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

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

STANLEY M. SHEPP,	:	No. 242 MAP 2003
	:	
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
	:	
	:	
	:	

OPINION

MADAME JUSTICE NEWMAN **DECIDED: September 27, 2006**

We granted allocatur in this case to consider the extent to which courts can limit parents from advocating religious beliefs that, if acted upon, would constitute criminal conduct.

Facts and Procedural History

Stanley M. Shepp (Father) and Tracey L. Shepp, a/k/a Tracey L. Roberts (Mother) married in June of 1992. They converted to the Mormon faith prior to their marriage.[1] Their child, Kaylynne Marie Shepp (Kaylynne), whose custody is at issue in this case, was born on February 3, 1993. The parties separated in April of 2000, and they divorced in February of 2001. Shortly after the divorce, the Mormon Church excommunicated Father because he is a fundamentalist who believes in polygamy.[2]

Following the parties' separation, Kaylynne lived with Mother and her three other daughters from previous marriages. On January 2, 2002, Father filed a Petition seeking an order of shared legal and physical custody of Kaylynne. The trial court issued an Interim Order for Custody on January 30, 2002, which provided that the parties would share legal custody and that Mother would have primary physical custody. The Interim Order notes, "Father's position is that he requests primary physical custody, although the Petition does indicate shared physical custody." Order dated January 30, 2002, at 3.

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[1] The official name of the Mormon Church is the Church of Jesus Christ of Latter-day Saints.

[2] "'Mormon Fundamentalism' denotes the beliefs and practices of contemporary schismatic groups that claim to follow the teachings of the Prophet Joseph Smith. The Fundamentalist movement began after the issuance of the Manifesto of 1890, which publicly declared an official end to plural marriage in The Church of Jesus Christ of Latter-day Saints. Fundamentalists held that God requires all 'true' believers to abide by the principle of polygamy, irrespective of Church mandate. . . . The thread that binds all Fundamentalists together is their belief that the LDS Church has improperly changed doctrines and practices." Abstracted from J. Max Anderson, "Fundamentalists" in *Encyclopedia of Mormonism*, ed. Daniel H. Ludlow, 4 vols. ((New York: Macmillan, 1992), 2:531-32. Abstract prepared by Brigham Young University Studies staff and interns at http://ldsfaq.byu.edu/view.asp?q=316 (last visited January 19, 2006).

The trial court held a hearing on May 6, 2002. Father testified that he practices Mormon fundamentalism and the teachings of Joseph Smith and Brigham Young. He further stated that fundamentalism "includes plural marriage." Notes of Testimony (N.T.), dated May 6, 2002, at 72. He testified that he has not set a limit on the number of wives he would like to have, but would have no problem with additional wives if they love his family and get along. Id. at 107. With respect to discussing plural marriage with Kaylynne, Father stated that he has told the child of the possibility that she could have another mother who comes into the family through plural marriage. Id. at 75. He indicated his belief that it is important for children to know, while they are young, about any lifestyle the family may practice, rather than to "all of a sudden pop something on them like that" when they are seventeen. Id. When asked if he would try to marry Kaylynne into a polygamist relationship, he replied that he would not, but that in order for her to be happy, she has to have choices, and that as a father it is his job to help her learn about and understand alternatives. Id. at 77-78.[3] Father's current wife testified that she accepts the idea of plural

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[3] Father's testimony was as follows:

> Question: As part of your fundamentalist Mormon philosophy, would you try to marry off Kaylynne into a polygamist relationship?
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> Answer: There is no way. Kaylynne has the same agency that anybody has. I can't marry her off any more than I could marry off anybody.

N.T. at 77-78. In his Dissenting Opinion, Mr. Justice Baer, purporting to correct this Court as to the facts, indicates that the trial court concluded that Father "'clearly would' seek to act and use his parental control to convince Child to act illegally and immorally. Id. at _." In making this assertion, Mr. Justice Baer quotes two words from the Opinion of the trial court, i.e., "clearly would." and then supplies his interpretation. However, these two words appear in a broader passage:

(continued…)

marriage and that she is comfortable with the idea of participating in a family with more than one mother. She stated that there are no plans at the present time for her marriage to become a plural marriage. Id. at 123.

Mother testified that Father's belief in polygamy was the reason for the parties' divorce. She stated that Father would like to have five wives, id. at 13, and expressed concerns that he would introduce Kaylynne to men so that she would be ready to engage in

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(…continued)

> We have also taken into consideration character, conduct, and fitness.
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> Both of the parties seem to have adequate character, conduct, and fitness, with one exception, and that is the fact that father acknowledges a belief in polygamy. That belief, if he would follow through with it, would be not only illegal in Pennsylvania, it would be immoral and illogical.
>
> The issue is not having such a belief, but his interest in pursuing this belief, which the testimony indicates that he clearly would.

Trial Court Opinion at 5. Thus, facially, it is less than evident that the court intended to memorialize a finding that Father would coerce Kaylynne into practicing polygamy. Indeed, in context it appears more plausible that the court was discussing Father's own marital plans. Moreover, to the extent that there is any ambiguity, the trial court's subsequent pronouncement clarifies the point:

> While we may have evidence of moral deficiency of father because of his belief in having multiple wives, there has been no evidence of a grave threat to the child in this case.

Id. at 6. The conclusion that there has been no evidence of a grave threat to the child would be difficult to explain if the court had previously found that Father "clearly would" coerce Kaylynne into polygamy, a practice that it has already noted was "illegal," "immoral," and "illogical."

polygamy once she reaches the age of thirteen. Id. at 16. She stated that she did not wish her daughter to interact with polygamist families or "to be taught polygamy in any way." Id.

Manda Lee (Manda), Mother's daughter from a previous marriage, testified that when she was thirteen years old, Father (who is her stepfather) told her "that if you didn't practice polygamy or you didn't agree with it, but mostly if you didn't practice it, that you were going to hell." Id. at 164. She further testified that Father told her that in Pennsylvania a fourteen-year old can get married with a parent's permission, and "since I was already living in the house and we were already related, that it would be a good idea for us to be married." Id. at 165.[4] On rebuttal, Father denied Manda's allegation that he suggested they participate in a polygamous relationship. Id. at 175.

At the conclusion of the hearing, the trial court noted:

> Contact [between a parent and a child] can be limited only when the parent has been shown to suffer from severe mental or moral deficiencies that constitute a grave threat to the child.
>
> While we may have evidence of moral deficiency of [F]ather because of his belief in having multiple wives, there has been no evidence of a grave threat to the child in this case.

Id. at 180. In its final Order, the court awarded joint legal custody to both parents, and primary physical custody to Mother. Noting that the parties had raised Kaylynne in the Mormon faith, the court directed, "the child will continue with that religious upbringing." Id.

[4] Section 1304(b)(1) of the Marriage Law, 23 Pa.C.S. § 1304(b)(1), provides, "No marriage license may be issued if either of the applicants for a license is under 16 years of age unless the court decides that it is to the best interest of the applicant and authorizes the issuance of the license."

at 181. However, the court ordered, "Father is specifically prohibited while the child is a minor from teaching her about polygamy, plural marriages or multiple wives." Id.

Father filed a timely appeal to the Superior Court, which affirmed the decision of the trial court. However, the Superior Court disagreed with the conclusion of the trial court, stating, "[t]he court's factual findings as to the nature of the practice endorsed by [Father] and as to [Father's] own character render its conclusion that [Father] poses no grave threat to his daughter both erroneous and unreasonable." Shepp v. Shepp, 821 A.2d 635, 638 (Pa. Super. 2003). The Superior Court made this determination based on the following facts elicited during the testimony of Father's stepdaughter, which the trial court and the Superior Court deemed credible:

> [Father's] promotion of his beliefs to his stepdaughter involved not merely the superficial exposure of a child to the theoretical notion of criminal conduct, but constituted a vigorous attempt at moral suasion and recruitment by threats of future punishment. The child was, in fact, warned that only by committing an illicit act could she comply with the requirements of her religion.

Id. The court further expressed concern that Father's intention to inculcate a belief in polygamy in his own daughter "may perhaps, as the child matures, even become insistence that she engage in such conduct." Id. While recognizing the difference between discussion and coercion, the court held that the best interests of the child would be served by restricting Father from discussing polygamy with Kaylynne until she is eighteen years old.

Discussion

This case implicates two highly important values: the free exercise of religion as guaranteed by the First Amendment to the Constitution of the United States and the public

policy of this Commonwealth, as set forth in Section 5301 of the Domestic Relations Code, "when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and a sharing of the rights and responsibilities of child rearing by both parents." 23 Pa.C.S. § 5301.

The essence of Father's position is that he is simply a parent who wishes to share his sincere religious beliefs with his child. In support of his view that the courts may not interfere with this right, he relies on Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, the United States Supreme Court affirmed a decision of the Supreme Court of Wisconsin, which held that the convictions of Amish parents for violating the State's compulsory school attendance law were invalid pursuant to the First Amendment to the United States Constitution. Although the relevant statute required that all children between the ages of seven and sixteen attend school, Yoder and other parents refused to send their children to school beyond the eighth grade. The United States Supreme Court recognized the importance of the State's interest in universal education, but nevertheless concluded that such interest "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children." Id. at 214. Furthermore, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Id. at 215.

Based on a review of the record, the United States Supreme Court noted that the Amish way of life, which the parents wished to maintain by prohibiting formal education beyond the eighth grade, was a matter of deep religious conviction. The Court stated:

> [T]he Court's holding in Pierce [v. Society of Sisters, 268 U.S. 510 (1925)] stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.

Id. at 233. Unchallenged expert testimony established that the "enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." Id. at 219. The United States Supreme Court determined that exposing Amish children to the worldly influences of secondary school "contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." Id. at 218. The State maintained that its interest in compulsory education was "so compelling that even the established religious practices of the Amish must give way." Id. at 221. The Court disagreed, noting that "[w]here fundamental claims of religious freedom are at stake . . . we must searchingly examine the interests that the State seeks to promote. . . ." Id. Because the record established that persons who practice the Amish faith are able to fulfill their responsibilities of citizenship without compulsory education beyond the eighth grade, and receive vocational education that allows them to be self-reliant, the Court determined that Yoder had introduced "persuasive evidence undermining the arguments the State ha[d] advanced to support its claims in terms of the welfare of the child and society as a whole." Id. at 234. The United States Supreme Court concluded by explaining that accommodating the religious objections of the Amish by foregoing an additional year or two of secondary education would not impair the health of the children or in any way harm society.[5]

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[5] In Yoder, the United States Supreme Court referred to Sherbert v. Verner, 374 U.S. 398 (1963), in which the appellant, a member of the Seventh-day Adventist Church, was (continued…)

In the case *sub judice*, Father asserts that where the State interferes in matters of religious speech between parent and child, such action is subject to strict scrutiny, or a showing that a compelling governmental interest outweighs the fundamental right of a parent to make decisions concerning a child's upbringing.

Mother disagrees with Father's position that polygamy is a constitutionally protected practice within a religious context. In the nineteenth century, the United States Supreme Court issued four decisions in which it took a firm position against Mormon polygamy: Reynolds v. United States, 98 U.S. 145 (1878); Murphy v. Ramsey, 114 U.S. 15 (1885); Davis v. Beason, 133 U.S. 333 (1890); Late Corp. of the Church of Latter Day Saints v. United States, 136 U.S. 1 (1890). See, Keith E. Sealing, Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause, 17 Ga. St. U. L. Rev. 691, 710-710 (2001). The Reynolds Court referred to polygamy as ''odious among the northern and western nations of Europe." Reynolds, 98 U.S. at 164. The Late Corp. Court stated that Mormon polygamy is "a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world." 136 U.S. at 48. In Davis, the Court upheld a law in the territory of Idaho that required an individual registering to vote to swear or affirm, inter alia, that he was not a bigamist or a

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dismissed from her job because she refused to work on Saturday, which her religion considers the Sabbath. Unable to find employment that would not require her to work on Saturday, she sought unemployment compensation benefits. The South Carolina Employment Security Commission denied benefits because the appellant failed to accept suitable work when offered. The Court of Common Pleas for Spartanburg County and the South Carolina Supreme Court affirmed the decision of the Commission. The United States Supreme Court reversed. The Court effectively created a balancing test that any burden on the free exercise of the appellant's religion must be justified by a compelling state interest.

polygamist, was not a member of an order that practices bigamy or polygamy, and that he did not and would not counsel or advise others to commit bigamy or polygamy.[6] The Court stated:

> Bigamy and polygamy . . . are crimes by the laws of the United States, and they are crimes by the laws of Idaho. . . . If they are crimes, then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases.

Davis, 133 U.S. at 341-42.

Plural marriage is a crime in Pennsylvania. Section 4301 of the Crimes Code, 18 Pa.C.S. § 4301 provides:

> (a) Bigamy.--A married person is guilty of bigamy, a misdemeanor of the second degree, if he contracts or purports to contract another marriage, unless at the time of the subsequent marriage:
>
> > (1) the actor believes that the prior spouse is dead;

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[6] In Romer v. Evans, 517 U.S. 620 (1996), the United States Supreme Court stated:

> To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. Brandenburg v. Ohio, 395 U.S. 444 (1969). To the extent, it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. Dunn v. Blumstein, 405 U.S. 330, 337 (1972); cf. United States v. Brown, (1965), United States v. Robel, 389 U.S. (1967).

Id. at 634 (citations modified).

> (2) the actor and the prior spouse have been living apart for two consecutive years throughout which the prior spouse was not known by the actor to be alive; or
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> (3) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know that judgment to be invalid.
>
> (b) Other party to bigamous marriage. --A person is guilty of bigamy if he contracts or purports to contract marriage with another knowing that the other is thereby committing bigamy.

In the instant matter, the illegal nature of polygamy becomes important when determining the appropriate level of scrutiny to apply to Father's free exercise claim. The decision of the United States Supreme Court in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (Smith II), is critical to this issue. Alfred Smith (Smith) and Galen Black (Black) were fired from their employment with a private drug rehabilitation organization because they ingested peyote while participating in a religious ceremony of the Native American Church. Pursuant to the relevant Oregon statute, persons in possession of peyote are guilty of a felony. Smith and Black applied for unemployment compensation benefits, which the Employment Division denied because their employer had discharged them for work-related misconduct. The Oregon Court of Appeals reversed based on its conclusion that the denial of benefits violated the free exercise rights of Smith and Black as protected by the First Amendment. The Oregon Supreme Court affirmed, holding that the criminality of the use of peyote was irrelevant because the purpose of the misconduct provision, pursuant to which the Employment Division denied relief, was not to enforce criminal laws, but to preserve the financial stability of the unemployment compensation fund. The Oregon Supreme Court held that this

purpose did not justify the burden that denial of compensation placed on the religious practice of Smith and Black. On appeal, Employment Division, Department of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988) (Smith I), the United States Supreme Court held, "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." Id. at 670. However, because the Oregon Supreme Court had not determined whether an exception to the controlled substance law existed for the sacramental use of peyote, the United States Supreme Court vacated the judgment and remanded to the Oregon Supreme Court for further proceedings. On remand, the Oregon Supreme Court held that there was no sacramental use exception to the criminal statute. It then determined that the prohibition was invalid pursuant to the Free Exercise Clause and, accordingly, reaffirmed its previous ruling.

The Employment Division again sought *certiorari*, which the United States Supreme Court granted. The Court, in an Opinion by Justice Scalia, reversed, determining that the Sherbert test, which requires a compelling government interest, does not apply where the challenged State action that is claimed to inhibit the free exercise of religion is a generally applicable criminal law. The Court noted:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, 'to become a law unto himself,' Reynolds v. United States, 98 U.S. at 167 -- contradicts both constitutional tradition and common sense.

Smith II, 494 U.S. at 885 (internal citation omitted).[7]

Like the Oregon law prohibiting the use of peyote, the Pennsylvania statute prohibiting bigamy is a law of general application. Therefore, pursuant to Smith II, a neutral law criminalizing polygamy overrides a claim that such law places an improper limitation on the free exercise of religion. Based on Smith II, Mother asserts, "[s]ince 18 Pa.C.S. § 4301 is a valid and otherwise neutral law, it follows that the Commonwealth of Pennsylvania has the right to enforce, regulate, and prohibit such conduct or speech that may be incidental to such conduct, whether it be the use of peyote, enforcement of social security taxes, or the practice of polygamy." Brief of Appellee at 14 (citation modified).

Smith II further recognized:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1562, 32 L.Ed. 2d 15 (1972) . . . .

494 U.S. at 88l. Justice Scalia referred to such claims as presenting "a hybrid situation[,]" id. at 882, which is subject to strict scrutiny. Id. at 881 n. 1 (reaffirming a higher level of scrutiny for cases involving a free exercise claim made in conjunction with other

[7] In a Concurring Opinion, Justice O'Connor expressed her belief in the continued viability of the Sherbert test, noting that "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." Smith II, 494 U.S. at 901 (O'Connor, J., concurring)..

constitutional protections, such as the right of a parent to direct the upbringing and education of his child). The instant matter, combining free exercise claims with the fundamental right of parents to raise their children, is a hybrid case. As such, Smith II, which presents a "free exercise claim unconnected with any communicative activity or parental right," id., does not directly answer the question of whether a court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime.

In light of the fact that Smith II does not apply to hybrid cases, we must reject the position advanced by Mother that a court may prohibit a parent from discussing religious beliefs with a child solely because acting upon those beliefs would result in the commission of a crime. Instead, we believe that Yoder provides the appropriate standard by which to consider the issue before us. As previously noted, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Yoder, 406 U.S. at 215. Based on the record before us, it is clear that the Commonwealth's interest in promoting compliance with the statute criminalizing bigamy is not an interest of the "highest order" that would supersede the interest of a parent in speaking to a child about a deeply held aspect of his faith. However, this does not end our inquiry because Yoder also provides:

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under Prince [v. Massachusetts, 321 U.S. 158 (1944),] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Id. at 233-34. Yoder recognized that government has an interest in protecting "the physical or mental health of the child." Id. at 230. Applying strict scrutiny,

> The Government may . . . regulate the content of constitutionally protected speech in order to promote a

> compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."

Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989). The state's compelling interest to protect a child in any given case, however, is not triggered unless a court finds that a parent's speech is causing or will cause harm to a child's welfare. Cf. Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 765-66 (1996).

In the instant matter, the trial court determined that Father believed in polygamy, and that acting on that belief "would be not only illegal in Pennsylvania, but would also be immoral and illogical." N.T., May 6, 2002, at 179. The court noted that Father had approached his stepdaughter and "informed her that she would go to hell if she did not believe in polygamy," id. at 180, and that the stepdaughter recalled that Father "had suggested that when she became of age, that they would perhaps be married." Id. Nevertheless, the trial court stated that there was, "no evidence of a grave threat to the child in this case." Notes of Testimony, May 6, 2002 at 181. Engaging in speculation that Father's statements to his stepdaughter might lead to insistence that his own child engage in polygamy, the Superior Court improperly substituted its judgment for that of the trial court, and concluded that the teaching of plural marriage constituted a grave threat. In light of the fact that the trial court did not find a grave threat, it erred in restricting Father from teaching Kaylynne about polygamy.

By their very nature, decisions involving child custody must focus on the character and conduct of the individual parents and children involved. Accordingly, there may be instances where restricting a parent from teaching a child about a sincere religious belief

involving illegal conduct is appropriate. However, we emphasize that the illegality of the proposed conduct on its own is not sufficient to warrant the restriction. Where, as in the instant matter, there is no finding that discussing such matters constitutes a grave threat of harm to the child, there is insufficient basis for the court to infringe on a parent's constitutionally protected right to speak to a child about religion as he or she sees fit.

Conclusion

For these reasons, we conclude that a court may prohibit a parent from advocating religious beliefs, which, if acted upon, would constitute a crime. However, pursuant to Yoder, it may do so only where it is established that advocating the prohibited conduct would jeopardize the physical or mental health or safety of the child, or have a potential for significant social burdens. Because such harm was not established in this case, there was no constitutional basis for the state's intrusion in the form of the trial court's Order placing a prohibition on Father's speech. That being the case, the second facet of the strict scrutiny test -- whether the trial court's Order was narrowly tailored to achieve a compelling end -- was not implicated. Accordingly, we reverse the Order of the Superior Court.

Mr. Chief Justice Cappy and Messrs. Justice Castille and Saylor join the opinion.

Former Justice Nigro did not participate in the decision of this case.

Mr. Justice Eakin files a concurring opinion.

Mr. Justice Baer files a dissenting opinion.