's decisions are determinative, and the trial court has no authority to dictate otherwise.[2]

As the trial court improperly placed the burden of proof on the custodial parent and failed to make sufficient findings of fact to support its decision, we vacate the Boone Circuit/Family Court's order and remand this matter to the trial court for further proceedings consistent herewith.

TAYLOR, JUDGE, CONCURS.

KNOPF, JUDGE, DISSENTS.

KNOPF, JUDGE, DISSENTING. Respectfully, I dissent. The majority mischaracterizes Travis's claim as one seeking the restriction of Kristy's custodial rights under KRS 403.330, a remedy available only upon a showing that the child's physical or emotional health is being harmed. In fact, Travis did not seek to limit Kristy's rights, he sought rather a ruling, in effect a declaration, that his own right to visitation includes

[2] We have considered the points and authorities advanced by the dissent. However, in light of the language of KRS 403.330(1) and the holding in *Wilhelm*, we do not find them persuasive or controlling.

the right to expose his child to his religion. As the trial court correctly understood, Travis may seek a declaration of his own rights without having to prove that Kristy is abusing hers. The burden-of-proof issue is a red herring. It did not distract the trial court, but has, unfortunately, distracted us.

I also agree with the trial court that Travis has the visitation right he claims. Kristy and the majority maintain that under KRS 403.330 her right to determine the religious exposure of the child is absolute. Most of the courts that have faced this issue, however, have ruled that custodial statutes similar to ours must be construed in light of the non-custodian's constitutional rights to express his religion[3] and to be meaningfully involved in the upbringing of his child.[4] The non-custodian is free, these courts have held, to expose the child to the non-custodian's religion, provided that the exposure is not substantially likely to result in physical or emotional harm to the child.[5]

---

[3] *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

[4] *Id; Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[5] *Chandler v. Bishop*, 702 A.2d 813 (N.H. 1997); *Zummo v. Zummo*, 574 A.2d 1130 (Pa.Super. 1990); *Funk v. Ossman*, 724 P.2d 1247 (Ariz.App. 1986); George L. Blum, "Religion as Factor in Visitation Cases," 95 ALR5th 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). *But see Johns v. Johns*, 918 S.W.2d 728 (Ark.App. 1996) (non-custodian properly ordered to take children to custodian's church); *Lange v. Lange*, 502 N.W.2d 143 (Wis.App. 1993) (custodian's rights to oversee upbringing are exclusive and absolute).

Inasmuch as we are obliged to construe statutes, when it is reasonably possible to do so, so as to preserve their constitutionality, I would hold that, while KRS 403.330 gives a custodian, such as Kristy, the right to make the major decisions affecting the child's education and religious training, it does not authorize her to restrict arbitrarily 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 accompanying the non-custodian to church for an hour or two during visitation, the non-custodian may take the child to church even over the custodian's objection.

Wilhelm v. Wilhelm,[6] upon which Kristy and the majority also rely, is not to the contrary. In that case, the former Court of Appeals overturned a provision of a custody decree that allowed the non-custodian to enroll the children in a parochial school. That provision, the Court ruled, was inconsistent with the custodian's right under KRS 403.330 to determine the children's education and religious training. There is a significant difference, however, between enrolling a child in a parochial school and taking the child to church. Whereas the former is the sort of major decision KRS 403.330 reserves for the custodian, the latter is not. To rule otherwise unnecessarily strains the statute's validity.

[6] 504 S.W.2d 699 (Ky. 1973).

In sum, the majority has imposed on Travis the burden of proving facts irrelevant to his claim and has subordinated his constitutional rights to Kristy's statutory ones. The trial court avoided these mistakes. I would affirm its judgment.

BRIEF FOR APPELLANT:

John M. Schultz
Benson and Schultz, P.S.C.
Walton, Kentucky

BRIEF FOR APPELLEE:

Michael D. Mason
Burlington, Kentucky