FILED
Jan 06 2023, 8:11 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

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IN THE
COURT OF APPEALS OF INDIANA

Kory Easterday,
Appellant,

v.

Amber (Easterday) Everhart,
Appellee

January 6, 2023

Court of Appeals Case No. 22A-DC-1510

Appeal from the Jackson Superior Court

The Honorable Bruce A. MacTavish, Judge

Trial Court Cause No. 36D02-1207-DR-000236

May, Judge.

[1] Kory Easterday ("Father") appeals the trial court's decision to modify the legal custody of Ka.E. ("Child"), who is Father's child with Amber (Easterday) Everhart ("Mother"). Father presents several issues for our review, two of which we find dispositive:

1. Whether the trial court erred when it granted Mother sole legal custody; and

2. Whether the trial court's order prohibiting Father from discussing religion with Child violates Father's right to free speech under the First Amendment to the United States Constitution.

We reverse in part.

Facts and Procedural History

[1] Mother and Father were married when Child was born on August 25, 2010. On July 10, 2012, Mother filed for divorce. On September 18, 2012, the trial court issued an order accepting the parties' settlement agreement and granting dissolution of the marriage. Pursuant to their agreement, the parties would share joint legal custody of Child, and Father would pay $175.00 per week in child support. Mother would be Child's primary physical custodian, and Father would exercise parenting time on Wednesday evenings and every other weekend. At the time, Father lived in Greenwood, Indiana, and Mother lived in Brownstown, Indiana.

[2] On March 17, 2014, the parties modified their agreement, in relevant part, so that parenting time exchanges would "occur at the Marathon Station at the Walesboro exit on I-65 just south of Columbus, Indiana." (App. Vol. II at 26.) On April 24, 2019, Mother filed a petition to modify parenting time. At Father's request, the trial court appointed a Guardian ad Litem ("GAL"), and

in due time the GAL filed a report that recommended parenting time stay the same. On October 3, 2019, the trial court indicated the proceedings were stayed.

[3] No further proceedings occurred until, on March 21, 2022, Mother filed a new petition to modify parenting time. Mother still lived in Brownstown, but Father had moved to Indianapolis. Mother requested "that the pick-up and drop-offs be completed by [Father] in a Jackson County location, the parenting time occur in Jackson County and the return of [Child] be at the same location as the pick-up[;]" that Father be responsible for assisting Child with her homework during his parenting time; and that Father return Child to the drop-off point no later than 8:00 p.m. (App. Vol. II at 28.) Additionally, Mother asserted "a substantial change in circumstances of the parties and [Child] since the Agreed Order of March 2014, which justifies a modification of all parenting time not just Wednesday nights." (*Id.*) On April 5, 2022, Father filed a request for a GAL. The trial court denied his request the next day.

[4] On May 19, 2022, the trial court held a hearing on Mother's petition to modify parenting time. During the hearing, the parties presented evidence and testimony about their different views regarding Child's religious upbringing. Mother testified she and her family, including child, changed churches and now attend "Seymour Christ Temple Apostolic" in Seymour, Indiana. (Tr. Vol. II at 61.) Since changing churches, Child stopped painting her nails and now wears only long skirts. Child attends church three times a week, on Sunday morning and Sunday evening for services and on Thursday night for youth

group. Mother admitted Child was baptized without Mother informing Father until after the baptism occurred. Mother testified she wanted the trial court to modify the parenting time "to eliminate [Father's] ability to question [Child's] religion or try to talk [Child] into believing that there is no God[.]" (*Id*. at 15.)

[5] Father testified he is an agnostic.[1] He denied telling Child "there wasn't a God" and testified he had not tried to "convince her the church she goes to isn't something she should be attending[.]" (*Id*. at 44.) He testified he wanted Child "to make her own choice" about religion. (*Id*.)

[6] The parties also presented evidence and testimony regarding mid-week parenting time that focused partially on the distance between Mother's residence in Brownstown, Indiana, and Father's residence in Indianapolis, Indiana. During the hearing, the parties agreed the court could conduct an in-camera interview with Child. The trial court conducted an in-camera interview with Child on May 27, 2022.

[7] On June 2, 2022, the trial court entered its order regarding Mother's petition to modify parenting time. The order stated, in relevant part:

> 1. The Court finds that the current Wednesday night parenting time for [Father] is not in [Child's] best interest. The current Wednesday mid-week parenting time places an unreasonable

[1] Agnostic is defined as "[s]omeone who believes that knowledge about ultimate things, such as the origin of the universe or the existence of a deity, is not possible and therefore professes certainty or a strong probability of the unknowability of such matters." Black's Law Dictionary 11th ed. (2019). Father testified he does "not necessarily" believe in God and is "just not very religious." (Tr. Vol. II at 43-4.)

> burden on [Child]. It requires her to spend 3 ½ hours in a car for [Father] to have midweek parenting time. This is an unreasonable burden on [Child] on a weeknight, particularly on a school weeknight. [Father's] midweek parenting time shall be exercised on Wednesdays in Jackson County from 5:30 p.m. to 8:30 p.m. with [Child] being picked up and dropped off in Seymour. The Court orders for summer parenting time, [Child] should be allowed to go to camp the week of May 30, 2022. Further, [Mother] shall have [Child] the week before school starts. Each parent shall receive one half of the summer in parenting time.
>
> 2. The Court finds that there has been a change in circumstances relating to legal custody. The Court finds that [Child's] parents hold very different views on religion. The Court having considered the evidence and in-camera interview, finds that [Child] has made an independent well reasoned decision about her faith, which should be respected and encouraged. The Court finds that to allow [Child] to pursue and express her faith, that [Mother] should have sole legal custody of [Child] as well as primary physical custody. [Father] shall not discuss religion with [Child].

(*Id*. at 18-19.)

Discussion and Decision

[8] As an initial matter, we note Mother did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id*. Prima facie error is

"error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

1. Legal Custody Modification

[9] Father contends the trial court erred when it modified legal custody[2] of Child because "a court may not modify custody based solely on the religious beliefs and practices of the parties to a custody dispute." (Father's Br. at 11.) Until the order before us, Mother and Father shared joint custody of Child, and thus they shared "authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training." Ind. Code § 31-9-2-67. In its order, the trial court found there had been a change of circumstances to warrant a modification of Child's legal custody from joint custody to Mother's sole custody "to allow [Child] to pursue and express her faith. (App. Vol. II at 18.)

[10] We have held "a change of circumstances relating to religion will sometimes be sufficient to warrant a change in custody." *Johnson v. Nation*, 615 N.E.2d 141, 145 (Ind. Ct. App. 1993). However, there is "no authority . . . which supports [a trial court's] conclusion that a substantial change in circumstances related to religion, without more, may support a modification of custody." *Id*. at 146. Further, religion is not one of the factors the trial court must consider when making its decision whether to modify child custody. *See* Ind. Code § 31-17-2-

[2] Father does not challenge the remainder of the trial court's order.

21(a) (trial court may not modify child custody unless "the modification is in the best interests of the child" and "there is a substantial change in circumstances under [Ind. Code § 31-17-2-8]"); Ind. Code § 31-17-2-8 (factors to consider when modifying child custody); *and* Ind. Code § 31-17-2-15 (factors to consider when modifying joint legal custody).[3]

[11] Here, the trial court's modification of legal custody in favor of Mother was based entirely on religion – Child expressed an interest in participating in religious activities at a church she attended with Mother. The trial court did not make a finding regarding, nor can we locate in the record, another substantial change in circumstances to warrant a change in legal custody. Therefore, we conclude the trial court erred[4] when it awarded Mother sole legal custody of Child based solely on Child's desire to "pursue and express her faith[.]" (App. Vol. II at 19.) *See Johnson*, 615 N.E.2d at 146 (holding the trial court erred when it granted Mother sole custody based solely on Father's increased involvement in religion without first finding whether that involvement affected children).

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[3] In addition to the factors listed in 31-17-2-8, "a trial court must consider the factors listed in Section 31-17-2-15 when determining whether a joint legal custody arrangement should be modified." *Julie C. v. Andrew C.*, 924 N.E.2d 1249, 1260 (Ind. Ct. App. 2010).

[4] Father also argues the trial court's findings do not support its decision to modify legal custody of Child. As we hold, as a matter of law, the trial court erred when it modified legal custody of Child based solely on religion, we need not address this issue.

2. Father's Free Speech Rights

[12] Father also argues the trial court's order prohibiting him from discussing religion with Child violates his First Amendment right to free speech.[5] The First Amendment of the United States Constitution provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech[.]" Under the Free Speech Clause of the United States Constitution, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). One of the chief purposes of the First Amendment is "to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "The special vice of a prior restraint is that communication is suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Barlow v. Sipes*, 744 N.E.2d 1, 9 (Ind. Ct. App. 2001), *trans. denied*.

[13] The protections the First Amendment affords against prior restraints are not triggered unless there is a state action. *Id*. A custody order that restrains speech is state action that triggers protection under the First Amendment. *In re Paternity of G.R.G.*, 829 N.E.2d 114, 124 (Ind. Ct. App. 2005). A prior restraint of speech is not a per se violation of the First Amendment, but it comes before us with a heavy presumption that it is constitutionally invalid. *Id*. "'The

[5] The First Amendment applies to the states via the Fourteenth Amendment to the United States Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[United States Supreme] Court has repeatedly emphasized that the prior censorship of expression can be justified only by the most compelling government interest.'" *Israel v. Israel*, 189 N.E.3d 170, 180 (Ind. Ct. App. 2022) (quoting *David K. v. Lane*, 839 F.2d 1265, 1276 (7th Cir. 1988)), *reh'g denied*, *trans. pending.* The First Amendment provides greatest protection to "speech concerning public affairs[,]" *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964), while "speech on matters of purely private concern is of less First Amendment concern." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

[14] We find instructive *G.R.G.*, a case that, like here, involved a custody modification order. 829 N.E.2d at 117. In the modification order in *G.R.G.*, the trial court ordered the mother and father to refrain from discussing their disputes with G.R.G. "forever[.]" *Id*. at 123. The father argued the restraint violated his First Amendment rights. *Id*. at 124. We disagreed and held the trial court's order did not violate his First Amendment rights for two reasons. *Id*. at 125. First, the speech challenged was private – that is, between the mother, the father, and G.R.G. *Id*. Additionally, the restraint on speech was narrowly tailored "to the extent it reasonably furthers G.R.G.'s best interests." *Id*. Further, we stated:

> The order in the case before us did not preclude Father and Mother from disagreeing with each other. Nor did it preclude Father from discussing with any other third party his disputes with Mother. Rather, it obviously reflects the trial court's reasonable belief that exposing G.R.G. to such matters would not be in the child's best interests.

Id.

[15] Like in *G.R.G.*, the speech here is private – that is, it is between Father and Child. However, the case before us is distinct from *G.R.G.* because the trial court did not find, nor does the evidence suggest, that Father was discussing religion with Child in a way that had a negative impact on Child. Mother testified Child "cries[,] . . . is withdrawn[,] . . . presents with a rash and/or hives[,]. . . [and] [h]er face is puffy" after visiting with Father. (Tr. Vol. II at 11.) However, Mother did not specifically attribute Child's reactions to discussions of religion between Father and Child.

[16] Mother asked the court to "eliminate [Father's] ability to question [Child's] religion or try to talk her into believing that there is no God" because those discussions are "harmful to [Child]." (*Id*. at 15.) However, there is no evidence in the record that Father was having such discussions with Child. Mother did not testify about a specific instance during which Father spoke to Child about religion in general, much less a time when Father disparaged Child's religious views or attempted to persuade Child there was not a God, and Father testified he did not tell Child there was no God and he wanted Child to make her own choices regarding religion.

[17] Even if Child reported during the in-camera interview that Father was disparaging her religious views and telling her there was no God, the trial court's total prohibition of Father's right to discuss religion with Child is not narrowly tailored to further the State's compelling interest in protecting Child's

welfare. There are likely many topics related to religion that Father could discuss with Child without causing harm to Child, including support for her decision to express and pursue her faith. With the trial court's order as it is, Father can neither encourage Child's faith nor encourage her to learn about how other people may believe and worship so that she grows up to be an educated citizen of our pluralistic country. Therefore, we hold the trial court's order totally prohibiting Father from discussing religion with Child violated his right to free speech under the First Amendment.[6] *See Matter of A.C.*, 198 N.E.3d 1, 18-19 (Ind. Ct. App. 2022) (trial court's prior restraint on the parents' speech regarding A.C.'s gender identity outside of family therapy did not violate the parents' free speech rights because, while conversations regarding A.C.'s gender were private among the mother, father, and A.C., it was undisputed that the conversations in that case harmed the child.), *reh'g pending*.

Conclusion

[18] Father has demonstrated prima facie error. We hold the trial court erred when it based the modification of Child's legal custody solely on religion. Further, the portion of the trial court's order totally prohibiting Father from discussing

[6] Father also argues the trial court's order prohibiting him from discussing religion with Child also violates the Establishment and Free Exercise of Religion Clauses of the First Amendment. As we conclude the prohibition violates Father's free speech rights under the First Amendment, we need not address whether the language violates his rights under other clauses.

religion with Child violates his First Amendment right to free speech. Accordingly, we reverse those parts of the trial court's order.[7]

[19] Reversed in part.

Crone, J., and Weissmann, J., concur.

[7] All other unchallenged parts of the trial court's modification order remain in effect.